



# SEEKING A BETTER LIFE: HUMAN WELFARE OF MIGRANTS IN IRREGULAR SITUATIONS IN THE UNITED STATES AND EUROPE



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SEEKING A BETTER LIFE  
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**Thesis:** *Today, studies regarding social rights need to be reconsidered and extended in light of emerging themes and issues presented by new migration trends. The United States and Europe, the two destinations often chosen by migrants, have very different views and policies around social rights. One of the most pressing issues in immigration studies is which protections should be extended to irregular or undocumented immigrants. The United States, a destination for significant numbers of irregular migrants in the world, do not explicitly recognize many rights for undocumented immigrants, especially those social rights requiring public expenditures. On the contrary, in many European countries, undocumented immigrants are formally entitled to social rights merely because they have human rights. These two different views lead to opposite policies. In both contexts, social rights remain one of the most important ways to solve many problems of undocumented migrants. However, social rights need to be reconsidered as tools for development and participation of poor and marginalized people essential to the common good, not as mere entitlements or mere human rights. The ambition of this article is therefore to help understand this gap by comparing laws, integration politics, and policies from these two different macro areas of the world.*

**Topic:** *recognize the need for a paradigm change and suggest a new way of thinking about social rights for immigrants.*

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## INTRODUCTION

Does national economic welfare consider the wealth of natives alone? Do people who migrate from poor to wealthy countries deserve a “better life”? What is the social protection of non-nationals who are without permanent legal permit in a foreign country? Is it acceptable to place irregular migrants completely outside any notion of social solidarity?

Immigration is surely a major issue in the politics of industrialized countries as well as one of the most recurrent subjects in social science works. The issues arising from irregular immigration are complex as they encompass every aspect of human life (education, work, healthcare, security, crime, etc.). Irregular migration is an empirical phenomenon, embedded in a complex matrix of social processes and mechanisms involving both sending and receiving countries and the spaces in between<sup>1</sup>. Modern legal research on migration has been focusing mostly on its national and international aspects without an extensive, comparative approach. These studies reveal a complexity in the unauthorized migration of the early twenty-first century<sup>2</sup>. Nation-states approach the issue of undocumented migrants differently than in the past. New strategies reveal the emergence of new legal status recognition for the future<sup>3</sup>.

The ambition of this article is therefore to contribute to bridging this gap - comparing laws, integration politics, and policies from two different macro areas of the world. Part I is dedicated to an overview of two cases from both the countries we chose to compare. The first is a case from the US. It concerns the law the state of Arizona enacted in 2010 to solve problems related to illegal immigrant. The second is an Italian constitutional case in which the Italian State sued before the Constitutional Court a law Tuscany Region passed to mitigate the presence of undocumented immigrants in its territory. Part II presents the cases studied and provides an overview of the approach that both American and European legal systems have to the issue of undocumented aliens. Part III discusses social rights approach

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<sup>1</sup> See Michael Bommers & Giuseppe Sciortino, *In lieu of a conclusion: Steps towards a conceptual framework for the study of irregular migration*, in *FOGGY SOCIAL STRUCTURES: IRREGULAR MIGRATION, EUROPEAN LABOUR MARKETS AND THE WELFARE STATE* 213, (Michael Bommers & Giuseppe Sciortino, eds., 2011).

<sup>2</sup> SCOTT D. WATSON, *THE DECURITIZATION OF HUMAN MIGRATION: DIGGING MOATS AND SINKING BOATS* (2009).

<sup>3</sup> LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006).

highlighting the differences among the three most different ways to deal with the extension of these rights to immigrants: economic approach; humanitarian approach; relational approach.

### I. IRREGULAR IMMIGRATION AS A CHARGED ISSUE

Reviewing theories regarding social issues arising from irregular migration need not be exhaustive in order for us to understand such phenomenon and the related consequences in depth. Irregular migration is a relatively young concept, as it became frequently used only over the last two decades, but only recently has it gained such prominence<sup>4</sup>. Therefore it should be treated as a rather new or late-modern feature<sup>5</sup>. It first emerged after the First World War contemporarily to the postwar process of redefining borders. This process involved a revival of legal provisions for the deportation of unwanted immigrants living in America<sup>6</sup>. Years later, after the Second World War, not only the US but also many countries across Europe began to tackle massive immigration<sup>7</sup>. Migrations usually flowed under recruitment schemes. In Germany, Netherlands and France for instance, people could easily regularize their immigrant position after placement.

This situation changed after the recession of the late seventies and eighties, when almost all industrialized countries started to abandon their recruitment policies and attitudes to easily grant work permits, as national workforce was privileged. Only throughout the eighties and nineties did all OECD countries impose regularizations and visa. Afterwards, an increasing number of countries followed this example<sup>8</sup>. This process was the pilot for the new legislation on immigration aiming to declare all undocumented

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<sup>4</sup> The phenomenon of illegal immigration is normally referred to the inability, or unwillingness, of developed nations to manage the countries' labour market needs with an appropriate immigration policy. See, Alejandro Portes, *Introduction: toward a structural analysis of illegal (undocumented) immigration*, *International Migration Review*, 470 (1978).

<sup>5</sup> Historians agree that the term illegal or irregular migrants meaning 'aliens illegally present in the country' was only created in the first years of the XX Century. See MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 3 (2004).

<sup>6</sup> Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1924-1965*, 21 *Law and History Review* (2002).

<sup>7</sup> Martin Baldwin-Edwards, *Towards a Theory of Illegal Migration: historical and structural components*, 29 *Third World Quarterly*, 1452 (2008).

<sup>8</sup> OECD, *Trends in International Migration: Continuous Reporting System on Migration*, (1990), available at

immigrants as an offence to be prevented either by administrative or by criminal procedures.

Requests from international organizations led many countries to renew their law on immigration. In 1986 the US Congress passed the Immigration Reform and Control Act (IRCA)<sup>9</sup>, including a section declaring illegal employment of undocumented immigrants. Italy, a country with a long history of mass emigration from the late XIX century until the end of the XX century, began to introduce its first immigration laws between 1986 and 1989 with several norms aimed to deter and expel irregular immigrants.

During the last two decades, governments of western countries have been actively re-thinking their immigration policies in principle. Although these countries have exerted a great deal of effort in better regulating and understanding the effects of undocumented immigration, they still lack a comprehensive immigration policy or do not have legislation well prepared to deal with undocumented immigrants. The growing sentiment considering immigration only as an externality of globalization and as a mere problem to solve does not help the enactment of a more comprehensive legislation concerning irregular migration<sup>10</sup>.

To understand the importance of the legal prospective I have decided to start with two examples of this difficulty emerging in two different cases.

#### A. *United States of America v. the State of Arizona*

The first case is the recent *Arizona v. United States of America*<sup>11</sup>. As set forth above, in the US there is a great concern about effects of unauthorized immigration. Many states have recently declared the will to enact their own legislation in order to enforce federal legislation on immigration. Most of them have also passed a law to anticipate the enforcement of federal's immigration law<sup>12</sup>. These states' statutes now authorize cooperative law enforcement and impose sanctions that consciously parallel federal law<sup>13</sup>.

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<sup>9</sup> Pub.L. 99-603, 100 Stat. 3359, enacted November 6, 1986.

<sup>10</sup> See Catherine Dauvergne, *Sovereignty, migration and the rule of law in global times*, 67 *The Modern Law Review* (2004).

<sup>11</sup> 567 U. S. – (2012)

<sup>12</sup> See MO. REV. STAT. § 577.680 (2010); UTAH CODE. § 76-9-1003(B) (2011); INDIANA CODE. § 11-10-1-2(a)(4) (2012); Illegal Immigration Reform and Enforcement Act of 2011. H.B. 87, Article 5(b) (Ga. 2011); An Act Relating to Illegal Immigration, H.B. 56., Section 12(a) (Ala. 2011). An overview of this legislation could be found in Patrick J. Charles, *Weighing the Constitutionality of State Immigration Verification Laws in the Wake of Arizona V. United States*, 27 (2012), available at SSRN: <http://ssrn.com/abstract=2119809>.

