Immigration and American Democracy

Subverting the Rule of Law

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Preface

I decided to write this book well before the midterm elections in 2006 when it felt to me that the Bush-era abuses of executive power and government outsourcing might endure indefinitely into the future. In part, the act of writing this book was my own plaintiff wail against the Bush administration's efforts to domesticate and privatize the war on terror at the U.S.–Mexico border. I lived at the border for several years, taught there and used to enjoy hearing my students tell stories about crossing the bridge to get to class, or visiting aunts and grandparents across the River. More recently, when I brought students from a college class in Baltimore to the border at El Paso-Juarez the signs of border militarization were quite obvious. We observed surveillance towers peering over border fences and symbolically gazing down upon the flags of five nations at a historic site by the fence. Perhaps the most disconcerting part of that trip for me occurred when we visited the border patrol station and a border patrol officer asked me if I was interested in seeing what they can see through the cameras. As I walked over to the monitors, he proudly focused the camera in on the living room window of somebody's house in Juarez. It was cool and mortifying at the same time.

I also worked with refugees at the border, and conducted research about human rights abuses and about refugees moving through the administrative process to apply for political asylum. From my experiences and findings, I believed that America's treatment of immigrants at its border was shameful.

Still, I was surprised to see the post-9/11 Bush administration unveil plans to seal the border with a 2,000 mile wall and electronic fence. The absurdity of building a wall across desert, national wildlife preserves, through the private property of Texas land grant families, and American Indian reservations was magnified by the absence of democratic deliberation. Decisions were being made behind closed doors and were released to the public as final. Nobody, it seems, could question the sovereign!

When I started this project, I never imagined the outcome of the 2006 midterm elections would ultimately lead to Barack Obama's election. And so, when I was about half way done writing the manuscript and Obama was elected President, I reexamined the project's relevance, and after a couple months of

the Obama Presidency became convinced that this project was more relevant than ever. President Obama has double downed on some of Bush's most egregious mistakes and his embrace of executive power and willingness to deploy risk management technologies during his early months in office increases the salience of this discussion. It strengthened my conviction that the deep structures of immigration control and the government's commitment to using sovereign powers over immigration continue to guide government practices.

Let me position myself within the terms of this book. I am a radical progressive, a civil libertarian and an immigrant rights advocate. I am a fan of privacy rights and having constitutional rights applied to immigrants at the border and wherever else they reside. However, I do not believe the struggle for immigrant justice ends with the recognition of constitutional rights. Quite the contrary, I believe this is where it begins. Besides recognizing the relevance of constitutional norms in immigration decision-making, dramatic changes must be made in the culture surrounding immigration politics. This means reframing the terms of the immigration control debate that go beyond rights discourse to include immigrants as subjects within their communities and workplaces. It also means settling on terms that depict immigrants as assets and as eligible for justice and fairness in immigration courts and in federal courts. It would recognize that fourth amendment rights to privacy apply to risk technologies, and that immigrants have rights to justice and democratic accountability. Currently the debate is framed in terms of a security discourse that perceives immigrants as a threat to domestic security. And in the absence of constitutional norms, that is, when the logics of sovereignty and risk rather than the rule of law provide the basis for decision-making, the immigrant struggle itself barely even registers among policy makers.

And so like any author's work, my book comes with a point of view, which will indeed inform my presentation. In part I would like to see my two cents added to the political discussion, and briefly here's the argument: the immigration control debate is currently framed in terms of security rather than in terms of law. This is a mistake. I shall argue that the current Hobbesian version of sovereign powers and security logic as the basis for immigration policy must be replaced with one that recognizes the rule of law, constitutional norms, and the assets that immigrants bring to their communities. I do not oppose the internal and external realities of sovereignty related to the US as a nation state. I do oppose the existing discourse that denies immigrants' human subjectivity and diminishes the contributions they make as workers, members of communities and families. The rule of law and a rights-based discourse belongs in the process of including and excluding immigrants.

I also believe the book contributes to the academic debate about the role that immigration plays in America's national identity. Immigration is the Id of American politics, more precisely, of nativist and racist zeal and of uncontrolled executive power. It shows what politicians, administrators, and bureaucrats are prone to doing if many of their decisions and actions go

unchecked by such democratic processes as pluralist politics, popular opinion, or the courts. Following David Cole, I also believe that excesses in the immigration field easily bleed over into other domestic policy fields affecting citizens. I believe such was the Bush administration intent, to use immigration control as a policy lab for the purpose of experimenting with executive power, risk management, and social control technologies.

