MIGRATION AND SECURITY: THE ROLE OF NON-STATE ACTORS AND CIVIL LIBERTIES IN LIBERAL DEMOCRACIES

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In an era of growing security concerns and heightened State efforts to curtail immigration to the developed world, Western democracies are increasingly caught between their liberal ethos and their ability to effectively and securely control their borders. An examination of *policy implementation* in the United States and Europe reveals that liberal States have responded to these cross-pressures by: a) reinventing their modes of immigration regulation; and b) adopting strategies which are converging. States have shifted the level of policy-making to *non-State actors*, who have the economic and/or political resources to facilitate or curtail travel, migration and return. These include a complex web of actors incorporated by the State, and the transfer of State functions to non-centralized jurisdictions. Liberal States have been able to extend their realm of action, and overcome certain constraints by changing the gatekeepers at external and internal sites, to include: private (i.e., airlines, travel companies, employers), local (i.e., civic actors, such as churches, elected officials, trade unions), and international/supranational agents (i.e., the EU, Mexico, ICAO). Together they reflect an enlarged 'migration playing field' in an increasingly global world. State agencies have thus been able to solve the control dilemma in ways that can at once appease public anxieties over migration and security, short-circuit judicial and normative constraints and still promote trade and tourist flows.

The expansion of an immigration regulatory playing-field has been evident in the United States and countries of the EU, since the 1980s when immigration began to be linked with law-and-order concerns. These approaches represent a trade-off of certain democratic values, sanctioned by citizens – a willingness to compromise civil liberties and personal freedom for a greater sense of security from immigration, terrorism, and globalization. They are consistent with an older repertoire of mechanisms liberal States employ when security looms large. Security is a powerful issue that motivates voters to transfer such authority to bureaucracies and other non-State actors in the name of law and order. It is important to examine the sources (i.e., public opinion constituencies, media framing) and rationale that inspire these dynamics, as well as the implications for immigration, rights-based norms, and democratic values. Assuming that convergence of these modes has taken place among democratic countries, to what degree are the outcomes similar in the U.S. and the countries of the EU, and why? What are the lessons that liberal democracies may offer each other regarding policy instruments? Does the impact of 9/11 promise more continuity or change?

The following section of the paper deals first with the assumption that September 11th has fundamentally changed the 'playing field' of immigration regulation. It examines the link between migration and security, and investigates the historical context of this link. Sections III and IV assess the extent that liberal States can go in controlling their borders in a liberal era, and identifies the complex modes of regulation that are available to policy-makers under conditions of heightened security threat. The rationale behind these regulatory modes of policy elaboration and implementation are discussed in section V. Finally, the conclusions draw on these trends to say something about the security and democratic consequences of non-State actors in immigration regulation.

A. WHAT HAS CHANGED? NEW WINE IN OLD BOTTLES

On September 11th, the alarm bells of terror reverberated beyond the borders of the United States. The implication of foreign networks was much discussed in the media, raised the specter of populism and led to arguments that liberal democratic governments would be compelled to dramatically rethink their border controls in a global world full of 'people on the move'. A marked increase in bilateral and multilateral activity

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on international migration, that include two UN experts' Coordination meetings, and the launching of an independent Global Commission on International Migration bear witness to the changing nature of migration. In the language of international relations, migration issues have shifted from the technical domain of 'low politics' to those related to security or 'high politics'. The growing tendency to view international migration-related questions through a national security heuristic has also coincided with the re-emergence of anti-immigrant politics on the extreme-right. The question posed especially since the tragic events of September 11th 2001 has been, what has changed?

The link between migration and security is not new. Security in its various forms has assumed various meanings across cultures and time. The traditional security agenda has been embedded in the notion of protection from external aggression, or national interests in foreign policy, and has thus been linked to State sovereignty and identity. The term however has been broadly attached to societal, personal, national, or more basic human security, including economic, physical, health, environmental, cultural and political dimensions (see, the 1994 Human Development Report of the UNDP). A few scholars developed the link between international migration and security as early as the 1980s. While Myron Weiner (1992; 1993) was the first political scientist to address the relationship between immigration and security issues, several scholars indirectly captured this linkage in their work on immigration and refugees in the US foreign policy (Teitelbaum, 1984; Zolberg, 1995). More recently, scholars of European politics have broadened their security-migration focus to include demographic (Koslowski 2000; 2001; Weiner and Teitelbaum, 2001), societal and cultural conflicts (see, Huysmans 1994; Heisler and Layton-Henry, 1993; Lavenex, 1999) as well as identity politics (Waever *et al.* 1993). Although the security ramifications of immigration have thus been evident for a long time, the broad security agenda that has emerged more recently makes clear that there is still no consensus regarding the scope and definition of security as it relates to international migration.

Similarly, the mechanisms States adopt with regards to migration control when security concerns loom large do not appear so new. In face of security and global pressures, States in the post-Cold Wars system are embracing an older repertoire of strategies they employ when seeking more effective immigration control (Lahav 1998; Lahav and Guiraudon 2000). They incorporate and enlist actors at the private, local and international levels in gatekeeper functions. There are two innovations here. First, globalization has afforded migration control an extraordinary degree of sophisticate and extensive new technology. Second, the post-WWII context of liberal judicial norms that States have to overcome in order to pursue these national interests is also unprecedented. That is, formal constitutional guarantees as well as activist administrative and constitutional courts have significantly circumscribed both the authority and the capacity of States to prevent family unification or to dispose of migrants at will (see Schuck, 1998; Legomsky, 1987; Hollifield, 1992; Guiraudon, 2000b; Joppke, 1998). The "liberal epoch" of human rights norms that facilitated humanitarian migration alongside labor recruitment (family unification and asylum) strikingly contrasts to earlier periods. One only needs to recall the expulsions of 400,000 Poles from Germany in 1885-1886 (Herbert, 1990), or the exclusion of Chinese immigrants before the turn of the century in the United States to realize the normative evolution that has taken place in the migration policy domain. Moreover, liberal States concerned with promoting modern trade and commerce cannot unambiguously embrace policies that hinder the movement of people across borders. Free trade requires a degree of openness that impedes calls for tighter border controls (Sassen, 1996).

