

# The Limits of Power and the Complexity of Powerlessness: The Case of Immigration<sup>1</sup>

By Saskia Sassen\*

My concern here is exploring the limits of power and the complexities of powerlessness—the direct or mediated resistances that the powerless can deploy knowingly or not.<sup>2</sup> Immigration policy enforcement is one institutional domain for exploring these issues, especially in the case of powerful countries and undocumented workers, among the most vulnerable subjects in those same countries. We can think of this case as representing an instance of highly formalized power (the U.S. state) and an instance of extreme powerlessness (undocumented immigrants). To gain some closure on this vast subject, I will focus on the tensions between current policies for controlling immigrants and what we can think of as new elements in the immigration reality. The particular policies that stand out involve the militarizing of border control. The particular changes in the immigration reality can be thought of as bits—as in digital bits—that are getting assembled into a somewhat novel reality constituted through both well-established conditions and emergent bits whose status is often unclear: they may or may not support that long-standing reality. Here I confine myself to certain bits in a multi-bit reality in the making which are unsettling basic alignments on which immigration policy rests. They also reveal the limits of even the most powerful state in the world to get its way, and they show that in certain settings, powerlessness becomes complex. Let me illustrate with two recent cases.

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<sup>1</sup> For a full development of the issues raised in this paper beyond the case of immigration see the author's recent book. SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (2006).

\* Saskia Sassen, formerly the Ralph Lewis Professor of Sociology at the University of Chicago, will be joining the Committee on Global Thought and Department of Sociology at Columbia University in Fall 2007. She has written extensively on immigration, cities, global capitalism and electronic markets. Her most recent books are *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (2006) and the edited volume *DECIPHERING THE GLOBAL: ITS SCALES, SPACES AND SUBJECTS* (2007).

<sup>2</sup> Power and powerlessness are, clearly, complex categories subject to diverse forms of theorization. This essay in a way can be seen as an exploration of the limits of the Weberian notion of power—power as an actor's or institution's capacity to impose its will. Elsewhere (2006: chs 3, 4, 8 and 9) I have elaborated on the work of constructing the condition we call power, and thereby emphasized the variable success and effectiveness of that work of constructing power and the durability of its results. *See* SASSEN, *supra* note 1, at chs. 3,4,8,9. There (2006: chs 2, 6, 7, and 8) I have also elaborated the notion that powerlessness is constructed and hence variable; from there, then, comes the possibility that at one end of that variable powerlessness can be elementary, and at another end, complex. *See* SASSEN, *supra* note 1, at chs 2, 6, 7, 8 This variability does not simply depend on the individuals: for instance, the powerlessness of a specific undocumented immigrant will be quite elementary in the context of a California commercial farm, but can become complex in a city like New York, Los Angeles or Chicago.

Mexico's (former) President Fox's decision to meet with undocumented Mexican immigrants during his visit to the U.S. in May 2006 amounted to the making of a new informal jurisdiction. His actions did not fit into existing legal forms that give sovereign states specific types of extraterritorial authority. Nonetheless, his actions were not seen as particularly objectionable; indeed, they were hardly noticed. Yet these were, after all, unauthorized immigrants subject to deportation if detected, in a country that is now spending almost \$2 billion a year to militarize border control. But no INS or other police came to arrest the undocumented thus exposed, and the media barely reacted. Further adding to the novelty was the fact that Congress was considering making illegal immigration a felony, mandating imprisonment. And yet, not even in this political atmosphere did any arrest take place. Nor did the press comment on the juxtaposition of elements.

A second case is the large demonstrations on the streets of Chicago, Los Angeles and other U.S. cities in March and April of this year, which included many self-declared undocumented claiming the right to have citizens' rights. Whether some of these may have been actually legal immigrants or citizens is beside the point. We do know that many were indeed unauthorized. At a time that our Congress was discussing legislation to criminalize illegal immigrants, these undocumented individuals responded by going into the streets and protesting in very public ways. Their faces appeared on hundreds of front pages and television screens, but none were arrested—again, against a backdrop of militarized borders and a policy aimed at apprehensions.

