Working Papers in International Studies

Centre for International Studies

Dublin City University

No. 3/2011

Risk, Human Rights and the Bureacratisation of Counter-terrorism

Ken McDonagh & Yee-Kuang Heng

DCU

Risk, Human Rights and the Bureacratisation of Counter-terrorism

Ken McDonagh,
Dublin City University

Yee-Kuang Heng,
University of St Andrews

Since the events of September 11ᵗʰ 2001 much as been written on how the construction of the terrorist threat post-9/11 contributed to the legitimising and use of extraordinary practices outside of the traditional boundaries of legal and, indeed, security practice. Much of this literature has focussed on the violation of the human rights of individuals caught up in the web of practices ranging from extraordinary rendition to targeted assassination to military intervention. Simultaneously a growing literature has drawn attention to the low key risk-based institutions and practices that have grown up around the 'War on Terror' such as the efforts against terrorist financing, the growing web of dataveillance and the emergence of risk management bureaucracies designed to calculate and manage risks to a tolerable level. This paper seeks to examine these latter discussions towards the concerns raised in relation to the less visible practices of counter-terrorism. What are the implications of the construction of risk-bureaucracies that operate on the logic of prevention and risk-management for our understandings of human rights? What accountability mechanisms are in place and how do they operate in practice? Given the complex and largely hidden nature of such regimes, the question of how we can reconcile them with the ideals of democratic and liberal societies is a pressing one, particularly as such structures once established may prove to be more long-lasting and have greater repercussions than the more controversial but visible practices mentioned above.

Draft - Not for citation without authors permission

Introduction

Since the events of September 11th 2001 much as been written on how the construction of the terrorist threat post-9/11 contributed to the legitimation and use of extraordinary practices outside of the traditional boundaries of legal and, indeed, security practice. Much of this literature has focussed, quite legitimately, on the violation of the human rights of individuals caught up in the web of practices ranging from extraordinary rendition to targeted assassination to military intervention. This discourse has viewed the 'War on Terror' as a threat to existing human rights standards and regimes and has attempted to articulate an alternative view of security that rejects the position that security somehow demands a restriction of liberty.[1] Simultaneously a growing literature has drawn attention to the low key risk-based institutions and practices that have grown up around the 'War on Terror' such as the efforts against terrorist financing, the growing web of dataveillance and the emergence of risk management bureaucracies designed to calculate and manage risks to a tolerable level.[2] This paper seeks to draw connections between these two literatures by examining the human rights implications of the bureaucratisation of risk management strategies both at the domestic and international level in the area of counter-terrorism. It begins by locating human rights within Ulrich Beck's concept of risk and, in particular, the role of globalization in rendering obsolete the sociological focus on group identities be they class or national. It will identify some tensions in Beck's account of individualization as the basis for cosmopolitan action and the practice of risk-management. The paper will then turn to examine risk-management

---

[1] See for discussion Jeremy Waldron (2003) "Security and Liberty: The image of Balance" *The Journal of Political Philosophy* Vol 11 No 2 pp.191-210

[2] See for example Louise Amoore and Marieke De Goede (2005) "Governance, risk and dataveillance in the war on terror" *Crime, Law & Social Change* Vol 43, pp.149-173

strategies in two areas – the Airport and the Main street – to examine how global risk management strategies impact on the everyday rights of individuals.

Beyond individualization: Risk and human rights

Before turning to a discussion of the interaction between Beck's notion of cosmopolitanism and human rights, we first must address the political context in which that interaction takes place. We argue that increasing consciousness of risk propels the proliferation of risk management industries seeking to reduce these risks that capture the public imagination. Risk management industries are well-known in the financial and business world. In the field of government and regulation, the emphasis on managing all manner of risk too has also permeated the main bureaucratic tools of government. Yet some risks generate dedicated risk bureaucracies in attempts at better regulation, while other risks simply do not get the same attention. This results in a 'concealed, responsive, self-politicisation of hazards in public perception, politics and the hazard bureaucracy'[3] Beck's argument suggests to us that increasingly government departments and regulatory agencies are assuming the form of a 'risk bureaucracy' dedicated to forecasting and developing risk-based guidelines to regulate and manage risks.

Despite the 'growing awareness of the globally interconnected form of threats, nation-states still provide key institutional contexts' through which these risks are being constructed as well as regulated.[4] As Giddens contended, states have and still are defined by their relative monopoly on administrative resources, technical expertise, bureaucratic intelligence and institutional influence. It is the very collective resources of government bureaucracies that Giddens described as the 'administrative

---

[3] Ulrich Beck, *Ecological Politics in an Age of Risk,* (Cambridge: Polity),1995, p.12
[4] Mark Whitehead, 'Cold Monsters and Ecological Leviathans: Reflections on the Relationships between States and the Environment', *Geography Compass,* 2(2), 2008, p.415

power of the state'.[5] While we accept that there are widely varying views of theories of the state in dealing with new global challenges, we are drawn here towards Beck's suggestion that states are increasingly having to develop 'risk bureaucracies' to protect their populations from all manner of risk.[6] We are more concerned with the ways in which risk has been bureaucratised into regulatory guidelines as states increasingly operate within complex global frameworks and engage with governance networks involving private corporations and civic groups. Risk and safety is seen as one of the major regulatory growth points for the 'regulatory state' in a risk society where the government's role as regulator is advancing into new domains with the establishment of new risk bureaucracies and rules to manage risk.[7] Comparisons can be made here with Weber's famous 'iron cage' of bureaucracy that operated according to a set of rules and procedures which made sense to bureaucrats and government. Consequently, human life became driven by efficiency, with ever more efficient rules devised for problem-solving purposes. The bureaucratisation of risk-based guidelines means however that increasingly new rules and regulations are built around risk and the need to assess and reduce risk rather than resolve problems definitely. We should stress that what Beck envisions in the Risk Society is not so much the demise of states and their regulatory powers. Rather, he thinks that states can reinvigorate themselves in the process of managing risk. In this paper we are concerned with the implications of the emergence of this architecture of risk bureaucracy for human rights. Before turning to examine the practice of risk management, though, we first need to address how Beck envisioned the relationship between the Cosmopolitan condition and human rights.

