

Law, Culture and the Humanities

<http://lch.sagepub.com/>

Spiderman's Web and the Governmentality of Electronic Immigrant Detention

Robert Koulish

Law, Culture and the Humanities published online 13 February 2012

DOI: 10.1177/1743872111433376

The online version of this article can be found at:

<http://lch.sagepub.com/content/early/2012/02/02/1743872111433376>

Published by:



<http://www.sagepublications.com>

On behalf of:

Association for the Study of Law, Culture and the Humanities

Additional services and information for *Law, Culture and the Humanities* can be found at:

Email Alerts: <http://lch.sagepub.com/cgi/alerts>

Subscriptions: <http://lch.sagepub.com/subscriptions>

Reprints: <http://www.sagepub.com/journalsReprints.nav>

Permissions: <http://www.sagepub.com/journalsPermissions.nav>

>> [OnlineFirst Version of Record](#) - Feb 13, 2012

[What is This?](#)

Spiderman's Web and the Governmentality of Electronic Immigrant Detention

Law, Culture and the Humanities
1–26

© The Author(s) 2012

Reprints and permission: sagepub.co.uk/journalsPermissions.nav

DOI: 10.1177/1743872111433376

lch.sagepub.com

lch.sagepub.com



Robert Koulish

University of Maryland

Abstract

The article examines the governmentality of noncustodial forms of immigration control over immigrant bodies. It uses the Spiderman cartoon character Venom (Black Spiderman) as a metaphor for expansive and shape-shifting state sovereign power. This plenary power is a machination of the Department of Homeland Security (DHS) and the courts. Like the venom symbiote it takes form from the state having contact with immigrants. Specifically, the article focuses on electronic detention (alternative to detention, or ATD), which limits an immigrant's freedom, but is technically considered neither detention nor custody. This legal construction leaves almost no accountability. Thus I argue that ATD initiatives create an extra legal space of unchecked power that is deployed on immigrant bodies, and just like Black Spiderman they allow aggression to be amplified to dangerous result.

Keywords

Spiderman, immigration, crimmigration, plenary powers, sovereignty, Alternative to Detention (ATD), ISAP, governmentality

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.¹

1. Michel Foucault, *Beyond Structuralism and Hermeneutics*, Second Edition With an Afterword by and an Interview with Michel Foucault (Chicago: The University of Chicago Press, 1983), pp. 231–2.

Corresponding author:

Robert Koulish, 410-925-3894 University of Maryland, Department of Government and Politics, 3140 Tydings Hall. College Park, MD. 20742.

Email: rkoulish@umd.edu

I. Introduction: Electronic Monitoring: An Alternative to Detention (ATD)

When Stan Lee created the Spiderman comic he probably did not imagine that one day it would inspire unaccountable government programs that would limit the mobility of immigrants within the United States. Today, immigration control initiatives exploit technologies inspired by Lee and others, and extend the state's plenary powers over immigration into administrative spaces of control.

The doctrine of plenary powers, a term coined by Stephen Legomsky,² is a Court creation that gives Congress and the executive branch sovereign authority over immigration. Since the sovereignty of the U.S. predates the Constitution, the concept of sovereignty assumes government power that pre-exists the Constitution and thus as a result leeches beyond the realm of Constitutional constraints on state power.

After a prototype was developed for Lee's imaginary device, ankle bracelets developed into a technology that diminishes the liberty of noncitizens that are neither under arrest nor in state custody. The state has plenary power to force immigrants to wear ankle bracelets. When this occurs, ankle bracelets come to constrain liberty in a manner that lampoons the rule of law more effectively than any cartoon possibly could.

In Part II, I introduce an analogy between Spiderman cartoons and electronic monitoring in the immigration context. This is done in several ways, by introducing a particular Spiderman character; examining the origins of electronic monitoring; and drawing parallels between the cartoon and two analytical constructs devised by immigration scholars Stephen Legomsky and Juliet Stumpf.³

In Part III, I examine the governmentality of the immigration exception to constitutional norms. Following Michel Foucault,⁴ Gilles Deleuze,⁵ and Giorgio Agamben,⁶ I examine how productive power is deployed in the immigration context. These power relationships draw attention to Foucault's notion of the panopticon, and Deleuze's notion of the post panoptic control society. The power exists within the space that Agamben describes in terms of the exception. This is where both law and the state are used as tactics of control over and through immigrants. In Part IV I examine alternatives to detention (ATD) as an example of this new governmentality of immigration control. Here I examine case law for the logic of exclusion, i.e., how courts have come to categorize ATD/ISAP as an instrument that exists outside custody, is oblivious to habeas corpus, but still manages to restrict individual liberty in significant ways.

2. Stephen Legomsky, "Immigration Law and the Principle of Plenary Congressional Power," *Supreme Court Review*, 255 (1984).

3. Stephen Legomsky, *supra*; Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime and Sovereign Power," 56 *American Univ. L. Rev.* (2006).

4. Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Pantheon, 1977); Michel Foucault, "Governmentality," in *The Foucault Effect: studies in governmentality*, G. Burchell, C. Gordon, P. Miller (eds.) (Chicago: University of Chicago Press, 1991).

5. Gilles Deleuze, *Postscript on the Societies of Control* (Cambridge, MA: MIT Press, 1992).

6. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, CA: Stanford University Press, 1998).

II. Spiderman and Immigrant Electronic Detention

I Background to Electronic Monitoring

The origins of electronic monitoring started in 1977, when New Mexico district court judge Jack Love was reading the funny papers and a Spiderman cartoon caught his eye. In the cartoon, Spiderman's nemesis had attached an electronic bracelet to Spiderman's wrist to follow his whereabouts. Of course Spiderman broke the device's grip and ultimately prevailed. Still, the cartoon inspired Love, who loathed the "practically intolerable jails" in his state of New Mexico, to convince an engineer friend, Michael Goss, to devise a monitoring prototype that the judge then introduced into the criminal justice system.⁷ Although the judge may have been unaware at the time, his cartoon reading enjoyment helped usher in a new era of social control.

The first electronic monitoring device hit the criminal justice market in 1983,⁸ and by 2002, Congress authorized the Immigration and Naturalization Service (INS), soon to be the Immigration and Customs Enforcement (ICE) to develop alternatives to detention that would adapt Stan Lee's vision into a dangerous social control reality. During this device's early years, the 1980s, the criminal justice system placed rigorous standards on its use. Regardless of whether an individual was placed behind bars or attached to a bracelet, the government first needed to bring charges, provide counsel and meet a standard of proof.⁹ But once ICE got involved, such procedural safeguards pretty much disappeared. As I discuss below, removing procedural safeguards is characteristic of both the doctrine of plenary powers,¹⁰ and crimmigration, a term introduced by Juliet Stumpf.¹¹

Because electronic monitoring allows authorities to gather information about individuals who are neither under arrest nor in custody,¹² and because it is not considered punishment in immigration law, electronic monitoring is not perceived as infringing upon an immigrant's liberty, which adds to its popularity with law enforcement. Electronic monitoring is also politically popular. It has become a preferred sanction by conservatives and liberals alike: it is well documented that electronic monitoring and other alternatives to detention are less costly (fiscally conservative) and intrusive (more humane, a liberal alternative) than incarceration.¹³ Whereas immigration detention is estimated to cost a minimum of \$122 per day per person, ATD is estimated at about \$22 per day.¹⁴ Thus a consensus has emerged that favors ATD scenarios where immigrants experience greater freedom even though they get less space legally speaking to assert fundamental rights in potentially abusive situations.

7. See <http://www.esquire.com/the-side/link/spiderman022007>.

8. See http://www.bop.gov/news/research_projects/published_reports/gen_program_eval/orepralternatives.pdf

9. Erin Murphy, "Paradigms of Restraint," 57 *Duke L. J.* 1321 (2008).

10. Stephen Legomsky, 1984, *supra*.

11. Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime and Sovereign Power," 56 *American Univ. L. Rev.* (2006), *supra*.

12. *Nguyen v B.I.*, 435 F.Supp. 2d 1109 (2006).

13. Lutheran Immigration and Refugee Services (LIRS), *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy* (2011).

14. LIRS, 2011, *supra*.

2 Superhero Cartoons

I make use of superhero cartoons to discuss immigration because there has always been a satiric bravado to immigration controls that wield almost unchecked government power against immigrants. In a manner similar to superhero cartoons, the government is on a mission to repel or least subdue unwanted evil (foreign) advances across territorial borders, and relies on plenary powers in achieving its ends. A Manichaeian narrative of good against evil creates the moral authority for such power. With each storyline, or immigrant flow, a risk is constructed, exacerbated and then overcome.

