



## 2008 Issue No. 16 — Democracy Under Fire

### Democracy of the Civil Dead: The Blind Trade in Citizenship

By Terry Eyssens

#### *The Death of the Citizen*

To be granted civil rights opens the way to being deprived of them. Western countries, in which democracy is generally organised under a neo-liberal parliamentary model, in which the rights and privileges of citizens are supported by notional social contracts, are increasingly exploiting contractarian logic to erode these rights and privileges. Governments cite “national security,” “border security” and economic growth (as security) as justification for the removal of civil rights and the constraining of possibilities of political participation. Implicit in such justifications is the trading of rights for safety. Apart from the problem of trading “things” that have been understood by some as fundamentally inalienable (an inalienability that I do not claim here), the trade in codified, legal, political rights that have accumulated over time raises the question of how much “stock” remains to be traded. What happens when the cupboard is finally bare?

Civil death is a concept which, in ancient times, referred to the loss of rights and privileges by those sentenced to death, banished or outlawed for committing a crime, often that of treason. It also referred to those entering a monastery because such a decision included renouncing any association with worldly states or realms. In this sense, civil death is sometimes understood to be obsolete [1]. Currently though, civil death refers to those who are deprived of those civil rights and privileges which are normally guaranteed by the law of a state. It is the loss of the status of citizen. This loss is usually partial, as the individual remains subject to the processes and constraints of law, and happens as a result of criminal conviction. For example, prisoners in Australia (and the US) are, to different degrees, deprived of their voting rights and eligibility to run for political office [2]. As Brian Costar has noted, the logic and rhetoric behind this process is that the citizen has breached the social contract and therefore loses rights supported by it (Costar). Civil death differs from the notion of “social death,” understood by Bourdieu and others as a lack of access to the means of symbolic recognition, as a situation in which the accumulation of “social capital” is denied or when “negative social capital” is attributed to a group by the surrounding culture (Bourdieu, *Pascalian Meditations* 241). In the Australian context, Ghassan Hage and Elaine Kelly discuss the operation of neo-liberal administration and procedure in the production of social death, particularly among migrants, asylum seekers and refugees (see Hage; Kelly). This essay however, as concerned with *civil* death, can be seen as focusing on a different layer of a similar set of circumstances. The political contexts of a “war on terror” and a “crisis” of national sovereignty have produced (to use a strange but apt metaphor) an atmosphere in which both social and civil death can breathe. The differences, however, are important. Where social death largely applies to those who are culturally and socially excluded from mainstream culture, civil death is potentially applicable to all (nominal) citizens with regard to the possibilities of political activity. The aim of this essay then, will be to examine the status of the contemporary liberal democratic citizen in relation to the notion of civil death and the various implications of the state of exception and “bare life” as developed by Giorgio Agamben. Via a discussion of the ways in which civil death is re-emerging in legal contexts and in relation to modern manifestations of

abandonment, banishment and outlawry and of civil death as enclosure, and bare life as exposure, I will argue that in the blurring or dissolution of these distinctions, the exposure of bare life can become a political position through which the liberal state is contested – a contestation which opens the way for, as Jacques Derrida puts it, a “democracy to come” – the possibility of a “democracy worthy of the name” (*Rogues* 8-9).

### *The right to (trade) citizenship*

The “war on terror,” as a trope, is used to justify “non-democratic” procedures and constraints in the name of democracy. Since September 2001, the Australian Federal government has enacted various pieces of new legislation which remove rights (particularly *habeas corpus* provisions) that have been regarded as essential in a modern democracy. Changes include provisions for detention incommunicado for up to a week [3] and detention without charge or conviction for up to 14 days [4]. Additionally, evidence can be excluded from court proceedings on grounds of a threat to national security, in which the decision to rule this evidence out is held in a closed court and the reasons given for the exclusion are not provided to defendants. In this situation, the court is directed to give the greatest weight to the Federal Attorney-General’s certificate claiming the threat to national security [5]. The removal of such rights is always accompanied by the assurance that doing so is necessary in order to preserve, to secure democracy. The thrust of these assurances is that if citizens “agree” to give up some rights, the government will be more able to guarantee the security that has been previously taken for granted. There is here a logic of trade, a logic that has an important place in liberal philosophy in the concept of the social contract.

