

ENTERING THE RISK SOCIETY: A CONTESTED TERRAIN FOR IMMIGRATION ENFORCEMENT¹

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"My point is not that everything is bad, but that everything is dangerous, which is not exactly the same as bad. If everything is dangerous, then we always have something to do. So my position leads not to apathy but to a hyper- and pessimistic activism."²

"The hidden central issue in world risk society is how to feign control over the uncontrollable- in politics, law, science, technology, economy and everyday life."³

I INTRODUCTION: RISKING ALTERNATIVES TO DETENTION (ATD)

Since 2004, the Department of Homeland Security (DHS) has assessed risk as a useful technology for calculating and managing undocumented immigrants. Uncertainty, which is the focus of risk analysis, applies to nearly every aspect of

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2 H. Dreyfus, P. Rabinow, M. Foucault: Beyond structuralism and hermeneutics, with an afterword by and an Interview with Michel Foucault, The University of Chicago Press, Chicago, 1983, 231-232

3 U Beck, and E Beck-Gernsheim, Individualisation: institutionalised individualism and its social and political consequences, Sage, London, 2002, 41.

undocumented status, from the immigrants' decision to leave their country, to crossing borders and living on the lam, to society's understandable fear of the unknown about a population of brown people that reside in their communities without papers or authorisation. Thus, it seems almost fated that undocumented immigrants would be subjected to risk technologies.

In this chapter I examine two discordant themes in the immigration enforcement discourse: modernism, which covers sovereignty and plenary powers, and late modernism, which focuses on post-sovereignty and risk. The modernist theme, as many scholars throughout the ages have shown, focuses upon rationality and the idea of individual mastery over circumstance. In the immigration context, the modernist theme emphasizes immigration laws that claim to maintain the territorial integrity of the sovereign nation-state.⁴ As Anthony Giddens suggests, the nation-state "develops only as part of a wider nation-state system, has very specific forms of territoriality and surveillance capabilities, and monopolizes effective control over the means of violence" (Giddens, 1991). In this chapter, I suggest Congress's plenary powers over immigration are analogous to the monopoly of control. Further, the contested terrain between modern and late modern discourse is quickly edging towards the latter, which favours risk management as the dominant frame for immigration control. Gone, perhaps forever, is the promise of territorial integrity (secure borders), and in its place risk informs a new agenda of spatial control and surveillance capabilities.

A sharp contrast exists between the modern scenario of preventing unwanted noncitizens from entering the country, and late modern efforts to manage immigrants after they arrive. The risk society concedes unauthorised border crossing. It develops the idea that undocumented immigration is a global phenomenon that transgresses sovereign borders both in its origins and destination. Like other post-sovereign phenomena – like AIDS or global warming or even radioactive tuna swimming from Japan into the fishing nets of US fishermen off the shores of San Diego, California – undocumented immigration is unimpeded by law. In fact, the government's focus on the social control of undocumented immigrants is a sign that sovereignty has become an anachronism.

Undocumented immigration comprises post-sovereign risk that is in league with AIDS, global warming and toxic sea life. This analogy asserts two things:⁵ First, government regulations are about as likely to stop undocumented immigrants (as a population not discrete individuals) as they are to stop any post-

4 The origins of the notion of the sovereign nation-state can be found in the Peace of Westphalia in 1648. The idea is based on territoriality and the absence of external agents in domestic affairs. Put another way, the modern nation-state has mastery over domestic circumstance, a thoroughly modernist concept.

5 By no means am I suggesting moral equivalency between undocumented immigration and any of these other phenomena.

sovereign phenomenon from crossing sovereign boundaries. Such phenomena are no longer perceived as stoppable dangers; rather they are manageable risks.

Second, risk narrative makes playful associations between constructs like undocumented immigration and real hazards to human life like AIDS and global warming, to real and deleterious effect. Such rhetorical analogies can blur very real distinctions between life-threatening catastrophes, like AIDS or global warming, and undocumented migrants. They also suggest how criminalisation emerges from the risk discourse. As the years following 9/11 showed, it is easier to criminalise human beings if we first analogise them to some potential border-crossing, global catastrophe.

I would also suggest that criminalisation is a fundamental risk strategy. At the same time, however, the risk discourse contains modes of social control that extend beyond criminalisation. Consider President Obama's recent executive order that suspends the removal of undocumented immigrants who are under thirty years of age and enter the US before the age of sixteen. The executive order is an example of risk management. It brings undocumented young people into the system, and provides them some freedom but few rights. The immigrants' status could be revoked at any time without due process.

The discussion below about alternatives to detention introduces another social control scenario that exists within the risk management narrative, while including but also extending beyond criminalisation. While the criminalisation of immigrants may ebb and flow depending upon the sways of the political climate, the risk discourse is more representative of a new regime that guides the development of database technologies of social control.

Risk plays a fundamental role in the undocumented immigration discourse in several ways. The border crossing experience for any discrete undocumented immigrant is fraught with risk. At a meta-level, undocumented immigration itself poses a risk to the integrity of the sovereign nation-state. Risk applies to territorial borders themselves as well as to basic government functions, which have to do with caring for and protecting people within territorial borders. As obvious as it sounds government protects and serves only the populations it knows about, which in many instances excludes undocumented immigrants. As an outcome, undocumented populations are ostensibly ungovernable, which constitutes risk for them and government as well as other populations within territorial boundaries. Consider an undocumented immigrant whose status prevents her from obtaining health insurance under the Affordable Care Act (Aguilera, 2012). She contracts a contagious illness; it spreads into the larger community and quickly becomes a risk to public health. In this discrete instance, we can see how undocumented populations are perceived as both at-risk and a risk to others, and thus also illustrate the schizophrenic way in which society sees undocumented immigration. As society seeks to penalise undocumented immigrants for their status, it harms itself in the process.

Since the purpose of risk management is to regulate (not prevent or get rid of) uncertainty, the government uses risk management techniques to collect data on populations of people about whom not much had previously been known. In this way, the government gains knowledge and power over elusive populations that by definition are ostensibly ungovernable. To the extent the government gets to know an undocumented population, it gains the capacity for governing it and protecting and caring for it. This has been a missing link in the development of federal immigration policy. For over a century, the government has had the power (recognized by the courts) but not the capacity to govern undocumented populations. Now, it seems, it has both.