Beyond the fact of the lack of intention to arrest these undocumented immigrants, the events point to a second—and perhaps more significant—bit of a reality in the making. There were signs that the claim-making was more about the right to have rights than about the desire to become American citizens *per se*. American citizenship becomes a channel for becoming a rights-bearing subject, a more foundational condition than American citizenship *per se*. There are multiple instances, also, in other countries, of an emerging claim for a similar sort of denationalized citizenship.

Both instances also signal that although undocumented immigrants are powerless and highly vulnerable, in certain settings they gain a measure of autonomy from powerful actors that intend to control them, and that they even can reshape the policies of powerful countries. Some of the most powerful countries in the world have re-gearred their public bureaucracies to control these powerless vulnerable actors. In this process, they have been willing to sacrifice their standing as states following the rule of law and compliant with human rights norms. In the long run, this is a very high price for “liberal democracies” to pay—and all in order to control extremely powerless and vulnerable people who only want a chance to work. In the process, they have also lost credibility and revealed the limits of their power, no matter how weaponized their borders.<sup>3</sup>

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<sup>3</sup> In using the term “weaponized”, I seek to emphasize a particular component of the militarized border—the materiality of border control. By contrast, the word “militarized” represents a form of control, which includes but cannot be reduced to the weapons being used. One reason for making the distinction is the role of the armaments industry in this shift, a subject I briefly address later in this essay.

This emergent multi-bit reality does not fit neatly under transnationalism nor under post-nationalism. It does not necessarily extend beyond the territory of the nation-state nor does it presume the end of the state. And even in cases where it might fit, we lose something when we explain it in those terms. Perhaps it is more helpful to see this reality as a variety of micro-processes inside the nation-state that are beginning to denationalize the national as historically constructed. They are not confined to immigration, although this essay utilizes that regime as its lens. Their partial and fragmented character means these processes can coexist with a renationalizing of policy and of political discourse in multiple domains, including immigration.

*The limits of militarized border controls given new realities*

Against this larger context, the increasingly militarized U.S./Mexico border is a sort of natural experiment to examine the interaction of great material power and great human vulnerability.

Even as the U.S. government seeks to further weaponize the border with Mexico to control undocumented immigration, the bits of this new immigration reality multiply. This multi-bit reality functions within specific settings insofar as migration flows are far more institutionally and geographically structured than is often assumed.<sup>4</sup>

The border itself is a good case to make legible the fact of multiple bits within which we need to situate government border control policy. There is a strong contrast, and possibly contradiction, between the project of militarizing border control and the reality of the border zone. In 2004, the latest year for which we have comprehensive figures on all the following variables, 175,000 legal immigrants entered the U.S. from Mexico, along with 3.8 million visitors for pleasure, 433,000 visitors for business, 118,000 temporary workers and dependents, 25,000 intra-company transferees and dependents, 21,000 students and dependents, 8,400 exchange visitors and dependents, and 6,200 traders and investors.<sup>5</sup> On the other hand, it is estimated that today there are approximately three million Americans living in Mexico, mostly undocumented; 19 million Americans travel there each year as visitors. U.S. foreign direct investment in Mexico now totals \$62 billion annually, and trade with Mexico grew by a factor of eight from 1986 to the present. More difficult to measure, but still very real, are the multiple cross-border networks connecting people from each side of the border which go beyond physical border crossings. These include the variety of transnational processes extensively described in the literature with terms such as

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<sup>4</sup> A few basic figures help illustrate this geographic structuring; I develop the institutional aspect in this article. About 30 countries account for over 75% of all immigration; eleven of these are developed countries, with over 40% of all immigrants. More generally, the latest estimate is of a world wide immigrant resident population of between 185-192 million in 2005. This is under 3% of global population, but up from the 2.1% of world population in 1975; and up from the 175 million or 2.9% of world population estimated for 2000. IOM, *WORLD MIGRATION 2005: COSTS AND BENEFITS OF INTERNATIONAL MIGRATION* (2006).