The modern social contract (like *habeas corpus*) has its roots in the rejection of the divine right of Kings and against the power of unjustified political authority. The social contract was devised in various forms by various thinkers to justify sovereign authority and the obedience of subjects to that authority. In return, subjects, or citizens, could expect the protection of sovereign authority through laws. The idea of the sovereign in contract theory varies. For example, for Hobbes in *Leviathan* the Sovereign is a Monarch (or an assembly) with absolute power. On the other hand, in *The Social Contract* Rousseau holds that the people are Sovereign and obedience is owed to their sovereign General Will. What does not differ so much is the kind of protection that citizens can expect. Generally, this is the right to liberty, the right of all citizens to go about their lives free from the interference of others. This idea of liberty has been elaborated, across the centuries, in more or less the same form by Hobbes, Locke, Rousseau, Mill and (more recently) Rawls. For Mill, the principle of non-interference is elaborated to include freedom of conscience and religion, freedom of speech and expression, freedom of association and freedom to choose one’s own lifestyle (Mill 75). It is with this principle, and from the notion that all citizens are equally entitled to liberty under it, that the modern notion of the rights of citizens (or civil rights) are intertwined.

It is well known that despite the noble sentiments, these rights and liberties have not been distributed equally among citizens over the course of history. The right to vote, for example, was first only granted to property owners and was still denied to Aboriginal Australians until 1968. Often, this denial is maintained by also denying the status of citizen to certain groups in a political community. But not always. Equal rights are still denied to gay and lesbian citizens in Australia with regard to access to marriage and are suspended under the Australian Federal Government’s ongoing intervention into Aboriginal communities in the Northern Territory. Despite the persistent inequalities, it is on the claim that all are equal under these principles, that the civil rights campaigns of the past 50 years, and their successes, have been based. And it is against this background that the loss of basic civil rights and liberties causes alarm.

The expansion of civil rights however, has not gone unchallenged. As the rights movements of the twentieth century racked up victories, broadening the base and scope of citizenship, conservative liberal thinkers argued that the very “governability” of democracy was threatened [6]. Their advocacy revolved around the theme that the expansion of rights has gone too far, that many of

these rights are surplus to the requirements of a stable liberal democracy. Their concern and their project was (and is) directed to the limitation of the scope of the political participation of citizens, to draw down on the perceived surplus of rights with the aim of restoring a balance based on the (passive) freedoms of political liberalism. This restorative push is important with regard to limiting resistance to both the deterritorialising aspects of neo-liberal economic globalisation and the increasing demands on citizens in the name of national security. And it draws on the classical liberal philosophy of John Stuart Mill.

As I have already noted, freedom from obstruction and interference (as the protection of individual liberties) is the foundation of political liberalism. In addition to his principle of “self-protection” (Mill 73), Mill outlines what he calls the “appropriate region of human liberty” (75). This is “the inward domain of consciousness,” including freedom of “conscience, thought, feeling and opinion” as well as choice of tastes and pursuits, and of “framing the plan of our life to suit our own character” (i.e. “lifestyle”) (75). All of this activity is “appropriate” as long as it conforms to the general principle of non-interference with others (73). The notions of citizenship that flow from these principles are those that prevail today. For example, a citizen in a neo-liberal democracy is someone who is assumed to be “free” to pursue their own choice of lifestyle and economic interests. This freedom is given under the expectation that the citizen will accept personal responsibility for the risks involved in participation in a “free economy.” Political participation for citizens has been largely understood to comprise of voting at elections, the expression of opinion, and the opportunity to run for political office. Participation in political organisations and political activity not directly associated with the parliamentary system is not given, assumed, expected or even desired in liberal political philosophy [7]. There are other notions of freedom however, where the activity of citizenship appears as less of a prosthesis.