<sup>13</sup> Cases and LAWS

One of the most important examples of a statute reflecting a comprehensive effort to deal with the disproportionate impact of irregular immigration is the amendment of Arizona Senate Bill 1070 signed into law on April 23, 2010.<sup>14</sup>

The legislative intent of this act, set forth in Section 1, is to “make attrition through enforcement of the public policy of all state and local government agencies in Arizona”<sup>15</sup>. The provisions of the law are intended to work together to discourage and deter “the unlawful entry and presence of irregular aliens and economic activity by undocumented aliens in the United States” (Section 1). Arizona’s Bill aimed to discourage irregular immigration by making it a crime under state and federal law and by inviting state authorities to watch out for irregular immigrants.

In particular, Section 2 of SB 1070 requires a reasonable attempt to be made to determine the immigration status of a person during any legitimate contact made by either an official or agency of the state or a county, city, town or political subdivision (political subdivision) if any reasonable suspicion exists that the person is an alien who is unlawfully present in the U.S. In addition, Section 2 prohibits any official or any agency of the state and of any other political subdivision from being prevented or restricted from sending, receiving or maintaining an individual’s immigration status information or exchanging that information with any other governmental entity for the official purpose of determining eligibility for any public benefit, service or license provided by any federal, state, local or any other political subdivision of Arizona. SB 1070 also includes others provisions about federal law enforcement, trespassing by unauthorized immigrants and transporting and employing undocumented immigrants. Section 3 creates a new misdemeanor. It aims to punish anyone staying in Arizona without a valid immigration document. Section 4 declares it is unlawful for a person to intentionally engage in the smuggling of human beings for profit or commercial purpose. Section 5 concerns the work of undocumented aliens. It also makes a state misdemeanor for “an unauthorized alien to knowingly apply for work as an employee or independent contractor”. Section 6 allows a police officer to arrest someone, without any warrant, in case the officer believes that this person has committed – at some point in time – a crime

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<sup>14</sup> Since 2005 Arizona has been demanding to the Federal Government a strong enforcement of federal immigration law. Before passing this law, former Governor of Arizona (Richard D. Lamm) declared that his state was assigning millions of dollars of its budget each year to incarcerate, and to provide healthcare, education and other benefits to irregular immigrants who entered and reside in the US country without a legal permit.

<sup>15</sup> See Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 Tul. J. Comp. & Int'l L. (2007).

that could cause him to be deported. Sections 7, 8, and 9 are related to issues of work, smuggling and license to drive.

Before Arizona's SB 1070 went into effect, the US sued the state of Arizona in Federal District Court with the request to declare the new law unconstitutional because it violated the Supremacy Clause on the ground that it was preempted by the Immigration and Nationality Act ("INA") and that it violated the Commerce Clause. The US also filed a motion for injunctive relief seeking to enjoin implementation of SB 1070 in its entirety until a final decision is made about its constitutionality. The District Court granted the United States' motion for a temporary injunction in part, enjoying enforcement of Sections 2(B), 3, 5(C), and 6, on the basis that federal law preempts these provisions. Arizona appealed the grant for injunctive relief, arguing that these four sections are not preempted.

In April 11, 2011 United States Ninth Circuit Court declared that the District Court did not abuse its discretion in finding that Sections 2(B), 3, 5(C), and 6, are invalid. The Ninth Circuit Court used several arguments in order to declare that federal law always preempts these provisions<sup>16</sup>.

First of all, the Ninth Circuit began by rejecting the above mentioned interpretation given by Arizona on its own statute, and interpreting instead as to maximize the number of situations in which state law allows state authorities to contact federal officials. Then the Majority relied on precedent composed of preemption analysis cases. Judges use these precedents to declare: "Congress intended for state officers to systematically aid in immigration enforcement under the close supervision of the Attorney General – to whom Congress granted discretion in determining the precise conditions and direction of each state officer's assistance". Moreover, with the same argument, the Court said that by significantly expanding the circumstances in which Congress has allowed state and local officer to arrest immigrants, SB 1070 exceeds the scope of federal authorization for Arizona's state and local officer to enforce the civil provisions of federal immigration law. The Court brought in public policy when it examined what consequences the law will have and whether these consequences will help federal immigration policy. First, the Court said: "by imposing mandatory obligations on the state and local officers, Arizona interferes with the federal government's authority to implement its priorities and strategies in law enforcement, turning Arizona officers into state-directed DHS agents".

Second, regarding the problem of norms criminalizing undocumented work, the Court highlighted another political argument when it recalled the Congress' affirmative choice to avoid criminalization of work as a measure

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<sup>16</sup> United States v. Arizona, 641 F.3d 339, 351 n.10 (9th Cir. 2011).

to discourage immigrant employment. In addition, the Court spoke about the detrimental effect on foreign affairs and the negative potential of this law to lead to 50 different state immigration schemes.

Arizona State appealed the decision of the 9<sup>th</sup> Circuit before the US Supreme Court. The decision of the Supreme Court of the US, which was released on June 25<sup>th</sup> 2012, struck down Sections 3, 5 (c), and 6 and upheld Section 2 (B). In upholding that lone section, the Court found that there were adequate standards in place, including the law's ban on racial profiling, which saved it from being invalidated on its face<sup>17</sup>.

The opinion of the Court – written by Justice Kennedy<sup>18</sup> – recognized that the United States government has a broad and undoubted power over the subject of immigration and status of aliens. The Court relied on precedent composed of Executive Branch power to ensure enforcement policies concerning relations with other Countries. They start with *Toll v. Moreno*, and *Hines v. Davidowitz*. The Court used these precedents to recognize federal governance of immigration as “extensive and complex” and made a political argument when it argued that discretionary decisions involving policy choices bear on Nation's international relations.

Turning to the specific provisions, the Court barred Arizona from enacting Section 3, which makes it a crime to be without a valid immigration paper. As Justice S. Alito said in his dissent, the Court observed in *Hines* that Congress had “provided a ‘standard for alien registration in a single integrated and all-embracing system’ and that its intent was ‘to protect the personal liberties of law-abiding aliens through one uniform national registration system”.

The Majority also struck down Section 5 (C), concluding that States may not “attempt to achieve one of the same goals as federal law – the deterrence of unlawful employment – it involves a conflict in the method of enforcement.

Finally the Court declared pre-empted Section 6. The decision forbids States to set up “its own immigration policy” that would lead to deportation of undocumented aliens who have committed crimes, unless federal government explicitly asks for such help.

Differently from the other Sections, the Court upheld Section 2 (B). The Court declared that this provision is not unconstitutional on its face – but

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<sup>17</sup> Kevin Johnson, *The Debate Over Immigration Reform Is Not Over Until Its Over*, SCOTUS BLOG(2012), available at <http://www.scotusblog.com/2012/06/online-symposium-the-debate-over-immigration-reform-is-not-over-until-its-over/>.

<sup>18</sup> The Court held decision five-to-three. Justice A. Kennedy was joined by Chief Justice John Roberts, along with Justices Breyer, Ginsburg, and Sotomayor. Justice A. Scalia, C. Thomas, and S. Alito wrote three separate dissenting opinions. Justice E. Kagan did not participate in the case. She recused herself, presumably because she was involved in earlier stages of the case while she served as the Solicitor General of the United States.

this part of the law may be unconstitutional as applied, so the Court remanded the matter to the lower courts. The Supreme Court did not rule out that Section 2 (B) could be pre-empted in terms of its application – the Court did not shield the norm from subsequent civil rights litigations. The Majority believed that there was a very narrow way in which this law might be applied in a constitutional fashion. Although there is a basic uncertainty about what the law means and how it will be enforced, the Court declared that “[w]ithout the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume § 2(B) will be construed in a way that conflicts with federal law”<sup>19</sup>.

As the dissenting opinion of Justice S. Alito shows precisely<sup>20</sup>, the practical matter now is that Section 2(B) is difficult to apply in a way that does not violate any right. The Supreme Court stated that the law could be applied constitutionally only when Arizona law enforcement officers contact U.S. Immigration and Customs Enforcement (ICE) without detaining a person any longer than necessary to carry out a non-immigration-related reason for the stop, detention, or arrest.

Saying that Arizona will be permitted to go ahead and try to apply Section 2(B), the Court left almost intact the “racial profiling question” – can State immigration verification laws be found unconstitutional on racial profile issues? On this problem the Court’s opinion could be interpreted suggesting a test to examine the law’s text: “[i]f the law’s text doesn’t impose ancillary burdens and serves the purpose of deterring unlawful immigration, it is constitutionally permissible. Conversely, if the law doesn’t impose ancillary burdens outside of what federal law already prescribes, it is pre-empted<sup>21</sup>”. Notwithstanding this, even if the law would pass the constitutionality test, it does not preclude the possibility that enforcing the law could raise questions of race, ethnicity or country of origin. In any case, the risk for racial profiling could potentially arise in the enforcement of any law, not just state immigration verification laws.