In an era of growing security concerns, Western democracies are increasingly caught between their global market and rights-based norms on one side, and political and security pressures to effectively control their borders, on the other. The key question is how far can liberal States go in pursuing national security interests?

B. How far can liberal States go?

The extent to which immigration regulation has converged throughout Europe and North America reinforces the commitment towards immigration regulation. The most striking policy developments towards

this goal include tighter border controls, increased visa requirements, readmission agreements, carrier sanctions, accelerated return procedures, employer sanctions, labor enforcement, detention and removal of criminal aliens, changing benefits eligibility, and computer registration systems. These initiatives were evident by the late 1980s, but soared after 9/11. Europe has adopted buffer zones, Eurodoc fingerprinting and Schengen Information System databases, 'safe third country' principles and increasing coordination. In a similar vein, American observers have witnessed the Patriot Law of 2001 and the passage of the Enhanced Border Security and Visa Entry Reform Act in 2002. Direct legislative responses to the terrorist attacks, these acts paved the way for electronic innovations, visa screening, racial and ethnic profiling, acceleration of procedures, unprecedented security checks, the modernization of immigration controls with the latest technology, such as the use of biometrics, the SEVIS database for foreign students, as well as the formation of a new Office of Homeland Security (which brought 22 federal agencies under one umbrella) to coordinate activities with a reorganized INS. The latter represents the first significant addition to the US government since1947, when Harry Truman merged the various branches of the US Armed Forces into the Department of Defense to better coordinate the nation's defense against military threats (US Department of Homeland Security, www.dhs.gov). The largest contingent (40%) is passenger and baggage screeners, a federal job that did not exist before Sept. 11, 2001 attacks, when private companies alone ran airport security. (Chattanooga Times Free Press, August, 26, 2003)

While national legislation and immigration reforms represent the most obvious policy responses to immigration, administrative decisions and policy implementation may provide more practical implications of the character of immigration control. What has gone unnoticed in all these policy developments has been the reliance on third-party, non-State actors who provide services, resources and non-public practices that are otherwise unavailable to central government officials (Gilboy, 1997). More specifically, policy implementation has relied on the enlistment or collaboration (also known as 'burden-sharing' in political jargon) of non-State actors, who have the economic, social and/or political resources to facilitate or curtail immigration and return. They represent efforts of States to extend the burden of implementation *away* from central governments and national borders, and *to the source* of control, thereby increasing national efficacy and reducing the costs to central governments. Most of these processes have relied on reinvented modes of 'remote control' mechanisms that enable States to control migration.

The development of the relationship between States and non-State actors in meeting security goals captures a global era marked by both a political desire to control movement and agents willing and able to play on the link between migration, crime, and security. Thus, any analysis of an enlarged migration 'playing field' needs to go beyond the typical analysis of State policies in terms of legislation and focus on implementation structures. In this framework, we can reconceptualize State and public regulatory modes by identifying the number of levels available to policy-makers in controlling migration.

Figure 1: Non-State Actors in Remote Control Immigration Policy

International

• EU • NAFTA • Schengen • Consulates (visa policy) • Foreign countries	• Airlines • Security agencies · Ship/transport carriers

Public	**Private**
• Local jails • Mayors • Schools/universities • Health care • Detention centers	• Employers • Sponsors • Families • NGOs • Hotels • Schools/universities · Travel agencies

Domestic

Liberal States have been able to extend their realm of action and overcome certain constraints by shifting the liabilities to: international and supranational actors; private actors (through privatization); and local agents (through decentralization). As the next section shows, these strategies are not new; they are reinvented when States migration concerns are most driven by security issues.

C. A COMPARATIVE ANALYSIS

The proliferation of non-State actors in regulating immigration is evident on both levels of policy—immigration (intake) and immigrant policy (integration). Three types of actors – private, local, and international – have been incorporated by liberal States to monitor external and internal sites, including questions of entry, stay and exit of migrants. Despite substantial structural and cultural differences between the EU and US, which mediate policy organization, implementation and effectiveness, a comparative analysis of the American and European cases reveals that policy tools are transferable. It suggests that an international regime on immigration is possible; however, unlike regimes for capital and goods, an international migration regime may be more oriented to protectionism, with some adverse effects on civil liberties.

Private Actors

Private actors, or independent authorities who rely on market forces have become crucial immigration agents in extending the area of what is referred to as "remote control" immigration policy (Zolberg, 1999). These actors include airlines, shipping carriers, transport companies, security services for entry; employer groups for work; universities, propriety schools such as language or aviation facilities, hotels, health care services and civic actors, such as churches, families, trade unions and NGOs for immigrant stays. They also include detention centers, for-profit security services and space for deportation and exit.

Often constrained by international agreements, these actors are either incorporated by the State or contracted out. To the extent that their functions have evolved from contractors into regulators – from the public to the private sphere, we can speak about these processes as a 'privatization of regulation'. The incentives for cooperation are economic; the constraints are sanctions or fines. Thus, with little training investments, private carriers and agencies are able to partake in an enlarged migration control as agents of the State. In return for government cooperation, they are assured a smoother flow of business, trade, labor, and tourism.

A core actor in the enlarged control system at the entry level is transport or carrier companies. This is not new. Carriers have long been obliged, at their own expense, to transport inadmissible passengers back to their countries of departure. Sanctions against ships have been in force in the United States, since the Passenger Act of 1902. However, since the adoption of guidelines established by the 1944 Convention on International Civil Aviation (ICAO), transport companies have been increasingly forced to assume the role of international immigration officers imposed on them by States. The standards of the convention established

the airline's responsibility to ensure that passengers have the necessary travel documents. Apart from ICAO guidelines, many countries have introduced laws that increase the responsibilities of carriers and levy fines against them for non-compliance. In 1994, all EU countries, with the exception of Spain, Ireland, and Luxembourg passed laws increasing carriers' responsibilities.