---

[5] Anthony Giddens cited in Mark Whitehead, 'Cold Monsters and Ecological Leviathans: Reflections on the Relationships between States and the Environment', *Geography Compass,* 2(2), 2008, p.415
[6] Ulrich Beck, *Ecological Politics in an Age of Risk,* Polity, 1995, Chapter 4
[7] Majone, G, 'The rise of the regulatory state in Europe', *West European Politics,* 17, 1994, p77-101

An initial point of clarification is required, particularly given the close association of Cosmopolitanism as a normative discourse and human rights in general. Beck uses the term in a number of specific ways[8] that are best understood by starting with what it is he was trying to say with this new concept in Sociology. Beck's argument was that contemporary societies have entered a second age of modernity that challenged the traditional sociological concepts of class and nationalism in particular. In place of these concepts he argues for a new Cosmopolitanism. There are two aspects to this Cosmopolitanism, on the one hand we have the 'Cosmopolitan condition' and on the other the 'Cosmopolitan moment'. The former is a descriptive term which in turn justifies Beck's insistence that Sociology move away from 'methodological nationalism', the latter is a recognition of the normative possibilities that such a move opens both in terms of our understanding of society and how we might transform it. In Beck's own words:

> "In order to unpack cosmopolitanism, we need to make another important distinction, namely that between normative-philosophical and empirical-analytical cosmopolitanism; or to put it differently, between the cosmopolitan *condition* and the cosmopolitan *moment*."[9]

Thus cosmopolitan-realism, the sociological study of actually existing cosmopolitanism, is an analytical term that allows us to re-examine the world without falling victim to a reliance on 'zombie' categories such as household, class, family, public as they are conceived within methodological nationalism.[10] This cosmopolitan-realism is, then, a necessary but not sufficient condition for seizing the cosmopolitan moment and transforming society along normative-philosophical cosmopolitan lines.

---

[8] For a critical account of Beck's usage see Calhoun, Craig (2010) "Beck, Asia and the second modernity" *The British Journal of Sociology* Vol 61 No 3, pp.597-619

[9] Ulrich Beck and Natan Sznaider (2010) "Unpacking cosmopolitanism for the social sciences: a research agenda" *The British Journal of Sociology* Vol 61 No 1, p..386

[10] Ulrich Beck(2002) "The Cosmopolitan Society and its Enemies" Theory, Culture and Society Vol 19 No 1-2, p.24

At the root of this is the structural transformation of society in the second modernity away from class based societies towards ones where individuals are best understood as disembedded from traditional social forms and commitments and instead they

"must produce, stage and cobble together their biographies themselves"[11]

Thus, the attachments, loyalties and sense of self of individuals cannot be taken for granted to break on artificially imposed national lines. Instead individuals find themselves both temporally and spatially dislocated and ultimately are responsible for relocating themselves within this global or cosmopolitan reality.[12] It is in this sense that methodological nationalism produces 'zombie' categories that lead sociologists to place individuals in pre-existing categories that bear little or no resemblance to their lived experience. It is also within this individualisation of social experience that Beck roots his arguments for a cosmopolitan human rights regime as

> "If human rights come to be understood as the necessary basis of an increasing number of individuals' autonomy, these people will 'feel' that they are defending the foundations of their own identities when they defend the importance of human rights for foreigners and strangers. The cultural and political diversity that is essential to this kind of life has been slowly elevated to a central political principle"[13]

It is in this sense that Beck's claim that human rights-international law represent a 'kind of civil religion of modern cosmopolitanism'[14] in that international human rights regimes are a product of the tension between the continued institutional structure of the state and the increased individualisation of subjects whose lived biographies transcend arbitrary state lines. Thus cosmopolitan structural change is the product of the interplay of the structural constraints of the first and second

---

[11] Beck as quoted in Will Alkinson (2007) "Beck, individualization and the death of class: a critique" The British Journal of Sociology Vol 58 No 3, p.352
[12] Ibid. p351-354
[13] Beck & Sznaider, op. cit. 2010 p.392
[14] Beck, op cit, 2002 p.37

modernities to produce new institutional structures, as Beck puts it in the context of ecological risks:

> "This demonstrates that the everyday experience of cosmopolitan interdependence is not a mutual lover affair. It arises in a climate of heightened global threats, which create an unavoidable pressure to cooperate. With the conceptualisation and recognition of threats on a cosmopolitan scale, a shared space of responsibility and agency bridging all national frontiers and divides is created that *can* (though it need not) found political action among strangers…This is the case when recognition of the scale of the common threats leads to cosmopolitan norms and agreements and thus to an institutionalised cosmopolitanism."[15]

Again here we see the interplay of the empirical and normative aspects of Beck's cosmopolitanism. The objective conditions of cosmopolitanism create the necessary conditions for the emergence of an international human rights regime rooted in the recognition of individual freedom but its realization is a product of actual political struggles in the context of the second modernity. Beck himself gives the case of Western states adopting the banner of human rights to legitimise military interventions as one example of how such a struggle may produce undesirable results. His solution is that:

> "in the spirit of Kant,…a transnational legal order [be created], which, among other things, excludes the possibility of interventions being decided and carried out unilaterally by the hegemonic military power and its allies."[16]

Thus Beck's cosmopolitan realism points towards the recognition of international human rights standards as a desirable institutional response to the process of individualisation in the second modernity. Before turning to map how these human rights standards are affected by the risk-management of terrorism on a global scale two key issues need to be addressed. First, in some ways a recognition of the success of and a response to the global human rights regime, is the privatisation of risk management away from sovereign power and therefore in some ways bypassing the

---

[15] Beck & Sznaider, op. cit., 2010, p.392
[16] Beck, op cit, 2002, p.37

existing human rights regime which as Beck states is 'against the sovereignty of individual states.'[17] Second, to what extent is Beck's notion of 'individualisation' itself a 'zombie' category that impedes our capacity to understand the challenges to contemporary human rights regimes?