<sup>5</sup> See DOUGLAS S. MASSEY, *BACKFIRE AT THE BORDER. WHY ENFORCEMENT WITHOUT LEGALIZATION CANNOT STOP ILLEGAL IMMIGRATION* (Center for Trade and Policy Studies, Cato Institute, 2005).

transnational households and communities,<sup>6</sup> as well as digital transactions that begin to constitute a cross border electronic space.

Thus the reality of the border is not quite a line that divides but a partly denationalized fuzzy zone. It binds as much as it divides, and perhaps more so. Thereby, it enters in tension with the explicit aims of U.S. immigration policy, and the latter in turn enters in tension with other major U.S. policies, notably trade, off-shore manufacturing, and tourism. The U.S. has indeed the resource and the power to insert a militarized barrier and to ensure night vision to border patrols in cars and helicopters.

We are left, however, with a significant subsequent question: can this powerful government—willing to go all the way to control that border—ensure that it will work as it wants it to?<sup>7</sup>

Many of the facts are by now familiar, but some are not. After 15 years of increased militarizing of the border, we have an all-time high in the estimated unauthorized immigrant population (ca. 11 million). The annual INS budget rose from \$200 million in 1996 to \$1.6 billion in 2005.<sup>8</sup> The number of Border Patrol officers increased from 2,500 in the early 1980s to around 12,000 today. *Backfire at the Border* finds a sharp increase in the costs per arrest and falling arrest rates. Before 1992, the cost of making one arrest along the U.S.-Mexico border stood at \$300; by 2002, that cost had grown by 467% to \$1,700, and the probability of apprehension had fallen to a forty-year low, despite massive increases in spending on border enforcement. Finally, the escalation of border control has raised the risks and costs of illegal crossing, which in turn has changed a seasonal circulatory migration—with workers leaving their families behind—into a family migration and long-term stays. The *Border* study established that in the early 1980s, about half of all undocumented Mexicans returned home within twelve months of entry. By 2000, the rate of return migration stood at just 25 percent.<sup>9</sup>

In brief, the results were the opposite of the government's aim: border militarization did not reduce the probability of illegal crossings on the U.S.-Mexico border, but instead forced unauthorized immigrants to stay longer than they wanted and to bring their families even when they would rather not.

There are three peculiar absences in the enforcement effort in the U.S. which are also part of the larger ecology within which militarization has failed to achieve its aims. One is the absence of a parallel "escalation" in the visa application process: because of understaffing it can still take ten years for a lawful applicant to get proc-

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<sup>6</sup> This literature is particularly vast in the case of North American scholarship on Western Hemisphere immigration. For a brief discussion, see SASKIA SASSEN, *A SOCIOLOGY OF GLOBALIZATION*, (2007), particularly ch 6.

<sup>7</sup> On the question of control as a political choice see Peter Andreas, *The Escalation of U.S. Immigration Control in the Post-NAFTA Era*, 113 *POL. SCI. QUARTERLY* 591 (1998-9). See also generally CORNELIUS ET AL., *CONTROLLING BORDERS* (2005).

<sup>8</sup> As of 2007, the INS function is now part of the Department of Homeland Security. Thus just about all the available data comes from the prior entity is correctly referred to as the INS.

<sup>9</sup> See MASSEY, *supra* note 5.

essed and we know that many are constrained, often for family reasons, to enter illegally because they cannot wait for years. Second, the budget for inspections of workplaces suspected of violating the law remains minimal and employers sanctions are rare.<sup>10</sup> Third, the budget for tracking visa over-stayers remains minimal and apprehensions are few.

At least part of the reason for these absences seems to me rather straightforward. There are four critical differences between these three options and investment in border control. They concern jobs, buying materiel, lobbies, and propaganda.