Early drafts of chapters referring to privatization were published in *Journal Migration and Refugee Issues* (Koulish, 2007); *Saint Thomas Law Review* (Koulish, 2008); and *MR-zine* (Koulish, 2008). In addition, early ideas were published as op-ed pieces in the *Baltimore Sun*, in "Making Real ID real" (2008); "Facing Manipulation on Immigration" (2007); and "A Corporate Takeover of American Borders" (2006).

I would like to thank Stephanie Flores-Koulish, my loving wife and best friend, whose encouragement and patience supported me throughout the process; to Olivia and Julian, my heart and soul, who keep me grinning; to my parents Joan and Sasha whose stories about their own parents' journeys, and their gift of my grandparents' and great grandparents' immigration documents, helped inspire my interest in immigration; to all the participants at the immigration panels for the 2008 and 2009 Law and Society Annual Meetings in Montreal (2008) and Denver (2009), particularly the Immigration and Citizenship CRN; the 2007 LatCrit conference meetings in Miami, Florida; and Philadelphia University; to Joel Grossman, a mentor and friend, who read a *Baltimore Sun* op-ed I wrote about privatizing the border and told me it was time to write a book; to the editors at Routledge, Michael Kerns and Mary Altman; to Sue Davis; Daniel Levin; Jeremy Koulish; Jon Goldberg-Hiller; Michael Cross-Barnet; Sonya Borton; Andrea Giampetro-Meyer; Tim Dunn; and to my students.

Abbreviations

ACLU	American Civil Liberties Union
AEDPA	Antiterrorism and Effective Death Penalty Act
APA	Administrative Procedures Act
ARRA	American Recovery and Reinvestment Act
BCIS	Border Crossing Information System
BIA	Board of Immigration Appeals
CAP	Center for American Progress
CBP	Customs and Border Protection
CCA	Corrections Corporation of America
CCR	Center for Constitutional Rights
CIS	Center for Immigration Studies
COP	Common Operating Picture
DHS	Department of Homeland Security
DMV	Department of Motor Vehicles
DOJ	Department of Justice
DRO	Detention and Removal Operation
DTA	Declaration of Taking Act
EAGLE	Enterprise Gateway for Leading Edge Technology
EDLs	Enhanced Drivers' Licenses
EFF	Electronic Frontier Foundation
EOP	Executive Office of the President
FAIR	Federation of American Immigration Reform
FBI	Federal Bureau of Investigation
FIAC	Human Rights Watch and the Florida Immigrant Advocacy Center
FOSS	Free and Open Source Software
FOTs	Fugitive Operations Teams
GATS	General Agreement on Trade in Services
HSAC	Homeland Security Advisory Council
HSIN	Homeland Security Information Network
ICE	Immigration and Customs Enforcement
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act

INS	Immigration and Naturalization Service
IRCA	Immigration Reform and Control Act
IRTPA	Intelligence Reform and Terrorism Prevention Act
ITECC	International Technology, Education and Commerce campus
LIC	low-intensity conflict
LSI	lead system integrator
MOU	memorandum of understanding
NFOP	National Fugitive Operations Program
NSA	National Security Agency
NSEERS	National Security Entry-Exit Registration System
OIG	Office of the Inspector General
OLC	Office of Legal Counsel
PFLP	Popular Front for the Liberation of Palestine
PMO	Program Management Office
PVTSAC	private sector advisory committee
RFID	radio frequency identification
SBI	Secure Border Initiative
SBODAC	Secure Borders and Open Doors Advisory Committee
SEIU	Service Employees International Union
SPP	Security and Prosperity Partnership
TBC	Texas Border Commission
TSA	Transportation Security Administration
UFCW	United Food and Commercial Workers Union
US-VISIT	U.S. Visitor and Immigrant Status Indicator Technology
WHTI	Western Hemisphere Travel Initiative
WTO	World Trade Organization

Contents

Chapter 1

Introduction

Immigration Politics within a Post-9/11 Frame

In September 2001, almost immediately following the tragic plane attack on the Twin Towers and Pentagon on 9/11, the Federal Bureau of Investigation (FBI) initiated a massive investigation, called PENTTBOM,[1] to "identify the terrorists who hijacked the airplanes and anyone who aided their efforts." In the days following 9/11, Michael Chertoff, then Assistant Attorney General for the Criminal Division, led an ungrounded campaign of racial and religious profiling against Muslim, Arab, and South Asian immigrants across the country. In the two months following 9/11 about 1,200 persons were detained and questioned. The names of 762 of those immigrants were added to the Immigration and Naturalization Service (INS) Custody List (OIG, 2003).[2]