Beck is correct to point towards the creation of international human rights regimes as a positive response to the challenge of the second modernity, he is also correct to highlight the danger that this 'transnational humanism can easily turn into a military humanism'[18] but one aspect that is less addressed is the effect the growing privatisation of aspects of states roles, which itself is a response to the cosmopolitan-condition as well as a deliberate response to the specific challenge of global human rights regimes, has on the practice and protection of human rights themselves. De Londras outlines four developments that have complicated this matter. First, is the securitization of world politics after-9/11 that legitimised the restriction of human rights or even in certain case, as she puts it, led to human rights 'sacrifice' in the name of security.[19] The second dynamic is the de-statification of sovereign performance or put more simply the private operation of sovereign functions from security provision to border control. Thirdly, the corporatization of sovereign performance. Transferring to corporate entities various sovereign implementation mechanisms from prisons to extraordinary rendition. And finally, the disembodiment of human rights by extending aspects of human rights frameworks to legal persons such as companies.[20] The net effect of these four developments has been to result in:

> "a situation where states have heavy rights-protecting burdens in their performance of sovereignty but are enabled to 'off-load' at least some of those burdens by means of privatisation to corporations that are imbued with both

---

[17] Ibid. p.37
[18] Ibid. P.37
[19] De Londras, Fiona (2011) "Privatized Sovereign Performance: Regulating in the 'Gap' between Security and Rights?" *Journal of Law and Society* Vol 38 No 1, p.101
[20] Ibid. p.101-103

human and corporate rights but perform sovereignty without being limited by the kinds of rights-protection burdens that inhibit state action."[21]

Thus, states have a line of escape from the imposition of human rights regimes which in Beck's formulation act against sovereign power. And one which we shall see that has been frequently used. Furthermore, although private actors are regulated in accordance with human rights obligations:

"that requirement is of little utility where such privatisation is undertaken with the purpose of evading human rights."[22]

As mentioned above, Beck argues that states can reinvigorate themselves through the deployment of risk management strategies. Ironically, in this case this reinvigoration takes the form of the privatization of certain aspects of sovereign performance in order to evade restrictions on sovereign practice by international human rights regimes. In this way, similar to the practice of 'policy laundering'[23], human rights violations at the states behest are laundered through private actors to avoid repercussions for the sovereign and protection for the individual. What is emerging in the 'War on Terror' then is what Beck would term a 'deformed cosmopolitanism', as the cosmopolitan moment is not seized to achieve the normatively desirable outcome but instead is used by states to abuse and extend their power against the individual. Cosmopolitan realism though is a necessary prerequisite to adequately capture and analyse this dynamic.

A second line of escape though goes more to the heart of Beck's conceptual model and that is the challenge posed to the concept of the subject or individual at the base of Beck's, and others, model of human rights in a cosmopolitan world by the emergence of bureaucratised risk-management strategies. Beck's concept of rights

---

[21] Ibid. p.104
[22] Ibid. p.104
[23] See Barry Steinhardt (2004) 'Three Cheers for International Cooperation' Eurozine http://www.eurozine.com/pdf/2005-10-25-steinhardt-en.pdf

building from the individual is fundamentally Kantian in form. One line of criticism would be to follow Levinas, and argue that Kant's self-regarding cosmopolitanism is flawed in that it relies on mutual recognition and therefore is susceptible to radical discourses of exclusion where the self dehumanises the other, thereby legitimising violent practices.[24] However, we'd like to focus on the challenge posed more specifically to the Beck's concept of individualisation as the basis for a human-rights regime in a risk-managed cosmopolitan world. As mentioned above, there has been much discussion of extreme human rights violations such as internment and extraordinary rendition, howeve as Amoore and de Goede have noted:

> "The war on terror involves the classification, compilation and analysis of data on, for example, passenger information and financial transactions on an unprecedented scale. These techniques of governance rely heavily on sophisticated computer technology and complex mathematical modelling to mine data and single out suspicious behaviour."[25]

A straightforward question follows from this, to what extent are human rights regimes capable of dealing with potential violations of rights that not only may be operated by the private sphere but also deal not with pre-existing unitary subjects but rather with abstract sets of potential risk factors which in turn are used to produce risky subjects.[26] Insofar as Beck's subjects remain free to construct their biographies uninhibited by such techniques then it is unclear where the form of resistance to human rights violations will, or even can, emerge. The problem for Beck is that the same processes of cosmopolitanism that produce individualisation also challenge the concept of the unitary universal subject. In a sense Beck is guilty of the crime he accuses others in sociology of being guilty – namely the insistence on the use of

---

[24] See David Campbell (1999) "The Deterritorialization of Responsibility: Levinas, Derrida and Ethics after the end of philosophy" in David Campbell & Michael Shapiro (eds) *Moral Spaces: Rethinking Ethics and World Politics* Minneapolis: University of Minnesota Press
[25] Amoore and de Goede, op. cit., 2005, p.151
[26] Amoore and De Goede for example deal with the US VISIT programme which they describe as 'a set of techniques for regulating mobility, in which private risk experts are authorised to identify and target risky persons'. Ibid p.151

categories that may no longer be appropriate in a cosmopolitan moment, in this case the individual as an agent rather than as a product of global governance forces. An alternative approach would be to a take more biopolitical line on subjectivity where:

> "the self is coerced into existence, not to become an agent but as a mechanism of control where systems of discourse work from inside out by creating a self-regulating subject"[27]

The critical issue here is that Beck, and other discourses of human rights, focus on individual autonomy opens up rather than forecloses the possibilities for human rights violations in a risk society by allowing such violations the space to escape the human rights discourse completely by not targeting individuals per se but instead shifting the debate to depoliticised concepts such as data-protection. In terms of human rights then, we can draw a parallel to the conventional model of risk. As Calhoun puts it:

> "The basic issue is that while the whole populations bear risks, only some of their members bear the actual loss and suffering."[28]

Similarly, all of our rights are under threat through the growing risk bureaucracy but only some individuals will bear the full (or any) cost of these violations when they become inscribed on their bodies via extraordinary rendition, internment or 'enhanced' interrogation methods. Thus, just as rights-violation laundering occurs through the use of private actors so too are violations concealed by targeting not individual humans per se but rather aspects of their behaviour recorded in ever expanding databases of state and private actor alike. The question now turns to what extent is the above an accurate characterisation of the performance of existing risk bureaucracies and secondly, what transformation of the existing human rights discourse needs to occur to create both the language and space to identify, understand and possibly resist these encroachments.