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<sup>19</sup> Moreover, at this stage Arizona has not yet had a chance to prove that its law enforcement officers can do that, so they should be given a chance to try.

<sup>20</sup> In his opinion S. Alito suggest a way to mitigate the risks that citizens, lawful permanent in this country will be detained: “Arizona could issue guidance to officers detailing the circumstances that typically give rise to reasonable suspicion of unlawful presence. And in the spirit of the federal-state cooperation that the United States champions, the Federal Government could share its own guidelines. Arizona could also provide officers with a nonexclusive list containing forms of identification sufficient under § 2(B) to dispel any suspicion of unlawful presence. If Arizona accepts licenses from most States as proof of legal status, the problem of roadside detentions will be greatly mitigated”.

<sup>21</sup> Cf. CHARLES, 7.

From the very outset, it has been clear that the Supreme Court's verdict has determined the fate not just of Arizona's law, but also of similar measures in other states. With the present decision this problem has been narrowed – is it possible to consider pre-empted any similar state immigration verification law? Some scholars suggest that since the “overwhelming majority of state immigration verification laws require a federal determination of immigration status before the person may be detained by state officials<sup>22</sup>”, interpretation and application of texts is becoming crucial for the constitutionality of any states' law.

Even when we foreclose that the aim of laws as Section 2 (B) is not allowing an intrusion into the federal sphere, the question “what is the real target of these statutes?” remains unsolved.

In my opinion there are two political aims in this law to be highlighted here.

The first is a *broad* political aim. Despite the fact that the Court trusts the importance of immigration policy for the Nation's foreign relationships, upholding Section 2 (B) sounds like an act of trust for “cooperative” behavior among States and Federation in order to apply immigration laws. In this way it is true the conclusion reached by Justice A. Scalia that on its face, Section 2 (B) “merely tells states official that they are authorized to do something that they were, by the Government's concession, already authorized to do”.

The second aim is much more related to the Court's opinion. Arizona statute seems likely to make it so difficult for irregular immigrants to remain in the US that they would choose, in a horrible phrase, to “self-deport”<sup>23</sup>. Opting for this solution, Arizona – as well as the other States' law – pretends to be entitled to have “its own immigration policy”, especially when federal immigration policy has been enforced in too lax a way. In this sense it is much more expressive than other explanations of the conclusion reached by Justice A. Scalia in his dissent about Section 3, when he said: “[w]hat I do fear [...] is that ‘federal policies’ of non-enforcement will leave the States helpless before those evil effects of illegal immigration that the Court's opinion dutifully recites in its prologue [...] but leaves unremedied in its disposition”.

Given these premises, it is clear that under the conflict between Arizona and the Government there is more than a “policy” conflict. The Supreme

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<sup>22</sup> See id. at, 10.

<sup>23</sup> This conclusion is not so far distant from the reality. According to the Pew Hispanic Center Mexicans are now leaving the US in greater numbers than they are entering it. See Jeffrey Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends*, 2010, <http://www.pewhispanic.org/2011/02/01/unauthorized-immigrant-population-brnational-and-state-trends-2010/>.

Court has probably opened the door to the scrutiny of new legislation on immigration. Probably proliferation of new laws will force the Federation to approve within the next months – probably right after the Presidential election – a comprehensive immigration reform that will be capable of overcoming the *status quo*.

*B. Republic of Italy v. Tuscany Region*

The second selected case is a judgment given by the Italian Constitutional Court in 2010<sup>24</sup>. The Italian State raised before the Constitutional Court a question concerning the constitutionality of a Tuscan Regional Law regarding the “acceptance, integration, participation and protection of foreign nationals” (lawfully and unlawfully present in Italy) on the grounds that it:

- a) infringed the State’s legislative competence over immigration;
- b) failed to comply with the fundamental principles set out in State legislation;
- c) purported to establish new powers to establish relations with international organizations.

The Constitutional Court ruled the question partially inadmissible and partially groundless. According to the opinion of Constitutional Court, seeking to accept foreign nationals in accordance with the principle of solidarity and equality the regional law could not be declared unconstitutional. Article 2 provided that “specific initiatives shall be put in place also in favor of foreign nationals who live in the Region, subject to the limits specified under this Law”. Articles 6 provided that “all persons who live in the Region, including those with no residence permit, may receive urgent and non-deferrable social security services necessary in order to guarantee respect for the fundamental rights guaranteed to every person under the Constitution and international law”.

The defense of the State argued that by regulating proper initiatives in favor of immigrants with no lawful residence, this provision is likely to facilitate the stay of foreign nationals who are not legally present in Italy, and therefore it is pre-empted by state’s provisions regulating the entry and residence of immigrants (according to the Italian Constitution this competence falls under the exclusive competence of the State legislature). The contested regional rule is claimed “to grant a right to foreigners irregularly present in Italy to a range of services not identified in detail,

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<sup>24</sup> Judgment number 269 of 2010

reserving to the Region the task of setting the criteria according to which the urgent and non-deferrable nature and contest is to be identified, thereby giving rise to a parallel social security system for foreigners not lawfully present in Italy” in breach of Italian constitutional principle.

The conclusions of the Court could be summarized in two parts.

First of all, the Constitutional Court rejected the interpretation of this Law as enacted against a legislative backdrop aimed at favoring the full integration of all citizens of EU. The regional legislation does not infringe upon the State’s legislative jurisdiction over relations with the EU, since it is limited to guaranteeing also to citizens of new Member of EU those services due to them under the terms of EU law obligations.

Second, the constitutional judges rely on precedent cases about the entitlement of fundamental rights for foreigners. Specifically the Court says that the non-national is “entitled to all fundamental rights that the Constitution acknowledges as vested in all persons and has in particular specified, with reference to healthcare” (judgment no. 148 of 2008)”. Moreover, there is “an irreducible core of the right to health protected by the Constitution as an inviolable sphere of human dignity, which requires that the creation of situation with no protection which may be detrimental to the implementation of that right be prevented”. This core of the right to health care must be granted to foreign nationals, irrespective of their situation as regards the provisions regulating entry into and residence in the State (judgment n. 252/2001).

The interpretative argument made by the Court upheld the contested regional provision as related to the protection of health care for every person. This Law was enacted in accordance with the backdrop composed by the fundamental principles relating to the protection of health laid down under State legislation. By seeking to guarantee also to irregular immigrants the fundamental health and social security services, the Region exercises its own legislative competence<sup>25</sup>.

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<sup>25</sup> Article 2(4) of the Regional Law was also challenged on the grounds that, in providing that “the initiatives provided for under this Law shall also be extended to citizens of the new Member States of the Community, insofar as compatible with applicable legislative provisions, without prejudice to rules providing for more favorable treatment”, introduces a measure concerning Community citizens, falling under the State’s exclusive legislative jurisdiction over matters pertaining to relations with the European Union, and also contrasts with the principles laid down in relation to the “right of asylum and the legal status of citizens of non-Member States of the European Union”. The Court judged this question “groundless”. The regional legislation has been judged “does not in any way infringe the State’s legislative jurisdiction over relations with the European Union, since it is limited to guaranteeing also to citizens of new Member States of the Community those services due to them under the terms of Community law obligations and relating to matters under their jurisdiction – whether shared or residual – attributable to healthcare, education, access to employment and housing and professional training”.

### C. Terminology

Irregular migration as a category is somewhat odd because ultimately it is an epiphenomenon of migration and citizenship policy. As many observers argue, irregular immigration is produced (social construction). First, because there can be no illegal immigration without immigration policy<sup>26</sup>. Second, because illegal migration as well as the migration process is the product of micro and macro factors shaping “migration industry” – including “legal/illegal and formal/informal activities and their interaction with the demand-side actors of the social process of international migration, such as governments, employers, migrants and their network and advocacy organizations”<sup>27</sup>.