Now for the dramatic tension: The government's mission to vanquish undesirable immigrants must overcome the challenge of its own limited capacity and unrealistic expectations, and the mission usually crashes and burns right there. Recent expectations, explicit or merely inferred, have included adequately sealing off approximately 6,000 miles of open border or removing millions of unauthorized immigrants from within territorial borders. The virtual fence,¹⁵ a multi-billion boondoggle that never advanced beyond the pilot stage; NSEERS,¹⁶ which was responsible for the government rounding up thousands of Muslim men without cause or suspicion; and US-VISIT,¹⁷ which is supposed to track the names of everyone who enters and exits the country; have all been abysmal failures.¹⁸ Simply put, the reality of immigration control must be distinguished from its symbolic if somewhat cartoonish rhetoric. The controls are not designed to rid the country of unlawful immigrants; the controls are serialized into an industrial complex that reaps profits for private firms while subjecting the noncitizen enemy to a wide variety of disciplines and controls.¹⁹

Here you also have the structure of virtually any 23-minute superhero cartoon, a quintessential law and order bad guy/good guy narrative. The narrative is simple, even simplistic and yet it makes sense of the relationship between the state and immigrants since the origins of immigration law. The state is the superhero that acts on behalf of the law-abiding citizenry, and stands watch against potential evildoers to crash upon our sovereign shores. Each episode showcases a life or death scenario that justifies assuming superhero powers and putting down the threat with gadgetry and anything else at its disposal. But to get superhero powers, we must recognize the aberrational nature of the superhero relationship. The relationship is unlike any other that Peter Parker or Clark Kent have had with other people in the course of their everyday lives. It takes the presence of some perceived danger to morph ordinary Peter Parker into the extraordinary Spiderman, or Clark Kent into Superman.

For this article, I am interested in how the superhero qua state gets its strength and puts it to good use via state of the art gadgetry/technologies. I say "good" use because the authoritarian nature of these scenarios involves the moral authority to fight for "the American way," to borrow from the Cold War-inspired original Superman television show.

15. *New York Times*, October 30, 2010. <http://www.nytimes.com/2010/10/31/opinion/31sun3.html>

16. DHS, DHS removes designated countries from NSEERS registration, May, 2011. <http://www.dhs.gov/files/publications/crcl-201105-nseers-registration-removal.shtm>

17. GAO-07-248 Border Security: US VISIT Program faces strategic, operational, and technological challenges at land ports of entry.

18. Robert Koulish, *Immigration and American Democracy: Subverting the Rule of Law* (New York: Routledge, 2010).

19. Koulish, 2010, *supra*.

The “securitization” of this authoritarian ethos helps legitimize the plenary powers that are claimed power on behalf of the American people.

At the same time, it is important to recognize the irony of superhero cartoons particularly to the extent the superhero has prescience regarding guilt, innocence and risk. Such certainty of vision makes it easy for the superhero to ignore basic criminal rights. But in the real world, the state lacks the superhero’s foresight and instead must bank its moral authority upon constitutional norms with references to the 4th, 5th and 6th Amendments. The problem for immigration enforcement occurs when humans claim superhero powers but ignore a democratic society’s need for constitutional norms. In this way the immigration regime lacks the moral authority and clarity of execution that we align with our superheroes or the constitutional norms that we align with mortals who wield law enforcement power.

This problem of superhero power originates in sovereignty, which is the basis for federal immigration law. In the immigration field, the state uses sovereign power to secure territorial boundaries. Specifically, I am interested in how sovereignty discourse translates state power into unaccountable technologies of social control.²⁰ Is it possible for a state relying on the plenary powers of sovereignty to pursue and subdue immigrants while maintaining its integrity as a democratic state? Since unchecked powers are anathema to democratic governance, the immigration regime has a daunting task to say the least. With a squint and a smirk I can imagine how immigration controls over the years might inspire the arc of many a superhero cartoon.

Indeed, the Venom arc in the Spiderman series lends itself to a skeptic’s view to the problem of immigration control. The Venom arc represents how unchecked power can distort the simplicity of a “good versus evil” narrative structure. Plenary powers are the black ooze that drips around the edges of constitutional constraints. They are the venomous ooze that drips onto Spiderman’s body and then leeches into his soul, changing both his behavior and moral compass. This venomous black ooze is a “symbiote,” as noted in *Spiderman3*. “It changes you. It amplifies characteristics of its host, especially aggression. This could be dangerous.”²¹

It is important to note that in the policy context the formula loses its comic appeal as parody gives way to critique. In this immigration control narrative, the venomous black ooze of plenary powers changes how judges suddenly look beyond constitutional norms whenever immigrants appear on the horizon.

3 *Black Spiderman in Policy Context*

This exclusionary narrative dates all the way back to the early days of the Republic. The Alien and Sedition Act of 1798, for example, endeavored to scare the public in general and foreign-born political opponents in particular. Its appeal to abject powers was as grandiose as its subsequent failure to deliver as marked by Adams’ loss to Jefferson in the election of 1800. The Chinese Exclusion Acts, which suspended the immigration of Chinese laborers, didn’t rid the country of all Chinese and Cold War exclusions didn’t kick out all

20. Robert Koulish, “Blackwater and the Privatization of Immigration Control,” 20 *St. Thomas Law Review* (2008); Robert Koulish, 2010, *supra*.

21. *Spiderman3*, Sam Raimi, Columbia Pictures, 2007.

the communist sympathizers. What they propelled, however, were social disruptions within ethnic communities that were the consequence of a growing discipline and control apparatus that now includes electronic detention.

Of relevance is how DHS' ICE – superhero/venom – derives its powers and how it uses the latest state of the art technologies in pursuit of its nemesis. Also important is how the fight to vanquish the enemy is just as important as the enemy itself to the serialization of the cartoon sequence. In other words, we want people to stay tuned for the next episode of this governance-sponsored programming.

4 Superheroes and Plenary Powers

The scenario suggests that political branches of the federal government have unchecked powers over immigrants which causes a great deal of hardship in immigrant communities. The logic of classic immigration control originates in a turn of phrase by Justice Field in 1889 that first refers to plenary powers to describe the prerogatives of Congress to regulate immigration with impunity.²² Field located plenary powers in the international law concept of sovereignty, which remains the extra constitutional core of immigration control.²³

The problem with plenary powers is that it is anathema to the limited powers embedded in liberal government. With plenary powers immigration regulation too often becomes an exception to the rule of law, on par with emergency situations and crisis responsibilities.²⁴ Such moments occur when the exemplary and prerogative powers of the executive are invoked to protect the state against foreign invasion, wars, natural and national crises.²⁵ The problem is that when the executive seizes exceptional powers for more than brief periods s/he reaches beyond the limits the constitution sets for legitimate governance.

When it comes to protecting sovereign boundaries from foreign invasion, Justice Field in *Chae Chan Ping* analogized foreign invasion instigated by enemies of the state to the invasion of unassimilable immigrants.²⁶ Just as prerogative powers were enlisted to help the nation through times of crisis, Field suggested, the federal government had plenary powers with which to preempt alien invasion.

This law case introduces some important questions for immigration control that have to do with the governmentality of the exception, which demonstrates how the exception is embedded into policy. I intend to examine this question with frameworks offered by Giorgio Agamben and Michel Foucault. Agamben emphasizes how emergency state powers have become the normal face of governance. He suggests the “state of exception

22. *Chae Chan Ping*, 130 U.S. at 606 (1889). See also Stephen Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* (Oxford: Clarendon Press, 1987), p. 217, for discussion of the Supreme Court's first mention of the term “plenary” in the Passenger Cases, 48 U.S. 283 (1849) in the context of federal-state power, not as used by Justice Field in 1889.

23. *Chae Chan Ping*, supra.

24. See also *U.S. v Curtiss-Wright Export Corporation* 299 U.S. 304 (1936); *U.S. ex rel. Knauff v Shaughnessy* 338 U.S. 537 (1950); *Shaughnessy v U.S. ex rel. Mezei*, 345 U.S. 206 (1953).

25. *U.S. v Curtiss-Wright Export Corporation* 299 U.S. 304 (1936) supra.

26. *Chae Chan Ping*, supra.

establishes a hidden but fundamental relationship between law and the absence of law. It is a void, a blank and this empty space is constitutive of the legal system."²⁷ Foucault's framework provides an interpretation of power in terms of the panopticon and governmentality, discussed below, which helps with mapping out this state of exception.