Governing strategies can take one of three possible approaches: 1) caring for 'at risk' populations (a liberal approach); 2) protecting against a risk-laden population (a neoliberal approach); 3) providing some combination of the two. Regardless of the governing strategy, risk technology goes a long way towards addressing a fundamental concern with undocumented immigration.

Along the way, managing undocumented populations in post-9/11 America has also become a lucrative endeavour. In recent years, as the modernist venture documents one failed border defence project after another, late modern risk-related initiatives highlight effective and lucrative alternatives. Highly marketable opportunities for private management firms highlight strategies for managing brown populations that have crossed the border and now reside in domestic cities and towns.

In Section 2, I describe the governmentality of immigration control. This discussion focuses on the 'conduct of conduct' of immigration control. It deals with how professionals think about immigration control, the discourse they use, and how technologies of control are established and deployed.

The modern/late modern tension introduces two notable modernist technologies of power: sovereignty, defined as the freedom and autonomy that follows the nation-state, and plenary powers, which is a technology of sovereignty, and combines them with the late modern technique of risk management. The 'exceptional' nature of plenary powers shifts the focus beyond constitutional norms and into the field of power politics (Agamben, 1995).⁶ Both approaches to immigration control occupy this realm of power politics.

In Section 3, I examine the development of modern immigration enforcement discourses through the lens of Michel Foucault's notion of the panopticon. The panopticon is the modernist technology of control that subdues bodies by mak-

6 It is in Agamben's state of exception where questions of citizenship and individual rights are diminished.

ing them docile and productive. It is painless, centralised and limited by its physical structure.

Next, in Section 4, I introduce the immigrant risk society, which is the driving force behind late modern immigration control. The immigrant risk society extends control technologies beyond the institutional panopticon and creates a control society, as Gilles Deleuze refers to it. The control society takes us beyond the certainty of the highly rationalised panopticon and into life's uncertainties outside the walls of physical custody. It also decentralises technologies of control into local communities and organisations.

In Sections 5 and 6, I illustrate how risk management drives two alternatives to detention (ATD): a new market-based alternative to detention and a community-based alternative to detention. The two approaches to ATD increase the immigrants' freedom but still subject them to control mechanisms that constrain liberty. As described below, the constraints embedded in the Intensive Supervision Appearance Program (ISAP) programme are pretty obvious.

ATD shifts the locus of control for ATD from closed institutions to open spaces. At issue, following Deleuze, is how privately managed ATD programmes constrain the liberty of 'free' immigrants. I address two forms of ATD programmes. The first is a for profit venture that supervises immigrants with electronic monitoring; the second is a non-profit form of community based supervision that supervises immigrants with community support and a variety of professionalized disciplines.

The constraint on liberty coming from the privately managed regime is more obvious and punitive; less obvious are the constraints to liberty that are embedded within a new non-profit community support network. These constraints, more productive than repressive, function in lieu of ankle bracelets to discipline immigrants into docile subjects.

In conclusion, I suggest an inverse relationship between criminalisation and risk management. Extreme acts of criminalisation are likely to diminish as government finds it is less costly and just as effective to merely 'constrain liberty' in the new risk society.⁷ At the same time, the risk society is likely to increase control over the population of immigrants who reside inside the territorial boundaries of the United States. As will be shown, this milder and gentler system of control enhances freedom, constrains individual liberty as it outsources enforcement responsibilities to nongovernmental entities.

⁷ I put this idea forward tentatively. It remains quite possible that criminalisation will continue to develop as it serves other purposes, such as instilling fear in immigrants and citizens alike. This fear is yet another control technology.

2 COMPETING DISCOURSES

In this section, I examine the governmentality of immigration enforcement. Michel Foucault coined the term governmentality during a series of lectures in the late 1970s to connote how problems and technologies of governance are formulated and addressed. Foucault refers to governmentality as the 'conduct of conduct.' Following Foucault's description, I examine a shift in the 'conduct of conduct' for immigration enforcement.

While metaphors of certainty and integrity are associated with sovereign borders and completeness of plenary powers within modernist discourse, late modern discourse addresses concepts associated with permeability, uncertainty and risk. Thus we see metaphors of territorial integrity that are associated with sovereignty shift to metaphors of border crossing and risk. The late modern metaphors are constitutive of Ulrich Beck's risk society and Gilles Deleuze's control society, which I refer to interchangeably.

Two crucial aspects of governmentality are worth mentioning. First, according to Judith Butler, 'governmentality operates through policies and departments, through managerial and bureaucratic institutions, through the law when the law is understood as 'a set of tactics,' and through forms of state power, although not exclusively' (Butler, 2004). Following Butler, therefore, I refer to governmentality in terms of how control tactics operate through policy, i.e., how technologies regulate immigrants into and within society, and punish them within a civil law context.

Second, it includes the role private actors play in directing human behaviour. This includes how individuals shape their own subjectivities. Thus, following Cruikshank who examines the technologies, or ethical obligations, of citizenship (Cruikshank, 1999), and Rose who examines self-governance as extending government into the soul (Rose, 1999), I suggest these are some of the ways of seeing neoliberalism, where regulation and discipline are forced upon the autonomous, self-regulating individual. Citizens are positioned as neoliberal subjects; they are active subjects of governance.

Late modern governmentality manages the uncertainty of risk. This late-modern discourse is softer than its predecessor and on the face of it more democratic. It puts less emphasis on the palliative functions of enlightenment science and more on its unintended consequences. It creates proactive and self-regulating subjects. The discourse is neoliberal to the extent that self-regulation conforms to well-advertised corporate norms, personal responsibility and entrepreneurship. In this regard, we understand immigration enforcement in terms of the government shifting responsibility for immigrant supervision onto nongovernmental entities and immigrants themselves.

Another dimension shows how self-regulation coincides with freedom from detention and legal custody. Such negative freedom (freedom from custody) supports government outsourcing of supervisory responsibilities to non-governmental actors. Since such freedom is not a corollary of having liberty (civil liberty and having rights), such neoliberal freedom can occur within a spectrum of control.