By looking at the use of words a clear definition of irregular immigration can be difficult. Although no term is perfect, and “illegal” is most commonly used in immigration laws of the United States to refer who is present in a nation state without proper authorization under immigration law<sup>28</sup> and it is largely predominant in EU measures and documents, this word raises three problems. First, because it is used normally as a recall for prejudice/xenophobia; the imaginary of “illegality” as danger plays a major role in the understanding of this phenomenon: people suffocating in the back of lorries, of unseaworthy vessels in the Mediterranean or Timor seas, or people from Central or South America attempting to cross Mexico-US borders. Second, because the predominant claim among legal scholars reveals that nobody can be illegal in an absolute way. If a person comes into conflict with national law, that individual becomes a subject of international law<sup>29</sup>. Third, both the term “illegal” and “irregular” are matched by the

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<sup>26</sup> See Richard Black, *Breaking the convention: Researching the "illegal" migration of refugees to Europe*, 35 *Antipode* (2003).

<sup>27</sup> RUBÉN HERNÁNDEZ-LEÓN, METROPOLITAN MIGRANTS: THE MIGRATION OF URBAN MEXICANS TO THE UNITED STATES 154-156 (2008).

<sup>28</sup> See, e.g., 8 U.S.C. § 1356(r)(3)(ii) (2006) (“expenses associated with the detention of illegal aliens”); 8 U.S.C. § 1366(l) (2006) (“the number of illegal aliens incarcerated in Federal and State prisons”). Another phrase that is used throughout the immigration laws of the United States is “alien not lawfully present in the United States.” See, e.g., 8 U.S.C. § 1229a(c)(2) (2006) (“the alien has the burden of establishing... (B) by clear and convincing evidence, that the alien is lawfully present in the United States”); 8 U.S.C. § 1357(g)(10) (2006) (“for any officer or employee of a State or political subdivision of a State... (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”). A more comprehensive identification of the use of terms like “illegal”, “undocumented”, “irregular”, and “unauthorized” has been made by KOBACH, 155.

<sup>29</sup> See BLACK, 34.

“volatility” of the subject as a social and political issue<sup>30</sup>. The attempt to see irregular immigration as a single issue is immediately undermined by the diversity of the people and situations to which it refers.

With all these caveats, in place of “illegal immigration”, the use of the adjective ‘undocumented’ or ‘unauthorized’ or ‘irregular’ immigrants might be more appropriate<sup>31</sup>. The expression un-documented, characterizing specifically the condition of these persons, appears to be more specific and accurate. An “undocumented” alien is a person of foreign origin who travels from a country to another irregularly, i.e. without authorization, or stays in the receiving country on an expired visa.

Along with undocumented I shall use also “irregular migration” as a concept covering a number of rather different issues. Three are immediately apparent: a foreigner arriving clandestinely on the territory of a state; a foreigner staying beyond his or her permitted period of entry and residence; a foreigner working when not permitted to do so or in a manner inconsistent with his or her immigration status. Normally these categories are implicit rather than explicitly stated in law.

Another important definition to explain is that of “social rights”. With this term we refer to those rights strictly related to the human welfare of people, such as health care, education, social security and condition of work. For the purpose of this article, I am chiefly concerned with a large subset of social rights: rights related to the conditions of workers, right to health care, education, housing, social security, etc. Even so focused the expression “social rights” can be used in different ways. In a legal sense these rights are both enacted in constitutions and recognized in international law in different ways, each one meant to entitle people to be included and to participate in the “social life”<sup>32</sup>.

These rights are at the root of the social experience of persons and imply the recognition of those relations enabling people to live together. In this sense social rights are related to human welfare and are the “institutional mode” in which it is pursued.

#### *D. Scope and methodology*

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<sup>30</sup> David W. Haines & Karen E. Rosenblum, *Introduction: problematic labels, volatile issues*, in *ILLEGAL IMMIGRATION IN AMERICA: A REFERENCE HANDBOOK* 4, (David W. Haines & Karen E. Rosenblum, eds., 1999).

<sup>31</sup> THOMAS A. ALEINIKOFF, ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 1291 (6th Edition ed. 2008).

<sup>32</sup> See Antonio Baldassarre, *Diritti sociali*, XI Enc. giur., 3 (1989).

Writing this text I was guided by the following problems. We are living in a moment in history when people can easily move in and out of home-countries in search of work, peace, health, education, etc. During the last decades, movement of people from undeveloped to developed countries has become more and more frequent. For people living in Latin America, North Africa and Asia, many countries like the United States, England, Germany, Australia, etc., have become the first “work providers”<sup>33</sup>. In addition to legal residents, there are other persons who live and work outside their home countries without either residence or permit in their new state of residence. These persons, in most cases, have left their home country for reasons related either to poverty or to political persecution. The real consistence of this phenomenon is not known in depth.

In this article I will start from the problem of the accession of irregular immigrants to social rights in the US and in Europe. My text is an attempt to interlace positive law, jurisprudence opinions and conceptions of social rights. More precisely I shall treat social rights as an empirical phenomenon and then I will analyze these empirical phenomena from three alternative points of view: the nationalist view, the humanitarian and the relational one.

Given this objective my aim in this article is twofold.

First, I will try to understand what kind of social problems undocumented immigration generates across the United States and the European Union. More precisely, I will focus on problems occurring with social benefits, healthcare and education in legal cases from the U.S. and E.U countries.

Second, I will present legal studies on immigration to consider this problem from a different perspective, considering social rights accorded to undocumented immigrants as people living and working in their country of residence. On one hand, the policy about irregular immigration in the US usually tends to emphasize negative economic effects deriving from the presence of these persons within US borders, omitting humanitarian problems related to unauthorized immigrants. On the other hand, the policy about irregular immigration in Europe usually tends to protect irregular immigrants as persons entitled to basic human rights regardless of all financial problems related to the presence of these people in European Countries.

Starting from this point of view the major issue of this article is: do undocumented immigrants have right to claim social rights?

For obvious reasons, undocumented immigrants do not have any contact with state authorities in countries where they live in. The risk for

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<sup>33</sup> Economic studies argue that the average person who moves from the first countries to the second increase that person's income by ten or twenty times. See J. Edward Taylor & Philip L. Martin, *Human capital: migration and rural population change*, 1 Handbook of agricultural economics (2001).

deportation is a deterrent encouraging people to avoid any contact with the state, living in an “invisible” condition.

However, the vindication of social entitlements is sometimes necessary. This is because the need for certain social protection in some cases is indispensable. Protection against sickness, need for children’s education or economic protection, are in certain situations unavoidable. Differently from human rights, social rights are in many cases pressing. In such cases it is impossible to bar systematically undocumented immigrants, because they are expressing needs.

Before moving forward, a few remarks are required. First, I do not aim to be exhaustive as immigration is so broad and so complex a topic. Irregular immigration is an equally vast argument as well. There are so many aspects to be considered, causes and effects. Migration flows remain an expression of human nature. Therefore, whoever pretends to circumscribe migration as an item in the budget of a Country could risk running out of expectations. Second, I would rather aim to pose relevant questions in a comprehensive approach, than relevant answers. The target of the paper is to reach a better understanding of undocumented immigration and in this prospective to suggest a way to reconsider problems related to this issue in a broader view. Third, I will refer to “undocumented immigrants” for people without the right to remain in countries where they move to live and work.

## II. HUMAN WELFARE FOR UNDOCUMENTED IMMIGRANTS IN THE USA AND IN EUROPEAN UNION

I will commence by looking at the problem of social rights for undocumented immigrants from an empirical angle, as a legal issue of constitutional and international law. This view is paramount for this topic. Undocumented migrants are usually denied the social rights provided to citizens. Social rights are related to legal permanence within state borders and to taxation (membership and citizenship)<sup>34</sup>.

I choose to begin with a scrutiny of the situation of social rights for undocumented immigrants in the United States; afterwards I will analyze the European situation with a specific focus on Southern Europe.

There is a big debate about irregular immigration in Europe and in the US. As one scholar said, “Concern is increasing even more rapidly than the phenomenon itself<sup>35</sup>”. Massive immigration also tends to determine lower levels of integration because people move in small or even large

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<sup>34</sup> THOMAS H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS* (1950).

<sup>35</sup> DAUVERGNE.

communities living apart from native people, and this can favor discrimination and fear of aliens as different. This might happen whenever no cultural elements (i.e. idioms, religion, etc.).

In general you can see an anti-immigrant sentiment, which is often correlated to economic conditions and increasing number of immigrants<sup>36</sup>. Anti-immigrant sentiment is also a powerful issue in states and federal political campaigns. In addition, questions about migration are a good subject for news<sup>37</sup> and – why not – for movies.

In the literature there are two narratives used against irregular migration.