Chertoff had primary authority over this part of the PENTTBOM Investigation, to "make all decisions on who was released and even who was held in solitary"[3] (DHS, 2003). He made sure that once on the INS Custody List, immigrants were held indefinitely until the FBI could clear them of connections to terrorism and were seemingly guilty until proven innocent (Dew & Pape, 2004, p. 187). Few detained immigrants ever faced criminal charges or a trial, and no immigrants placed on the INS Custody List were convicted of crimes related to 9/11 or terrorism (Cole, 2003; Janofsky, 2004). Immigrants were held as material witnesses or charged with minor immigration violations that do not normally warrant detention (Brill, 2003; Cole, 2003; Janofsky, 2004). They were denied access to attorneys and family, and were detained under abusive conditions; many were denied access to basic hygiene and medical treatment.

Chertoff was bothered by none of this ethnic and religious profiling. Nor was he perturbed that the Office of Inspector General harshly criticized these arrests and detentions as "indiscriminate and haphazard" (DHS, 2003). Quite the opposite; he "later told Congress that he would have done the same thing all over again" (Whitney, 2005). When choosing between the rule of law (due process) and the arbitrary use of state power, Chertoff chose the latter. Chertoff made the same choice again in October 2001 when he co-authored the Patriot Act, and then again in summer 2002, when he told the CIA that its members

would not be prosecuted for waterboarding prisoners.[4] On Chertoff's advice, several people were tortured. Rather than acting as a rogue agent, however, Chertoff was merely applying the Bush administration's policy to immigration. All was fair game in the Bush administration's "war on terror," as long as any act that ran roughshod over the constitution could be justified in terms of securing the homeland. Indeed, Chertoff's activities earned him recognition as a "key leader in the War on Terror,"[5] for which he was rewarded with the appointment as head of Department of Homeland Security (DHS) in January 2005.[6]

After Chertoff had monitored the racial profiling of immigrants and advised the CIA about torture, he was appointed to the U.S. Court of Appeals for the Third Circuit,[7] a lifetime appointment that removed him from the line of political fire that might have eventually held him responsible for mishandling these crucial human rights issues.[8]

Just before Chertoff was nominated to the federal bench, Tom Ridge became the first head of the DHS.[9] As first head of the DHS, Tom Ridge established a revolving door culture for private defense contracting firms where outsourcing and future employment opportunities informed policy (Klein, 2007). Ridge himself owned stock in several of the companies lobbying the Bush administration for defense contracts.[10] One such firm, Unisys, would soon join the Boeing team in soliciting and receiving a several billion dollars SBInet contract, which gave the company the responsibility for designing and implementing a virtual fence at the Mexico border. Thus, Ridge was implying more than dialogue when he told these firms, "You can count on regular contact . . . We welcome your input" (Theimer, 2002). Regular contact was further institutionalized in a private sector advisory committee (PVTSAC), which Ridge established to solicit advice from "leaders in the private sector on homeland security" (DHS, 2003). Rick Stephens, Executive Vice President at Boeing, was an early member at PVTSAC and this social network helped bring about the Boeing deal. When Ridge left his post at DHS, he quickly secured employment in the IT/security sector (Klein, 2007).

The combination of ideas that informed the Ridge and Chertoff tenures at DHS became popularized as a neoconservative approach to sovereignty and neoliberalism. These ideas germinated in the Nixon "Imperial" White House[11] and developed over the quarter century that followed the Church Committee investigations that documented executive branch abuse of power during the Watergate era. Nixon's demise was a formative moment in the political development of Nixon disciples Donald Rumsfeld and Dick Cheney[12] (Klein, 2007; Hayes, 2007). Regrettably for the nation and world, however, both men spent the next 25 years plotting in both the public and private sectors to recoup the power they decried as lost. In 2001, they returned to the executive branch as evil archetypes of neoconservatism and neoliberalism. In the years following 9/11, no one and no institution dared rein in their efforts to restore and extend the "imperial" excesses first experienced a quarter century before.