The abolition of internal borders critical to European integration has been essentially mitigated by the flurry of legislation and implementation of the carriers' liability to check passengers. Indeed, more stringent security checks at airports--of identity cards, tickets, boarding passes, baggage, and so on--have made the absence of passport controls virtually irrelevant. International instruments have further sanctioned the role of States in controlling their borders. In the European Union, member-States refer to their obligations to Article 26 of the 1990 Supplementation Agreement of the Schengen Convention in relying on carriers to serve as immigration officers.

Although private actors have long been incorporated in European policy-making through neo-corporatist arrangements, even in the United States, independent commissions to regulate inter-State commerce had been established by the late 1880s. Devolution of inter-State regulation to expert bodies in the US may be traced back to federal government adoption of the InterState Commerce Act regulating the railways and setting up a corresponding regulatory body (InterState Commerce Commission). The United States Congress, thereby delegated its own power to regulate an important part of interState commerce, namely railway traffic to an agency designed especially for the purpose. This was an important institutional innovation at the federal level (Majone, 1996: 16). It represented the transfer of activities of State interests to private actors. In this way, market activities may be generally regulated in areas which are considered important, and in need of protection as well as control.

Security concerns have laid the grounds for enlistment of private actors in State regulations, and have been justified to compromise certain civil liberties. In the wake of September 11th, the Transportation Security Administration (TSA) has threatened to use its power to issue a security directive to force airlines to hand over passenger information so that the federal government could screen reservation records for possible terrorists (*The Washington Post*, September 27, 2003). These options place private companies in delicate positions, as exemplified by the notorious JetBlue Airways outrage, which has led to a 2003 class action lawsuit on behalf of 5 million passengers, for giving personal information to a Defense Department contractor.[2] Such episodes tap into the ideological conflict that exists between protecting privacy rights and security interests ("Guarding Privacy vs. Enforcing Copyrights," *New York Times*, September 28, 2003). Furthermore, in a corporate culture, travel industry groups have voiced concern that new airport security systems could hurt the industry (CNN, October 29, 2003). Security concerns however have prevailed, and are a powerful motive to justify the incorporation of non-State or private actors who can help with monitoring functions in ways otherwise unavailable to central government officials.

At the internal level of immigration control, the private counterpart to admissions regulation lays in the employment sector, where immigration control may be equally effective. Increasingly, approaches to stem illegal migration at the work site have been developed to extend and redistribute the liabilities of migration control outside of the central State, and make employer groups more significant actors. In the early to mid-1970s, most advanced European countries instituted similar provisions adopted by the French as early as 1926,[3] and have adopted and refined employer sanctions (see Table 2).

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[2]The incident involved the sharing of customer records to a military contractor for a test program to blend the data with personal financial information from another company to spot likely terrorists.

[3] France decreed employer sanctions again in 1976; the United Kingdom adopted legislation prohibiting the harboring of illegal aliens, though not their employment (out of fear of fueling discrimination) in 1971; Switzerland has had anti-harboring statutes since 1931 and adopted an employment statute in 1984; Western Germany first prohibited the employment of clandestine aliens in 1975; the Netherlands did so in 1974, as did Austria in 1981, and Italy, Spain and Belgium have followed suit (see, Miller, 1995).

Table 2: Third Party Non-State Actors in Immigration Regulation (in select liberal democracies)

Country	**Transport Companies** (sanctions)	**Employers** (sanctions)	**Immigrants** (punishment for illegal)	**Civil Society** (sanctions for harboring illegal)
Belgium	Y	Y	Y	Y
Canada	Y	Y	Y	Y
Denmark	Y	Y	Y	Y
Finland	Y	Y	Y	N
Germany	Y	Y	Y	Y
Italy	Y	Y	Y	N
Netherlands	Y	Y	N	Y
Sweden	Y	Y	Y	Y
UK	Y	Y	Y	Y
USA	Y	Y	Y	Y

Strategies for enforcement have evolved over time, and have been marked by both the increase of legal arsenal and the number of actors.

The French approach to stem illegal migration at the work site has been considered a model of emulation for other Western countries, including the United States (see Miller, Report to U.S. Commission on Immigration Reform, 1995). Premised on the assumption that the battle for immigration control would be won or lost at the local level, in particular in industries and places of employment, the French model of department-level commissions, brings together concerned enforcement services, elected officials, and representatives of employers and employees (Miller, 1995: 27). Similarly, the agreement in the 1990s between the U.S. Department of Labor and the Immigration and Naturalization Service to allow labor inspectors to check I-9 compliance represented a step towards the French approach.[4]

There are substantial differences, which derive from conceptual distinctions between European and American systems of labor control. Despite considerable structural variations, in most European countries, the agency with the most labor market expertise, the labor agency, has responsibility for detecting and removing unauthorized workers from the workplace. Europe, for example has a long history of protecting her workers by controlling access to her labor market by illegal migrants. Her labor agency thus regards the

[4] Operation Jobs, begun in Dallas in fiscal 1995 and expanded to 18 States, and Operation SouthPAW (Protect American Workers) in six southern States accounted for most of the 11,000 illegal aliens INS removed from worksites in fiscal 1995 (INS, 1996). Elevated fines, random spot checks, raids, and removals of illegals from select industries known to rely heavily on illegal labor have served to threaten to close some small factories.

removal of undocumented workers as a means of protecting legal workers. In contrast, in the United States, inspectors from the Immigration and Naturalization Service have traditionally been concerned about the workers' legal status, rather than about their wages or working conditions, while the State labor inspectors are concerned about wages but not about the workers' legal status. Over time, controversies involving State labor inspectors who have failed to cooperate with federal officials have led to a rethinking of coordination.