My project follows this query into the immigration field. Specifically, I examine how ICE initiatives that introduce ATD activities comprise an example of this sort of empty space where, as Agamben suggests, "governance through management is on the ascendancy, (and) rule by law appears to be in decline."²⁸ In other words, I examine how management technologies is replacing law as the method of deciding entry and exit requirements as well as how immigrants inside the country are dealt with.

The literature is replete with investigations into plenary powers in the immigration field.²⁹ Natsu Saito focuses on the immigration example of such exceptional powers,³⁰ and David Cole (2003) specifically focuses on how such powers have led to a loss of rights in the aftermath of 9/11. Saito and Cole contend that plenary powers never really left the immigration scene. Saito (2003) reminds us that as a result of existing precedent on plenary powers,

Congress and/or the executive have the power to decide who can come, how long they can stay, and when they must leave. ... Congress can change the rules and then apply new rules retroactively without violating the prohibition on ex post facto laws. ... Because deportation is deemed not to be punishment, the constitutional protections guaranteed to all persons in criminal trials do not apply, allowing, among other things, the use of secret evidence and indefinite incarceration without a hearing.³¹

Stephen Legomsky discusses several justifications the Supreme Court has offered for the government using plenary powers in the immigration context.³² Legomsky questions these justifications and suggests the exceptional powers are neither necessary nor legitimate.³³ He says, the Court incorrectly concludes that when Congress acts in the immigration field,

27. Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005); Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Translated by Daniel Heller-Roazen), Stanford: Stanford University Press, 1998).

28. Giorgio Agamben, (2004) (http://www.germanlawjournal.com/pdfs/Vol05No05/PDF_Vol_05_No_05_609-614_special_issue_Raulff_Interview.pdf)

29. Stephen Legomsky, 1984, *supra*; Stephen Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* (Oxford University Press, 1987); Hiroshi Motomura, "Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation," 100 *Yale L.J.* (1990); Natsu Saito, "The Enduring Effect of the Chinese Exclusion Cases: The 'Plenary Power' Justification for On-going Abuses of Human Rights," 10 *Asian Law Journal* 13 (2003); David Cole, "The New McCarthyism: Repeating the History in the War on Terrorism," 38 *Harv. C.R.-C.L. L. Rev.* 1, 3 (2003); Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime and Sovereign Power," 56 *American Univ. L. Rev.* (2006).

30. Saito 2003: 11, *supra*.

31. Saito 2003, *supra*.

32. Stephen Legomsky, "The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms," 64 *Washington & Lee Law Review* (2007).

33. Legomsky 1984, *supra*, 1987, *supra*.

the courts lack the power to review its acts for compliance with the individual rights provisions of the Constitution.

Indeed, several prominent scholars have documented the erosion of plenary powers over the years.³⁴ Legomsky³⁵ and Hiroshi Motomura³⁶ demonstrate the court's increasing reliance on constitutional norms to interpret immigration statutes.

My argument acknowledges the increasing willingness of the courts to interpret immigration statutes along constitutional lines as they open up a new administrative space for plenary powers to continue dripping black ooze onto state practices. My focus on administrative spaces of extra-legality extends the Legomsky,³⁷ Cole³⁸ and Saito³⁹ thesis into a post-modern framework.

Several recent immigration initiatives are responsible for creating extra-legal administrative spaces that diminish judicial review of administrative decisions that restrict the liberty of immigrants.⁴⁰ These initiatives make use of digital technologies in the enforcement of immigration law. Along the way they leave spaces of unchecked power that are as dark and wide as any discretionary wiggle room immigration officers have historically enjoyed in the course of their law enforcement activities.

My discussion of ATD will provide an example of just such an extralegal space and highlight one example of how federal immigration law normalizes the exception. I focus on ATD programs, specifically electronic monitoring, which constrain mobility in ways other than relying on secure detention. ATD immigrants are denied access to an immigration judge after seven days, and to habeas corpus relief in the federal courts primarily because they are perceived as not being in custody and because the courts perceive technological constraints on liberty as unimportant.⁴¹ This regime has scary implications for immigrants and the rule-of-law by making rights less accessible and relying upon privatized and automated management techniques. Such control techniques replace face-to-face administrative inspections and make due process and individual adjudication seem increasingly anachronistic.

The ATD programs 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 albeit without judicial review. The courts' logic suggests that electronic devices fail to rise to the level of depriving immigrants of a liberty interest or amount to a custodial relationship. Whereas political branches and courts typically legitimize control technologies by adding the palliative of judicial review, the immigration scenario that I examine circumvents this normalizing process.⁴²

34. Alexander Aleinikoff, "Citizens, Aliens, Membership and the Constitution," 7 *Const. Comm.* 9 (1990); Alexander Aleinikoff, *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* (Cambridge, MA: Harvard University Press, 2002); Legomsky, 1987, *supra*; Motomura, 1990, *supra*.

35. Legomsky 1987, *supra*.

36. Motomura 1990, *supra*.

37. Legomsky 1987, *supra*.

38. Cole, 2003, *supra*.

39. Saito 2003, *supra*.

40. *Diawara v DHS* (MD Dist. Court, 2010).

41. *Kennedy v Mendoza-Martinez* 372 U.S. 144 (1963), *Nguyen v B.I. Inc.* 435 F.Supp.2d 1109 (2006).

42. Motomura 1990, *supra*.

5 Crimmigration and the alien-other

The technology of power helps to criminalize immigrants, which is another way of placing them outside the norms of society and constituting them as deviant. Scholars have noted several trends in the criminalization literature: increasing reliance upon enforcement actors and mechanisms in civil immigration proceedings; increasingly harsh criminal penalties attached to laws regulating immigration; and the rise in immigrant removal alongside criminal penalties involving immigrants.⁴³

Although criminalization covers a lot of ground, I describe it as a sort of money-laundering scheme where the state is the criminal symbiote – acting outside the law. As Legomsky says, the “theories, methods, perceptions and priorities of criminal law enforcement have been incorporated into immigration proceedings, while the procedural protections of criminal adjudications have been explicitly rejected.”⁴⁴ The state launders criminal sanctions/punishments through a civil law narrative that excludes language for punishment. In other words, the sleight of hand increases state power by combining criminal law structure and a civil law form. It covers punishment in black ooze, which veils it from the rule of law.

III. Governmentality

I examine the governmentality of the exception in the immigration context. My purpose is to describe *how* technologies of sovereign power have been deployed on immigrants in the enforcement context. Michel Foucault coined the term governmentality during a series of lectures in the late 1970s, to connote a form of productive power that constitutes people as a particular sort of subject. For Foucault, power relations are central to any analysis of society. Unlike liberal conceptions of power, which are mostly negative, Foucault imagines that power can be liberating or productive as well as being repressive. Foucault’s project is not to condemn power but to examine its genealogy in specific fields. He has famously written about panoptic power as it pertains to sexuality, the asylum, or prison. Thus it is also with immigration and the notion of plenary power. Following Foucault, I discuss immigration powers in its panoptic and post-panoptic guise. Further, while I agree with the juridical inclination to condemn the government’s use of unchecked power on immigrants, it is more important to my project to examine how such power is utilized. Thus, as Foucault says, governmentality should also be understood as the “conduct of conduct,” or, a purposeful calculated attempt to regulate human behavior.⁴⁵

43. Asli Baili, “Scapegoating the Vulnerable: Preventative Detention of Immigrants in America’s War on Terror,” 38 *Stud. In Law, Pol. Soc’y* 25, 54 (2006); Cole 2003, *supra*; Koulish 2010, *supra*; Ingrid V. Eagly, “Prosecuting Immigration,” 104 *Northwestern University Law Rev.* 4 (Fall, 2010); Jennifer Chacon, “Managing Migration Through Crime,” *Columbia L. Rev.* 109, 135 (2009); Stumpf 2006, *supra*.

44. Legomsky 2007, *supra*.

45. Foucault 1977; Graham Burchell, et al. (eds.), *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991); Kim McKee, “Post-Foucauldian Governmentality: What does it offer critical social policy analysis?,” 29 *Critical Social Policy*, 2009; Michell Dean, *Governmentality: power and rule in modern society* (London: Sage, 1999).

Three important 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.”⁴⁶ Following Butler, therefore, I refer to governmentality in terms of how control tactics operate through policy, i.e., how technologies regulate the liberty of immigrants into and within society, punish immigrants within a civil law context.