The first is the economic fear of illegality. Illegal migration is in the same class of problem as all non-legitimized private economic activities occurring across national territorial boundaries. Undocumented immigrants are a burden on public finances. They fuel an irregular economy and are less tied to taxation.

The second narrative is “border control”. Some argue the debate is really about whether we should have hard consistent borders like they have in the US versus stand-by borders like we have across Europe<sup>38</sup>.

Are we sure this really is a problem of borders? If we look at the length of US borders we understand it is impossible to armor them completely<sup>39</sup>. Without an overall package of reforms with the intent of reducing labour demand and holding companies accountable to verify workers’ rights, we cannot reduce irregular immigration. A full legion of scholars argues that undocumented immigrants are welcomed in receiving countries for being labor *a bon marché*. This view is true but partial. For decades undocumented immigrants were individuals coming up from Mexico or Central America alone. Since the late Sixties of the 20<sup>th</sup> century, and steadily increasing to these days, they became a permanent “population”<sup>40</sup>.

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<sup>36</sup> See for example the opinion of the Court in the case *Arizona v. United States* 567 U.S. 6 (2012) above mentioned.

<sup>37</sup> L. Vargas, *Not Legal Not Leaving*, Time (Cover story) <http://search.ebscohost.com.proxy.library.nd.edu/login.aspx?direct=true&db=aph&AN=76906110&site=ehost-live>

<sup>38</sup> R. Zapata-Barrero, *Theorizing State Behavior in International Migrations: An Evaluative Ethical Framework*, 77 *Social Research: An International Quarterly* (2010).

<sup>39</sup> See Gordon Hanson, et al., *Illegal immigration*, in *IMMIGRATION POLICY AND THE WELFARE SYSTEM: A REPORT FOR THE FONDAZIONE RODOLFO DEBENEDETTI* 221, (Tito Boeri, et al., eds., 2002). (During the 1990s, the US Government dramatically increased resources devoted to border enforcement, though in an uneven manner across border regions. These efforts do not appear to have eliminated or even reduced significantly illegal immigration from Mexico. Relatively few resources are devoted to monitoring and inspecting employers likely to hire illegal immigration).

<sup>40</sup> During the 1950s and the early 1960s many Mexican farm workers gained experience working in the United States in the “Bracero” program. This was a contract farm labor program started in 1942 to augment wartime labor supplies and was terminated in 1964. As

Nowadays irregular immigrants are not just workers, but also people living in the receiving countries and exploiting their economies<sup>41</sup>.

Are the economic arguments and lack of border protection sufficient explanations of the fear for irregular immigrants?

It is impossible to forget that anti-immigration sentiments are ‘cheap goods’ for the political market.

It is no accident that discussions over irregular immigration are partly fueling the 2012 Presidential Campaign. Even the unemployment rate is sometimes explained with charges that immigrants are stealing the work of residents (this is pointed out in general terms referring to work and omitting that irregular immigrants in the vast majority of cases do the poorest, humblest and unwanted jobs).

In general migration policy is transformed into the new bastion of sovereignty<sup>42</sup>. Nations assert their “nationness” by cracking down on irregular immigration. The rhetorical focus on irregular immigration shifts the boundaries of exclusion. When a part of the population is acknowledged to be irregular, it is excluded and erased from within and it is impossible to use the argument of membership and entitlements. When people are identified as ‘unauthorized’ it is hard to argue their membership or their right to award benefits, even when they contribute to the economy of a country. Even in this case contribution is counted as evidence of their transgression.

## A. USA

### 1. A “definite” number of undocumented immigrants

In recent American history many times Government has sought to deal with the presence of a large number of irregular migrants. After the

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a result of the experience gained in the Bracero program, hundreds of thousands of Mexican farm workers had their appetites whetted for the good life up north. They, their younger brothers, their sons became illegal aliens when the bracero program ended and other opportunities for legal migration were reduced. See Barry R. Chiswick, *The Illegal Alien Policy Dilemma*, in *ESSAYS ON LEGAL AND ILLEGAL IMMIGRATION* 73-87, (Susan Pozo, ed. 1986). Philip L. Martin, *Trade and migration: the Mexico-US case*, in *INTERNATIONAL MIGRATION : TRENDS, POLICIES AND ECONOMIC IMPACT* (Slobodan Djajić, ed. 2001).

<sup>41</sup> See Richard D. Lamm, *Liberals Beware: There Is a High Cost to ‘Cheap’ Labor*. Lakewood, CO: Defend Colorado Now [http://www.defendcoloradonow.org/perspective/art\\_liberals\\_beware.html](http://www.defendcoloradonow.org/perspective/art_liberals_beware.html).

<sup>42</sup> DAUVERGNE.

Immigration and Control Act (IRCA<sup>43</sup>) of 1986 – enacted to satisfy the demands of those who wished to drastically curtail illegal immigration –, Congress passed the Illegal Immigration Reform and Immigration Responsibility Act (PRWORA<sup>44</sup>). One major provision of that legislation act was to limit all Federal benefits, including Medicaid coverage, to those who are unlawfully in the United States. In the same year the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA<sup>45</sup>) increased the number of border patrol agents and made deportation easier.

The USA Patriot Act (enacted in 2001<sup>46</sup>) focused upon deterring acts of terrorism by permitting the deportation of aliens who are linked to terrorist organizations. The Homeland Security Act of 2002 merged the Immigration and Naturalization Service (INS) into the new Department of Homeland Security. The new cabinet increased border and customs enforcement.

After the failure of the “Comprehensive Immigration Reform Act” of 2007, during the 2008 presidential campaign, candidate B. Obama promised a sensible overhaul of national immigration policy that would provide legal status to undocumented immigrants and clear backlogs in the current admission system.

Efforts to fix bugs in the American immigration system suggest the great concern about irregular immigration in the US public debate. The flow of irregular immigration is seen negatively impacting not only public security, but also children’s schools and the healthcare system.

The bigger concern is the large number of undocumented immigrants present in the US<sup>47</sup>.

Thanks to the quantity of surveys, demographic studies, and estimations of undocumented immigrants, we have a reasonable estimate of how many immigrants live in America<sup>48</sup>.

These demographic surveys and polls estimate over 11 million undocumented aliens currently residing in the United States. This number is rapidly growing every day.

According to the report “Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011”<sup>49</sup> the number of

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<sup>43</sup> Pub.L. 99-603, 100 Stat. 3359, enacted November 6, 1986, also Simpson-Mazzoli Act.

<sup>44</sup> Pub.L. No. 104-193, 110 Stat. 2260.

<sup>45</sup> Division C of Pub.L. 104-208, 110 Stat. 3009-546, enacted September 30, 1996.

<sup>46</sup> Pub.L. 107-56, enacted October 26, 2001.

<sup>47</sup> STEVEN G. KOVEN & FRANK GÖTZKE, AMERICAN IMMIGRATION POLICY: CONFRONTING THE NATION’S CHALLENGES (2010).

<sup>48</sup> See PASSEL & COHN.

<sup>49</sup> Michael Hoefer, et al., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*, Office of Immigration Statistics, Policy Directorate,

undocumented immigrants reached an estimated 11.5 million in January 2011. The survey shows that of all unauthorized immigrants living in the United States in 2011, a 55% circa entered between 1995 and 2004; entrants since 2005 accounted for only 14% circa of the total. The largest part of undocumented immigrants passed US borders during the last part of the nineties and right after 2000. Despite the annual net growth of the unauthorized population slightly decreasing since 2004, the number of undocumented migrants reaching the U.S. every year is significantly larger.

Although a considerable uncertainty affects these surveys, estimates confirm that the unauthorized immigrant population increased in spite of high U.S. unemployment, improved economic conditions in Mexico, record numbers of apprehensions of unauthorized immigrants at U.S. borders and greater levels of border enforcement.

With reference to the origins of the undocumented population the survey reports that Mexico continues to be the leading country as source of unauthorized immigrants to the U.S. Mexicans represent about 59% of the unauthorized population<sup>50</sup>. With reference to the states of destinations, more than half (58%) of the undocumented population lives in just five states: California (25%), Texas (16%), Florida (6%), New York (6%) and Illinois (5%).

Although highly concentrated, statistical data also reveal another trend. In the past, the foreign-born irregular population was highly concentrated. But since the mid-nineties, the most rapid growth in the undocumented population is taking place in new settlement areas where previously the foreign-born was a minor presence<sup>51</sup>.