Broadly-speaking, these cross-cultural differences have meant that liabilities have been governed by different conceptual schemes, generating disparate outcomes even when similar policy tools have been adopted. In the United States, worksite sanctions have fallen in the framework of (illegal) migration rather than within the rubric of employment standards. In contrast to France, where employer sanctions have been part of labor laws since as early as 1926, in the United States, before IRCA (1986), illegal aliens were considered to violate Federal law by entering the country and working, but employers were not. Employer sanctions corrected this asymmetry and made the knowing hire of illegal aliens a violation of Federal labor law for the first time. In addition, employers have now been required to verify the status of their new hires by examining a selection from a large variety of documents and keeping records of their examinations. Nonetheless, due to the European system's heavy social safety net, which sets employer payroll taxes and related overhead costs at higher levels than they are in the United States, the fine structure in Europe is often far greater than in the United States (UN Monitoring, 1997). As noted by one observer, the differing motives (i.e., a labor market control measure, employment standard, illegal migration control) give rise to different expectations in each type of case, and thus the measure of "effectiveness" also differs (Papademetriou, 1993: 211).

Although much of the enforcement capacities of work control systems depend on the verifiability of documentation, there are dramatic differences between the U.S. and its European counterparts that stem from different civic traditions and political cultures. Although France for example does not have a mandatory national identification document system, it is believed that over 90 per cent of Frenchman carry a national identity card (Miller, 1994: 26). Lacking in such traditions, American strategies to regulate the worksite have been hampered in addressing the problem of fraudulent and/or counterfeit documents. Moreover, a political culture adverse to business or corporate intervention makes the role of employers less vulnerable to liabilities than their European counterparts. Nonetheless, there are incremental changes on this front. In 1989, the INS revised the "green card" and in 1996, began replacing some of the older work authorization forms with a new "tamper-resistant" Employment Authorization Document (EAD), based on a Social Security number (SSN), and on improved breeder documents to establish identity. The INS also began to develop and test databases and access systems for businesses to use in verifying employment eligibility. In November 2003, new legislation was passed to expand the 1996 law used by employers from six original States to the country-wide level (*New York Times*, November 19, 2003). Under the program, employers can check with the Social Security Administration and the INS to confirm that Social Security numbers and alien identification numbers are authentic.[5] The adoption of a worker authorization system has been viewed as a first step towards a national ID card, and unsurprisingly has come under substantial ammunition from civil rights advocates and those who oppose the expansion of federal government power to give employers permission for hiring. Since 9/11, renewed calls for national identity cards have gained more legitimacy, and public opinion has been more sympathetic to the option.

The system of work-site control of immigration represents a coordinated effort to stem migration at the source, while ensuring a necessary supply of workers needed to maintain a competitive economy. In both Europe (especially Germany) and the United States, there have also been a growing number of tripartite agreements between governments, employers, and trade unions, or coordinated activities that emphasize the central role of employers in immigration control. These agreements have coincided with the reemergence of

[5]Many Democrats in the House of Representatives argued that giving employers access to a federal database with inadequate privacy protections would be an invasion of privacy, and could lead to a nation-wide identification system. Other controversies involved provisions (ultimately removed) that would have allowed the Homeland Security Department to use the program for other verification purposes, or giving States and local governments access to the information.

guest-worker programs, a feature of the initial 30-year post-War period until 1973. At the core of this system are quotas, negotiated between government, employers and trade unions. Although reminiscent of the Bracero program of 1942-64, and its unintended consequences, an amendment to the 1996 US Illegal Immigration Reform and Immigrant Responsibility Act granted temporary work visas for approximately 250,000 foreign farm workers. Such initiatives have been designed to stem illegal migration flows and target sectors with shortages.[6] In interest-matrix terms, these dynamics mean that seasonal workers obtain skills and earn a salary which can then be used on return, in their country of origin. The sending country benefits from the influx of resources and more highly skilled work force. The company hiring these workers profit through lower wage rates and freedom from heavy fines imposed by hiring illegal migrants; and the host country reduces illegal immigration, the costs of border control and resource-draining legal procedures for eventual deportation. In addition, the State can also derive benefit from taxes and social welfare contributions of these temporary or seasonal workers

The devolution to private actors over immigrant control or issues of immigrant stays has emerged in many forms, both officially and unofficially. These strategies are less novel than they are more formally enforced. In the United States for example, foreign students have long been required to sign a waiver permitting their registered institutions to provide information to immigration officials as a condition of most education visas. Nonetheless, while the government stopped asking for this information because of the immense workload of the INS, in the wake of 9/11, 220 institutions reported to have been contacted by FBI and INS agents about information regarding students from Middle Eastern countries (*The New York Times*, November 12, 2001: B8). By 2001, the Student and Exchange Visitor Information System (SEVIS) database was created by the federal government to track foreign students. While the U.S. Department of Homeland Security, which runs SEVIS have promised that their systems would be able to handle the massive influx of work, college officials have been concerned that they as well as foreign students will suffer. (*Chronicle of Higher Education*, August 1, 2003).

In the U.S., before the last breath of the Immigration and Naturalization Service proper in March 2003, the increasing focus on immigration *enforcement*, came at the expense of its *service* component.[7] The Service's functions of *processing* had increasingly been redelegated to churches and trade unions that have operated as go-betweens in legal services, educational programs and information campaigns between immigrants and legislation. Moreover, the absence of INS offices or federal legal services in certain areas of the vast country have contributed to the expansive role of municipal officers, jails, security services and detention centers in regulating migrants on behalf of federal inspectors (Conference on Immigration and the Changing Face of Rural America, 13 July 1996).

States have also shifted the onus of regulation to private individuals and civil actors in monitoring stays through deportation and enforcement of exit rules. The 1996 U.S. bills granted new authority to State and local police officials to detain aliens when there is an outstanding order to depart (see next section) and they imposed increased penalties for document fraud on illegal migrants, such as civil fines and the barring of future entry (a serious penalty for someone with close or nuclear family members). The "contracting out" of detention centers and guards to private for-profit security services, companies, and space has been deferred to private, State, and local actors, with the support of government sums. These trends have coincided with increasing emphasis on detention, and have prompted all types of civil rights criticisms, as well as uprisings at apparently underinspected facilities (*New York Times*, 7 July 1996: A1).

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[6] At the time, the plan was designed to delimit permanent stays by withholding 25 per cent of foreign workers' wages until their return (NY Times, 6 March 1996: 14).