### *The inappropriate region of human liberty*

In contrast to the liberal understanding of political freedom, Hannah Arendt and Cornelius Castoriadis, drawing on the Greek *polis*, see action, rather than consciousness, as the “appropriate region” of freedom. According to this understanding, in the *polis*, activity is interactivity, life is *social* and, as a citizen, political activity is a key aspect of this life (Arendt, “What is Freedom?” 145-6). Arendt writes that the *polis* “is not the city-state in its physical location” but the activity of people “acting and speaking together” – a way of life that is exemplified by the words, “Wherever you go, you will be a *polis*” (Arendt, *The Human Condition* 198). Drawing on Aristotle, Arendt describes three ways of life which, having a common concern with the beautiful, can be chosen in freedom. These are: the philosophical life; the life in which the beautiful is consumed; and political life, “the life devoted to matters of the *polis*” (*The Human Condition* 12-13) [8]. Not all action though, has the status of free activity. Activities ruled out as “free” are “ways of life that are chiefly devoted to keeping oneself alive.” These are the working lives of the slave and the free craftsman and the acquisitive life of the merchant (*The Human Condition* 12).

The contrast between the classical Greek and the liberal citizen is striking. In the liberal tradition, the proper domain of freedom is individual consciousness and allowable activities are protected by the principle of non-interference. These (passive) liberal freedoms, those Arendt describes as being “chiefly devoted to keeping oneself alive” are the very things that, for a citizen of the *polis*, *cannot be done freely*. What is freedom for Mill and liberalism, is slavery for the Greeks. If this is so, a concern for the erosion of the rights of the liberal democratic citizen, while valid, may lead us to overlook the limitations of liberal citizenship with regard to political activity. Further, liberal rights and “protections,” also *enclose* the individual within a security blanket of laws and norms. As Agamben writes, “the liberties and rights won by individuals in their conflicts with central powers” also tacitly inscribe the lives of those individuals “within the state order” (*Homo Sacer* 121) [9]. According to liberal principles of non-interference, the security blanket of codified rights can also be used as a straight jacket.

### *The blind trade*

It would be wrong to say that the rights and protections associated with liberalism have meant nothing. In the context of the consolidation of nation-states, rights, as belonging to citizens of such states, have had a place and have functioned to some degree according to their conceptualisations. As previously noted, these rights have been largely supported by the reciprocal logic of the social contract (i.e. a “covenant” between all citizens in agreeing to waive certain *natural* rights and to obey a Sovereign (*Leviathan*), or the “general will” (*The Social Contract*)) and these rights are ceded according to the understanding that the sovereign will in turn protect citizens and respect their remaining, or *civil*, rights. Breach of this contract can result in, among other things, civil death. In a system of nation-states, while populations of citizens are unproblematically tied by birth to the nation, this arrangement operates with some stability. However, as Schmitt, Benjamin and Arendt have shown, this stability has been severely shaken since around the time of the First World War.

The creation of stateless people and refugees, during and following the two world wars marked the emergence of a situation with which the modern state struggled to cope. The constant rearranging of borders and the denaturalisation of minorities created a situation in which millions of people found themselves as nationals without a nation, deprived of citizenship, the right to legal representation and, most importantly, deprived of homes. In this situation, countries trying to expel newly “stateless” groups found that no other country would accept those who could not eventually be repatriated. While a few individuals found their statelessness an advantage, for most it meant persecution, deportation, internment or (particularly in Nazi Germany’s concentration camps) extermination. With no desire to include minorities as equal citizens and nowhere to send them, the states built camps – places where the normal constitutional laws and rights were deemed not to operate (Arendt, *The Origins of Totalitarianism* 267-302).

Under pressure from these crises, the social contract and other reciprocal notions became subject to question. From the early decades of the twentieth century the suspension of normal constitutional laws and rights under the banner of state of emergency or siege (declared in circumstances deemed threatening to the state) has been employed so regularly at times that some argued that it had become the rule (Benjamin, “On the Concept of History” 392). During such times, the boundary between the normal operation of rights and the exceptional suspension of them is blurred and the notion of the social contract and the system of reciprocal limitations and rules is destabilised (Agamben *Homo Sacer* 37-38). Arendt, Schmitt and Benjamin have all written on this situation, particularly with regard to the politics of Europe in the first half of the twentieth century. It is worth noting that a similar and perhaps more contemporary situation exists, in which no state of emergency is decreed (although it may be unofficially implied) and under which the contract and the notions of trade and reciprocity are used as justification for the deprivation of rights. This situation exists in an atmosphere of national security scare politics, which is seen by Anthony Burke as an attempt to shore up the sovereign ontology of nation-states in the face of the deterritorialising practices of neo-liberal globalisation (Burke).