An additional demographic category is the U.S.-born children of undocumented parents. Estimates of U.S.-born children of undocumented aliens are not easy. Previous reports show that there are about two children born in the U.S. of unauthorized immigrants for every undocumented child<sup>52</sup>.

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US Department of Homeland Security [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf).

<sup>50</sup> The next leading source countries were El Salvador (660,000), Guatemala (520,000), Honduras (380,000), and China (280,000). The ten leading countries of origin represented 85 percent of the unauthorized immigrant population in 2011. (id. at, 4.).

<sup>51</sup> “According to estimates for 1990, about 88 percent of the undocumented population lived in only six states that had been traditional settlement areas for the foreign-born—California, New York, Texas, Illinois, Florida and New Jersey. But, by 2004, only 61 percent of the undocumented population lived in those six states”. Jeffrey Passel, *Estimates of the Size and Characteristics of the Undocumented Population*, Pew Hispanic Center <http://www.pewhispanic.org/2005/03/21/estimates-of-the-size-and-characteristics-of-the-undocumented-population/>.

<sup>52</sup> Id. at, 3.

Another important estimate emerges from a different part of the report. In 2011, the number of unauthorized immigrants aged in the range 18-44 amounted to 73%, of which 54% were male. According to these data 12% of undocumented immigrants are below 18 years old and 15% are over 45 years old. Although, the stereotype of young adult male as undocumented migrants is strongly supported by the report, a deeper analysis reveals a different picture of the entire group.

In sum the population of unauthorized migrants in the early twenty-first century appears demographically complex. In contrast to the iconic single male searching for occupation, there are clear signs that unauthorized migration has become a family affair, with more adult men and women and many mixed-status (documented and undocumented) families that include children. At the same time, the unauthorized remain strongly tied to the US labor force and originate largely from Mexico.<sup>53</sup>

## 2. *Undocumented immigration and labor market*

There are two main explanations for the existence of irregular migration: first, the attraction of better salaries and, second, the incomplete enforcement of immigration law by authorities<sup>54</sup>. Normally, these two reasons are considered homogeneous as part of the two most important push and pull factors of irregular immigration. They have to be considered as a harmonious whole in a study about irregular immigration. Nevertheless, it is necessary to draw a line between push and pull factors. In this article I am concentrating my effort here on problems of this second type: pull factors. Among “pull factors” employment is one of the main important. It is surely the major magnet attracting undocumented immigrants across U.S. borders.<sup>55</sup> Undocumented immigrants are normally engaged in not-legal labor<sup>56</sup>. Not-legal employment is essentially the product of two factors: a

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<sup>53</sup> See Katharine M. Donato & Amada Armenta, *What We Know About Unauthorized Migration*, 37 *Annual Review of Sociology* (2011).

<sup>54</sup> A clear explanation of this word is in Jonathan Seglow, *The Ethics of Immigration*, 3 *Political Studies Review*, 317-334 (2005).

<sup>55</sup> Other important pull factors addressing people elsewhere are related to the human welfare: high living standard; new possibilities for immigrants' children (education and health care).

<sup>56</sup> Irregular immigration is part of the underground or informal economy. The informal economy is composed of activities generally taking place in the formal economy, but under forms that do not comply with numerous regulations. Mats Tjernberg, *The Economy of Undocumented Migration: Taxation and Access to Welfare*, 12 *European Journal of Migration and Law* (2010).

legislation restricting possibilities for legal labor migration; economic incentives for employers to circumvent the costs of employing legal labor.

Some economist suggests that this situation has to be seen as a product of increased global competition, which forces many small and medium-sized firms to draw on the supply of cheap labor. Illegal migrants are not people but labor, an input for which demand grow larger and smaller. Globalized economy has changed the parameters of work, facilitating demand of extralegal work force<sup>57</sup> – an increasing number of jobs are part-time or seasonal and work is increasingly “outsourced”.

In addition, many companies are seeking to fill low wage jobs that Americans just refuse to take – from fruit pickers to groundkeepers to custodians. Up to 75% *circa* of agricultural workers are unauthorized immigrants.

It has been possible to calculate that low skilled immigration has reduced the wages of the average native-born workers in low-skilled occupation by 12% a year, almost \$2000<sup>58</sup>. Surveys demonstrate that cities with the largest increase in immigrant workers have had the fastest economy growth (New York City is an example of this). In addition, there is no statistically significant relationship between unemployment and recent immigration. The unemployment rate among native-born workers is actually lower in areas with higher levels of immigration, because spending by immigrants stimulates the economy and creates additional work. Nevertheless, the recession is helping to stem the flow of job seekers across America’s southern border. The number of people caught trying to cross declined sharply. The Pew Hispanic Centre issued a report arguing that Mexicans, who once accounted for most of the irregular influx, are now leaving the country in greater numbers than they are entering.

What kinds of measures are most likely to crack down irregular employment?<sup>59</sup>

- Expand legal programs;
- Reformation of employing rules (reduce taxation or introduce financial incentives);
- Regularizations;
- Employers sanctions;
- Toleration.

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<sup>57</sup> S. SASSEN, GLOBALIZATION AND ITS DISCONTENTS § 78 (1998).

<sup>58</sup> Center for Immigration Studies.

<sup>59</sup> Christina Boswell & Thomas Straubhaar, *The illegal employment of foreign workers: An overview*, 39 *Intereconomics*, 4 (2004).

During the last twenty years the US has increased border security funding almost every year, while at the same time the estimated population of irregular immigrants has more than tripled.

In order to deal with the problem of irregular immigration the U.S. has enacted the Legal Workforce Act. With this act, in addition to the securitization of borders, politicians try to reduce the number of illegal immigrants using job market as leverage.

The Legal Workforce Act (H.R. 2885, September 12, 2011) amends the Immigration and Nationality Act to make mandatory and permanent requirements relating to the use of an electronic employment eligibility verification system, and for other purposes. This system is named Employment Eligibility Verification System (E-Verify)<sup>60</sup>. E-Verify requires an employer to attest, during the verification period and under penalty of perjury, that he has verified that the person he is hiring is not an unauthorized alien.

Instruments such as E-Verify are not completely useful. Workers and their employers will simply move off the books into the cash economy with an increase of the underground economy. This massive shift into the underground economy will result in staggering losses of federal, state, and local tax revenues, including a drastic reduction in contributions to the Social Security trust fund<sup>61</sup>.

E-Verify is also error-prone. In American cities and states where E-Verify has been implemented, the results have been not so good. The accuracy of E-Verify continues to be limited and inconsistent by both inconsistent recording and employees' names and frauds<sup>62</sup>. It is not secondary to remark that this system probably would increase discrimination against Latino, Asian, and other foreign-born workers. The existing E-Verify system already results in discrimination against foreign-born workers, since they are more likely to be the subject of errors in the databases the program relies upon. E-Verify error rates are 30 times higher for naturalized U.S. citizens and 50 times higher for legal nonimmigrants than for native-born U.S. citizens.

Despite technology is helping us to reduce irregular work, unauthorized aliens remain a convenient source of labor-force (cheaper work) for

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<sup>60</sup> See problems among US and Arizona for the E-Verify system.

<sup>61</sup> Tyler Moran (Policy Director, National Immigration Law Center) Statement in front of the House Committee on the Judiciary Subcommittee on Immigration Policy and Enforcement Hearing on the Legal Workforce Act June 15, 2011.

<sup>62</sup> Statement of Richard M. Stana, Director Homeland Security and Justice, EMPLOYMENT VERIFICATION

Federal Agencies Have Improved E-Verify, but Significant Challenges Remain, GAO February 10, 2011.

employers. Why is so convenient to hire undocumented migrants instead natural citizens?

Narratives in the literature highlight two main reasons. First, irregular immigrants are automatically unskilled workers, lacking the means to document their own skills. Whatever skills they had before, now they are unskilled. As unskilled workers, it is only the lower level of the labor market that can welcome them. Secondly, the existence of an informal economy makes easier for employers to minimize labor costs and the obligations towards employees. An Informal/underground economy provides a suitable environment both for undocumented migrants and those who employ them. More specifically employers do not have to provide any benefit to irregular immigrant workers. Andrew Sum, the eminent labor economist at Northeastern, said: “Employers have chosen to use new immigrants over native-born workers and continue to displace large numbers of blue-collar workers and young adults without college degrees. One of the advantages of hiring, particularly young, undocumented immigrants is the fact that employers do not have to pay health benefits or payroll taxes.”