[7] Part of the efforts to redress this discrepancy, the enactment of legislation establishing a new Department of Homeland Security (DHS) abolished the Immigration and Naturalization Service in March 2003. Its functions were transferred to DHS and split into two new bodies: the Directorate of Border and Transportation Security and the Bureau of Citizenship and Immigration Services.

In the U.S., the Illegal Immigration Reform and Responsibility Act of 1996 put into motion a shift in liabilities away from courts and toward individual migrants. Eliminating the authority of federal courts to review decisions by the INS in deportation and legalization cases, the Act essentially stripped both the rights of non-citizens to file complaints against the agency in court; and the rights of courts over what in the past has been considered the last line of defense against abuse of official power. It practically placed the INS beyond judicial scrutiny. Since 9/11, indefinite detention is valid without an initial court hearing, as part of the anti-terrorist campaign.

With the US Patriot Act, Attorney General John Ashcroft put into effect sweeping changes that include the indefinite detention of those who enter the country illegally. While in the past, denial of release required a court ruling that the person was dangerous or would flee if released, since 2001, an illegal immigrant could be denied release if he/she raised national security fears (not necessarily a risk) among US government agencies (*The Boston Globe*, April 25, 2003). The focus on detention of immigrants has been speculated to become a lucrative business,[8] and has comer under attack by civil rights advocates who have repeatedly lost the battle to security interests. Thus, for example, in the US, the Supreme Court has consistently upheld the government's secret detention hearings, where the foreigner was deemed to be a "special interest" case. The Court has rejected appeals from the American Civil Liberties Union over the government's surveillance powers, and those from the international community over the detention of hundreds of prisoners picked up in Afghanistan and held at Guatanamo Bay, Cuba without formal charges or access to lawyers. These decisions were made on the grounds that national security concerns outweigh public access to such hearings (*St.Louis Post-Dispatch*, Missouri, May 28, 2003).

At the core of privatizing regulations for immigrant stays has been the role of the family and private citizens. In the United States, the burden on families has emerged in the form of more restrictive sponsorship rules and practices that are now enforceable. New sponsorship rules affect legal immigrants who are typically sponsored by relatives or by business.[9] Until the recent Immigration bills, sponsors of immigrants were typically required to assure that anyone they brought into the country would not become a 'public charge'. Since these pledges had become unenforceable in court, the more recent bills aimed to make this support binding. Sponsors, rather than taxpayers, are required to provide a more substantial safety net for immigrants by making the sponsor's affidavit of support a legally enforceable document (up to 10 years or the immigrant becomes a citizen). For the first time, the notion of "becoming a public charge" has been carefully defined with the intention of making this a realistic ground for deportation.

Similarly, the controversy in France over a proposed Government law aiming to prevent illegal immigration reflects State efforts to "transform all citizens into police informers" (*New York Times*, 20 February 1997). The new bill proposed that French hosts who have foreign guests on special visas inform the town hall when their guests leave, allowing the French government to compile computer records on the movements of foreigners. Although due to heavy protests the article of the bill was amended, efforts to extend the burden of regulation was shifted to the foreigner, who is required to submit his certificate of accommodation upon leaving the country.

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[8]In Pennsylvania, a 500-bed addition to York County local prison was planned for the explicit rental to the immigration service. One county commissioner reported a profit margin; the cost of $24/day for a $50/day reimbursement (The NY Times, 7 July 1997).

[9] The new immigration bills changed the legal admissions system by increasing the minimum income a sponsor must have to sponsor relatives for admission (to 125% of the poverty line in the Senate bill, and 200% in the House (NYTimes, 28 May 1996).

The role and liabilities of non-State actors in sharing the burden of regulation has developed almost uniformly in the countries of Europe as well as the United States, and are manifest in the use of more stringent deterrent methods such as sanctions (see Table 2). On the one hand, these shifts in liabilities represent an incorporation of private actors in State regulatory functions; on the other they constitute more general trends occurring in other policy areas, namely to shift the externalities of policy-making outside of the central government. Privatization, loosely defined as the shift of a function from the public sector to the private sector, involves a dependence on market forces for the pursuit of social goods, and may turn local actors or contractors into regulators (Feigenbaum and Henig, 1994). Both the incorporation of private actors through sanctions and the privatization of migration regulation through 'contracting out' of implementation functions involve the extension of State control over migration outside and beyond its borders. These strategies which operate *before* the border or at the control site facilitate the movement of tourists and businessman while preventing unwanted migrants. In this way, liberal States can respond to the consequences of globalization: sustained migration pressures, tourism, free trade flows, and global terror networks.

While many of these instruments are not new, their novelty lay in the current context of liberal norms. They are now deployed to circumvent legal constraints absent in the early twentieth century. However, these areas are where the most significant problems occur, as exemplified by the notorious JetBlue Airways episode. They challenge the Western commitment to civil liberties and democratic values amidst a climate of heightened threat.

Local Actors

Local actors too have gained a bit of prestige from their expanded jurisdiction. Through processes of decentralization, national governments have delegated substantial decision-making powers to local elected officials, in ways that have been considered to be exclusionary and detrimental to foreigners' rights. A major reason behind this kind of decentralization is that national elected officials concur and depend on local elected officials, who under financial and political pressure to attract more funds and votes by adopting exceptionally harsh measures against immigrants.

In France, for example, mayors have become actors in migration control through their authority over marital and residential certificates. City halls have the prerogative to inspect the veracity of marriages between nationals and foreigners. A 1993 law granted mayors the possibility to refer a marriage involving an alien to the *Procureur de la République* (State prosecutor), who can delay the marriage for a month and then, if they see fit, prevent it. A 1996 survey on this measure revealed significant geographical diversity in its implementation, and a use of the measure to arrest illegal aliens (Weil, 1997).[10] Since 1982, when the Deferre laws on decentralization were voted in France, mayors have gained in clout and local political debate has intensified even outside electoral campaigns. Mayors in urban areas or in the Southeast, where the National Front has made electoral headway have used their new monitoring role in migration control policy to the fullest (Lahav and Guiraudon, 2000).