---

[27] Callero, Paul (2003) "The Sociology of the Self" *Annual Review of Sociology* Vol 29, p.118
[28] Craig Calhoun (2006) "The Privatization of Risk" *Public Culture* Vol 18 No 2, p.260

Dataveillance at the Airport

Since 9/11, the airport has been recognised as a critical site for the intersection between the emerging global security architecture and individual citizens. This is not only due to the specific nature of the 9/11 attacks but also as Salter notes:

> "Few sites are more iconographic of both the opportunities and the vulnerabilities of contemporary globalization"[29]

For present purposes, contemporary globalization can here be read as a euphemism for the cosmopolitan-condition. That said, on closer examination, the emerging security architecture governing aviation security regimes is emblematic of a deformed cosmopolitanism rooted in the articulation of state interests rather than an adequate response to the cosmopolitan moment. The US *National Strategy for Aviation Security* called for a:

> "risk-based, cross-discipline, and global approach to aviation security"[30]

Similarly, the global private airline trade body, International Air Transport Association (IATA) too recommended a risk-based approach to setting common standards,

> The next step is for governments to harmonize a risk-based approach to security…. We need a constant level of vigilance that is constantly adjusted to deal with specific threats or events. To achieve this, we must develop a common risk-assessment methodology.[31]

Indeed, IATA has consistently promoted 'a risk-based approach to security among governments, developing a common risk-assessment methodology'.[32] The EU has been engaged in the construction of the first transnational aviation security regime

---

[29] Mark Salter, Ed.(2008) Politics at the Airport Minneapolis: University of Minnesota Press p.IX
[30] The White House *National Security Strategy for Aviation Security* Section II, 'Risk Methodology', March 2007 <http://www.dhs.gov/xlibrary/assets/laws_hspd_aviation_security.pdf> 22 December 2009
[31] IATA Director General Giovanni Bisignani, Remarks at McGill Conference - Aviation Security and Environment, 15 Sep 2007
[32] Giovanni Bisignani, *CEO Brief,* October 2007, http://iata.org/NR/rdonlyres/B71D7FEE-622C-445B-A435-A3B32D115A9E/0/ceoBrief_Oct07.pdf, accessed 04 February 2008

extending to both EU member states and beyond to the members of the European Civil Aviation Conference.[33] However, these efforts have remained piecemeal and incomplete in terms of creating a viable standardised and global aviation security regime. Rather what we see is tensions emerging between national and/or regional jurisdiction over standards, practices and regulations. Of particular interest to the present paper is though the increased use of 'dataveillance' to identify risky individuals and prevent or at least closely monitor their use of aviation and the extent to which this approach opens another line of escape from overarching human rights standards.

Dataveillance can be defined as the "the proactive surveillance of suspect populations, to identify 'risky groups of people' for the purposes of 'targeted governance.'"[34] The techniques deployed range from the technological to behavioural observation by airport security personnel[35] and are focussed on allowing authorities to break "the individual up into a set of measurable risk factors."[36] Much of the legal and human rights discourse on aviation security regimes has focussed on the (mis)use of watch lists as the main organ of passenger surveillance with a particular focus on false positives and the lack of due process.[37] In the US aviation watch-lists are maintained by the FBI in their Terrorist Screening Database.[38] The UN also maintains lists of suspect individuals and organisations under the auspices of the UN's Al-Qaeda and

---

[33] See Regulation (EC) No. 2320/2002 and the updated Regulation (EC) No. 300/2008 both available at http://ec.europa.eu/transport/air/security/legislation_en.htm accessed 04 February 2010. On the ECAC see http://www.ecac-ceac.org/index2.html and for discussion see Heng and McDonagh *Risk, Global Governance and Security* , p.120-122

[34] Amoore and De Goede, op. cit, 2005, p.151

[35] See TSA blog: http://blog.tsa.gov/2010/05/tsa-spot-program-still-going-strong.html?showComment=1274464283131

[36] Amoore and De Goede op cit, 2005, p.150

[37] See for example Fisher, James (2008) 'What price does society have to pay for security? A look at the aviation watch lists' in *Willamette Law Review* 44 pp.573-613

[38] Ibid. p582

Taliban Sanctions committee established by UNSC Res 1267.[39] Largely due to the relatively arbitrary nature of such lists, problems of transliteration and a number of cases of mistaken identity, international governments have increasingly sought alternatives to the watch list approach. As Bennett has noted:

> "One FBI agent described the initial screening process as a 'massive data dump' of anybody with a connection to terrorism, which the TSC [the Terrorist Screening Centre at the FBI] has been trying to clean up ever since"[40]

Although despite this caveat, the implementation and effectiveness of such lists is dependent on the willingness of a variety of civil society actors to cooperate with enforcement.[41]

Of more interest to this paper is the large scale collection and analysis of data on passengers that has been developed in aviation security regimes ranging from requirements for biometric security features on passports, Passenger name records (PNR's), finger printing at border access points and behavioural observation. The purpose of these data collection and control techniques operate to effectively break each 'individual into a set of measurable risk factors.'[42] Increasingly air travellers are subjected to a dense web of social control as they pass through the variety of security assemblages both physical and electronic. Despite the obvious implications for Human Rights, as Salter has noted,