The Rumsfeld/Cheney team set the tone for DHS as it began to deploy risk management technologies in the war on terror against immigrants. Risk technologies were a Bush era add-on to Nixonian power politics.[13] Bush actors extended the notion of sovereignty onto subunits of government and the private sector, largely for the purpose of managing risk, or more precisely as Louise Amoore notes, to make sure "the appearance of securability and manageability is sustained" (Amoore & de Goede, 2008, p. 9). Judith Butler refers to the subunits as "petty-sovereignties," which denote the immigration officials, mid-level bureaucrats and private actors who render unilateral and unaccountable preemptive security decisions (Amoore & de Goede, 2008, p. 13). As Butler notes, "Petty sovereigns abound, reigning in the midst of bureaucratic . . . institutions mobilized by aims and tactics of power they do not inaugurate or fully control" (2004, p. 56). As I will argue, such petty-sovereigns were given a mandate to manage risk, and thereby unleashed risk management technologies in the immigration control field.

As Secretary of DHS, Chertoff quickly gained a reputation for extending executive power, mismanaging the federal bureaucracy and hollowing out DHS in a manner similar to the way Donald Rumsfeld managed the Pentagon.[14] Perhaps nothing is more indicative of Chertoff's belief in arbitrary executive power than the arrogant power grab of April 2008 in which he declared that the DHS would ignore more than 30 laws enacted by Congress.[15] On June 22, 2008, the Supreme Court refused to stop Chertoff from circumventing these laws, which led Oliver Bernstein, Sierra Club spokesperson to say:

> This decision leaves one man—the Secretary of the Department of Homeland Security—with the extraordinary power to ignore any and all of the laws designed to protect the American people, our lands, and our natural resources.
>
> (Stout, 2008)

With this decision, Chertoff also smoothed the way for Boeing Inc. to fulfill its obligations under the boondoggle SBInet contract and meet its timeline in constructing the virtual and concrete border fence along the Mexico border.[16]

Starting almost immediately after 9/11, as the INS Custody List suggests, immigration became a laboratory for Cheney, Rumsfeld, and their neoconservative acolyte demi-sovereigns—Ridge and Chertoff—to experiment with a distorted version of sovereign power and free-market enterprise in domestic policy. Once the DHS was created in 2003, and the immigration control agencies placed within it, Tom Ridge and then Michael Chertoff had the task of replicating the neoconservative/neoliberal template that Cheney and Rumsfeld had already created in Baghdad.

Why a laboratory? The search for undocumented immigrants is conducive to preemptive risk management strategies. DHS, and immigration more

specifically, was a perfect laboratory for experimentation with risk management, an awkward concept that disdains the rule of law, because of its secrecy and office holders' lack of concern. Consider that immigrants, and the immigration process, politics and bureaucracy have always held a marginal status in the democratic polity (Koulish, 1996). Immigrant interests are more easily ignored and immigrant abuses are more easily shrugged off when few resources and rights and fewer votes are at risk, and when the courts have been stripped of the review authority.

Because immigrants cannot vote[17] in national elections and are excluded by most locals from voting in local elections, they do not matter to election-minded politicians.[18] Neither have immigrants been known for writing checks to political candidates (it's illegal if they're not permanent legal residents), or volunteering in political campaigns. Finally, since immigrant populations have been undercounted in the census, their contributions to the economy in terms of social security, and property taxes have also been under-represented.

Before 2003, the immigration agency had been neglected for more than a century, by every one of its host bureaucracies—Treasury, Commerce, Commerce and Labor, Labor and then Justice—ever since federal immigration controls began in the late nineteenth century. Invariably last in line to receive funding, quality staff and other resources, the immigration agency was a bottom feeder in the federal bureaucracy. If an applicant did not score high enough on an aptitude test to join the DEA or become a U.S. Marshall, for example, she might still join the border patrol (Harwood, 1986).

In addition, due process is more diluted in immigration court than in other administrative hearings, in part because immigration courts are neither Article I nor Article III courts,[19] and meet only sketchy approximations of an administrative hearing (Juceam & Jacobs, 1980; Roberts, 1980). For example, the immigration judge has a great deal of discretion to decide how to prepare a case record; determine what is proper court etiquette; to decide what evidence she will hear.[20] Unlike judges in other courts, immigration judges may permit hearsay[21] and exclude from the record arguments in connection with motions, applications, requests, or objections (Koulish, 1992). The immigration judge is technically not even an administrative law judge and holds no contempt powers. As a result, immigration hearings tend to be ad hoc and arbitrary, and when it comes to immigrants "almost all procedural errors are considered harmless" (Koulish, 1992, p. 552).