In the trend in liberal democracies to use integration policy to affect immigration flows, national governments have increasingly shifted monitoring functions of immigrant stays and rights downwards to local actors. By devolving implementation of such measures as barring the children of undocumented migrants from public schools to local actors, the theory is that undocumented migrants will be discouraged from migrating, or from staying illegally. In France, following the passage of the Act on Immigration Control and Conditions of Entry and Residence of Foreigners (1993), foreigners living in the country illegally no longer

[10] 41.6 per cent of the marriages suspended by mayors involved an undocumented alien (Weil, 1997).

qualify for social security (i.e., child allowances, health insurance, old age pensions, and unemployment benefits) (UN, 1997: 368). In these cases, local governments are bearing the direct costs. In the United States, Proposition 187, and the Gallegly Amendment, measures to bar the undocumented and their children from public schools and welfare programs, while ultimately failing, focused on the liabilities of local actors for implementation. These demands for more local power concur with national plans for restrictions of foreigners' rights. The 1996 Welfare Reform Act marked the end of the sixty-one year-old federal guarantee of cash assistance for the nation's poorest children; it revoked federal benefits like food stamps and Supplementary Security Incomes from non-citizen immigrants, (NY Times, 21 February 1997: 18). This new law also gave States vast new authority to run their own welfare programs with lump sums of federal money. It thus represented renewed efforts to grant States (local actors) more control over traditionally unfunded mandates, creating a mechanism for uneven integration policies among States and regions.

Of course, the incorporation of local actors in migration regulation is not new. In the United States, State and local governments have long regulated the movement of people across legal borders, through the use of criminal laws, vagrancy laws, quarantine laws, registration, and before 1865, throughout the law of slavery (Neuman, 1996). Until the middle to late nineteenth century, States still carried a number of prerogatives in the area of migration, including the rights granted to aliens (Schuck 1998), and the bestowing of nationality (Neuman, 1998). Part of the explanation stems from the fact that States with slave populations wanted control over nationality and hence, it was not surprising that courts rescinded these State rights after the Civil War. Increasingly, during the twentieth century, Supreme Court decisions emphasized the exclusive federal prerogatives in the area of immigration regulation, via the plenary power doctrine, and the dangers of State encroachment. Thus, although some argue that the devolution of immigration policy to States is a growing reality, and a legitimate one, given the handful of States that are major fiscal and political stakeholders of immigration (Spiro, 1994), from a historical perspective, contemporary political demands for a State role in immigration policy is a call to turn back the clock.

In many cases, although the complicity between national and local actors to surveil foreigners have been evident at the informal level, increasingly the delegation of competence has taken a legal forum, through laws and the enactment of circulars, and implemented by decentralization measures. In France, substantial controversy was generated by the prerequisite "housing certificate" administered by city hall in order to be eligible to host a foreigner. The 1982 creation of the certificate became a migration control tool in mayors' hands in 1993.[11] Since the law of 24 August 1993, the certificates could be refused by the mayor after ordering an investigation by the International Migrations Office (OMI). In fact, some mayors refused to distribute the forms or systematically did not deliver them, and over 50% were reported to seek papers not required by law (*Le Monde*, 19 February 1997). Before these changes, there had been a number of instances in which mayors had exceeded their authority to target aliens, but they had been condemned in court. The novelty in the 1990s is therefore not the attitude of local authorities, but the new means that they have been granted to play a role in migration control (Lahav and Guiraudon, 2000)

To be sure, the devolution of mandates, downward to States, municipalities, and local actors, to monitor immigrant stays are old strategies employed when nations look to impose more stringent control over migration. Immigrant policy, long delegated to State and local governments to implement and fund, often with unfunded mandates from federal legislation and court decisions, is marked by increasing formalization of legal controls and responsibilities imposed by central governments. By reinforcing the local authorities' responsibilities and autonomy in immigrant policy, federal governments have been able to effectively enlarge immigration control through burden-sharing exchanges. Still, as legal scholars have argued in the American

[11] Due to heavy protests in February 1997 against the Debre laws, the Socialist parliamentary majority voted to terminate the *certificat d'hebergement*. (see *Le Monde*, December 12, 1997).

case, it is ultimately up to the U.S. Congress to authorize States to play a role in immigration policy, as the latter did in 1996 with respect to welfare benefits. In part, these trends have led to renewed conflicts between federal, State, and local mandates (see Neuman, 1993; Olivas, 1994). Thus, the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, which permitted the INS to train and deputize local police officers to enforce immigration laws has received uneven political reception. In New York City, home to one of the most diverse immigrant populations in the U.S., Mayor Bloomberg, for example, under pressure from immigration groups and the City Council was forced to revise his immigration policy to make it more difficult for city agencies to report illegal immigrants to federal authorities (*New York Times*, September 18, 2003: B1). Such political wranglings are seen not only to heighten turf wars, and contradictory goals of different arms of the State (i.e., the police, judiciary, public administration), but also the lines between national and local mandates (and supranational, in the EU case). The more general implications of decentralization and incorporation of local actors for immigration flows are more diverse local outcomes and uneven integration strategies, which often give the semblance of policy incoherence.

International, Third-State and Transnational Actors

International and transnational actors have become important agents in the State's coordination of migration regulation. There is a misguided tendency to understand the role of intergovernmental groups (such as Schengen in Europe), international conventions or bilateral agreements (e.g., U.S.-Mexico) as constraints to national interests in managing migration. In fact, the collaboration between foreign actors and private and local ones may be interpreted to buttress State interests in securing their borders. In policing and border control, for example, competition between different types of police at the national level makes participation in international fora an important source of domestic recognition, and may be a means of expanding national jurisdiction. The devolution of immigration regulation to these actors beyond the State level has served to extend State control over immigrant rights, and in certain cases, have enabled States to regain some control that may have been lost because of national jurisprudence (Lahav and Guiraudon, 2000).