In other words, as we see with risk management as well as with alternatives to detention (ATD) initiatives, social control and freedom go hand in hand in late modern society. For example, immigrants in ATD programmes are no longer in custody. They are 'free' while at the same time they remain subjected to electronic and community-based control technologies that constrain liberty. This is neither a normatively good or bad thing; rather it is a description of late modern power relationships. In this space, immigrants have the freedom to abide by dominant norms as a result of their own autonomous choices. Thus autonomy and freedom have become constructs of late modern technologies of power.

The norms themselves are created, not by 'the people' but by professionals in politics, law, business, and administration. Choice is limited to abiding by these norms and being considered normal or worthy, or rejecting them and being seen as abnormal or unworthy. Another way of describing the 'conduct of conduct' has to do with how discourse frames rules that subsequently regulate human behaviour (Burchell, Gordon & Miller, 1991). Foucault describes the normative regulation of conduct in terms of normalisation (Foucault, 1977).⁸ Normalisation is the process of creating citizen subjects and of excluding persons who fail to abide. Since 9/11, we have seen a shift from modern to late modern frames of normalising citizen subjects. Only 'worthy' immigrants are allowed to traverse the normalisation process with the intended outcome being the production of a neoliberal subject.

The normalisation process is multidimensional and even contradictory. It creates a neoliberal subject that passes through the immigrant from a variety of sources. For example, the ATD case management system discussed in the final section illustrates several and at times contradictory discourses of power that come together to create the immigrant subject. Immigrants enter a network of discourses that are intended to address psychic, legal and physical wounds. Only 'worthy victims' are allowed to be cared for in this way: the asylum applicants who have shown a credible fear of persecution. 'Unworthy victims' are the at-risk immigrants. Government protects society against them; they are not protected. They remain in detention and are likely to receive removal orders by

⁸ Foucault refers to normalisation in terms of idealised norms of conduct. In the context of immigration control, normalisation has to do with using discipline to get immigrants to act as if they were citizens. Normalisation in the immigration context has to do with Americanisation, a process of right conduct for immigrants.

ICE or in immigration court. As for the 'worthy' victims, immigrants who volunteer for community supervision are also participants in their own rehabilitation, availing themselves of a variety of disciplines that are deployed through the community support network. Such neoliberal subjects assume responsibility for their own normalisation, while ultimately relying upon the disciplining techniques imposed through a variety of professional disciplines.

Foucault has famously written about panoptic power pertaining to sexuality, the asylum, or prison in modernity and late modernity. Gilles Deleuze picks up the Foucauldian torch to examine control in the noncustodial setting. Following Foucault and Deleuze, I discuss immigrant detention and ATD scenarios, a noncustodial form of control.

ATD technologies of control pertain to immigrants who are outside custody but whose liberty is constrained both in terms of coercion (external power) and normalisation (power internalised). In the Intensive Supervision Appearance programme (ISAP) discussed below, electronic monitoring is a noncustodial form of control, which places constraints on the immigrants' movements in space and time. In the Community Support Network (CSN), also discussed below, support communities are assembled to make sure the immigrant reports for hearings and removal. This latter discourse subjects immigrants to dominant service-delivery discourses of knowledge and power. In this scenario, power from competing disciplines rains down upon immigrants as it creates new docile subjects.

Both ATD practices guide the subject into voluntary compliance with social norms. ISAP involves coercive pressures as the CSN subject immigrants to intensive surveillance. Put another way, these ATD procedures comprise two somewhat complementary technologies of normalisation.

The wisp of plenary powers, as they pertain to informal and thus largely unmonitored administrative initiatives, delimits the government's power over immigrants in this context. Such examples include Secure Communities and ISAP II. These initiatives deploy plenary (unchecked) powers. They are administered with none of the democratic checks (transparency and accountability) that are typically reserved for administrative rules and regulations.

3 FOUCAULT AND THE MODERNITY OF IMMIGRATION CONTROL

In large part, the exemplary status of immigration law derives from interweaving two historically different approaches to sovereignty. Early modern characteristics describe sovereignty in terms of self-preservation (Foucault, 1977). Rogers Smith has written extensively about how the exclusionary threads of immigration law are irreconcilable with liberalism (Smith, 1993). These illiberal threads are rooted in the early modern conception of sovereignty that play

out in both the process and substance of immigration law. In terms of process, the doctrine of plenary powers gives Congress nearly unchecked authority to establish processes for detention and removal. In terms of substance, Congress enjoys the same power to exclude any category of immigrants of its choosing, accountable only to the court of public opinion.

The modernist discourse emphasises territorial integrity, which ostensibly provides for the general population's safety and wellbeing (e.g., health, sanitation, mental and physical capacities). The plenary power to exclude facilitates territorial integrity. The modern immigration discourse originates in the early administrative state where expert knowledge and plenary power first intersected in the early 1890s. The opening of Ellis Island in 1892 and naming of the first immigration commissioner ushered in this new administrative capacity. Using the expertise of doctors, researchers and other public servants, Ellis Island became one of the first sites where administrative and plenary powers crossed for the purpose of inspecting and monitoring immigrants coming off the passenger boats at ports of entry.

Modern discourse originates at this intersection. The inspections compared new immigrants from southern and eastern Europe against the norm of the first wave immigrants from northern and western Europe. Immigrant exclusions were based upon social Darwinist understandings of these latter immigrants as genetically inferior to their predecessors. Many of the categories that excluded immigrants, such as those in the 1882 legislation (lunatics, idiots convicts and those likely to become a public charge), perceived immigrants as behaving in 'ape-like' ways. These immigrants were perceived as either burdens 'on the public purse,' or 'unassimilable' (Torpey, 2000). Such immigrants were excluded while the immigrants who entered the country were put on a two-year probationary period as potential burdens 'on the public purse'.

Once experts determined immigrants were unfit to disembark, they were put into the cells at Ellis Island, where they remained until a ship could return them to their country of origin. Others were detained for a while some indefinitely, as others were subjected to 'scientific' experimentation, and then released into the country or returned home.