> "the public imaginary has become fixated on the inconveniences of travel and not on the increased securitization of everyday life."[43]

In particular, by linking these large databases containing passenger information to other law enforcement and intelligence databases allows the creation and maintenance

---

[39] UNSC Press Release http://www.un.org/News/Press/docs/2004/sc8102.doc.htm
[40] Colin J Bennett 'Unsafe at any altitude: the comparative politics of No-Fly lists in the United States and Canada' in Mark B Salter (ed) *Politics at the Airport* (Minneapolis: University of Minnesota, 2008), p.68
[41] Colin J. Bennett, op. cit., 2008, p.71
[42] Louise Amoore and Marieke op.cit, 2005, p.162
[43] Mark Salter , op. cit, 2008, p.244

of profile information for all passengers that enter the system, in some cases indefinitely. In the US this has taken the shape of the new US VISIT programme, a database that links more than 20 existing databases with a view to "weeding out" criminals and terrorists. Some of the databases linked include IDENT, the automatic fingerprint id storing biometric data on all foreign visitors, immigrants and asylum seekers; ADIS storing entry and exit data; APIS storing passenger manifest information; SEVIS storing information on exchange and foreign students in the US; IBIS a watch list linked to Interpol and national crime data; CLAIMS 3 a database holding information on foreign nationals claiming benefits "and an array of links to local law enforcement, financial systems and educational records."(Ibid, 162) The goal of linking such information is to be able to categorise and identify people by their degree of "riskiness." (Ibid, 162) In the EU, US demands for greater access to passenger information was quite contentious. After a period of negotiations the EU and the US signed an agreement on the sharing of PNR's with 34 pieces of data to be shared. However this agreement was struck down by the European Court of Justice in May 2006, and has since been replaced with an interim and further long term agreement in July 2007. The amended agreement reduces the number of elements to be shared to 19 to comply with EU privacy laws. Even so the data to be transferred contains quite comprehensive information, as the EU faq on the topic note that:

> "The US Department of Homeland Security (DHS)…will filter out and not use sensitive information, save in exceptional cases where life is at risk. Sensitive information means data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership or concerning the health or sex life of the individual"[44]

Even though EU data protection laws are more robust than in the US, similar moves towards the creation of databases and sharing of information have been taken. For

---

[44] EU FAQ on PNR, op cit.
http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/294&format=HTML&aged=0&language=EN accessed 25/01/08

example the EU data retention Directive, which gives states until 2009 to comply, requires the collation and retention of internet and other communications data for a period ranging from six months to 2 years.[45] When coupled with initiatives such as the proposed moves to an e-border system in the UK, the probability of an equivalent of the US VISIT programme emerging is quite high. Thus the individual traveller is sorted based on a variety of risk factors, and treated differentially based on these assessments. In the US the most recent developments include CAPPSII (Computer Assisted Passenger Pre-screening System) and the rolling out of ESTA (Electronic System for Travel Authorization) for visitors from visa-waiver countries.[46] In the EU passenger profiles were already being checked against INTERPOL data and databases covering donations to proscribed or suspect organisations.[47] Despite the serious privacy implications for these practices, as noted by Salter and mentioned above, the main complaint from passengers has been about the excessive delays these innovations have caused. Thus, the individual is only resistant insofar as their individualised biography is inconvenienced by the practices of aviation security.

An example of this is the additional security measures introduced at Heathrow for domestic and Irish travellers transferring from Terminal 1 to any of the international terminals. A photograph is taken of the passenger as they re-enter the airside part of the terminal. This picture is then encrypted and used to check against the passengers at various security check-points as they make their way across the airport. The photograph is then destroyed within 24 hours of the passenger leaving the

---

[45] Victoria Shannon "Europe's plan to track Phone and Net use" in *The New York Times* Feb 20 2007, available online at http://www.spiegel.de/international/0,1518,467475,00.html accessed 24/01/08

[46] See for discussion Alenka Kuhelj "The Twilight zone of privacy for Passengers on International Flights between the EU & USA" in *UC Davis Journal of International Law & Policy* 38, 2009, pp.383-436

[47] Timothy M Ravich "Is airline Passenger profiling necessary?" *University of Miami Law Review* Vol 62 No 1, 2007, p.50

terminal.[48] Unless a passenger actually commits an offence in the interim then the process represents nothing more than a minor delay, on the other hand while within the governance structure of the airport the passenger is continually surveilled and controlled in anticipation of a threat. Interestingly, a number of aviation security regimes have adopted an incentivisation approach to encourage passengers to avail of bypasses to these additional security measures at the airport by pre-registering as essentially 'non-risky' individuals. Programmes such as 'Secure Flight' in the US and 'Privium' in Schippol airport in the Netherlands are examples of this.[49] Similarly Heathrow has run a pilot in conjunction with the private consultancy Accenture of a passenger identification system called 'miSense'. The system uses passenger fingerprints, iris scans and photographs as biometric identity markers to allow access through the airports security and border control.[50] Interestingly the justification for the development of the process is put in terms of enhancing 'passenger experience'. As BAA head of product development, Stephen Challis, puts it:

> "With miSense, we are investigating the very latest technologies, in collaboration with airlines and border control authorities, to improve passenger experience and identity security."[51]

Accenture also cite a survey, albeit from a technology provider, that suggests 90% of passengers support the use of biometric data if it eases their passage and reduces delays at airports. Individuals then are willing to constitute themselves as non-risky subjects even if this involves a loss of privacy if they can reduce the minor inconveniences of airport security checks. The extensive governance of subjectivity

---

[48]Heathrow Airport, Faq,
http://www.heathrowairport.com/portal/page/Heathrow%5EGeneral%5EAirport%20information%5EHeathrow%20security%5EFlying+within+the+UK/72c150bb2fa58110VgnVCM10000036821c0a____/448c6a4c7f1b0010VgnVCM200000357e120a____/
[49] Ravich Op. Cit, 2007. p.50
[50] Accenture "miSense Trial Results' 2008, http://www.accenture.ie/us-en/technology/technology-labs/Pages/success-simplifying-passenger-travel-interest-group-heathrow-biometrics-pilot-summary.aspx
[51] Ibid

by the emerging aviation risk bureaucracy is then, becoming a normalised and accepted part of air travel with passengers less concerned about the loss of privacy or indeed, loss of liberty of others, than they are about convenience and access. The question now is to what extent are such mechanisms specific to the site of the airport or are they colonizing other aspects of society at large.