On jobs, regardless of political party, the U.S. government repeatedly has shown a strong reluctance to create more jobs for inspecting workplaces, for tracking visa-overstayers, and for processing green-card applications. Over the past twenty years especially, none of these efforts have seen the sharp budgetary increases allocated for controlling the border with Mexico. On buying materiel, the sharp increases in the INS budget have benefited the makers and sellers of armaments and surveillance technology. A third difference concerns lobbying efforts in Congress. Armament makers and large corporate employers in agri-business, meat-packing and other sectors known to employ significant numbers of unauthorized immigrants, operate powerful lobbies. INS inspectors and green card processors, and large sectors of the workforce, do not. Finally, there is the electoral-and-public opinion machinery: weaponizing a border makes for better footage and a better media story than does hiring more INS inspectors and green card processors.

There are winners and losers in this policy framing. The winners include armament makers, some large corporate employers in particular sectors of the economy, various types of lobbies, employers of undocumented immigrants generally insofar as employers' sanctions are not seriously enforced, and the growing numbers of smugglers whose fees and whose business have increased sharply as U.S. policies have made border crossing riskier and more difficult.

The losers include citizens whose taxes are paying for a far larger and costlier border control operation that is not even reducing illegal crossings—the intended policy outcome for supporting all those Congressional authorizations for budget increases.

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<sup>10</sup> Only about 2 percent of the INS budget has been allocated to employer sanction enforcement over the last several years; and few sanctions have been imposed since the passing of the legislation as part of the 1984 Immigration Reform and Control Act (IRCA). In 2005, U.S. Immigration and Customs Enforcement, which succeeded the INS, strengthened enforcement efforts: it won 127 criminal convictions in 2005, up from 46 in 2004, and won \$15 million in settlements from Wal-Mart and 12 subcontractors for violations. To address the failure of employers' sanctions enforcement, the government has started the Basic Pilot Program, part of Homeland Security. It is an electronic search machine that combines Social Security and immigration databases to verify an employee's status. While today's program is small and voluntary, with about 6,000 employers enrolled, it can be extended to each of the country's approximately 8 million employers. Violations of the law would subject employers to stiff fines, with jail sentences for repeat offenders. However, the program is problematic in technical and legal terms. This combination has created a mixed opposition—from civil rights organizations to big business. A Government Accountability Office report issued in August 2005 criticized the program for its inability to identify fraud, for flaws in the databases, and for the possibility that employers will abuse the system.

The losers also include the migrants themselves whose crossings have become far more difficult, dangerous, sometimes deadly as well as costly given the greater need for using a smuggler. They also include the INS inspectors who have not seen sharp increases in their numbers and resources to enforce employers' sanctions, and the overworked and understaffed processing units at the INS.

But the problems go deeper. The emergent multi-bit immigration reality briefly and only partially described earlier is an increasingly active socio-political ecology<sup>11</sup> that undermines traditional notions of border control. Further, this emergent reality is partly fed and strengthened by the fact that the estimated 500 annual deaths among illegal crossers due to current U.S. border control policy are becoming unacceptable on normative grounds—whether social justice norms, human rights, or religious values.

### *The state itself has changed*

While the state continues to play the most important role in immigration policy making and implementation, the state itself has been transformed by the growth of a global economic system and other transnational processes, such as the institutional thickening of the human rights regime, and EU institutions in the case of the EU.

Three particular changes in the positioning of national states could have a potentially significant impact on the role of the state in immigration policy making and implementation.

One is the relocation of various components of state authority to supranational organizations, including the institutions of the European Union, the newly formed World Trade Organization, or the newly instituted International Criminal Court with its potentially universal jurisdictions. In the specific case of migration there is also the renewed role of the IOM in managing migration and refugees flows, and to some extent the OECD.

Strictly speaking we should include a whole series of other actors as well. One instance is the financial and banking sector that handles immigrant remittances. This sector is not an insignificant actor if we consider that worldwide immigrant remittances reached \$230 billion in 2005.<sup>12</sup> Further, to mention something typically overlooked, the banking and financial sector plays a key role in the larger migration web. The Inter-American Development Bank (IADB) estimates that in 2003, immigrant

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<sup>11</sup> In using this term I am partly playing off a concept that is today much used in analyses of the new interactive communication technologies: the notion is that these technologies become performative (deliver their “goods”) in the context of social systems or configurations that go well beyond the technology itself. See SASSEN, *supra* note 1, at ch 7. In the context of the border I seek to emphasize that the border can be activated into diverse specific formations, not only the one that has to do with dividing and closure.