Politicians and police chiefs often speak of the need to ensure a balance between democratic rights and freedoms and the imperatives of national security (usually in response to the alarm expressed by citizens at proposed new legislative constraints on civil rights, or when the activities of governments, police, and the functioning of the law are further veiled in secrecy, or when the operation of new laws demonstrates the extent to which rights have been limited – as with the Haneef case in Australia [10]). Additionally, while the duration of limitations to civil rights is not “permanent,” the point in time at which the limitations are to be lifted is rarely stipulated by either legislation or as part of the arguments used to justify such measures. It is relatively easy to ascertain what rights are being circumscribed but it is impossible to clearly understand what the “pay-off” in security is. There is no indication that this process is slowing. We can call the casual acquiescence of citizens (which is not unlike the Gramscian notion of consent) to the process itself and the contractarian invocation behind it, the “blind trade” in citizenship.

## *Allegiance and the plea*

Under the conditions of a blind trade, with the vagueness of the promise of “increased security” and with many (previously public) functions of government, police and the law veiled in secrecy, the invocation of the contract necessitates supplementary pleas and demands for trust and allegiance. The plea for trust takes a twisted form when those who question the need for increased secrecy or limitation of rights, are in turn questioned about the possible reasons for their displays of mistrust and disloyalty. The answers to such questions are implied: i.e. a lack of allegiance (Un-Australianness) or a pernicious hostility to the police, political leaders and the “rule of law” [11]. The *demands* for allegiance are easier to identify, as they tend to be more subtle versions of G.W. Bush’s post September 11 2001 statement, “Either you are with us, or you are with the terrorists” (Bush). In addition to the loaded questioning, pleas and demands, the supplement of allegiance and trust is gained via the all-encompassing, “integrated,” spectacle (Debord 9), where, in addition to the effects of the media industry and lifestyle consumption, allegiance to the state is bound up with massive public events such as Olympic and Commonwealth Games, national sporting “heroes” and teams, and cultural and artistic festivals [12].

The corruption of the contract and, with it, the diffusion of the illusion of reciprocity, is marked by the plea for trust and the demand and allegiance, and is characterised by the state’s mistrust of citizens [13]. Demands and pleas are addressed one way, without the necessary expectation of a response. The promise of security is qualified with the admission that security cannot be guaranteed. This promise, as the promise of nothing, is infinitely promisable. The trade of rights for this promise is finite, is unambiguously exhaustible. Having been already reduced by liberalism to mere (passive) bearers of rights (rather than participants in the political action of the *polis*), the total deprivation of the rights of (non-criminal) citizens is possible and the current trajectory is towards the realisation of this possibility. A citizenry of civil dead is the real promise contained within the blind trade. However, these civil dead will not be imprisoned or constrained from going about their daily business (as long as they do not pose a threat to “security”). They will be, according to the (neo) liberal tradition, “free.” They will be, in a sense, the ghosts of citizens, “free” to roam the streets of the city (if not the *polis*), but unable to manifest as political figures. Nevertheless, even this presence discomfits the state [14]. The ghosts of citizens, through their exposure, through their release from the reciprocal obligations of rights and the contract, also contain the potential to occupy a new political space.

## *Death and the void: (civil death and bare life)*

Earlier I referred to Benjamin, Arendt and Schmitt in relation to their discussions of the use and effects of the suspension of normal rights by states in times of “emergency.” Any consideration of a notion such as civil death, cannot take place without attention to Agamben’s work on these states (and spaces) of exception, and on the “bare life” that inhabits them. Agamben draws on Benjamin and Schmitt, working over their interpretations of the various states of emergency (as states of exception) that prevailed in the Weimar Republic, and the de facto “permanent” state of exception under National Socialism. In the state of exception, Agamben finds human beings stripped of all legal rights and privileges, stripped of any representable identity, and understands them as “bare life.” For Agamben the state of exception is a zone of indistinction, “a space devoid of law, a zone of anomie in which all legal determinations ... are deactivated” (*State of Exception* 50). In this “juridical void,” where laws and rights remain operative but do not apply, it is not possible for anyone to either execute, transgress or create law (50).