Second, it includes the role private actors play in directing human behavior, which suggests examining the privatization of immigration control technologies. Third, it includes how individuals shape their own subjectivities. Thus, following Cruikshank who examines the technologies, or ethical obligations, of citizenship,⁴⁷ and Rose who examines self-governance as extending government into the soul,⁴⁸ I examine technologies of membership and exclusion that pertain to immigrants who find themselves outside custody but still surveilled and their liberty constrained. In this way it covers how these control strategies get immigrants to internalize features of control that enhance the likelihood of the immigrants’ own incarceration and subsequent removal from the country.

I examine immigration control technologies that combine two approaches to sovereignty, which the courts perceive as the basis for immigration law. By Foucault’s account, early sovereignty has to do with the sovereign’s self-preservation as demonstrated during the *ancien régime*.⁴⁹ The sovereign’s preoccupation with self-preservation provides the logic for a pre-constitutional approach to sovereignty. The sovereign can act with impunity to ensure its own self-preservation. Any other conceivable task pales in importance. I analogize Foucault’s early sovereign’s concern for self-preservation to the pre-constitutional conception of sovereignty that the Supreme Court has used to justify the basis for federal immigration power since 1889. In terms of deploying mechanisms of control, the logic of self-preservation lends itself to draconian enforcement measures and broad exclusion.

Next is the modern account of sovereignty, which is rooted in constitutionalism and a normative concern for the wellbeing of the population, a concept Foucault defines in terms of it being docile and productive.⁵⁰ As federal immigration law developed in 1882 and 1891⁵¹ upon the infrastructure of the new administrative state,⁵² mechanisms of control were introduced, including immigrant inspections and quarantines that focused on matters of exclusion, and public health and wellbeing.

46. Judith Butler, “Indefinite Detention,” in *Precarious Life: The Powers of Mourning and Violence* (New York: Verso Press, 2004), p. 52.

47. B. Cruikshank, *The Will to Empower: democratic citizens and other subjects* (Ithaca: Cornell University Press, 1999).

48. Nicholas Rose. *Governing the Soul: the shaping of the private self* (London: Free Association Books, 1999).

49. Foucault 1977, *supra*.

50. Foucault 1977, *supra*; Foucault 1983, *supra*.

51. Act of Aug. 3, 1882, ch. 376, sec 2, 22 Stat. 214; Act of Mar. 3, 1875, ch. 141, sec 5, 18 Stat 477; Immigration Act. Chap, 551, 1084 (1891).

52. Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities (1877–1920)* (Cambridge: Cambridge University Press 1982); John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000).

This contested terrain of sovereignty (between self preservation and well being) provides a useful interpretation of immigration law's more anomalous nature. Immigration rests upon a structure of sovereignty that predates the constitution and thus can legitimize any exclusion that is justified on the basis of self-preservation. It develops within the modern administrative state, which enhances state capacity for inspecting and surveilling the immigrant population for the sake of public health.

I Foucault and the Modernity of Immigration

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.⁵³ Rogers Smith has written extensively about how the exclusionary threads of immigration law are irreconcilable with liberalism.⁵⁴ 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 sort of power to exclude any category of immigrants of its choosing, accountable only to the court of public opinion.

Traces of these early-modern origins would persist as immigration law developed upon a modern administrative foundation. The state would rely upon plenary powers to implement its vision for wellbeing in the immigration context. Wellbeing would be perceived through the lens of disciplining immigrants through inspections and surveillance, which draws inspiration from Foucauldian concepts of biopolitics and the panopticon. Thus plenary powers, like venom's ooze triggered through alien interaction, would creep into modern administrative initiatives to dangerous effect.

Early immigration controls of the late 19th and early 20th centuries provide a quintessential example of Foucault's biopolitics which is the mode of power that operates through the administration of life (bodies). It deals with such characteristics of managing a population as health, sanitation, mental and physical capacities and more (McKee 2009). Such was the initial focus of federal immigration control when Congress started excluding immigrants on the basis of individual characteristics in the Immigration Act of 1875 and then in 1882 when Congress barred idiots, lunatics, convicts, and "persons likely to become public charges."

In describing the role of the panopticon, Foucault said,

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

53. See Foucault 1977, *supra*.

54. Rogers Smith, "Beyond Tocqueville, Myrdal and Hartz: The Multiple Traditions in America," 87 *American Political Science Review*, 1993.

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.⁵⁵

Since *Chae Chan Ping*, immigration control has provided an example of how the modern state deploys sovereign power. The Immigration Acts of 1875, 1882 and 1891 introduced categories of immigrants that would be excluded at ports of entry. These immigrants were perceived either to be burdens “on the public purse,” or “unassimilable.”⁵⁶ Unassimilable immigrants were either excluded or deported while the rest were perceived of as at risk for being a burden “on the public purse.” The latter group were admitted into the country and then subjected to panoptic risk assessment strategies.

These early Court cases constructed a scenario of danger that helped rationalize the use of prerogative powers as the basis for immigration control. It seems the state’s power grew as it came into contact with the alien ooze. Justice Field 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.”⁵⁷ Field also suggests a preemptive function of sovereignty is to mitigate potential crises. “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.” Thus, sovereignty serves as a relevant source of authority even when the “vast hordes” are at bay.

In discussing even preemptive 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.”⁵⁸ Here the exception becomes the rule as Justice Field recognizes the state’s super power morphing out of the alien ooze. 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 touched further on ideas surrounding risk when he legitimized Congress’ “white witness” rule as a way of preventing the “... great embarrassment ... (and) suspicious nature” of a court entertaining the “loose notions entertained by the witnesses” ... “of the same race” as the Chinese immigrant.⁵⁹ The border at issue had to do with law courts. The “white witness” rule addressed the perceived risk that Chinese immigrants might well embarrass the rule of law/court by not taking “the obligation of an oath” seriously.⁶⁰ It diminished risk by allowing for the deportation of such immigrants.

55. Foucault 1977: III, *supra*.

56. Torpey 2000: 100, *supra*.

57. *Chae Chan Ping*, *supra*.

58. *Chae Chan Ping*, *supra*.

59. *Fong Yue Ting v U.S.* 149 U.S. 698 (1893).

60. *Fong Yue Ting v U.S.* 149 U.S. 698 (1893).

In each instance (*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. Of course modern case law has added several nuanced revisions on the use of plenary powers. Still, current immigrant debates continue to shift and turn within a narrow discourse that exploits fears that “vast hordes are crowding upon us,” and that such hordes pose a risk to some basic tenets of democracy as broad as the notion of social contract or as narrow as local government services and tax revenues.

2 Criminalization of Immigration

The heyday of panoptic controls on immigrant populations coincides with a broader criminalization movement that first gained popularity as the “war on crime,” which President Nixon introduced in 1973 and President Reagan popularized during the 1980s. In its initial construction, criminalization was intended as a law and order backlash against the urban riots, anti-Vietnam War protests and flower power movements of the late 1960s. In its initial stages it weakened the due process safety net established under the Warren Court.⁶¹ By the 1980s, criminalization was a preferred method to “manage rising inequality and surplus populations” for the postindustrial era.⁶² This turn transformed it into a facile tool of the neoliberal agenda. Under neoliberalism strategies of privatization and deregulation weakened accountability to the rule of law. Ideological appeals to fear helped weaken safeguards for the accused, minorities, immigrants and other vulnerable categories of people.⁶³

By the late 1970s–1980s, immigrants found themselves in the crosshairs of criminalization strategies. The U.S.–Mexico border was militarized with Vietnam-era surveillance and low intensity conflict technologies,⁶⁴ and by the mid-1980s, the Corrections Corporation of America (CCA) opened the first private detention facility for immigrants. In 1988, Congress enacted legislation that instructed immigration authorities to imprison and then remove immigrants for offenses that would not imprison citizens.⁶⁵

The 1988 legislation, the Anti Drug Abuse Act (ADAA),⁶⁶ introduced the “aggravated felony” category of excludable and deportable offenses. ADAA provisions required “the initiation and, to the extent possible, the completion of deportation proceedings . . . before the alien’s release from incarceration.” This requirement led to the Institutional Hearing Program (IHP), which similarly intended deportation proceedings for criminal aliens (aggravated felons) in federal and state prisons before the completion of their sentences.

61. Doris Marie Provine, *Unequal under Law: Race in the War on Drugs* (Chicago: University of Chicago Press, 2007).

62. Christian Parenti, *Lockdown America: Police and Prisons in the Age of Crisis* (New York: Verso, 2000).

63. Jonathan Simon, *Governing through crime: how the war on crime transferred American democracy and created a culture of fear* (New York: Oxford University Press, 2009).

64. Timothy Dunn, *The Militarization of the U.S.–Mexico Border* (Austin: University of Texas Press, 1996); Koulish, 2010, *supra*.