<sup>12</sup> World Bank, *Global Economic Prospects: Economic Implications of Remittances and Migration*. Washington, DC: The World Bank, 2006.

remittances generated \$2 billion in handling fees for the financial and banking sector on the \$35 billion sent back home by Hispanics in the U.S.<sup>13</sup>

Second, the privatization and deregulation of public sector activities has brought with it a type of de facto (rather than formally explicated) privatization of various governance functions that were once in the public bureaucracy.<sup>14</sup> This privatization of governance is particularly evident in the internationalization of trade and investment. Corporations, markets, and free trade agreements are now in fact “governing” an increasing share of cross-border flows, including the regimes for cross-border professionals described earlier.

Third, the numbers and kinds of political actors involved in immigration policy debates and policy making in Europe and the U.S. are far greater than they were two decades ago: the European Union; anti-immigrant parties; vast networks of organizations in both Europe and North America that often represent immigrants, or claim to do so, and fight for immigrant rights; immigrant associations and immigrant politicians, mostly in the second generation; and, especially in the U.S., so-called ethnic lobbies. The policy process for immigration is no longer confined to a narrow governmental arena of ministerial and administrative interaction. Public opinion and public political debate have become part of the space wherein immigration policy is shaped. Whole parties position themselves politically in terms of their stand on immigration, especially in some of the European countries.

The emerging realities about immigration and the state described in these two first sections amount to a larger ecology within which border controls function. That larger ecology can unsettle, if not undermine, the foundations of border controls.

### *When bits of the national get denationalized*

There is more movement towards a novel approach in handling immigration than the statements and speeches of national politicians in the U.S. and Europe would make you think. U.S. immigration policy, with its overwhelming focus on border control, rests precisely on not factoring in that emergent immigration reality and the particular state transformations described in the first two sections. Here I can only limit myself to the narrowest definition of these issues.

One particular angle into this matter is to understand whether the renationalizing of the politics of membership precludes the denationalizing of a growing set of components of the larger immigration reality. The partial denationalizing of the national

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<sup>13</sup> The IADB also found that for Latin America and the Caribbean as a whole, in 2003 these remittance flows exceeded the combined flows of all foreign direct investment and net official development assistance.

<sup>14</sup> Elsewhere I have examined how when public sector firms get privatized, and, more generally, when economies are deregulated, regulations do not simply disappear. Rather, they get transformed into private corporate specialized services (accounting, legal, etc), and get oriented towards the private interests of the firms and markets at issue. See SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (Princeton University Press, 2d updated ed. 2001) (1991).

is to be distinguished from transnationalism and from post-nationalism because it does not happen beyond the realm of the national or in more than one country. Its distinctive character is that it happens deep inside the thicket of the national. It may at times intersect with or be one moment in a larger transnational dynamic. In that sense, identifying this denationalizing multi-bit reality adds to, rather than replaces, the types of processes identified in the rich literatures on transnationalism and post-nationalism.

Some of the developments in the EU can be interpreted as an instance of denationalized portable rights. It might be interesting to provide some detail because it may well signal the beginning of a process of which we see elements in the U.S. At the heart of this process is the shift of rights to individuals as individuals rather than as citizens of a specific country. Immigrants are incorporated into various national and EU-level systems of rights as a result of EU law. This EU-level format for rights shifts the question of “immigrant integration” away from an emphasis on the “foreignness” of immigrants and what to do about it (such as the requirements for learning the language and the culture of the host country increasingly demanded by national governments of EU member states), and begins to move towards the work of mixing EU level law/policy (like the *ECHR* and the *Social Charter* of the Council of Europe) with the decisions of national judiciaries, that is to say with a particular component of the state rather than “the” state as such.<sup>15</sup> One possible outcome is that integration (including the necessity to learn the language of the country of residence) shifts from being *the* requirement for acquiring rights to a responsibility for a rights-bearing immigrant.