The figure inhabiting the state of exception is “bare life,” “that is, the life of *homo sacer* (sacred man), *who may be killed and yet not sacrificed* ... human life [that] is included in the juridical order ... solely in the form of its exclusion (that is, of its capacity to be killed)” (*Homo Sacer* 8) [15]. Bare life is the politically exposed, natural life (*zoē* in Arendt and Agamben), the everyday, “liberal” life,

stripped of the liberal protections and identifications, the “natural” life which has become nothing more than biological matter of fact.

Is it appropriate to claim then, that the civil dead, like bare life, inhabit a state of exception? States of exception are situations in which certain “normal” laws are suspended for large groups or categories of people or, sometimes, for the entire citizenry. When a group is subject to a state of exception, it is not due to the commission of (or conviction for) a criminal act (although the group may be deemed as threatening to the integrity of the state – in the same way that someone suspected of treason is). And, in a state of exception, a citizen is not transformed into “bare life” according to a contractarian logic. “Bare life” is not the result of a breach. In the realm of civil death however, limits to rights (e.g. for prisoners) are legislated *from the inside* and *remain inside* the normal juridical order. Transgression is still the issue. In transgression, the category is the “criminal” rather than the refugee or stateless person, and, as Arendt notes, the criminal (as opposed to the stateless person) still possesses an identity within the law and as such, is a “respectable person” who is entitled to normal legal protections (Arendt, *The Origins of Totalitarianism* 286-87).

Agamben himself illustrates the crucial difference between civil death and bare life. In his comparison of the prison and the (internment and concentration) camp he writes that “while prison law only constitutes a particular sphere of penal law and is not outside the normal order, the juridical constellation that guides the camp is ... martial law and the state of siege .... As the absolute space of exception, the camp is topologically different from a simple space of confinement” (Agamben, *Homo Sacer* 20). In a prison, rights are withheld from the criminal. In a camp, rights do not apply. In a prison, the criminal is (supposedly) still protected (enclosed) by laws of the state, written to govern the treatment of prisoners. In the camp, “anything,” and “everything is possible” (Agamben, *Means Without End* 40; *Homo Sacer* 171). The bare life inhabiting the camp, the ultimate state of exception, is exposed as nothing but biological fact. This is the “life that may be killed without the commission of homicide” (*Homo Sacer* 159).

However, this exposure of bare life is “double-sided.” Exposure does not only imply a defencelessness or an incapacity to act. Picking up from Jean-Luc Nancy’s discussion of the “ban” Agamben writes that the

relation of the exception is a relation of ban. He who has been banned is not ... simply set outside the law ... but rather *abandoned* by it, that is, exposed and threatened on the threshold in which life and law, outside and inside, become indistinguishable ... (This is why in Romance languages, to be “banned” originally means to be “at the mercy of” and “at one’s own will, freely,” to be “excluded” and also “open to all, free.” (*Homo Sacer* 28-29) [16])

To be exposed is to be free – to be outlaw – to be (potentially) a danger to the state. While the civil dead remain “enclosed” within the laws and norms of the state, bare life inhabits a zone of indistinction, neither inside nor outside of the law.

So, while civil death cannot be said to be the same as the bare life that inhabits the state of exception, the differences seem to be limited to the presence or absence of the (actual or illusory) reciprocal notion of the social contract and the rights inscribed in it. If this is so, the implications are intriguing. For only as long as the fiction of the contract can be maintained can the illusion of citizenship endure, and with it, the enclosure of citizens within the constraints, restrictions and protections of the law of the state. As “the liberties and rights won by individuals in their conflicts with central powers” also tacitly inscribe the lives of those individuals “within the state order” (*Homo Sacer* 121), a blind trade maintains a permanent indebtedness in the illusory reciprocal relation. While citizens remain blind to their willingness to trade rights for nothing, they remain bound to and enclosed within the state and as such, the potential for the political contestation of the state, in the exposure of the ban, is reined in.