Since the earliest days at Ellis Island, immigrant detention has served as a quintessential example of the Foucauldian panopticon. According to Foucault,

"Power has its principle not so much in a person as in a certain concerted distribution of bodies, surfaces, lights, gazes; in an arrangement whose internal mechanisms produce the relation in which individuals are caught up... So, it is not necessary to use force to constrain the convict to good behavior, the madman to calm, the worker to work, the schoolboy to application, the patient to the observation of the regulations... He who is subject to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon

himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection."

Foucault (1977)

Since *Chae Chan Ping*, immigration control has provided an example of how the modern state deploys sovereign power on immigrants. Early court cases constructed a scenario of danger that helped rationalise the use of prerogative powers as the basis for immigration control. Justice Field's opinion in *Chae Chan Ping* appeals to sovereignty as the power of self-preservation that was needed to deal with crisis and potential crisis situations, coming as a result of war or, put another way, from 'vast hordes of people crowding upon us'.⁹ Field also suggests that a function of sovereignty, which deploys plenary powers, is to repel warlike dangers.

"The existence of war would render the necessity of the proceedings only more obvious and pressing. The same necessity, to a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both instances, its determination is conclusive upon the judiciary."

In discussing plenary powers, the Court provides the rationale for shifting the short-term exception into a long-term policy: 'The same necessity, in a less pressing degree, may arise when war does not exist.'¹⁰ Here, the exception becomes the rule for governing immigration. Indeed the perception of the potential danger of the alien other was and remains the key rationale why sovereignty persists as the basis for immigration law.

Just a few years later, in *Fong Yue Ting*, Justice Gray extended the government's rein over immigrants to include immigrants already inside the country.¹¹ The border at issue had to do with law courts. In both instances (*Chae Chan Ping* and *Fong Yue Ting*) plenary powers were invoked to protect important institutions. Whereas *Chae Chan Ping* focused on sovereign powers at the territorial border *Fong Yue Ting* applied the same super power to persons inside the country.

Chinese exclusion and Cold War immigration cases, which played a fundamental part in the development, some say stunted, of immigration law, portray undesirable immigrants as posing a threat to US society. The discourse suggests that stricter immigration laws enacted under the doctrine of plenary pow-

9 See *Chae Chan Ping v. US* (1889), which is the first of a series of Supreme Court cases to discuss plenary powers in the context of immigration exclusion.

10 Ibid.

11 *Fong Yue Ting v US* 149 US 698 (1893) extended plenary powers to include deportation scenarios.

ers would remove the threat and effectively seal ports of entry. With unlimited power, it seems, the government could master all circumstance, ward off any threat and keep sovereignty intact. This discourse, which promises to secure borders in exchange for plenary powers, crumbles under the realities of undocumented immigration. The promise it seems simply could not be kept.

4 THE IMMIGRANT RISK SOCIETY

Foucault observes that the primary function of the modern nation-state is to intervene, manage, and protect its inhabitants so as to maximise wealth, welfare and productivity (Lupton, 1999).

"The things with which in this sense government is to be concerned are, in fact, men, but men in their relations, their links, their imbrication with those other things which are wealth, resources, means of subsistence, the territory with its specific qualities, climate, irrigation, fertility, etc; men in their relation to that other kind of things, customs, habits, ways of acting and thinking, etc; lastly, men in their relation to that other kind of things, accidents, misfortunes such as famine, epidemics, death, etc."

Foucault (1991, p. 93)

The existence of a substantial undocumented subpopulation in the United States is indicative of a failure of governing. The undocumented population is ungovernable. It is located inside territorial boundaries, off the books and in shadow economies and politics. By definition and practice, the undocumented and hence unregulated population is ungovernable. Severe criminalisation pushes them deeper into the shadows. For example, as local police come to assume federal immigration enforcement responsibilities as part of the Secure Communities initiative or under state mandated "papers please" provisions of Arizona's anti-immigration law, undocumented immigrants and their families become increasingly loath to report a crime or health problem in their neighbourhoods. As an outcome, the State is less likely to achieve its core mission to protect the residents and provide for wellbeing. Such are some of the condition of the immigrant risk society.

Ulrich Beck suggests several stages to the risk society. First is the construction of risk; second is the recognition of risk; third is the strategising to manage risk.

First, Beck refers to *reflexivity* as occurring when risks are produced, but society has yet to concede them.¹² The risk that coincides with undocumented immigration may be traced to the immigration policies of the 1960s and 1970s, which

¹² The existing undocumented immigration problem is an outcome of several late 20th century initiatives including immigration policies that set a visa ceiling on neighbouring countries

placed ceilings on the number of visas the government gave to non-citizens from the western hemisphere countries hoping to reside in the United States. When per country caps were placed on migration from Mexico, a huge spill over entered the country without authorisation.

Next, by 1976 society starts to concede the risk produced shortly after the Immigration Act of 1976. For much of the next generation, the modernist discourse would prevail, but along the way concessions to uncertainty and the inevitability of undocumented immigrants laid the groundwork for a new discourse. Beck refers to this *reflection stage*, which involves self-confrontation, and concedes the unanticipated consequences of modernist policies and programmes.

To all intents and purposes, this reflection stage became salient during the latter 1970s when the Carter Administration initiated efforts to militarise the border, and 1980s, when President Reagan signalled the demise of the modernist discourse with his assertion that border states (on the Mexico border) had 'lost control' to an 'invasion' of 'illegal Mexican immigrants' (Durand, Massey & Parrado). It was during this time that the State conceded the risk that its own policies and practices had produced.

Rather than sealing off the border, a last failed modern claim on territorial integrity and a technological and political impossibility to boot, a new narrative of controlling immigrants that were already present in the country gained steam with the Employer Sanctions provision of the Immigration Reform and Control Act of 1986. Although employer sanctions were poorly devised and proved impossible to enforce, the reliance upon ID technology (by 1980s standards) as a means of controlling immigrants who were already here signalled a strategy shift and helped pave the way for a new discourse.

Third, the new discourse seized upon the modernist project of detention and immigrant removal and soon established its own narrative space. At first, the first immigration-related response of strict criminalisation and securitisation (Rickerd, 2011) merely 'double downed' on an unfulfilled promise of a restored and whole sovereignty (Wadhia, 2009).