Dataveillance on Main Street

Understandably, much of the discussion of dataveillance post September 11th has focussed on the particular architecture of the airport. Nowhere else is the interaction between the individual and the bureaucratised counter-terrorist regime more obvious and far reaching. However it is worth considering to what extent the practices pioneered at the airport can become more widespread in society at large. Indeed there was a time when airport security was either essentially non-existent or only selectively applied.[52] Similarly, travelling outside of the West the technologies familiar to us in the departure lounge are routinely used in other everyday circumstances. In New Delhi for example metal detectors are to be found at the doorway of every major hotel, place of worship and shopping mall and are virtually uncommented upon. Adding similar technology to public transportation networks in the West has been a recurrent feature of the post-9/11 security debate, with added urgency after the Madrid and London bombings. That said, metal detectors have only been used on a trial basis on the London tube network and even then, with a focus on knife crime rather than terrorism.[53] Bar the extensive spread of CCTV, the visible architecture of security governance is yet to become commonplace in Western cities,

---

[52] See Jens Hainmuller and Jan Martin Lemnitzer (2003) "Why do Europeans fly safer? The politics of airport security in Europe and the US" in *Terrorism and Political Terrorism* Vol 15 No 1. for discussion of Germany in this regard.
[53] Sims, Brian (2008) 'Command Structure'
http://www.info4security.com/story.asp?storyCode=4119414&sectioncode=10

despite this the hidden architecture of dataveillance and bureaucratic controls are arguably more extensive than is generally assumed to be the case.

O'Malley discusses the implications for the shift to technologically driven and risk inspired policing methods using the Deleuzian concept of 'dividual' to capture how the liberal (and risk-cosmopolitan) individual is fragmented into abstract factors for the purposes of targeted governance and the management of risk:

> "It is risk that is governed 'through' the policing of my dividual, appropriately enough because as a property of distributions, risk does not apply to individuals so much as to dividuals in the form of those statistical properties of individuals that are aggregate to form risk pools"[54]

Although O'Malley was specifically discussing what he termed 'simulated governance' in relation to traffic offences, was using this to describe a more general transformation in governance that was, paraphrasing Foucault, designed:

> "to cause as little disturbance as possible to the circulation of valued bodies, utilities and things…and this to maximize 'goog' – desired – circulation and interfere only with 'bad' circulation"[55]

We can similarly view the variety of structures, databases and practices that constitute the everyday risk management of terrorism as a set of tools, targeted not at the level of the liberal individual but rather at the 'dividual' aimed at managing the flow of circulation in specified risk pools be that in terms of populations in general or specific areas such as financial transactions. For example in the US a series of large databases have been constructed by a variety of law enforcement and security agencies. One such programme, TALON (Threat and Local Observation Notice) collected information on thousands of American citizens involved in anti-war and anti-government protests and shared this information across 28 government organizations

---

[54] Pat O.Malley, (2010) "Simulated Justice: Risk, money and telemetric Policing" British Journal of Criminology 50, p.796
[55] Ibid. p.796-7

and over 3,500 officials.[56] Although now defunct, the system was not abandoned due to civil liberty issues but rather because the agencies involved believed the analytical value of the data had declined.[57] Similar systems have been explored in the EU as means for sharing both identification data and psycho-social profiling information.[58] The potential for such systems to infringe on civil liberties was captured in the case of a German sociologist, Adrej Holm, who was arrested as a result of a web based investigation by German authorities that identified similarities between his work and the writings of a group known as 'militante gruppe.' Although the charges were lifted by the German courts due to a lack of evidence[59], this monitoring of open source data raises serious questions about freedom of speech in the context of dataveillance. Unlike at the airport, where the infringement of liberties is by its very nature acknowledged and transactional and avoidable, the spread of these practices to everyday governance raises questions about the extent to which individuals can escape these modes of governance and in the context of Beck's process of individualisation will even want to so far as it does not impinge excessively on their personal biographies.

A more mundane example of this can be found in the practices of financial institutions in the practices relating to 'Know your customer' and suspicious transaction reports (STRs). The roots of these practices can be traced from the bank clerks desk to the global level via the Financial Action Task Force (FATF) which has been responsible for developing new global counter the financing of terrorism (CFT) standards. The approach developed by the FATF deploys risk-based models as a

---

[56] Christopher Slobogin, (2008) "Government Data Mining and the Fourth Amendment" *The University of Chicago Law Review* Vol 75 No 1, p.319
[57] Collaborative Project (2009) *Survey of Counter-terrorism Datamining and Related Programmes* Detecter: Detection Technologies, Terrorism, Ethics and Human Rights FP7-SEC-2007-217862 p.24-26
[58] Ibid. p.28-9
[59] Ibid. p.32-3