One recent intervention that helped weaken due process in immigration proceedings is court stripping, a phenomenon of Congress that removes a great deal of the courts' review authority, starting with the Illegal Immigration Reform and Immigrant Responsibility Act, 1996 (IIRIRA) (Kanstroom, 2006/2007). The IIRIRA eliminated judicial review of non-final orders or rulings primarily involving aliens in removal proceedings, and retroactively rendered permanent residents deportable based on prior criminal convictions.[22]

It also contained provisions that expedited the removal of prospective asylum seekers without affording them the opportunity for judicial review. Only final removal orders directed at aliens were reviewable. Further, Section 1252(a)(s)(B)(ii), entitled "Judicial Review of Orders of Removal," provided:

> Notwithstanding any provision of law, no court shall have jurisdiction to review . . . (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) further diminished the government's commitment to due process for aliens by eliminating judicial review for criminal aliens. According to the AEDPA, "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against any alien who is removable by reason of having committed a criminal offense . . ." The Act also deleted the law that permitted habeas corpus review of claims by aliens who were held in custody pursuant to deportation orders.

In 1997, the Supreme Court reviewed the IIRIRA provisions.[23] Speaking for the court, Justice Scalia upheld Sec. 1252(g), which prohibited the courts from reviewing decisions by the Attorney General to "commence proceedings, adjudicate cases, or execute removal orders against aliens under this Act." According to the Court,

> [t]he Executive should not have to disclose its "real" reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals—and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.

By suggesting that immigration adjudicators did not need to state the reasons for ruling against nationals of a particular country, Scalia discounted the role that facts play in adjudication and instead justified the "kangaroo court" character of many immigration hearings. The Court further noted, "Congress has the power to determine the terms and conditions of a non-citizen's presence in the United States and has vested in the Attorney General the power to enforce such provisions; therefore it is not for the Court to second guess the other branches' actions in the typical deportation case . . ." Once Congress vests power in the Attorney General, it rarely reviews that delegation of power, leaving it to immigration authorities to interpret and enforce the law per whim.

In 2005, Congress enacted the Real ID Act, which precluded judicial review of all discretionary decisions, and removed an entire level of review for immigrants in removal proceedings. Since a huge amount of immigration decisions are discretionary, a great many legal and factual issues now exist beyond the scope of judicial review (Kanstroom, 2006/07, p. 165), which suggests political and ostensibly legal actors may ignore legal norms with impunity. The Act removed the jurisdiction of federal trial courts to review BIA decisions, which is where the judge typically reexamines facts as well as law. Instead, cases are directed into the federal court of appeals, which reviews only matters of law.

In sum, the immigration regime functions in the absence of several important legal standards that are designed to provide checks on executive power. An even stronger interpretation suggests the creation of a "counter law" regime that provides the government with an alternative rationale to bypass legal constraints in its effort to secure the homeland. The regime was solidified in 2003 when immigration was removed from the Department of Justice and placed within the DHS, which has as its mission to "prevent and deter terrorist attacks and protect against and respond to threats and hazards to the nation" (DHS, 2004). By transferring immigration to DHS, the administration furthered the securitization of immigration (Walters, 2008).[24] Migrants would henceforth be defined through the lens of security, rather than labor markets or law enforcement.

Immigrants are susceptible to such securitization because as a group they are politically impotent (cannot vote) and have few rights. Further, the regulating agency is susceptible to such top-down change in mandate because of its own structural weaknesses. The immigration agency has a reputation for gross incompetence, broad discretion and loose procedures; and the judiciary is prevented from scrutinizing a great many decisions that are made by immigration actors that ostensibly deal with life and death issues. The absence of such constitutional checks on power encouraged the Bush power elite to make a game of immigration control.

Because of their low status within the federal bureaucracy and such weak claims to fair process, immigration agencies and officials working for them never receive peer-to-peer or top-down accountability, much less the public review that has kept other federal agencies in line over the years. To the immigration elite, these factors help make immigration a perfect vehicle for securitization and neoliberalization. Thus with few people watching, Ridge and then Chertoff enlisted private firms and local governments to help extend executive power along market rationales into the nooks and crannies of different immigration control policies and programs[25] (Simon, 2001).

Ridge and Chertoff were able to reconcile disparate social forces in ways that create serious problems for democratic accountability. The disparate social forces consist of neoliberalism, a phenomenon that when applied to immigration urges border-softening measures (facilitating guest worker provisions), and

neoconservative sovereignty, the idea that urges harder and more secure borders (border walls and mandatory detention and removal).