A far thinner version of denationalized rights can be seen in the portable mobility rights given to top-level professionals through the major free trade agreements as part of the globalization of trade and investment in services. These are rights inscribed in WTO, NAFTA and dozens of other trade agreements shaped by the new realities launched in the 1990s. There is a mini-immigration policy in each of the major chapters in these treaties (chapters on a broad range of services, notably, finance, business services, telecommunications, particular types of engineering, and so on). Professionals in each of the specific sectors are given the right to reside in any signatory country for at least three years and enjoy various rights and protections. Staff from major supranational organizations such as IMF and WTO also enjoy special protections that will hold even in their own country of citizenship.<sup>16</sup>

While the fact of such portable mobility rights is rarely a focus in the migration literature, these professionals are a class of “migrant workers” who are formally endowed with multiple rights. This fact is obscured by the placement of these mobility rights in the treaties under specific economic sectors and descriptions that avoid the language of migration. These are rights that originate in international agreements

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<sup>15</sup> David Jacobson and Galya Benarich Ruffer, *Social Relations on a Global Scale: The Implications for Human Rights and for Democracy in* DIALOGUES ON MIGRATION POLICY 25-44 (Marco Giugni and Florence Passy., eds. 2006).

<sup>16</sup> For a development of this aspect, see SASSEN, A SOCIOLOGY OF GLOBALIZATION, *supra* note 6, at ch.6.



and require signatory states to fulfil them. Their fulfilment entails a partial denationalizing of the national state's power to grant rights.<sup>17</sup>

The filtering of supranational norms into national law can take many forms.<sup>18</sup> The fact that national systems are critical for the implementation of non-national types of rights (whether those inscribed in free trade agreements or in the human rights regime) is not the only mechanism. A different type of filtering is the growing weight of international norms in national courts and in national law, and more generally, in domains once reserved to the exclusive authority of national states. While this does not amount to postnationalism or transnationalism, the filtering of non-national norms does involve a partial denationalizing of at least some components of national law.<sup>19</sup> It all happens within the state apparatus and often remains coded in the language of the national.

Positing matters as an either/or (as in either national or global) is far less valid today than it was even 10 years ago. The past decade has seen significant changes, not only in the EU but also in a country like the U.S., one of the most closed and “nationalist” in the world. Even the U.S. Supreme Court has in the past few years acknowledged that it needs to consider not only international but also foreign law in its interpretations and decisions.<sup>20</sup> Specifically, when it comes to human rights norms, the U.S. has seen sharp growth in the use of these norms in national courts, and it has seen the federalizing of these norms through rather informal processes that make these norms part of customary practice, eventually enabling their federalization—their becoming national law.<sup>21</sup>

*Any policy bits to match the new immigration reality?*

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<sup>17</sup> A detailed examination of these issues can be found in SASSEN, *op.cit.*, chaps. 5, 6, and 9).

<sup>18</sup> *See, e.g.*, Peter, J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L. J. 1411 (1997); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998).

<sup>19</sup> For instance, to mention just one of the more recalcitrant EU members, in 2000 the UK incorporated the bulk of the European Convention of Human Rights into domestic law. The British Parliament adopted the Human Rights Act of 1998 in November of 1998; it became effective in the UK in October 2000.

<sup>20</sup> *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 577 (2005) (noting that “the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishment’”, and citing various international propositions to support the ruling that the death penalty constitutes unconstitutional cruel and unusual punishment for individuals who committed murder when they were under the age of 18); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing the European Court of Human Rights in a decision overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had permitted criminalization of consensual gay sex).

<sup>21</sup> Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L. J. 1379 (1997)

Accepting the fact of a new emergent immigration reality and the serious limitations and even unsustainability of militarized borders does complicate governments' efforts to control immigration. The EU offers some interesting options, even though EU member states are foundationally different from the U.S. in their political culture.

Over the past two decades, the EU has actually accumulated a series of innovations that move it towards governing, rather than controlling, immigration *inside* the EU. This move towards governing is gaining strength even as national governments in the EU continue to speak of unilateral control. Yet when it comes to immigration from outside the EU, strengthening control is what the EU has been gearing up to for the past decade. We can learn something positive from the EU's internal efforts, and, in a way, the EU can learn something negative from the U.S. border control policy—how not to do it.