### *The denizenry: (exposure)*

As the most common and recognisable form of *homo sacer* and bare life, Agamben sees the *refugee* as “the central figure of our political history” (*Means Without End* 22). As such, he argues that the increase of people who “are no longer representable inside the nation-state” threatens its very foundations (21-22). He writes that,

industrialized> countries face ... a permanently resident mass of non-citizens who do not want to be and cannot be either naturalized or repatriated. These non-citizens often have nationalities of origin, but, inasmuch as they prefer not to benefit from their own states’ protection, they find themselves as refugees, in a condition of de facto statelessness ... “denizens” (*Means Without End* 23).

Agamben argues that, as a neologism, “denizens” “has the merit of showing how the concept of citizen is no longer adequate for describing the socio-political reality of modern states” (23) [17]. He then expands on the theme, beyond the situation in which statelessness is imposed or, in other ways involuntary, to that in which citizens effectively opt out (or desert from) constitutional political participation. He writes that these people show “an evident propensity to turn into denizens, into noncitizen permanent residents” (23).

Criticism of Agamben’s work has focused on the idea that the state of exception “invests all structures of power and eradicates any experience and definition of democracy” (Negri) and on the unrealistic “bifurcation of the population into two halves: political beings and bare life” (Ong 22). Ong argues that “in this rigid binary opposition, Agamben seems to preclude the possibility of non-rights mediation or complex distinctions that can buttress claims for moral protection and legitimacy” (23). However, in the figure of the denizen, we do not find this bifurcation. She is a political being inhabiting (at least some of) the conditions of bare life. And the stance of the denizen seems to include the possibility of “non-rights mediation.” The denizen can also be seen as an example of how, as Negri has noted, Agamben’s analysis “can be realist and revolutionary” (*The Ripe Fruit of Redemption*). Still, there are limitations. The denizen’s conscious or unconscious acceptance of the exposure of a state of exception, and the ban, and a refusal of the enclosure of laws, rights and citizenship could not be said to inhabit a realm of “political life” (as Arendt would have it). This acceptance, as residing in consciousness (or unconsciousness), does not amount to political *action*. However, if the figure of the denizen contains the possibility of the adoption – the taking up of a political *position* – of exposure, exception and the ban and of the refusal of enclosure in the laws, rights and citizenship inscribed into the state order, the possibility for a different “experience and definition” of democracy could be opened.

How long will it be before citizens more deliberately renounce citizenship of their countries of birth, to become conscious denizens, because states of exception and the suspension or denial of civil rights has rendered being a citizen of that state meaningless? Until now the act of denying citizenship of a state to certain native born residents has been exercised only by states. Agamben claims that the refugee, in “breaking the identity between the human and the citizen and ... between nativity and nationality ... brings the originary fiction of sovereignty to crisis” (21). If this is so, what then would the presence of *deliberate* denizens – who inhabit a legal space like that of the refugee and who refuse the refuge of their “own” state’s laws and rights – mean for the integrity of the state? The presence of large groups of “rights rejecters” within the state would firstly reduce the efficacy of anything like a blind trade. The state would need to either present or force through exceptional measures without pleas and appeals to the security of a contract, or would have to abandon them. Regardless of the possible strategies of governments in response to such a situation, the denizen contains the potential to change a political situation – whether they represent a ruinous rupture in the political fabric, or whether they represent a new kind of bug that a state has to learn how to swat. This question cannot be answered until, or unless, or if, enough denizens take such a stance. If nothing else, to consciously take up a position of exposure

and the ban is to embrace the possibility of inscribing a political life as “being open to all, free” in such a way that (as with the medieval outlaw) the state is opened up to contestation.

To invoke the denizen as a notion of political life and activity is not to call for a return to or “re-creation” of the classical Greek ideal of “life devoted to matters of the *polis*” (Arendt, *The Human Condition* 13). Such “retrospective consciousness of a lost archaic community” is of an ideal community that “has never taken place along the lines of our projections” (Nancy 10-11). And so, it’s impossible. Jean-Luc Nancy argues that such an ideal repeats the mistake of “the thinking of community as essence” which is effectively “the closure of the political,” rather than thinking of a “being in common” as exposure, openness and sharing (xxxviii). For Nancy, this “being in common means ... no longer having, in any form, in any empirical or ideal place ... a substantial identity and sharing this ... “lack of identity” ” (xxxviii). The denizen is a political being without a political identity. That is, without an identity associated with a (closed) community or state. “The denizenry” is “being in common” rather than a “being in essence.” The invocation of the denizen is not to invoke the *polis* as a physical location or ideal community but as “being in common of acting, speaking and sharing and, as a response to the call to “*be a polis*” (Arendt, *The Human Condition* 198). In a similar way, the invocation can be understood as a response to an understanding of the word “democracy,” of which we are “legatees,” and which has been “addressed to us for centuries” (Derrida 8-9), and under which political life is more than merely holding rights or opinions. This understanding cannot but reject the existence of a blind trade.