The modernist project, however, could not handle the certainty in its own narrative. The SBI net fiasco of 2006 followed by DHS Secretary Napolitano's quip in 2008, 'You build a 50-foot wall, somebody will find a 51-foot ladder,'¹³ provided evidence of the dying discourse. The SBI net fiasco promised a virtual fence and then delivered a panoptic gaze that could not distinguish a human being from a deer or raccoon (US GAO, 2008). Even with plenary powers and

in the western hemisphere, maquiladora programmes and NAFTA which opened the US Mexico border for commerce and kept it closed to migrant labour.

¹³ E. Sullivan on Associated Press, Nov 20, 2008

technological advances, it turns out Congress still lacked the ability to stop undocumented immigration. The modernist promise of mastery was unable to contend with the uncertain realities of the Post-9/11 world.

After September 11, a whole new rationality began to grasp how the government was to handle immigration enforcement. Perhaps the risk society starts with the establishment of the Department of Homeland Security and the shift of immigration enforcement from the Department of Justice to the Department of Homeland Security secured the application of the security moniker to immigration.¹⁴ Under the DHS banner, immigration is officially a security concern, which brings risk analysis into the realm of immigration control. When ICE was established in 2003, it transformed its methods of operation previously used by the Immigration and Naturalization Service (INS) and introduced new state of the art technologies of control.

Perhaps most indicative of the new discourse is how biometrics (ankle bracelets and databases, hair samples and radio frequency identification—RFID—tags) started to replace the watchtower as the dominant tools for surveillance, and passwords and digital databases quickly replaced human signatures and bureaucratic case file numbers (paper trail) (Deleuze, 1992). Instead of having to carry documents on one's person as recently ordered by Arizona state authorities in SB 1070, or as customs authorities ordered over a century ago certifying lawful presence of Chinese labourers during the 1890s, under these new initiatives biometric data are stored within databases, which recognise RFIDs, ankle bracelets, retinas, and fingerprint or DNA. These new technologies extend the capacity to mine data about populations and further distinguish members and non-members within their territorial borders. Such are the technologies of the new risk management discourse.

Risk management techniques

The DHS approach to risk management originates after the September 11 attacks in efforts to render the homeland secure from future terrorist attacks. It initially launched a plan to 'assess risks and vulnerabilities' (CRS, 2007). The plan consisted of establishing a 'minimum infrastructure' of risk control technologies in every state and city, and then supplement minimal resources in areas with the 'highest risks and vulnerabilities.' The plan was to be implemented by enlisting state and local assistance (CRS, 2007).

In 2005, Michael Chertoff, former DHS head, first introduced risk into the immigration lexicon at his confirmation hearings. Chertoff later said,

14 Sections 402 and 421 of the Homeland Security Act of 2002, P.L. 107-29, transfer authority for immigration matters, to the Secretary of DHS.

'We must make tough choices about how to invest finite human and financial capital to attain the optimal state of preparedness. To do this we will focus preparedness on objective measures of risk and performance. Our analysis will be based on these three variables: threat, vulnerability, and consequence.'¹⁵

From this point onward, ICE would use the DHS template to organise its own operations in terms of preparedness for some future unknown event. At first the pursuit of undocumented immigrants was conflated within the manhunt for terrorists. ICE registration initiatives, such as NSEERS and US-VISIT, were enacted with this purpose in mind. As years passed, with growing infrastructure (capacity), such pursuit of potential terrorists would also include potential risks to public safety. Immigrants, particularly undocumented ones, would be adorned with both labels.

From a risk perspective, initial data collection is more important than detention, legal hearings and removal. For example, consider how the technological genius of Secure Community collects data during the criminal booking stage of proceedings regardless of what transpires further down the criminal and/or immigration process. Biometric data from the immigrant are fed into FBI and ICE databases (IDENT) regardless of the charge, where it remains even if the charge is eventually dropped. Thus a stop for a flickering taillight could land someone's data in the database. For all intents and purposes, once the digital fingerprint is entered the immigrant is no longer undocumented. Since such immigrants remain undocumented in a legal sense, they become even more vulnerable to local law enforcement, which has gained access to these technologies through such immigration initiatives as Secure Communities. Secure Communities also hit a nerve because it fulfilled the DHS strategy to extend the control infrastructure into states and cities and to use state and local law enforcement as force multipliers. In this way, local law enforcement quickly became a technology of control within the risk management strategy.

After immigrants are arrested and booked by local police, many are then turned over to immigration authorities. Once in immigration custody the immigrant receives a risk assessment test, called Risk Classification Assessment (RCA). The RCA is an automated system that is scheduled for roll out countrywide in 2012. It accounts for a variety of calculations dealing with public safety and the risk of not showing up for a scheduled hearing.

The RCA criteria ostensibly distinguish worthy noncitizens from unworthy ones (Berger, 2009).¹⁶ Worthy noncitizens are among those with special vulnerabilities, which include 'disability, serious medical or mental health needs, risk

15 Department of Homeland Security, second stage review remarks, July 5, 2005.

16 See Berger, 2009, shows how the legal regime distinguishes worthy and unworthy immigrant victims.

based on sexual orientation or gender identity, advanced age, pregnancy, nursing, sole caretaking responsibilities or victimisation, including individuals who may be eligible for relief related to the Violence Against Women Act (VAWA),¹⁷ victims of crime (U visa), or victims of human trafficking (T visa).¹⁸ Such victims are 'worthy' to the extent they are powerless, abused, moral, responsible, and entrepreneurial. In other words they are worthy because they are no risk. This process is not dissimilar from the Ellis Island Social Darwinist approaches that used psychological testing as a determinant of a human being's value and worthiness.

The unworthy victim is a 'liar, troublesome, criminal' 'and (is) removed from the United States' (Berger, 2009, p. 214). According to the RCA, the worthy victim (who ostensibly poses no threat) is released from detention while the unworthy victim remains in ICE custody. It just happens that the worthy immigrant is labelled powerless and vulnerable and thus is low risk. That is unless the powerless victim is an asylum seeker. The parole process for detained asylum seekers follows a similar route.