This quote is much more explanatory than many words we could use to understand the “economy” of undocumented immigrants. No economic explanation of irregular immigration, despite reaching a high level of accuracy, can give us a complete overview of such a movement of people. Among other factors, it is particularly forceful, in order to understand the complex system in which unauthorized immigrants move, to consider the difference between formal and informal economy. The latter is defined as composed of activities commonly taking place in the former, but “under forms that do not comply with various regulations”<sup>63</sup>. In this situation, undocumented persons, like other weak individuals or social groups, become a resource that other, powerful social actors use through informal methods, to acquire economic and/or political profits. Persons belonging to weak social groups often adopt informal strategies themselves in order to survive in situations where all other social avenues are closed to them<sup>64</sup>. As explained in the quotation of Sum, the main reason for participating in the informal economy is above all an economic one. Undocumented workers usually may increase their wages by avoiding taxes and social contributions. These tasks are met by employers’ incentives to reduce costs<sup>65</sup>. As actors of

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<sup>63</sup> TJERNBERG, 149-171.

<sup>64</sup> Zoran Slavnic, *Political economy of informalization*, 12 European Societies, 1–21 (2010).

<sup>65</sup> It is necessary to remark that not only undocumented migrants and employers take part in the informal economy. In a broad sense all kind of people and business inside a territory do the same.

the informal economy, both undocumented migrants and employers support economic growth and in this case they don't differ from other actors inside the territory.

The situation of the job market may produce three negative consequences. The first is of course the undermining of the states' sovereign and control capacities. The second is the undermining of solidarity structures established around the tax and social protection systems<sup>66</sup>. The third is that the presence of undocumented immigrants is usually harmful to those native workers who compete with them<sup>67</sup>; irregular migrants are perfect substitutes for unskilled native workers.

In sum the growth of the underground job market is not only a direct product of the irregular migration<sup>68</sup>. Although the underground or informal economy is now growing in highly developed countries, it is not only a result of the immigration wave from the South. As one scholar suggests this is partially true<sup>69</sup>: immigrants tend to replicate survival strategies typical of their home countries. As Sassen explained, despite the massive presence of irregular immigration in the underground economy and the favorable pretension of these to seize the chances presented by informalization, they do not themselves necessarily create these opportunities. (Immigration is part of the consumption economy).

These results would suggest to policymakers that they rethink the way they eradicate irregular immigration. Undocumented immigrants are weak persons that become a resource that others, powerful social actors, use through informal methods, to get economic and political profits<sup>70</sup>.

### *3. The provision of health care to undocumented immigrants*

One of the most pressing research topics facing scholars of undocumented migration is health care for the estimated 20–30 million undocumented, or unauthorized, migrants worldwide.

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<sup>66</sup> M. Fuentes & F. Javier, The regularisation of undocumented migrants as a mechanism for the 'emerging' of the Spanish underground economy, (Unidad de Políticas Comparadas, Working Paper n. 05, 2006).

<sup>67</sup> See George J. Borjas, Increasing the supply of labor through immigration, Washington, DC: Center for Immigration Studies(2004), available at <http://www.cis.org/articles/2004/back504.html>.

<sup>68</sup> Richard D. Lamm, Liberals Beware: There Is a High Cost to 'Cheap' Labor, Defend Colorado Now(2006), available at [http://www.defendcoloradonow.org/perspective/art\\_liberals\\_beware.html](http://www.defendcoloradonow.org/perspective/art_liberals_beware.html).

<sup>69</sup> SASSEN.

<sup>70</sup> SLAVNIC.

Although undocumented immigrants are a “shadow” population, they are in need of healthcare, or will likely have it in the future; nevertheless they are excluded, either in part or completely<sup>71</sup>, from systems of health care promotion, protection, and provision that apply to citizens and authorized immigrants.

In light of these questions, the major issue here is how to find a more inclusive way to give access to health care for undocumented immigrants. In literature as well as in practice are emerging signs and examples of a new way to handle the health care problems of irregular immigrants.

I begin by citing barriers in the US system that prevent undocumented immigrants from accessing health care<sup>72</sup>. They are invisible and normally insurance is “unaffordable” for them. Providers of care face difficulties when they attempt to care for unauthorized immigrants. Moreover, undocumented immigrants with very low income do not have medical insurance provided by their employer. Only some of them receive government-sponsored insurance, especially women, for whom care is often provided to ensure the health of future US citizen babies they give birth to<sup>73</sup>.

Surveys made in some areas of the US demonstrate undocumented immigrants are utilizing medical care in a ‘specific’ way, rather unconventional. Assuming that undocumented status is an important structural constrain when seeking medical services, this survey reveals how irregular immigrants use cost efficient, clinic-based medical care when they are in need, or they get medical advice from private doctors.

Therefore, undocumented immigrants and other vulnerable populations face many obstacles when seeking medical care. This underutilization of medical services, as proven<sup>74</sup>, is associated with “poorer health outcomes

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<sup>71</sup> According to the Legislation of each State/Nation.

<sup>72</sup> Since the enactment of Federal Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) in 1996 undocumented immigrants are ineligible for “any retirement, welfare, health, disability . . . or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.”<sup>1</sup> Exceptions include “assistance for health care items and services that are necessary for the treatment of an emergency medical condition” and “public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.” (Pub L No. 104-193, 110 Stat 2260).

<sup>73</sup> The cost for pregnant woman is one of the most important in the Budget of Medicaid. See GAO, *Undocumented Aliens: Questions Persist about Their Impact on Hospitals’ Uncompensated Care Cost* (2004).

<sup>74</sup> Mónica Ruiz-Casares, et al., *Right and access to healthcare for undocumented children: Addressing the gap between international conventions and disparate*

such as longer stays in hospitals, more acute health crises, and higher mortality rates.” When facing obstacles, undocumented immigrants may turn to emergency room service as the health care as a last resort, which is the most expensive form of care with a negative effect on public resources.

Debates over a right to medical care and issues of deservingness for unauthorized residents have emerged in the United States and in many other countries<sup>75</sup>, both industrialized and developing. There is a wide range of possible health concerns in connection with irregular migration. In addition, health care for irregular immigrants raises many questions among large part of the US population<sup>76</sup>.

Some citizens and policymakers argue that irregular immigrants are not part of the social contract linking citizens to the broader community. In compliance with this line of reasoning, neither host states nor host societies are obligated – legally or morally – to care about unauthorized immigrants health-related needs or invest in their well-being. Nationalists notice that state welfare should be devoted to natural citizens. Cultural differences between native citizens and immigrants may make natural citizens less able to identify with and eager to support a welfare system that gives so many benefits to non-natives<sup>77</sup>. Immigrants do not pay as much in taxes as natives from the moment they are paid “off the books”. Rather, a welfare state needs to know exactly the population it serves if it is to work properly, and with an effective redistribution of wealth among citizens.<sup>78</sup>

The current global recession period has reinvigorated public discussion about the sustainability of certain economic systems, and it has revived complex questions of social membership, political rights, and moral “deservingness”<sup>79</sup>. Multiple processes of reform – especially related to health care – have been discussed in most of the nation-states traditionally receiving larger number of immigrants. In these countries, reforms of health

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*implementations in North America and Europe*, 70 *Social Science & Medicine*, 329-335 (2010).

<sup>75</sup> For the France situation see Stéphanie Larchanché, *Intangible Obstacles: Health Implications of Stigmatization, Structural Violence, and Fear among Undocumented Immigrants in France*, 74 see id. at 858–863 (2011).

<sup>76</sup> Anna Viladrich, *Beyond welfare reform: Reframing undocumented immigrants' entitlement to health care in the United States, a critical review*, 74 *Social science & medicine* (1982), 822-29 (2011).

<sup>77</sup> Jonathan Seglow, *Too diverse?*, 95 *PROSPECT* (2004).

<sup>78</sup> SEGLOW, 317.