In recognising the blind trade as a means of keeping citizens enclosed in the reciprocal illusion of the social contract and as a veil behind which the state of exception and bare life can become more prevalent, we open the way for its rejection. This rejection is a gesture on the way to taking up a position of exposure, which can be understood as a position which opens towards a “being in common” or a “community without community” (Nancy 71) or even a “democracy to come” (Derrida 8). The denizen allows us to imagine the possibility to engage in political action and activity as one might in a polis, without the enclosure of rights and identity that are inscribed in our received liberal and classical notions. In the figure of the denizen is the possibility to *be a polis*. The denizen opens the way for a response to the erosion of civil rights in liberal democracies that does not rely on the logic that makes that erosion possible.

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## Endnotes

1. See Walker *The Oxford Companion to Law* (222). Others, such as Susan Ellis Wild’s *Webster’s New World Law Dictionary* (73), include a contemporary definition which refers to modern notions of civil rights. Whether or not the concept is deemed obsolete seems to relate to whether or not civil death exists *formally* in law. Brian Costar’s discussion of the concept in relation to the erosion of electoral rights in Australia in recent decades is an example of this.



[A]rguments advanced [by politicians] to undermine prisoners' rights rarely rose above sloganeering. One minister told us that "if you're not fit to walk the streets,...you're not a fit and proper person to cast a vote" while another thought the case against felons voting was so self evident that it would easily pass any "pub test."

Such views are a crude articulation of the ancient but discredited doctrine of *civil death* which has never been a feature of Australia's legal system. According to the doctrine when a person commits a criminal offence they break the "social contract" and thereby forego their civil rights - perhaps for all time. It is the civil equivalent of capital punishment. (Costar).

See also Hughes & Costar's *Limiting Democracy: the Erosion of Electoral Rights in Australia*. Other aspects of the lack of clarity around the concept's current status relate to the differences between ancient understandings of rights and privileges and the modern notions of formal civil rights and the association of ancient civil death with exile, banishment, outlawry and ostracism.

2. For example, in Australia, Section 93 (8AA) of the Commonwealth Electoral Act stipulates that, "A person who is serving a sentence of imprisonment for an offence against the law of the Commonwealth or of a State or Territory is not entitled to vote at any Senate election or House of Representatives election." Under Section 163, "Any person who ... has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer ... shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives." Accessed 16 May 2008  
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[www.austlii.edu.au/au/legis/cth/consol\\_act/cca1995115/sch1.html](http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html) >  
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[www.austlii.edu.au/au/legis/cth/consol\\_act/aa22005214/sch4.html](http://www.austlii.edu.au/au/legis/cth/consol_act/aa22005214/sch4.html) >
5. National Security Information (Criminal and Civil Proceedings) Act Accessed 16 May 2008.  
[www.austlii.edu.au/au/legis/cth/consol\\_act/nsiacpa2004575/](http://www.austlii.edu.au/au/legis/cth/consol_act/nsiacpa2004575/) > The stripping away of *habeas corpus* laws in relation to the war on terror in both the U.S. and Australia is described and discussed in more detail by Julian Burnside in his book, *Watching brief: reflections on human rights, law and justice*. See especially pages 131-152 and 178-183.
6. An example of the new right, neo-liberal attitude to democracy is expressed by Samuel Huntington, who contends that "the strength of the democratic ideal poses a problem for the governability of democracy." (cited in Laclau & Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* 165).
7. Laclau and Mouffe observe that under the neo-liberal/neoconservative regime the attempt is made to redefine democracy and empty it "of all substance" in such a way that "would serve to legitimize a regime in which political participation might be virtually non-

existent” (Laclau & Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* 173). They also cite Zbigniew Brzezinski who argues that political participation in a democratic society should be democratic, “in a libertarian sense; democratic not in terms of exercising fundamental choices concerning policy-making but in the sense of maintaining certain areas of autonomy for individual self-expression” (173).