shared regulatory platform for discussion which seem, on the surface at least, to be providing the new consensus for governance that global governance theory suggests is crucial: Beck's 'risk-cosmopolitanism' and enforced integration to avert shared risks come to mind. In practice these standards include new regulations, surveillance, detection, increased checks and hurdles for terrorist financing to cross, in the process altering terrorist operating capabilities and intentions, and reducing vulnerabilities of infrastructure. The FATF 40+9 Recommendations, which are characterised above all by its emphasis on risk: "customer risk profiles"; "risk management systems"; "operating on a risk-sensitive basis"; 'lower risk categories' are concepts liberally peppered throughout.[60] Among others, it recommends legislating to make terrorist financing a crime, allowing freezing of terrorist assets, implementing due diligence and Know Your Customer (KYC) requirements for banks and other financial institutions, establishing a suspicious transactions reporting process, and sharing financial intelligence with foreign partners by setting up Financial Intelligence Units in countries worldwide. Critically, recommendation 14 includes a provision that financial personnel be legally compelled to not reveal to customers that an STR is being produced on their transaction.[61] Thus customers are unaware of any engagement with the global Anti Money-Laundering (AML)/CFT regime unless charges are forthcoming. The influence of the FATF standards spreads beyond the various participating states as indicated by the fact that these Recommendations have been endorsed by the World Bank (WB) and the International Monetary Fund (IMF) as benchmark global standards. UN Security Council Resolution 1617 in 2005 also 'strongly urges all member states to implement the comprehensive international

---

[60] FATF, *The 40 Recommendations*, available at http://www.fatf-gafi.org/dataoecd/7/40/34849567.PDF, 2003, accessed 12 Jan 2008
[61] Recommendation 14. http://www.fatf-gafi.org/document/6/0,3746,en_32250379_32236920_43689670_1_1_1_1,00.html

standards' contained in FATF recommendations. These risk-based global norms are now providing a basis for negotiations with a range of partners initiated by FATF attempts to proliferate these common standards worldwide. After all, the FATF's core activities revolved around a need to engage with stakeholders and partners throughout the world, and to promote global implementation of its standards.

Similarly, under the Wolfsberg agreement, all major international banks set global standards for customer identification for AML purposes. Levi suggests these are not window dressing but rather the alignment of procedures is best practice in organised crime and corruption prevention. Even though these standards are private initiatives outside legal frameworks, media scrutiny has created reputational risks for banks to consider. [62] This process redeploys commercial risk techniques first pioneered in private financial markets in novel ways. Private data mining companies, including the British data mining companies Mantas and World-Check, have developed specialised software tools to be used by financial institutions to single out suspicious transactions. Data are now approached and analysed through risk-based calculative models that aim to identify suspicious transaction, populations and unusual activity, producing new spaces for governance.[63] Critically again customers are treated 'dividually,' that is to say their differential treatment is determined by various risk factors combining objective and behavioural characteristics to appropriately sort international financial flows between risky and non-risky behaviour. As with the aviation sector, the link between agencies of the state and the private sector is crucial to the success of the CFT regime, and again investigative powers traditionally the preserve of the state have been transferred to private actors, in this case banks and other financial institutions.

---

[62] Levi, M, 'Lessons for countering terrorist financing from the war on serious and organised crime', in Biersteker et al, *Countering the Financing of Terrorism*, p.272
[63] Amoore & de Goede, op cit. 2005 p.177

Conclusion

In 2002, the science fiction film *Minority Report* dealt with the issue of 'Pre-crime'.
The film, set in a not too distant future, examines a world where notions of privacy
and risk are radically altered. The protagonist, John Anderton, is part of a police unit
that uses information from three psychic siblings to apprehend murderers before the
crime has been committed. Anderton is a strong advocate of this system. He also
inhabits a world where biometrics are used by private companies to tailor street side
advertisements and shop displays to the individual passing and where every aspect of
life is networked into a constant web of surveillance. Further this lack of privacy is
not presented as dystopian nor is it perceived as such by Anderton and his associates.
Only when the psychics report that Anderton himself is going to commit a murder is
the protagonist shaken from his complacent faith in the system and forced to question
the ethics and justice of not only the 'pre-crime' system but the nature of freedom in a
surveillance society. In a similar fashion the practices of dataveillance outlined above
do not yet feature as a politicised aspect of our contemporary way of life. Additional
security, biometrics, cctv surveillance are all increasingly accepted as the price of
living in a world risk society, with the main debates relating to the inconvenience of
such matters in our everyday lives. Furthermore, such practices are to a great extent
optional, and therefore any resistance can simply be met with the response that no-one
is forcing us to engage with these systems. However as O'Malley notes:

> "It is possible to escape a good deal of the associated governance literally by not
> buying into it. However, this escape can be achieved only at the cost of
> jeopardizing all those licensed 'freedoms' or 'privileges' that expose us to the
> telemetric monitoring devices immanent in the transactions and circulations of
> consumer societies"[64]

---

[64] O'Malley op cit 2010 p804

Thus the process of individualisation outlined by Beck in the second modernity, while formally granting us the freedom to resist these technologies of governance also forces us to choose between this freedom and the benefits of modern life – banking, aviation, even shopping. While individualisation re-locates our life narrative away from traditional concepts of class, family and nation and can lead, as outlined above, to a cosmopolitan human rights architecture it also creates a situation where those rights can be eroded from below the level of the individual, to that of the 'dividual' risk factor. This is not to say that we are facing a totalitarian future but that debates on rights in a world risk society need to take into account the transformed ways in which individuality is constituted and disrupted by the practices of risk governance and to re-politicise and debate the consequences for such practices for our understanding of human rights. In other words, we should not wait until, like John Anderton, we are fingered by the risk governance system and given 36 hours to save our skins before we challenge the lines of escape that governments have used to evade and launder the violation of aspects of our human rights.