One foundational outcome from years of EU negotiations that can illustrate the specificity of the EU approach and its contribution to notions of governing rather than controlling immigration is the 2003 Treaty of Amsterdam.<sup>22</sup> It formally allows a shift of immigration policy and its coordination out of the third pillar, where it gets handled as part of justice and home affairs, to the first pillar, whose legal provisions become part of European Community law and which are binding on each member state. Further, it is possible to argue that since individuals will have the legal capacity to invoke first-pillar laws and bring them to bear against member states, the changes of the Amsterdam Treaty may give the judiciary, here the European Court of Justice (ECJ), more authority over immigration as well. The Treaty calls for enforcement of non-discrimination principles within member states, with enforcement through the ECJ. The Treaty's formal commitment to human rights could strengthen the ECJ's authority over member states and contribute to strengthening the notion of rights-bearing individuals who can move across the member states with their portable rights.

More generally, beyond human rights there is a far larger case to be made: multiple different types of international law are becoming part of the fabric of national law, both through legislative law making and through use in judges' interpretations. This contributes to partly denationalize aspects of national law. Thus one of the foundational transformations lies in the extent to which a good part of the EU's project inhabits and gets structured inside the complex institutional apparatus of the state. Similarly, in the case of the U.S. much of globalization gets structured inside the state. In both cases, this often happens in the language of the national—national law, national economic regulations, national monetary policy, and so on. We need to decode this language of the national rather than take it at face value: though formulated as national, these structurings may have little to do with the national as historically constructed.

Finally, a few words on borders. Borders are institutions, and as such they are undergoing change and stress. In my research I have tried to track the formation of a whole range of novel types of bordering capabilities—types of controls that are not

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<sup>22</sup> Treaty of Amsterdam, Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, O.J. (C 340) 1 (1997).

embedded in the notion of geographic borders as produced in the historic process of nation-state formation.<sup>23</sup> These bordering capabilities do not pivot on geographic border controls. They are highly technical capacities which have multiple institutional locations beyond the “border” *per se*. For instance, in global finance, there are multiple such bordering capabilities (many inside financial institutions rather than in government offices) that have replaced the older traditional national borders. Free trade agreements certainly open up countries, but multiply processes of certification at point of production, again not the typical border. When “borders” are looked at through these lenses one can see a wide range of possibilities. The sharpest, and most developed case at this time, when it comes to these new bordering capabilities and people flows are the portable rights of the new transnational professional class. These rights are derived from free-trade agreements, discussed earlier, as well as the IMF and other institutions deeply engaged in global processes; as rights they become operative inside the countries that are signatories. There is no similar regime for working-class migrations today, but it is one possible regime in the future, perhaps as part of a flexibilizing of migration flows (which would enable return and circular migrations).

This paper has examined the institutional insertions of the immigration question in a far larger and complex map than current immigration law can fathom. We need more such close examinations in order to understand the micro-shifts that are amounting to a new immigration reality. This new immigration reality comprises a variety of bits. These include changes in the position of the state in a world that is not only increasingly interdependent but also one where the national is itself being partly denationalized through state action. This begins to unsettle the distinction of national-foreign, as epitomized by Fox’s visit described earlier and by more foundational shifts, such as the institutionalizing of the human rights regime and claims for rights made by unauthorized immigrants in all major immigration countries. Immigration is beginning to play on a far broader register than that represented by the “immigrant” in her relation to immigration policy narrowly defined. This opens up a whole new research agenda that is not concerned with the familiar issues of geographic border controls and the binaries of inside/outside. Such analyses dislodge the immigration question from narrow national versus foreign dimensions as made emblematic in militarized border control. It helps expand the analytic and policy terrain within which to examine the question of immigration, immigrant rights, and the governing of immigration.

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<sup>23</sup> For more detail see SASSEN, *TERRITORY, AUTHORITY, RIGHTS*, *supra* note 1, at ch. 9.