In Europe, where the movement towards complete free movement of persons is critical for European integration, abolition of checks at internal borders have been somewhat offset by the proliferation of intergovernmental and supranational actors (i.e., the EU 'third pillar', the Ad Hoc Immigration Group, TREVI, EUROPOL, the coordinating Rhodes Group and the Schengen Group) who promote a more effective migration control regime. Bolstered by the European project of regional integration, these actors and types of arrangements have now evolved in the image of the Schengen Group, representative of the administrative culture of traditional immigration decision-making, where decisions have been typically made behind closed doors, with little or no formal debate in a public forum. Many intergovernmental cooperation groups do not have to answer to a more representative body or international courts such as the European Parliament or the European Court of Justice. The lack of transparency of these negotiations not only makes it difficult for certain national actors to oversee the process, but may be used to circumvent even the most liberal national constraints on migration control (Bunyan and Webber, 1995; Guiraudon, 2000a). This proliferation and diversification of instruments used to restrict immigration in Europe are considered to fortify the State apparatus in immigration control, leading some to insinuate evolving images of police States (Pastore, 1991; Bunyan, 1991; Van Outrive, 1990).

Border extensions may be said to exist in Europe as a result of "Schengland," which makes each member country the beneficiary of police screening efforts of the others, long before incomers arrive to national borders. European integration has produced the 'securitization' of internal and external controls through collaborative policy agency work, and the extension of police and gendarmerie activities (Bigo, 1996: Miller, 1995). An empirical study in France has suggested that increased competition for budgets has forced these agencies to develop strategies for the expansion of their jurisdiction by appealing to EU networks, both as a source of legitimacy and efficiency (Bigo, 1996). In an attempt to control illegal migration across Europe's southern borders following the 2002 Seville meeting, Operation Ulysses was deployed among five EU countries (Spain, Britain, France, Italy and Portugal) to coordinate police, customs and navy ships. This

represents the first time that EU members have formally coordinated their efforts in this way, and according to Spain's interior minister, Angel Acebes, the operation "could be and should be" the precursor to a common European border police force (NY Times, January 29, 2003).

To a less degree, but in the same vein, the joint United States.-Mexican border patrol taskforces have attempted to coordinate strategies to deal effectively with illegal migration as NAFTA has been consolidating. Institutional reforms are closely linked to the deployment of control strategies and philosophies or norms that reflect a major shift in operational strategies from illegal apprehensions *after* crossing (i.e., "Operation Hold the Line" in El Paso, 1993, and "Operation Gatekeeper" in San Diego, 1994), to deterrence *before* entry. These changes in control sites essentially represent a border shift *outward*. In the U.S, success has been marked by a significant reduction in petty crime and street vending, which has been said to derive from strong public support (even within the Mexican-American community) and the perception of enhanced public safety (as a result of the discontinued chases of border patrol and undocumented aliens near the border (Passel, 1996: 14).

While negotiations between American President Bush and Mexican President Vicente Fox on the eve of September 11th 2001 for 'an amnesty program came to a crashing halt, a new focus was directed at the Canadian border. The revelation that several hijackers entered surreptitiously across the Canadian border led the US to opt for some type of "joint security perimeter" in lieu of compromising a friendship and economic interest by resorting to physical and administrative barriers along the border (*New York Times*, September 27, 2001). In an effort to get the Mexico deal back on the table, resumed talks with President Fox have also proposed the inclusion of Mexico along with Mexico into a security perimeter that covers all NAFTA territory.

The fortification of external controls is reinforced by these kinds of international agreements, cooperation, and the creation of transnational spaces. International agreements have also generated substantial visa harmonization among EU countries, and have expanded the role of third States in fortifying external controls. The joint visa list of the EU States established through the Dublin Convention in 1993, imposed visa requirements on travelers from 73 of the 183 non-EU States. A list of 110 countries whose nationals require visas to enter the EU region was established at the EU Justice and Home Affairs Council meeting on 25 September 1995.[12] In addition to the uniform pan-European entry visa regime, where "problem countries" are identified, countries such as Germany, station immigration officers at overseas airports to ensure that documentation is correctly checked (The Economist, 24 August 1996: 40). These measures may not only be interpreted as a border shift *outward* (i.e., 'Schengenland', or U.S-Mexico joint border patrols and shift from apprehension after crossing to deterrence before entry). These strategies also mean that governments may rely on "remote control" immigration policy or the creation of international zones (i.e., in airports) where intervention by lawyers and human rights associations is almost impossible and thus foreigners' civil rights are less likely to be respected in these juridical "no man's land" or transnational spaces.

International cooperation and the incorporation of third-State actors have also created transnational spaces in the employment sector, where they may circumvent national protection of foreign workers' rights (Lahav and Guiraudon, 2000). One critical trend in shifting levels and liabilities in the employment domain comes in form of bilateral contracts or work agreements between EU or Eastern European firms, who are authorized to move with their foreign workers in order to complete a project. In these cases, the workers are physically present in France, for example, but they cannot claim pension or social insurance benefits nor be protected by labor law there (Faist, 1994). In these ways, States have been able to delegate functions out to other States

[12]An additional requirement for airport transit visas was adopted on nationals of ten countries from which many asylum claims originated. These included Afghanistan, Ethiopia, Eritrea, Ghana, Iraq, Iran, Nigeria, Somalia, Sri Lanka and Zaire.

and third-party actors, and thus shift levels of policy elaboration upwards to international and transnational political spaces

The potency of international actors and rules in sanctioning States to adopt all types of restrictive migration policies has greatly been underestimated by theorists of globalization and policy-makers, who have overlooked the role of international agreements in bolstering national interests. Indeed, when national interests coalesce, favorable conditions leading to the pooling of sovereignty may lead to migration coordination in order to "upgrade common interests" (Keohane and Hoffmann, 1990). European regional integration for example represents a prevalent supranational order which consists of strong States committed to pooling sovereignty, based on restrictive migration policies and more effective control. Unlike international regimes for capital, goods, and services, international cooperation on migration matters may be less than "liberal," serving to *inhibit* immigration rather than to promote it. Indeed, up to date, cooperation predominantly exists in the prevention of migration (Münz, 1996: 14). While a shift in regulatory functions upwards to international or foreign State actors is in an infant State, it is becoming increasingly institutionalized as reflected in the 1997 Amsterdam and 1999 Nice Treaties in Europe (see Baldwin-Edwards, 1997; Lahav 2004). The proliferation of transnational and international actors, agreements and cooperation may be interpreted as national efforts to more effectively control migration. Through international and transnational cooperation, liberal States have managed to use foreign actors to fortify and extend their borders, well before immigrants even arrive, and even after, by circumventing more liberal national jurisprudence. The interests of international actors, particularly civil servants and emergent institutions, are to expand the agency's recognition and jurisdiction, while gaining more national prestige back at home. For States, of course, it offers an essential border shift outward.