Managing asylum seeking and parole

As recent ATD strategies suggest, immigration enforcement authorities become less religious in their efforts to detain and deport undocumented immigrants after they gain the capacity and method to regulate, categorise, and survey. Exceptional plenary powers are insufficient in themselves to the task of controlling a population. Technologies of control along with such methods as risk assessment add capacity (previously lacking) to the government's plenary power over the undocumented population. Since the 1890s, immigration enforcement has included administrative infrastructure, examinations and surveillance of immigrants at formal detentions centres usually located at ports of entry. New techniques of control were warranted, however, to contend with the undocumented immigration routine of entering the country between ports of entry without any formal examination process.

Immigrants who were caught by the Border Patrol or ICE were booked at local detention centres where they were subjected to a risk assessment. Some of these noncitizens become eligible for release into ATD regimes. This project focuses on the role that non-detained noncitizens play in the governmentality of immigration enforcement.

17 At the writing of the chapter, Congress is re-examining its commitment to VAWA.

18 ICE Custody Classification System, 'Instructions for Completing the ICE Custody Classification Worksheet,' PBNDS (2011) p. 72

Generally speaking, the risk logic is designed to:

"... dissolve the notion of a subject or a concrete individual, and put in its place a combination of factors, the factors of risk. Such a transformation, if this is indeed what is taking place, carries important practical implications. The essential component of intervention no longer takes the form of the direct face-to-face relationship between the carer and the cared, the helper and the helped, the professional and the client. It comes instead to reside in the establishing of flows of population based on the collation of a range of abstract factors deemed liable to produce risk."

Castel (1991)

In this passage, Robert Castel clearly distinguishes risk management from a legal narrative.

This extra-legal system of control has deep roots in immigration law. It is premised upon the exceptional foundation of plenary powers, which has developed along a trajectory that has more in common with political power than the rule of law.¹⁹ The management logic is more closely aligned to politics than law, and lessens the relevance of law in immigration enforcement determinations.

Immigration enforcement operates in a distinct manner from legal enforcement systems. Unlike regulatory systems that regulate detained populations for purposes of punishment, rehabilitation or deterrence, the immigration system warehouses and commodifies immigrants within an increasingly privatised system of control. The immigration discourse reconstitutes the immigrant as a neoliberal subject when not removing or detaining immigrants. This occurs through technologies of risk and other forms of control.

The seeds for failure regarding federal immigration enforcement were sown as far back as 1976 when public policy restricting visa entries from Mexico coincided with both an intensifying economic demand in the US for cheap labour and a porous 2,000-mile long land border. There is simply no way to prevent undocumented immigration without sealing the border with Mexico, something the Bush and Obama Administrations have tried half-heartedly and all but abandoned.

The new immigration enforcement mission contributes to the contradictory message that greets undocumented workers at the border, which says 'jobs available' and 'no entry.' The mission is to calculate and manage the risk of having undocumented immigrants favourably respond to the former rather than be deterred by the latter. It took from 1976 until now for the risk discourse to take hold with 9/11 hastening and then justifying the trajectory of this new

¹⁹ See D Kenney, P Schrag (2008), for an excellent example of the political nature of the legal process for political asylum applications.

path. Now that the risk discourse has taken hold it seems to occupy the heart of ICE's organisational and enforcement strategy, with many unintended consequences, a couple of which are discussed below.

Alternatives to Detention

Several recent immigration initiatives create administrative spaces that diminish judicial review of administrative decisions and restrict the liberty of immigrants (*Diawara v DHS*, 2010).²⁰ These initiatives make use of digital technologies in the enforcement of immigration law. Along the way they leave spaces of unchecked power that are much darker and wider than any discretionary wiggle room immigration officers have historically enjoyed in the course of their law enforcement activities (Koulish, 2012).

The ATD programmes introduce a scenario in which immigrants who have neither been arrested nor charged with a crime, nor are in custody are nonetheless forced into a criminal-like process without judicial review. In this scenario electronic devices neither deprive the immigrant of a liberty interest nor amount to a custodial relationship. In other words, being attached to an electronic device is the same as being free. Whereas political branches and courts typically balance the use of control technologies with due process, this immigration scenario circumvents this legitimising process (Motomura, 1990).

The important question here has to do with whether or not ATD immigrants are in custody (*Diawara v DHS*, 2010).²¹ If ATD immigrants were in custody then the State would be responsible for their care and they would have habeas corpus rights to seek redress against the State. The decision to place ATD immigrants outside custody, however, forces immigrants into a neoliberal subjectivity. They enjoy freedom liberty but the trade off is surveillance of risk.²² For a moment compare the scenario of being released without ATD, and then with ATD. In the former instance, immigrants released from detention (and custody), are suddenly responsible for their own wellbeing and preservation as well as for showing up at the correct immigration court on the correct day and time. This expectation is less 'freeing' than it seems, however, because of severe cultural and resource constraints. For example, many immigrants speak no English and

20 *Diawara v DHS* (MD Dist. Court, 2010) suggests immigrants under ERS supervision are neither in custody nor "detained" under the meaning of *Zadvydas v Davis* (2001). The distinction between detention and custody is somewhat blurry. See Koulish (2012) for discussion of this issue in greater detail. I agree with legal scholar Mark Noferi (personal correspondence on file with author) that this distinction is likely to be further fleshed out in the courts in coming years.

21 *Ibid.*

22 I would like to attribute this insight to Mark Noferi. The term freedom as I use it in this paper can also be referred to as liberty in an absolute sense, tho in this paper I analogize the term liberty to rights. Thus, I discuss the contradiction between freedom and liberty in this ATD context.

thus cannot understand simple date/time and location information printed in English on 'notice to appear' forms. For these immigrants 'freedom' is challenged by the everyday realities of being a 'foreign-tongued other' in an English-speaking world. In the second instance, which I discuss in detail below, immigrants released into ATD gain a modicum of resource support but this advance carries the trade off of being subjected to surveillance for risk.²³

ATD/ISAP Origins

In 2002, the soon to be former INS introduced the Alternative to Detention Initiative (ATD), a pilot programme that deployed electronic monitoring via radio frequency and global position satellite monitoring and was intended to ensure that 'aliens released from detention appear for their court hearings.'²⁴ The ATD initiative consisted of three programmes: the Electronic Monitoring Program (EMP), which began in 2007; the Intensive Supervision Appearance Program (ISAP), which was initiated in 2004 and quickly became the most popular of the programmes; and the enhanced Supervision Reporting Program (ESR), which was initiated in 2008. ESR used the same monitoring methods as ISAP with one difference: it required fewer home visits. The ESR contract was also initially awarded to the firm Group 4 Securicor (G4S). In practice, these programmes were distinguishable by their different reporting requirements but are otherwise quite similar.