65. The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (“ADAA”).

66. The Anti-Drug Abuse Act of 1988, *supra*.

The ADAA also turned the phrase “aggravated felony” into an important rhetorical weapon in the war on drugs and similarly on immigrants. An aggravated felony committed any time after entry now subjected non-citizens to deportation. No longer were criminal aliens protected by a five-year statute of limitations. This meant that when it came to crime immigrants would be held to a higher degree of scrutiny than citizens. Immigrants could be deported for minor offenses committed no matter how long ago.

The 1990 Immigration Act expanded the list of deportable offenses to include lesser drug crimes and raised the bar to re-entry after a conviction to twenty years. It also made certain aggravated felonies ineligible for discretionary relief from deportation. Mitigating circumstances were no longer considered. The Act also eliminated judicial recommendations against deportation (JRAD), which had given the courts a check on executive removal power.⁶⁷

The Clinton White House pushed through the Anti-terrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) as responses to the bombing in Oklahoma City.⁶⁸ The Acts unleashed egregious aspects of criminalization, perhaps inextricably linking immigrants, crime and terrorism in the public consciousness. They made it difficult to imagine crimes that do not qualify as aggravated felonies, requiring mandatory detention followed by removal. Immigrants who found past offenses on the growing list of deportable offenses were suddenly ineligible for relief, and were barred from reentering the country for twenty years.

By the end of the 1990s, immigrants who were leading pretty productive lives and raising families in this country were “rounded up” as a risk to the safety of the national community. Such enforcement activities contributed to overcrowded prisons and detention centers. As the nonprofit organization CLINIC describes mandatory detention,

Despite its lamentable track record and failure to make even marginal progress on many of these issues over the span of many years, Congress passed legislation in 1996 ... that has nearly tripled the number of noncitizens in INS custody. The act requires the ICE to detain virtually all immigrants inadmissible or deportable on criminal and national security grounds; virtually all asylum seekers who present themselves at the border but lack proper documents, until they can demonstrate a “credible fear” of persecution; those seeking admission to the United States who appear inadmissible for other than document problems; and those ordered removed for 90 days or if the person “conspires or acts to prevent his removal” for more than the 90-day “removal period.”⁶⁹

In *Demore v Kim*,⁷⁰ the Court legitimized mandatory detention in language that is derived from the immigration exception, saying, “In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”⁷¹

67. 104 Stat. 5050.

68. Public Law 104-208, 110 Stat. 3009 (Sept. 30, 1996); Pub. L. No. 104-132, 110 Stat. 1214 (April 12, 1996).

69. Catholic Legal Immigration Network (CLINIC), “The Needless Detention of Immigrants” 2000, p. 2.

70. *Demore v Kim* 538 U.S. 510, 521 (2003).

71. *Demore v Kim* 538 U.S. 510, 521 (2003).

This shift towards criminalization in the immigration field also helps lock immigration control within a panoptic paradigm. As LIRS notes, “rather than impose a burden upon the government to justify the need to detain individuals on a case-by-case basis, the law mandates detention of certain categories of immigrants without a bond hearing or any other judicial review.”⁷² As long as mandatory detention exists and electronic monitoring and other ATD are constructed as noncustodial, many nonviolent immigrants would remain within the walls of closed detention sites.

IV. Alternatives to Detention

Soon after 9/11, a new postmodern governmentality began to emerge alongside this burgeoning closed detention industry. In this section I introduce the postmodern technology of electronic detention, referred to in policy papers and case law as an alternative to detention (ATD). When discussing how ATD strategies gained power, I consider sovereignty and plenary powers on the one hand and administrative (civil) law on the other. The outcome is an uneasy relationship that enhances plenary powers over the individual in an administrative law setting.

Generally, the difference between modern and postmodern governmentality comes down to the technologies of control. The panopticon confines the individual within a bricks and mortar institution and imposes discipline. The postmodern scenario is less confining: it focuses on efforts to fragment individual identities with a multi-directional (post bureaucratic) set of techniques. This scenario occurs in the “control society” that Gilles Deleuze examines in *Postscript on a Control Society*.⁷³

Deleuze extends Foucault’s approach to domination in the absence of confining spatial arrangements, and attributes this expansion of power to the use of digital technology. He talks about controlling persons through digital technologies that control access to digital space (access space). Management techniques are relied upon to digitalize data collected from surveillance and inspection. Such techniques disaggregate the individual into both fragments and aggregates of identity data, which introduces a new approach to human subjectivity. Such management techniques are 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.⁷⁴

In this scenario, human interaction between guard and inmate is replaced by the push of a button on a database, and guided by risk management principles. Risk-management

72. LIRS p 37, supra.

73. Deleuze 1990, supra.

74. Robert Castel, “From Dangerousness to Risk,” in *The Foucault Effect* (1991).

consists of transparent calculative regimes of accounting and management.⁷⁵ It places special and sometimes insidious constraints on the liberty of “high risk” immigrants.

Ankle bracelets and databases, hair samples and radio frequency identification (rfid) tags replace the watchtower as the dominant tools for surveillance, and passwords and databases replace the signature and case file number (paper trail).⁷⁶ Instead of having to carry documents on one’s person certifying lawful presence as Chinese laborers did during the 1890s, under these new initiatives data is contained within databases and recognizes rfids, ankle bracelets, one’s retina, fingerprint or DNA. The technologies include electronic monitoring, biometrics, digital databases and DNA databases, all of which deepen the state’s capacity to gain information and knowledge about populations distinguishing members and nonmembers within its territorial borders.

The question arises that if such alternatives to detention were categorized as a form of custody, then nonviolent immigrants subjected to mandatory detention would be eligible for electronic bracelets and other less confining ATDs. The criminal law categorizes electronic monitoring as a form of custody. Were it a form of custody in the immigration context it would be available for nonviolent immigrants in mandatory detention. Custody would also trigger due process and make it possible for immigrants under electronic monitoring to file habeas corpus petitions. The problem with immigration is that electronic monitoring is not considered to be custody or detention in the immigration context.

In the criminal field instructions to wear electronic bracelets are accompanied by procedures where the state lays charges, provides counsel and must meet the standard of proof beyond a reasonable doubt or “demonstrate by clear and convincing evidence that an individual post a danger if released pretrial.”⁷⁷ Similar instructions in the immigration context come void of such procedural safeguards because electronic monitoring in the immigration context is perceived as regulatory rather than criminal.⁷⁸ In other words, as the American Immigration Lawyer’s Association (AILA) suggests, “All of DHS’s alternatives to detention programs rely heavily on electronic (tagging) devices which seriously restrict an individual’s freedom of movement – thereby converting the program into an alternative form of custody rather than an alternative to detention.”⁷⁹ In sum, criminalizing civil penalties reveals a punishment laundering process that opens the door for civil authorities to unleash unaccountable and unchecked techniques that, as a result, must also be perceived as plenary. This laundering process cleans up everything but the black ooze.

I Electronic Monitoring

By nearly all accounts an individual’s wearing an ankle bracelet and being forced to stay at or near one’s home is less intrusive than being in jail or prison. In such ways, alternatives to detention are perceived as a humane alternative. It has been used as a punishment

75. Rose 1996, *supra*.

76. Deleuze, *supra*.

77. Murphy 2008: 1346, *supra*.

78. Murphy, *supra*.

79. American Immigration Lawyer’s Association, “Position Paper: Alternatives to Detention,” July 3 (2008).

of privilege in earlier incarnations for the likes of dissident intellectuals and, more recently in celebrity culture. Celebrities like former International Monetary Fund head Dominique Strauss-Kahn, film director Roman Polanski, and celebrities Paris Hilton and Lindsay Lohan prefer it to going to jail. Individuals are neither in a jail cell nor exposed to the institutional life of uniforms, institutional food, and dangerous conditions of prison confinement. Instead, they can eat in their own kitchen, watch television, wear their own clothes and sleep in their own bed.

This contemporary legacy of the ankle bracelet reinforces the idea that its effects on liberty are negligible and for the most part not worth complaining about.

It was only with the assistance of a brigade of high-priced lawyers that Strauss-Kahn could convince a judge to order his release on rape charges from Rikers Island. Forced to wear an ankle bracelet, Strauss-Kahn was ordered to a chichi East Side apartment suite with his wife. By wearing the ankle bracelet out in public, Lindsay Lohan and Paris Hilton created a fashion statement as well as helped commodify the ankle bracelet as a punishment of choice for lawfully challenged celebrities. The publicity helped raise the financial value of the firms like Behavioral Interventions put these beleaguered stars in the headlines; and is fodder for entertainments shows and entertainment magazines.