Chertoff's and Ridge's response to 9/11 provides a "parable" for how the Bush administration brought the "war on terror" home and secured it on domestic soil through immigration control policy. Their actions while at DHS and in Chertoff's case, including those before he arrived, serve as an introduction to the dominant immigration control discourse, which is the focus of this book. In this book, I examine a highly charged racialized/political space where discussions, policies and practices encourage unchecked executive power, free market capitalism, and the use of criminal and surveillance techniques. Three broad concepts help shape the discourse: neoliberalism, sovereignty, and risk management. These concepts frame the immigration control discourse in such ways that encourage racist and denigrating depictions of immigrants so as to legitimize official responses, however harsh and however contrary to the rule of law.

Neoliberalism

The term neoliberalism has different meanings and is used in a variety of ways.[26] It is an approach to government that reshuffles the relationship between individuals and the market. Neoliberal policies include free trade, privatization, financial deregulation, and fiscal austerity. As applied to immigration it is the social force that has people imagining soft borders that open to trade and facilitate temporary immigrant labor. In 2001, this imagining of soft borders framed the policy negotiations between President Bush and Mexican President Vicente Fox. On September 10, 2001, *Business Week* reported that the United States was about to adopt a sea change in immigration policy. President Bush, along with Fox, was preparing to propose changes in immigration policy that would consider "regularization" of status for unauthorized Mexicans, and facilitate the entrance of Mexican temporary workers into the United States:

> It is now clear that without the biggest immigration wave in its history, the U.S. would not have been able to achieve the high growth rates of the '90s. The Bush-Fox meeting promises to open a dialogue that could lead to reform of American immigration policy, shifting it away from a system based on quotas, family, and policing toward one aimed at international negotiations that meet the labor needs of the U.S. and other countries. This could be a welcome breakthrough.

Immigration policy that focuses on the labor needs of the United States reinforces neoliberal values associated with flexibility, personal responsibility, and efficiency in the labor market, and results from the structural connection between markets and immigrant labor.

The immigration control regime was developed in part to codify conditions that facilitate the interests of capital and persons who possess human capital within the market, and the exploitation of immigrant labor. This market logic is embedded within two prongs of many immigration laws. For example, it is embedded in the "mentalities and technologies associated with audits, performance assessments, benchmarking, and risk ratings" (Sparke, 2006, p. 16). Like the court stripping provision of the IIRIRA, such micro-political reforms streamline bureaucratic procedures and endeavor to efficiently produce outcomes at less cost. Court stripping is a neoliberal strategy that endeavors to expedite the legal process; it also sacrifices individual rights and fair process along the way at the altar of personal responsibility. In summer 2008, the government overstepped its assumption of personal responsibility when it introduced a pilot program that encouraged "illegal immigrants to come forward and schedule their own deportation" (Gaynor, 2008).

Perhaps more important in terms of democratic culture is how the neoliberal approach threatens to downgrade traditional conceptions of citizenship (political entitlements and claims) to more closely approximate the rights and entitlements currently assigned to immigrants. Neoliberalism draws upon metaphors that derive from a vision of capitalism that equates markets with democracy. It imagines a system of markets where individuals are free to participate according to their own interests and abilities (Aman, 2007, p. 8). This becomes the kind of participation that is favored by new citizenship. One's citizenship status is determined by one's status in the market. As Aihwa Ong notes, ". . . [S]trict discriminations between citizens and foreigners are dropped in favor of the pursuit of human capital" (Ong, 2006, p. 409).

Along these lines, membership in a society would be reconstructed along the lines of human capital attainment and boundaries separating new citizens and non-citizens would now be hardened between such haves and have-nots. Americans who do not have human capital, like society's business class, could expect to see their rights and privileges downgraded to approximate those currently made available to immigrants (Ong, 2006). New surveillance and policing technologies would enforce the demarcation. The benefits of 'citizenship' for the haves are transferable from one country to the next, while the have-nots would have few rights anywhere. This is the somewhat exclusive and apocalyptic vision of neoliberal citizenship. Whether they are born on U.S. territory, persons who lack human capital would be reduced to what Georgio Agamben refers to as "bare life" (Agamben, 1998), by which he means those individuals lacking legal and cultural forms of recognition.

While neoliberals imagine some law[27] as the enemy of markets, I am interested in how law and legal process is perceived as the enemy of a particular *governmentality* that unfairly criminalizes immigrants and preemptively subjects them to policing and surveillance technologies that comprise the authoritarian underbelly of neoliberal politics. This authoritarian side of neoliberalism is