8. Cornelius Castoriadis makes similar points. He draws on the *Funeral Oration* of Pericles and writes,

Pericles does not say we love beautiful things (and put them in a museum), we love wisdom (and pay professors or buy books). He says we *are* in and by the love of beauty and wisdom and the activity this love brings forth .... The object of the institution of the *polis* for him is the creation of the human being, the Athenian citizen, who exists and lives in and through the unity of these three: the love and “practice” of beauty, the love and “practice” of wisdom, the care and responsibility for the common good, the collectivity, the *polis*. (Castoriadis 122-123)

Giorgio Agamben also discusses these distinctions in the Introduction to *Homo Sacer*.

9. My use of the term “enclosure” here differs from that which refers to the enclosure of lands as an aspect of primitive accumulation – as theorised by Marx, Luxemburg and more recently, Massimo De Angelis (see de Angelis) – which simultaneously accompanies the displacement of those “in communal control of the means of subsistence” (“Midnight Notes”). However, it is important to note that the process of (new) enclosures in the former Soviet union, China and Indonesia have played a part in the movement of peoples and are an element of the deterritorialisation of sovereign boundaries. These are processes which may lead to the exposure of *homo sacer* and the release from enclosure of the denizen.
10. For example, in July 2007, Indian doctor Mohammed Haneef was detained under Anti-Terrorism legislation without charge for 12 days. In relation to this matter, former Australian Attorney-General Philip Ruddock argued that “we have to get a balance right between protecting people’s right to life, safety and public security, along with the other entitlements that people have to a fair trial, to being presumed innocent until a finding of guilt is determined” (Steketee). After the prosecution case collapsed due to insufficient evidence, Dr. Haneef’s visa was cancelled and he was transferred to an immigration detention centre. The public outcry around this case eventually led Australian Federal police commissioner Mick Keelty to call for a ban on media reporting of such cases until “the full gamut of judicial processes has been completely exhausted” (Maiden & O’Brien).
11. For some examples of this see David Marr’s recent Quarterly Essay, *His Master’s Voice: The Corruption of Public Debate under Howard* (Black Inc. 2007)
12. I have previously discussed allegiance in relation to the spectacle in “ON | OFF : From alienation to allegiance to alienation.” *Overland* 188 (Spring 2007): 62-67.
13. This mistrust is itself characterised by an annoyance at the public when it exposes the inconsistencies, lies and incompetence of governments and its agencies (Bourdieu “The Government Finds the People Irresponsible”; Maiden & O’Brien).
14. Arendt notes the nervousness with which governments hold civil death. In a footnote, she writes of the “danger” represented by civil death and excommunication to the late Roman Empire because of the “full freedom” in which the civil dead were left (*The Origins of Totalitarianism* 302).

15. In *The Origins of Totalitarianism*, Hannah Arendt vividly describes what Agamben calls “bare life”:

The calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion – formulas which were designed to solve problems *within* given communities – but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them; not that they are oppressed but that nobody wants even to oppress them. Only in the last stage of a rather lengthy process is their right to live threatened; only if they remain perfectly “superfluous,” if nobody can be found to “claim” them, may their lives be in danger. Even the Nazis started their extermination of the Jews by first depriving them of all legal status (the status of second-class citizenship) and cutting them off from the world of the living by herding them into ghettos and concentration camps; and before they set the gas chambers into motion they had carefully tested the ground and found out to their satisfaction that no country would claim these people. The point is that a condition of complete rightlessness was created before the right to live was challenged (295-96)

16. Arendt’s comments on civil death reveal some similarities. She notes that in the early Middle Ages the civil dead are somewhat beyond the reach of the law and “full freedom” is possible, much like the zone of indistinction inhabited by bare life. And in the associated ancient and medieval custom of outlawry which placed “the life of the outlawed person at the mercy of anyone he met” (*The Origins of Totalitarianism* 302) we clearly recognise *homo sacer*.
17. Agamben credits Tomas Hammar for the “creation” of the neologism “denizens” and for its use in this context. (Hammar *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration*)

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