D. Cost-benefit Analysis

Actors at different levels have different incentives and constraints in participating in such collaborative arrangements with the State. For local authorities such as elected officials, the extension of their domain of jurisdiction may often coincide with a scapegoating of foreigners when budgetary crises emerge. Financial or political compensation may serve as both a carrot and a stick for vigilant policy implementation. While the constraints for private actors are sanctions or fines, the incentives are economic. Thus, with little training investment, private carriers and agencies (i.e., airline and shipping companies) are able to partake in an enlarged migration control system as agents of the State. Private security agencies expand their range of action through their participation in migration control with little training investment. These strategies provide the State with the technological and resourceful means to effectively differentiate between the 'legal' passages of travelers or economic tourists and would-be-overstayers or migrants (Weber, 1998). At the international level, civil servants and third-State actors may enhance the degrees of freedom of national policy-makers while reaping the benefits of legitimacy and participation through expanded jurisdiction. The result may include enhanced political capacity of States to all types of migration pressures, and more effective State legitimacy. The expenses are clearly imposed on individual migrants, at the price of liberal migration regimes. Cases of stowaways thrown abroad to avert heavy carrier fines, reversals of due process of law, human right violations, corruption and abuse abound. The risk to the State in these devolution processes lays in the *appearance* of expropriated control, a gamble that lends support to more nationalist movements of the extreme right.

Since 9/11 however, this risk has been tempered by heightened security threats. That is, new norms have emerged because public perceptions of national interests are likely to shift under conditions of heightened threat. As cross-cultural research shows, when immigration policy becomes linked to physical security, the public favors more restrictive immigration policies to coalesce around a common national interest (Hammar, 1985). Indeed, there appears to be a link between countries that have experienced terrorist attacks and border restrictions, as illustrated in the Israeli case which has cyclically prevented Palestinians from working in the country (Bartram, 1998). In addition to physical insecurity, threats to national community and identity have

been shown to accompany general immigrant intolerance and rejection (Lahav 2004; Inglehart, 1997). Threat increases ethnocentrism, in-group solidarity, and xenophobia. It promotes intolerance and a willingness to forego basic civil liberties, and leads to closed-mindedness (see Huddy, Feldman, Lahav and Taber, 2003 for overview).

Indeed, public opinion polls have revealed that since September 11th, the role of civil liberties and human rights have been seen as a price of shifting security concerns – a trade-off of certain democratic values, sanctioned by citizen or a willingness to compromise civil liberties and personal freedom for a greater sense of security from immigration, terrorism, and globalization (Davis and Silver, 2002; Huddy, Feldman, Lahav and Taber, 2003; Gibson, 1996, 1998; Sniderman *et al*., 1996) In the United States, since 9/11, Americans have reported support for racial and ethnic profiling of Arab Americans, greater FBI invasion of citizens' privacy and a close monitoring of legal immigrants (Polling Report 2001). They are more likely to entertain national identity cards and to be inconvenienced by surveillance schemes for more security.

E. CONCLUSIONS

To what extent have security concerns opened up new channels and opportunities for State regulation over migration? In view of the evidence presented above, it appears that liberal democracies can go very far in the pursuit of their national security interests. Well before 9/11, but particularly after, with more public support, liberal States have been oriented not only in rhetoric but also in capacities toward more restrictive immigration policy. In efforts to reconcile the cross-pressures between economic liberalism and security protection, States have delegated implementation and enforcement functions upwards to intergovernmental forums and cooperation, downward to local authorities, and outward to non-State or private actors.

Under heightened threat, immigration policy has shifted to older, more nuanced forms of control. The image of governments simply making and then implementing policy simplifies the process of contemporary migration practice. Establishing bureaucratic instruments through which to implement and monitor policy is a major activity, and such acts are especially important. However, equally fundamental to increased State commitment to control immigration is a tendency towards pursuing burden-sharing norms that rely on international/transnational, private and local actors and spaces. This is not only elaborately developing in the EU countries, which have a rich history of neo-corporatist arrangements, but also in the United States, which has openly called for "burden-sharing" in its Report of the Commission on Immigration Reform (1995). Consistent with the EU trend of liberal democracies, US policy (similarly 'constrained' by NAFTA considerations) is increasingly pursuing inter-agency coordination not only within and among its own national institutions, but also with civil rights groups, outreach programs and international police forces, of which the coordination of Mexican-US Border Patrols has been most notably promising.

While in all cases, these strategies represent the revival of old approaches towards immigration regulation, their adoption in the 1990s reflect a formalization and institutionalization which rely on such third party actors, as industries, services, companies, local governments, and particularly other States--as extensions of State borders. These arrangements are based on mutual bargaining exchanges: the promotion of movement, particularly for legal migrants, favoring businesses, and certain social sectors; for assistance in combating and deterring illegal migration. By bringing in private actors, for example, the State itself may be said to reverse the process closer to its favor and diffuse the costs of immigration--more specifically, that of a hostile anti-immigrant public opinion. The State may thus diminish the political fall-out of migration controls through a diffusing strategy that relies on a variety of third-party actors.

In an era of a prevail security agenda, liberal States can go fairly far in regulating migration not only because of the help of non-State actors, but also because of public support. Under heightened conditions of threat, the ability of governments to tie immigration to law and order, and to frame the immigration debate in

that context has yielded restrictive and exclusion outcomes. They are sanctioned by their public and by the modes of regulation to compromise their rights-based norms.

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