So when non-celebrity criminals, mental patients, drug addicts, sex addicts and immigrants are saddled with similar devices, they face a difficult time countering the public perception of ankle bracelets as a non-serious, somewhat frivolous sanction. The more that popular descriptions of the ankle bracelet describe it as frivolous or lenient, the more difficult it becomes to raise legal concerns.

Such spin about the trivial nature of this constraint on liberty easily transfers to non-celebrities who are saddled with a similar punishment but without the headlines and media ratings. In such situations, it becomes easy to imagine how this alternative to detention strategy morphs into a strategy that emphasizes alternative to release from detention, which increasingly includes persons who have committed no crime/offense and should never be in state custody. The ankle bracelet phenomenon allows for the extension of technologies of control to constrain the liberty of people for whom the state has no suspicion or cause to detain.

The ATD programs were created during the early 2000s in part to lessen growing pressure on institutional facilities. But of course ATD came with its own set of problems. Given the breadth of the mandatory detention statutes and the fact that ATD programs were not considered a form of custody, many nonviolent immigrants who were imprisoned under mandatory detention could not be released into the ATD programs.

2 Origins of ATD for Immigrants

In 2002, the soon to be former INS introduced the Alternative to Detention Initiative (ATD Initiative), a pilot program 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.”⁸⁰ The ATD Initiative consisted of three programs:

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

the Electronic Monitoring Program (EMP), which began in 2007; the Intensive Supervision Program (ISAP), which was initiated in 2004 and quickly became the most popular of the programs; and the enhanced Supervision Reporting Program (ESR), which was initiated in 2008. ESR used the same monitoring methods as ISAP but required fewer home visits. The ESR contract was also initially awarded to the firm Group 4 Securicor (G4S). In practice, these programs were distinguishable by their different reporting requirements and little else.

ISAP has been the most popular program and recipient of the most funds. The programs are managed through the Office of Detention and Removal Operations (DRO). It 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.⁸¹ One component of this effort has been to accelerate the development of ATD programs.

It is worth noting that neither ISAP nor ESR designers drafted regulations under 8 CFR. The programs were drafted outside 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.”⁸² Such flaws provide examples of the venom-like impulses associated with plenary powers.

Funding for ATD programs started small but quickly grew into a significant financial commitment. In 2002, Congress appropriated \$3 million for ATD. In FY 2005, Congress authorized \$5 million. The following year its commitment to ATD jumped to \$28.5 million.⁸³

In 2004 ATD was outsourced to Behavioral Interventions (BI), a private firm that specializes in electronic monitoring of criminals.⁸⁴ June 2004, BI case specialists were tasked with administering the new program as a trial run in eight cities including Washington D.C. and Baltimore. The program relied on ankle bracelets, GPS monitoring devices, telephonic reporting, unannounced home visits and home arrest (curfews).⁸⁵

In July 2009, DRO awarded a \$372 million five-year contract to BI Incorporated for the Intensive Supervision Appearances Program (ISAPII). At about the same time federal allocations jumped to \$63 million in FY 2009, and approximately \$72 million in FY 2011.⁸⁶

Since 2010 these three programs coalesced under GEO Group management, at about the same time GEO Group, known for detaining immigrants, acquired BI Incorporated

81. Dora Schriro, “ICE, DHS, Immigration Detention Overview and Recommendations,” 20 (Oct. 6), 2009, available at http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf.

82. Susan Carol, “Flaws found in options for Immigrant Detention,” *Houston Chronicle* (October 20, 2009).

83. LIRS 2011.

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

85. LIRS 2011, *supra*.

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

for \$415 million. It is not insignificant that GEO Group has come to manage both closed detention facilities and ATD.⁸⁷ 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. 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 ISAPII, and as LIRS has reported, “ISAPII is poised to expand; according to ()contract with ICE, more offices were scheduled to open from July 2009 through July 2014.”⁸⁸

3 Assessing ATD

According to the courts, the electronic monitoring bracelet turns house arrest into an efficient and humane punishment. Like Judge Love the courts perceive little harm in adapting Spiderman to the real world. Like Judge Love they forget that the ankle bracelet would undoubtedly serve part of some larger nefarious agenda. As Deleuze argued, this sort of agenda moves the locus of control from closed institutions to open spaces. In terms of detention policy, this suggests a shift from an ATD initiative to an alternative to release.

Again, few would prefer sitting in a prison cell to wearing an ankle bracelet. But as central as this claim is for the courts – at least electronic monitoring isn’t as bad as prison – this observation is beside the point. At issue is how the privately managed ATD/ISAP program helps ICE to constrain the liberty of immigrants. It is not whether you or I would prefer home arrest to a prison cell; the issue has to do with how the state unaccountably impedes liberty interests of individuals who have committed no crime and for whom ICE has given no justification to hold under its “custodial” authority.

The monitoring device itself is about five inches square making it too big to conceal beneath normal street clothes. As the Detention Watch network has documented, “the bracelet can be uncomfortable, particularly for pregnant women, and participants describe the experience as one of shame and humiliation.”⁸⁹

ISAPI⁹⁰ guidelines place restrictions on the movement of immigrants as well as on how they spend time and plan a schedule. As the immigration judge (IJ) in *Aguilar-Aquino* said, it “does cause the loss of a great deal of Respondent’s liberty, and requires confinement in a specific space, i.e., the Respondent’s home between 7pm and 7am every day.” It also requires immigrants to spend up to 3 hours each day physically attached to a cord and electrical socket in order to recharge the electronic ankle bracelet. In brief,

87. Byrd 2010, *supra*.

88. LIRS 31, *supra*.

89. <http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/background%20fact%20sheets.pdf>

90. It is important to note that ICE GEO Group practices have changed somewhat under ISAP II. The notion of ATD has been extended to include the more restrictive form of constraint under discussion in this section, to other forms of ATD that consist of telephonic reporting by the immigrant. Although the severity of the liberty interest in question is different with telephonic reporting than with electronic bracelets and house arrest, the central issue of this article, dealing with unchecked power, remains.

...participants agree to a set of strict rules, including ... three face-to-face meetings per week with a case worker, and unannounced telephone calls and home visits from the authorities. Each immigrant is also fitted with a GPS monitoring ankle bracelet and must install voice recognition technology on his home telephone line, which allows caseworkers to confirm they are speaking to the ISAP participant during routine phone calls.⁹¹

ISAP constrains and regiments activities within the home. It limits mobility and the ability to work and creates social stigma for immigrants forced to wear the device. Even small-bore violations like answering the phone after too many rings or failing to pick it up can beget penalties. It is a matter of discretion for the individual BI agent to recommend that a particular violation took place and deserves some penalty. Inattention to the unexpected knock on the door, as per the guidelines, or an impolite response and a poor attitude could lead to physical punishments like returning the immigrant to secure detention, deprivations and petty humiliations in front of family, neighbors and employers. Although procedural due process issues arise when changes in punishment follow such kinds of violations, immigrants have no rights here to seek redress, except for a brief seven-day period of administrative review before an IJ.

Perhaps most crippling for some immigrants are the psychological effects of electronic monitoring, the fear and anxiety that continuous monitoring causes. Hofer and Meierhoefer report that home confinement can take a psychological toll.⁹² Further, by adding an ankle bracelet to home confinement, “the offender is constantly reminded of his status and that “someone is watching.”⁹³ It has been documented that some offenders choose jail over house arrest and electronic monitoring because of the “high level of surveillance and supervision associated with electronic monitoring.”⁹⁴ One study reports findings from women in Canada that claims electronic monitoring and home arrest was more difficult than imprisonment due to increased stress.⁹⁵ The fear and anxiety is accentuated when the immigrant goes out in public. For immigrants who already fear the state either because of their status in their home countries or as a refugee or undocumented immigrant in the U.S., being tethered to the state is a constant reminder of their extreme powerlessness and can have acute consequences. Human rights advocates suggest the ankle bracelet is particularly humiliating for women. As Salvadoran immigrant Maria Bolanos, a domestic violence victim, recently said of her ISAP experience “I’m really ashamed to show it in public. People see it and think I am a murderer. I try to keep it covered at all times.”⁹⁶

91. Gabriela Reardon, Immigrants Fight Restrictions at Home City Limits (*City Limits*, Sept 8, 2008).

92. Paul Hofer and Barbara Meierhoefer, Home Confinement: An Evolving Sanction in the Federal Criminal Justice System 5 (1987).