Bibliography

Accenture (2008) 'miSense Trial, London Heathrow: High Level Results' Available at: http://www.accenture.ie/us-en/technology/technology-labs/Pages/success-simplifying-passenger-travel-interest-group-heathrow-biometrics-pilot-summary.aspx (accessed March 2011)

Alkinson, Will (2007) "Beck, individualization and the death of class: a critique" *The British Journal of Sociology* Vol 58 No 3, pp.349-366

Amoore, Louise and Marieke De Goede (2005) "Governance, risk and dataveillance in the war on terror" *Crime, Law & Social Change* Vol 43, pp.149-173

Argyriades, Demetrios (2010) 'From Bureacracy to Debureaucratization?' in *Public Organization Review* 10 pp:275-297

Beck, Ulrich (2002) "The Cosmopolitan Society and its Enemies" *Theory, Culture and Society* Vol 19 No 1-2, pp.17-44

Beck, Ulrich and Natan Sznaider (2010) "Unpacking cosmopolitanism for the social sciences: a research agenda" *The British Journal of Sociology* Vol 61 No 1, pp.381-403

Beck, Ulrich Beck (1999) *World Risk Society* Cambridge: Polity Press

Beck, Ulrich Beck, (1995) *Ecological Politics in an Age of Risk,* London: Polity

Bisignani, Giovanni (2007) , *CEO Brief*, available at: http://iata.org/NR/rdonlyres/B71D7FEE-622C-445B-A435-A3B32D115A9E/0/ceoBrief_Oct07.pdf , (accessed February 2008)

Calhoun, Craig (2004) "A world of emergencies: Fear, intervention, and the limits of Cosmopolitan Order" *CRSA/RCSA* Vol 41 No 4 pp.373-395

Calhoun, Craig (2006) "The Privatization of Risk" *Public Culture* Vol 18 No 2, pp.257-258

Calhoun, Craig (2010) "Beck, Asia and the second modernity" *The British Journal of Sociology* Vol 61 No 3, pp.597-619

Callero, Paul (2003) "The Sociology of the Self" *Annual Review of Sociology* Vol 29, pp.115-133

Collaborative Project (2009) *Survey of Counter-terrorism Datamining and Related Programmes* Detecter: Detection Technologies, Terrorism, Ethics and Human Rights FP7-SEC-2007-217862

Collaborative Project (2010) *Report on Meeting on Data Mining, Human Rights and Ethics* Detection Technologies, Terrorism, Ethics and Human Rights FP7-SEC-2007-217862

De Londras, Fiona (2011) "Privatized Sovereign Performance: Regulating in the 'Gap' between Security and Rights?" *Journal of Law and Society* Vol 38 No 1, pp.96-118

De Vries, Katja (2010) "Identity, profiling algorithms and a world of ambient intelligence" *Ethics and Information Technology* Vol 12, pp.71-85

Douglas, Mary (1985) *Risk Acceptability According to the Social Sciences* New York: Russell Sage

Fisher, James (2008) 'What price does society have to pay for security? A look at the aviation watch lists' in *Willamette Law Review* 44 pp.573-613

Friedewald, Michael (2010) "A new concept for Privacy in the light of Emerging Science and Technologies" *Technikfolgenabschatzung – Theorie und Praxis* Vol 1 No 19, pp. 71-74

Friedewald, Michael, David Wright, Serge Gutwirth and Emilio Mordini (2010) "Privacy, data protection and emerging sciences and technologies: towards a

common framework" *Innovation – The European Journal of Social Science Research* Vol 23 No 1, pp.61-67

Giddens, Anthony (1998) 'Risk Society: The context of British Politics' in Jane Franklin (ed) *The Politics of Risk Society* Cambridge: Polity press

Hainmuller, Jens and Jan Martin Lemnitzer (2003) "Why do Europeans fly safer? The politics of airport security in Europe and the US" in *Terrorism and Political Terrorism* Vol 15 No 1

Heng, Yee-Kuang and Kenneth McDonagh (2009) *Risk, Global Governance and Security* , Routledge, London

Kuhelj, Alenka (2009) "The Twilight Zone of Privacy for Passengers on International Flights between the EU & USA" *U.C. Davis Journal of International Law* 383 pp.383-436

Levy, Daniel (2010) "Recursive Cosmopolitization: Argentina and the global Human Rights Regime" *The British Journal of Sociology* Vol 61 No 3, pp.579-596

Luhmann, Niklas (1993) R*isk: A sociological Theory* New York: Walter De Gruyter

Martell, Luke (2009) "Global Inequality, Human Rights and Power: A critique of Ulrich Beck's Cosmopolitanism" *Critical Sociology* Vol 35 No 2, pp.253-272

Nickel. Rainer (2011) 'Data mining and 'renegade' aircrafts: the state as agents of a global militant security governance network – the German example' in *Emory International Law Review* No 24 Vol 2, (forthcoming)

O.Malley, Pat (2010) "Simulated Justice: Risk, money and telemetric Policing" *British Journal of Criminology* 50, pp.795-807

Poole Jr., Robert W. (2008) 'Toward risk-based aviation security policy' *Joint Transport Research Centre* Discussion paper no. 2008-23

Ravich, Timothy M. (2007) 'Is airline passenger profiling necessary?' in *University of Miami Law Review* Vol 62 No 1 pp.1-57

Salter, Mark B Ed.(2008) *Politics at the Airport* Minneapolis: University of Minnesota Press

Shannon, Victoria "Europe's plan to track Phone and Net use" in *The New York Times* Feb 20 2007, available online at http://www.spiegel.de/international/0,1518,467475,00.html (accessed January 2008)

Sims, Brian (2008) 'Command Structure' Available at http://www.info4security.com/story.asp?storyCode=4119414&sectioncode=10 (accessed March 2011)

Slobogin, Christopher (2008) "Government Data Mining and the Fourth Amendment" *The University of Chicago Law Review* Vol 75 No 1, pp.317-341

Steinhardt, Barry (2004) 'Three Cheers for International Cooperation' Eurozine Available at: http://www.eurozine.com/pdf/2005-10-25-steinhardt-en.pdf (accessed March 2011)

Tanka, Hiroyuki, Rocco Bellanova, Susan Ginsburg and Paul De Hert (2010) *Transatlantic Information Sharing: At a crossroads* Washington DC, Migration Policy Institute

The White House *National Security Strategy for Aviation Security Section II*, 'Risk Methodology', March 2007 available at <http://www.dhs.gov/xlibrary/assets/laws_hspd_aviation_security.pdf> (accessed December 2009)