ISAP has been the most popular programme and recipient of the most funds. The programmes are managed through the Office of Detention and Removal Operations (DRO). This consisted largely of electronic monitoring and home arrest, structured reporting requirements and unscheduled home visits.

In August 2009, ICE announced plans to overhaul its immigration detention system (Schriro, 2009). One component of this effort has been to accelerate the development of ATD programmes.

It is worth noting that neither ISAP nor ESR designers drafted regulations under 8 Code of Federal Regulations (CFR). The programmes were drafted outside Administrative Procedure Act (APA) requirements, with no public notice and comment, i.e., no feedback and no accountability. The lack of public accountability provides an explanation for an investigation reported in the *Houston Chronicle* that found that ESR 'suffered from poor data tracking of immigrants who have absconded from the program' (Carol, 2009). Such flaws provide examples of the lack of accountability that too often accompanies plenary powers.

²³ Ibid.

²⁴ <http://www.aila.org/content/default.aspx?bc=1016%7C6715%7C12053%7C26286%7C26314%7C10854>

Funding for ATD programmes started small but quickly grew into a significant financial commitment. In 2002, Congress appropriated \$3 million for ATD. In FY 2005, Congress authorised \$5 million. The following year its commitment to ATD jumped to \$28.5 million (LIRS, 2011).

In 2004 ATD was outsourced to Behavioral Interventions (BI), a private firm that specialises in electronic monitoring of criminals.²⁵ In June 2004, BI case specialists were tasked with administering the new programme as a trial run in eight cities including Washington D.C. and Baltimore. The programme relied on ankle bracelets, GPS monitoring devices, telephonic reporting, unannounced home visits and home arrest (curfews) (LIRS, 2011).

In July 2009, Detention and Removal Operations (DRO) awarded a \$372 million five-year contract to BI Inc. for the Intensive Supervision Appearances Program (ISAPII). At about the same time federal allocations jumped to \$63 million in 2009, and approximately \$72 million in 2011.²⁶

Since 2010, these three programmes coalesced under GEO Group management at about the same time that this group known for detaining immigrants acquired BI Incorporated for \$415 million. It is not insignificant that GEO Group has come to manage both closed detention facilities and ATD (Byrd, 2010). As a private firm seeking to increase its share of the immigrant control market, GEO Group now has no financial incentive to distinguish detained from non-detained immigrants, or to distinguish alternatives to detention from alternatives to release.²⁷ The idea is that GEO Group stands poised to extend its services into the market of immigrants who are not in detention. At the moment about 17,500 immigrants are enrolled in ISAP II and, as LIRS has reported ISAPII is poised to expand its contract with ICE as more offices open from July 2009 through July 2014' (LIRS, 2011, 25).

6 ALTERNATIVE TO DETENTION II: COMMUNITY SUPPORT NETWORK

ATD also exists as a private, not for profit alternative to the market-based model. In this section I introduce a pilot initiative that extends the State's gaze as it

25 See ISAP II, Statement of Work, Contract No. HSCECR-09-D-00002, SOW-30.

26 See ICE Fact Sheets; US Public Law 112-10, April 15, 2011; LIRS 201; S Byrd, Alternatives to Detention and Immigration Judges Bond Jurisdiction, Immigration Law Advisor, April, 2010, See <http://www.justice.gov/eoir/v11/ILA-Newsletter/ILA%202010/vol4no4.pdf>

27 My point here is to draw an analogy to vertical integration in the corporate world, a form of management control in which different functions in a supply chain have the same owner. It is not to suggest that GEO Group would lobby against itself for detention or ATD. Rather GEO stands to profit regardless of government priorities to detain or release immigrants from detention. They now cover two different market functions (detention and release from detention) within the immigration enforcement regime.

subjects asylum seekers to a variety of control technologies. It subjects immigrants to multiple risk assessments in detention (risk classification assessment, a credible fear interview and parole interview) and several more after release from detention. After immigrants voluntarily enter the community support network (CSN), they are exposed to expert disciplines in the legal and helping professions, all designed for the purpose of getting immigrants to show up for their court hearings and removal.

When asylum applicants notify immigration authorities at ports of entry that they would like to apply for political asylum, they are placed in expedited removal,²⁸ which means they are also placed in mandatory detention. Until recently, such asylum applicants would linger in detention for weeks or months, sometimes longer. In January 2010, ICE rolled out a UNHCR inspired recommendation to parole immigrants who have established 'credible fear,' and order them released from custody.

After asylum seekers establish credible fear, they become eligible for a parole interview.²⁹ The parole test is similar to the RCA test that determines whether immigrants may be released into ISAP. In this instance, however, risk classification is used to determine whether asylum applicants are to be released into the CSN pilot programme. Yet, whereas 'worthy victims' might still have been excluded a century ago as public charges, they now reside inside the country albeit without formal status.³⁰

Origins of CSN

The CSN idea sprung from the May 2011 Global Roundtable on Alternatives to Detention held in Geneva. The roundtable was hosted by the United Nations High Commission for Refugees (UNHCR) and was attended by four UN agencies, non-governmental organisations (NGOs) and government representatives from over a dozen countries. The meeting was a way for countries to share their experiences, best practices lessons learned, and discuss remaining gaps in considering alternatives to immigration detention. It was also in response to this discussion about best practices in Australia and gaps in the United States that representatives from ICE and US-based NGOs devised the idea for the CSN.

²⁸ INA Section 235(b).

²⁹ US Immigration and Customs enforcement parole of arriving aliens found to have a credible fear of persecution of torture, online at http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf.

³⁰ As parolees they have not been formally admitted into the country. This status ensures their fate may be determined by the classification system of multiple professional disciplines (legal, psychological and social work). These professionals now have the task of rendering authoritative judgments about how immigrants are faring in their new surroundings. As a result of how they fare, parolees could be returned to detention or be deported.