93. Sheldon Zhang, Robert Polakow, and Barry Nidorf, *Varied Uses of Electronic Monitoring: The Los Angeles Experience*, in *Intermediate Sanctions: Sentencing in the 1990s* 3, 3–4, John Ortiz Smykla and William Selke (eds), 1995.

94. Jon Meyer, Home Confinement with Electronic Monitoring, in *Intermediate Sanctions in Corrections* 97, 104–09 (Gail A. Caputo ed.), 2004.

95. Julian Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment* 20. 2004.

96. Shanker Vedantam, “Call for Help Leads to Possible Deportation,” *Washington Post*, November 1, 2010.

4 How ATD got its Super Powers

Like many digital-laden initiatives, ATD gets its plenary powers from the criminalization process and more specifically from two sources. First, ATD gets power from a line of cases that minimize the liberty interests at stake with electronic monitoring and second, it derives power from courts mutating traditional habeas corpus to make it inapplicable for immigrants in this immigration scenario. As an outcome, such programs incentivize immigration authorities to require monitoring when in the past they would just release the person.

The rubric for distinguishing criminal measures from regulatory ones was introduced in *Kennedy v Mendoza-Martinez*,⁹⁷ a case that involves an immigration statute that revoked the citizenship of those who left the country to evade military service.⁹⁸ *Mendoza-Martinez* (1963) distinguished between criminal and civil law in terms of its effects. Accordingly,

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned...⁹⁹

Courts have subsequently referred to the *Mendoza-Martinez* test as a way of condoning technological restraints on liberty. Because such restraints are decidedly regulatory, not punitive, there are no clear appeals to constitutional scrutiny.

When it comes to constraining liberty interests under the 5th Amendment, Murphy draws attention to the functions of digital technology at the government's disposal to control potentially dangerous persons without subjecting them to physical incarceration.¹⁰⁰ It is important to note that whereas physical incapacitation requires some procedural safeguards and constitutional scrutiny, non-institutional technological restraints are not so constrained.¹⁰¹ Thus, it is important to distinguish custody and technologies that constrain liberty. Although persons in custody retain a right to habeas corpus and thus some important means of redress, the technological constraint itself is not construed as harming a person's liberty.

In the immigration context, persons hitched to an electronic monitoring device are construed as neither in custody, nor as having a liberty interest that is subject to harm. Consider this sleight of hand. Here the electronic monitoring bracelet, as the courts construe it, is truly a virtual restraint; it is not real.

It is also worth noting that the Court fails to recognize the immigrants' liberty interests, which weakens any rationale for judicial scrutiny over government abuse.¹⁰² In *Demore v Kim*, the Court suggests that an immigrant's interest in not being mandatorily detained

97. *Kennedy*, (1963), *supra*.

98. Murphy 2008 1348, *supra*.

99. *Mendoza-Martinez* 1963:168-9, *supra*.

100. Murphy, 2008, *supra*.

101. *Mendoza-Martinez*, 372 U.S. 168 (1963) *supra*.

102. *Diawara v DHS* 2010, *supra*; *Zadvydas v Davis*, *supra*; *Demore v. Kim* 2003, *supra*.

pales against the government's plenary power.¹⁰³ As Justice Souter notes in dissent, "The [majority's] holding that the Due Process Clause allows [detention] under a blanket rule is devoid of even ostensible justification in face and at odds with the settled standard of liberty"¹⁰⁴ Almost any government objective here would be perceived as legitimate. Thus immigrants tethered to an electronic monitoring box seem to have three strikes against them: 1) they are not in custody; 2) they have no fundamental liberty interest; 3) electronic monitoring does no harm to the residual liberty interests they enjoy.

The outcome harkens back to the dark days of Chinese exclusion and the Cold War when the government's plenary powers over immigrants were as obvious as they were repressive. The difference now is that plenary powers are concealed within administrative initiatives rather than subjected to the light of statutes, and the form of restraint is digital rather than institutional. Otherwise, the outcome is quite similar as the government ignores the liberty interests of immigrants who have been tethered, without cause or counsel and without access to the courts.

5 Circumventing Habeas Corpus

Beyond interpreting statutes and liberty interests under the 5th Amendment, the courts must also contend with the Great Writ (U.S. Constitution, Art. I Sec. 9), which is another potential source of relief for immigrants whose liberty has been unlawfully deprived. Although habeas corpus can apply to the immigration context in terms of physical detention,¹⁰⁵ the question of whether habeas applies to the electronic detention scenario comes down to whether or not electronic bracelets constitute custody.

A recent Board of Immigration Appeals (BIA) decision demonstrates that habeas corpus does not apply to immigrants who are tethered to ankle bracelets and home arrest. ATD immigrants are not in custody, to dramatic effect: Petitioners for habeas relief would not be presenting a live case or controversy. The habeas petition would be denied and the case dismissed.¹⁰⁶

The key to understanding ATD as a technology of plenary power has to do with how ATD circumvents the right to habeas corpus by defining the custodial nature of the electronic bracelets (combined with house arrest) sanction as existing outside of custody. In other words, the question is how to distinguish being tethered to the state and being in its custody.

In criminal law, habeas corpus extends beyond incarceration to include conditions of parole, probation and bail, sentencing to a halfway house, or subject to house arrest or electronic monitoring, i.e. the individual may be considered to be in custody even if not incarcerated. In the criminal context, it is suggested that even restraints on conditions of release on recognizance constitute custody¹⁰⁷ or that that placing restrains and conditions on a parole order amount to custody.¹⁰⁸

103. *Demore v Kim*, 2003, *supra*.

104. *Demore* at 557, *supra*.

105. *INS v St Cyr*, 553 U.S. 289 (2001); *Zadvydas v Davis*, 533 U.S. 678 (2001).

106. See *Diawara v DHS* 2010, *supra*.

107. *Hensley v. Mun. Court*, San Jose Milpitas Judicial Dist., Santa Clara County, Cal., 411 U.S. 345 (1973).

108. *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

By contrast, immigration law has a much narrower definition for custody, equating it with detention.¹⁰⁹ In immigration law the terms custody, detention and incarceration have interchangeable definitions, which is to suggest custody is defined in terms of detention.

6 *Matter of Aguilar-Aquino*

Under the recent BIA precedent decision in *Matter of Aguilar-Aquino*, which deals with an immigrant's right to have an IJ reconsider the terms of release from custody, immigrants are construed to be in custody only when detained, which conflates custody to detention. This case visits the issue of electronic monitoring and house arrest and concludes that immigrants placed under house arrest and forced to wear ankle bracelets are not in custody.

The IJ had found that ESR is a form of "custody," within the meaning of INA Section 236 and 8C.F.R. 1236.1(d)(1) (2008), which gave her jurisdiction to re-determine conditions of custody at any time prior to issuance of a final order of removal. According to the IJ, the ankle bracelet and home confinement amount to custody because it "does cause the loss of a great deal of Respondent's liberty, and requires confinement in a specific space, i.e., the Respondent's home between 7pm and 7am every day."

The respondent had been one of over 150 workers at the Micro Solution Enterprises in Van Nuys, California who were caught during an ICE raid in February 2008. Some workers were detained and many others were placed in Enhanced Supervision/Reporting program (ESR), which required them to "wear bracelets" and remain at home from 7pm to 7am daily.

In immigration court, the respondent had conceded that home arrest was not a form of detention but was a form of custody. The idea here is that there exists a difference between detention and custody and that custody is the broader term. One could be in custody without also being detained. Custody was broader than actual physical confinement. The respondent contended the IJ had authority to re-determine the sanction by the plain terms of custody. The IJ relied on habeas precedent as well as on *Black's Law Dictionary*¹¹⁰ to define the term custody, and concluded that custody need not be "actual physical custody." The reasoning was twofold. First that one could be in custody without being physically confined and next that being in custody triggered one's right to habeas corpus. The IJ reasoned that ankle bracelets and house arrest were custody because of the onerous conditions of the ESR program.

In hindsight, it seems the immigration judge dared to bridge what Erving Goffman refers to as the difference between the home world and the institutional world.¹¹¹ The immigration judge invoked the legacy of habeas corpus and logic of the everyday realities of being tethered to an ankle bracelet and found them onerous. In short, she gave words to the obvious constraint on liberty.

In *Matter of Aguilar-Aquino*, a precedent decision, the BIA reversed an immigration judge's opinion that ankle bracelets and house arrest constituted a form of custody. The BIA blurred the distinction between detention and custody, and defined both in terms of

109. *Matter of Aguilar-Aquino*.

110. *Jones v Cunningham*; *Hensley v Municipal Court*, *supra*.

111. Erving Goffman, *Asylums* (New York: Anchor, 1961), p. 13.

a narrow reading of detention, as actual physical confinement. Thus the BIA held that electronic monitoring was a condition of release, distinguished conditions of release from a form of custody, and limited the term custody, like detention to mean “actual physical restraint.” Were the respondent in custody, he could request a custody redetermination hearing at any point until the issuance of a final removal order. As a condition of release, however, the timetable for appeal from an IJ is reduced to seven days. Since Aguilar-Aquino registered his appeal after seven days the BIA declared the IJ lacked jurisdiction to hear Aguilar-Aquino’s case. Aguilar-Aquino might have had his liberty constrained but he was not in custody.

The difference in how the IJ and BIA defined custody is important. The IJ’s reading of existing statute was more in accordance with accepted standards of statutory interpretation.¹¹²

To arrive at the conclusion that electronic monitoring is not a form of detention/custody, the BIA needed to fudge over important wording in the existing statute, regulations as well as common sense. In 1996, Congress enacted immigration reform that became known for its criminalization of immigration law.¹¹³ When it came to the Attorney General’s authority to arrest, detain and release aliens, Section 303 of IIRIRA of 1996 revised existing provision 242(a)(1) INA, which in turn became codified as Section 236(a) INA. The IIRIRA Section 303 was substantially the same as the existing section 242(a)(1), with one important exception: Section 303 replaces the word custody in 242(a)(1) with the narrower word detain. Thus Section 236(a) INA similarly mentions the word detain, not the word custody.

According to the BIA’s reading, Congress intended to limit the meaning of custody in the immigration context to detention or institutional incarceration. The BIA also reasoned that since Congress intended to equate detention with custody, its reference to “alternative to detention” means an alternative to custody.

The BIA glosses over the distinct change in word choice in the statute (plain words of the statute), preferring to rely instead on the Conference Committee report for IIRIRA, a secondary source, and one that incorrectly suggests that “new section 236(a) restates the current provisions in section 242(a)(1) regarding the authority of the Attorney General to arrest, detain, and release on bond an alien who is not lawfully in the United States.”

Since the BIA was interpreting the statute regarding the meaning of “custody,” such a change in wording should have raised a red flag. Typically when Congress changes the wording in a statute in this way, the courts require strong signal from the legislature that it intends to remove habeas. As Justice Stevens wrote about the canons of statutory interpretation in the *St. Cyr* decision, “When a particular interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that the Court intended that result.”¹¹⁴ The Court also said, “(I)f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is “fairly possible,” we are obligated to construe the statute to avoid such problems.”¹¹⁵

112. See *INS v. St Cyr* 2001, supra.

113. See Stumpf 2006, supra; Chacon 2009, supra; Eagly 2010, supra.

114. *INS v St Cyr*, 553 U.S. 289, at 299–300 (2001) (citing *Ashwander v Tenn. Valley Authority.*, 297 U.S. 288, 341, 345–8 (1936)).

115. *St Cyr*, 533 U.S. at 300 (quoting *Heikkila v Barber*, 345 U.S. 229, 236 (1953)).

This is the way courts can make sure that habeas corpus is not suspended in an unconstitutional manner. The BIA, however, took their reasoning in a different direction,

(W)e find that Congress did not intend the term “custody” in section 236 of the Act to be afforded the broad interpretation employed in the Federal habeas corpus statute, given that, with respect to habeas corpus, “custody” is interpreted expansively to ensure that no person’s imprisonment or detention is illegal.¹¹⁶

In the *Matter of Aguilar-Aquino*, the BIA helps ATD to become part of what Deleuze refers to as the control society. Immigrants who are neither detained nor in custody are still under the custodial control of ICE: their movements are limited and now, after seven days, they have nowhere to turn to hold ICE accountable. They have succumbed to plenary powers redux.

Now that ICE seems increasingly committed to using technology as a preferred means of gaining custodial control over immigrants, and is using ATD programs as a substantial part of detention reform, the agency has a choice to make about the future of its fast growing immigration control regime. Currently immigrants who are in mandatory detention are ineligible for ATD programs. The reason has to do with the BIA decision that ATD is not a form of custody. This decision precludes it from being used as a relief valve for thousands of immigrants in mandatory detention. It is also due to ICE’s own position that ATD is noncustodial, which aligns with the court’s decision. To put ATD to the use that ICE insists it intends for it, however, this narrow construction of custody should be broadened. An alternative would have Congress reform those aspects of the 1996 IIRIRA and AEDPA that mandate detention for immigrants who commit nonviolent offenses. This latter choice is problematic because the 1996 legislation follows a pattern of criminalization that has been ongoing since 1988 and is unlikely to be revisited any time soon particularly in the current political climate. A second alternative is to consider ATD as an alternative to release rather than an alternative to detention, which I fear, offers ICE the path of least resistance, and is the likely future for increasing numbers of non-detained immigrants.

V. Conclusion

As much as superhero cartoons remain a box office draw, their distortions of reality would seem to make them ill suited as a template for immigration control technologies. But such distortion has hardly stopped policy designers from continuing to imbue immigration control initiatives with superhero power, storylines and science fiction-like gadgetry. Indeed the cartoonish template for immigration control seems to get even more exaggerated with each new technological advance and with each new perceived threat to self-preservation. How different is the virtual fence fiasco from a cartoon of Spiderman spraying a web from San Ysidro, California to Brownsville, Texas?

In the instant case electronic detention is but the latest tactic in the fight of good versus evil, where the bad guys keep coming and the good guys seek new extralegal ways of vanquishing the enemy. With each new extralegal initiative, however, it seems Spiderman

116. *Aguilar-Aquino* at 752, *supra*. See also *Matter of Sanchez*, 20 I&N Dec. 223, 225 (BIA 1990).

is ever more covered with Venom's viscous black ooze. All the while there is a tacit wink between Spiderman and Venom as the cartoon gets ever more entertaining and profitable.

The cartoonish nature of immigration control has easily captured the public's imagination. The problem is that as long as the objects of control are dehumanized they will continue to be scorned by society and find neither rights nor respect in law. The power relationship reminds us of Agamben's portrayal of the barebones sovereign-homo-sacer relationship, which is as excruciating from the "alien's" perspective as it is vainglorious for the superhero.

At the moment ATD programs reinforce plenary powers, i.e., immigrants have limited access to courts and they are denied important rights that similarly situated persons enjoy in the criminal process. It is important to note that the nexus between ATD programs and plenary powers is a precarious one; it rests largely upon the BIA's precedent decision in *Matter of Aguilar-Aquino*. It also rests upon the federal court's similarly subjective insistence that nonphysical technological controls fail to unfairly impede a person's liberty interests. Although rule of law precedent serves the paradoxical role of separating ATD programs from constitutional norms, it is unlikely that these precedent decisions will be overturned any time soon. It is also unlikely given the country's current politically polarized environment that Congress will reexamine its commitment to crimmigration, which has grown since the late 1980s. Thus, as precarious as the plenary powers doctrine might be in immigration law, the executive's plenary powers over ATD immigrants is likely to remain on fairly solid footing for the foreseeable future, at least.

The larger question, I think, still has to do with the governmentality of immigration control and the Spiderman scenario, which explains how the immigration regime perceives noncitizens rating a higher risk to the security of the nation than citizens and then deploys technologies of surveillance and inspections on this population. ATD programs represent the increasingly common technologically based power dynamic that was so popular immediately following 9/11.

Law is merely one of many technologies, as with any governmentality. Thus as important as it is to consider the relationship between plenary powers and constitutional norms, it is even more important to make sense of how the state constrains large parts of the immigrant community's movement and mobility, how immigrants have been led into the web of the new control society, and democracy is to handle this still new phenomenon.

Acknowledgements

I would like to acknowledge the following people for reading versions of the article, commenting on panel presentations or otherwise providing feedback to me as I developed this research. Stephanie Flores-Koulish, my wife, partner and best friend; Olivia and Julian, who recently reacquainted me with Spiderman; Jon Goldberg-Hiller; Sarah Pedersen; Michelle Brane; Maria Joao Guia; Ingrid Eagly; Susan Biber-Coutin; Juliet Stumpf; Stephen Legomsky; Hiroshi Motomura, and Alessandro De Giorgi, panel discussants at the 2010 and 2011 Law and Society Association meetings; and colleagues and students at the University of Maryland. I would also like to thank the anonymous reviewer. The discussions and feedback were splendid. The interpretations of the issues presented in this article are my own.