CCSN, the Gaze and Normalisation

This community-based alternative to detention provides the State with an occasion to delegate some of its sovereign responsibilities to service providers in civil society. According to an agreement between ICE and NGOs, the CSN is intended to

“... demonstrate that providing non-profit case management and access to holistic services (e.g., legal, psycho-social, medical, housing) helps ensure the release from detention for those who do not need to be detained, increases appearance rates at immigration court hearings and ICE appointments and promotes increased individual health and well-being and successful long-term integration of those granted relief at the end of their removal proceedings.”³¹

From the look of the CSN plan and conversations I was privy to, the CSN intends to deliver immigrants to freedom and provide them with access to legal, psychosocial, medical and housing services. According to LIRS, the sponsoring NGO, the CSN will provide

“... access to stable housing, intensive case management, and legal representation provided by non-profit employees that are accustomed to working with traumatised foreign-born individuals will encourage rehabilitation and social integration and compliance with immigration proceedings.”³²

And it will do so at much lower cost than detention. Thus we see the CSN as combining two agendas: the State intends to get immigrants to appear in court at the lowest possible cost, and NGOs are committed to seeing low risk immigrants released from detention and exposed to legal assistance, medical care and social services.

A new power/knowledge emerges from this win-win scenario using technologies of quantitative data collection and the adoption of case management processes. The technologies consist of risk assessment and a variety of case management and professional tests and examinations. They also trigger the normalisation of this undocumented population. A fair amount of data is produced, and much of it ends up in government databases.

The CSN also establishes a new locus of power over immigrants that connect non-profit management, expert knowledge (legal, psychological and social work) with the institutional power of the Department of Homeland Security.

“This model will work as a complement to current local enforcement and removal operations (ERO) supervision and support our officers to make decisions to release

31 Personal correspondence 1 on file with the author, April 2012.

32 Personal correspondence 2 on file with the author, April 2012.

individuals that do not need to be detained. Commitment to this pilot will allow ICE to affirmatively demonstrate its receptivity to its international obligations as well as recommendations made by NGO and academic reports on the issue of alternatives to detention. This initial pilot also helps ERO explore whether this non-profit service delivery model supports appearance rates at a lower cost.³³

Along the way the discourse creates a normative non-citizen subjectivity, which is to be law abiding, dependent and docile. This occurs as the State extends its gaze over the undocumented population. The gaze is extended by agreement between ICE and the participating NGO community. The agreement also tacitly shifts the locus of the state's gaze from the detention centre into and through civic and professional organisations.

While the government extends its gaze over immigrants it outsources risk and responsibility to the CSN. The NGO network subsidises the project through private grants, philanthropy and fundraising and thus assumes nearly all the financial risk. The network also assumes responsibility for the care and wellbeing of persons whose temporary parole status reinforces ICE's plenary seeming power over them.

Finally, ICE can revoke this temporary parole status at any point in the process, at whim, which enhances their leverage over the immigrant and CSN. Thus the entire experiment occurs under the unchecked, or plenary, ICE authority. Although the State relinquishes direct physical control over immigrants, it gains even more data about populations of undocumented immigrants.

About a year after the plan was hatched, asylum applicants in six regions around the country had volunteered to participate in the CSN pilot programme. By fall 2012, they will have been released from detention at the doorstep of one of the community support providers and continue their asylum claims under CSN supervision.

Although the outcomes for this pilot won't be known for quite some time, the CSN introduces a new element to the governmentality of immigrant ATD. It suggests new technologies in noncustodial control over undocumented immigrants that facilitates efforts at data collection and risk assessment even during periods of government retrenchment. In this new neoliberal sensibility, the government widens its control net over non-detained immigrants, and now it does so within a post-human rights discourse. This new, late modern discourse addresses the uncertainty that marks the undocumented population. It also deals with some of the concerns of immigrant rights advocates, while promising to cut costs. All the while, it extends disciplining technologies into and through local immigrant communities.

33 *ibid*

7 CONCLUSION

In this chapter I have examined the clash between modern and late modern immigration discourses in immigration enforcement. My premise is that a new control discourse has emerged and is edging closer to fruition in the aftermath of 9/11. It adapts the modernist foundation for immigration control- plenary powers- to the late modern reality of administrative and private initiatives. It is a 'gentler and milder' form of neoliberal control that transfers responsibility (risk) to nongovernmental entities including the immigrants themselves. As effectiveness and efficiency increase for government, freedom increases for the immigrant: a seemingly win-win scenario.

This new regime manages the risk that is related to having a population of people about whom not much is known. As discussed, undocumented immigration is a late modern (post-sovereign) phenomenon. The purpose of risk management is to identify and discipline the undocumented population that resides in cities and towns across the country. Thus, in this new regime, immigration control focuses less on the sovereign concern for territorial integrity and more on the late modern interest in population management.

I subject this late modern phenomenon to critical examination, using the case study of recent alternative to detention scenarios. The new risk society focuses on worthy victims and for the first time extends immigration control over a population of immigrants that have been released from detention. This new immigrant freedom is also a subject of examination, as I contend it is a freedom without much liberty. In part this is because the new discourse pays little attention to legal requirements and, with it, individuals rights and liberty. New technologies of power are deployed with the intent of gathering data. Such new data systems replace individual rights as the preferred technology of care and protections. Within new support communities, immigrants experience technologies of power from a variety of locus points, from private firms and non-profit social service providers.

I have attempted to prove this argument with reference to immigrant alternative to detention. Immigrants in ATD programmes have limited access to courts and are denied important rights that similarly situated persons receive in the criminal process. I imagine that such noncustodial alternatives to detention represent a future direction for immigration enforcement: normalisation on the cheap, which creates law abiding and dependent victims. As long as a risk society can manage the risk of undocumented immigration, -- that is, identify and normalise undocumented immigrants-- more costly and drastic methods of criminalisation are likely to be unnecessary.

Given the likelihood of the risk society continuing to develop in the foreseeable future, the larger questions, I think, also have to do with how risk discourse constructs new ways of seeing freedom and liberty in immigrant communities;

how it leads immigrants into yet more webs of control, and how democracy might experiment with new ways of addressing the risk society.

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