<sup>79</sup> For more information see Sarah S. Willen, *Introduction to the special issue "Migration, 'illegality', and health: Mapping embodied vulnerability and debating health-related deservingness"*, 74 *Social Science & Medicine* (2012). Sarah Horton, *Different subjects: The health care system's participation in the differential construction of the cultural citizenship of Cuban refugees and Mexican immigrants*, 18 *Medical Anthropology Quarterly*, 472-489 (2004).

care systems normally raise debates among people for and against an amnesty for irregular immigrants. Voices against the amnesty argue that once irregular immigrants (normally young people) become American citizens they have the right to sponsor their parents for permanent residence with no early numerical limitation. In these cases, a large number of new citizens could be eligible for Federal programs, such as Supplemental Security Income and Medicaid<sup>80</sup>. Under the new Health Care and Education Reconciliation Act of 2010<sup>81</sup>, unauthorized immigrants will no longer be eligible to receive federal subsidies to purchase their own private insurance, and they will not be allowed to purchase health insurance through new state-based health insurance exchanges, even if they completely pay it with their own resources<sup>82</sup>. Consequently, unauthorized immigrants are expected to become one-third of the remaining 23 million uninsured Americans by 2019.

Notwithstanding this, if we go deeper and see what is happening in practice, we realize how the US system allows undocumented aliens to have some basic care charged on states' budgets<sup>83</sup>. They can access emergency care in life-or-death situations. Using programs as EMTALA<sup>84</sup>, many uninsured irregular immigrants enter the emergency room of hospitals asking for health care (labor and delivery). Moreover, many States allow self-declaration of US citizenship for Medicaid<sup>85</sup>.

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<sup>80</sup> R. Rector of the Heritage Foundation estimate that the parents' participation in just the two programs mentioned would add \$ 30 billion per year in costs to the Federal Government.

<sup>81</sup> Pub.L. 111-152, 124 Stat. 1029.

<sup>82</sup> Jill Jackson & John Nolen, Health care reform bill summary: A look at what is in the bill, 21 Political Hotsheet, CBS News, Blogs, March(2010), available at <http://www.lmghs.org/ourpages/auto/2011/11/16/51801824/Health%20Care%20Reform%20Bill%20Summary.docx>.

<sup>83</sup> The extent to which these patients affect hospitals' uncompensated care costs remains unknown. See GAO, *Undocumented Aliens: Questions Persist about Their Impact on Hospitals' Uncompensated Care Cost* (2004).

<sup>84</sup> EMTALA applies to hospitals participating in Medicare, the federal health insurance program for seniors age 65 and over, and some disabled persons. See 42 U.S.C. § 1395dd (2000). According to federal regulations implementing EMTALA, a hospital that provides emergency services must medically screen all persons who come to the hospital seeking emergency care to determine whether an emergency medical condition exists. If the hospital determines that a person has an emergency medical condition, the hospital must provide treatment necessary to stabilize that person or arrange for an appropriate transfer to another facility. See 42 C.F.R. pt. 489 (2003).

<sup>85</sup> See Department of Health and Human Services, Self-declaration of U.S. citizenship for Medicaid, (July 2005), available at <http://oig.hhs.gov>. (Forty-seven States allow self-declaration of U.S. citizenship for Medicaid; nearly all of these require evidence if statements seem questionable).

In addition, there are also some examples of local entities [San Francisco] which are starting to use “inclusive local policies” in order to strengthen their commitment to an official “sanctuary policy”. They act on safety-net primary care providers’ guidelines in order to let unauthorized immigrants appear as “morally deserving” patients. In these cases there is the will to reduce disparities by legal status and to help prevention of contagion from infectious diseases, reduce the cost of preventable emergency care, or help institutions comply with ethical stances that support the provision of care to all humans<sup>86</sup>.

As we can see, much research in the literature suggests a more comprehensive approach to these problems that would be capable of letting us understand how the local configuration of irregular migration affects immigrants’ health experience. They argue that “illegality” is a risk factor interacting with other risk factors, “including occupational hazards; risk of exposure to infectious disease, vulnerability to violence, poverty, discrimination, and structural, institutional, linguistic, and cultural obstacles to health care, among other factors – to put unauthorized immigrants in positions of health-related disadvantage<sup>87</sup>”. The health literature has consistently supported an overarching framing narrative – normally interdisciplinary – devoted to portraying immigrants as deserving of health benefits on the basis of their contribution to society. This narrative has two main supportive reasons.

First, there is an argument of accountability. Undocumented immigrants’ poor health will have in the long run a negative spillover effect. Their ultimate need for emergency services mostly paid by taxation and non-reimbursable services would have in the future a broad impact on public expenditure. Consequently, providing time effective preventive health care, such as immunization and early screening could be a cost-effective strategy. Denying immigrants’ access to health care until an emergency situation arises is seen as myopic public policy, which at the end leads to increased costs for the society at large<sup>88</sup>. This argument is further enhanced if we take into account that undocumented immigrant children may stay indefinitely in the country becoming lawful residents or citizens. Following *Plyler v. Doe*, denying services to undocumented migrants is seen to be counterproductive

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<sup>86</sup> See Helen B. Marrow, *Access Not Denied? The Role American Localities Can Play*, Field Actions Science Reports, <http://factsreports.revues.org/483>. Helen B. Marrow, *The power of local autonomy: expanding health care to unauthorized immigrants in San Francisco*, 35 *Ethnic and Racial Studies*, 72-87 (2012).

<sup>87</sup> See Sarah S. Willen, et al., *Take a Stand Commentary: How Can Medical Anthropologists Contribute to Contemporary Conversations on “Illegal” Im/migration and Health?*, 25 *Medical Anthropology Quarterly*, 331-356 (2011).

<sup>88</sup> See Susan Okie, *Immigrants and health care, At the intersection of two broken systems*, 357 *New England Journal of Medicine*, 525-529 (2007);id. at.

because if they get sick or disabled they will need more public services and support, whereas allowing them to lead economically independent lives will benefit the society at large and prevent higher “costs of unemployment, welfare, and crime”<sup>89</sup>.

Second, as already mentioned above, there are many reports demonstrating how irregular migrants underutilize health services and are responsible for lower health expenditures than citizens. Contrary to the usual assumption of undocumented foreigners’ abuse of the health care system, these scholars demonstrate that immigrants, regardless of nationality and legal status, tend to report less use of health care services in the US compared with their US-born peers<sup>90</sup>. Despite popular and official perceptions that the undocumented over-utilize medical services and purposely migrate to take advantage of health and social services, they have demonstrated that the undocumented use fewer medical services than citizens<sup>91</sup>. This behavior cannot only be attributed to their “invisible” status and their fear of being caught by authorities. Consider how the illegal immigrant population arrives young and strong and therefore without need of frequent care. They will probably keep using healthcare facilities in case of emergency as it already occurs right now. Hence, I do not expect to see a substantial difference in the frequency of access to such facilities, but a slight increase on account of ceasing to be fearful.

In line with these works, another narrative demonstrates how treating immigrants who are potentially vectors of pathogens and endemic diseases might be beneficial for all the population<sup>92</sup>. By denying irregular immigrants the right to health care, this frame further blames the Government for ultimately hurting its own citizens. Even the “security/terrorism” frame provides an extra validation to this theory, endorsing undocumented aliens’ access to health care services as an

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<sup>89</sup> *Plyer v. Doe*, 457 U.S. 202, 226, 230, 1982.

<sup>90</sup> See Jim P. Stimpson, et al., *Trends in health care spending for immigrants in the United States*, 29 *Health Affairs*, 544 (2010). (An examination of health care spending during 1999–2006 for adult naturalized citizens and immigrant noncitizens - which includes some undocumented immigrants - finds that the cost of providing health care to immigrants is lower than that of providing care to U.S. natives and that immigrants are not contributing disproportionately to high health care costs in public programs such as Medicaid. However, noncitizen immigrants were found to be more likely than U.S. natives to have a health care visit classified as uncompensated care). See also Annette C. DuBard & Mark W. Massing, *Trends in emergency Medicaid expenditures for recent and undocumented immigrants*, 297 *JAMA: The Journal of the American Medical Association*, 1085-1092 (2007).

<sup>91</sup> This is a clear effect of the exclusion, criminalization, and indifference. See James Quesada, *Special Issue Part II: Illegalization and Embodied Vulnerability in Health*, 74 *Social Science & Medicine*, 894–896 (2011).

<sup>92</sup> Cf. VILADRICH, 825.

important preventative measure against their becoming potential carriers of diseases<sup>93</sup>. Though the metaphor of immigrants as vectors of sickness is far from new, the revival of this theory is important in understanding how literature has refurbished it to justify the importance of basic access to health care for the most vulnerable segment of irregular immigrant populations (such as women, the elderly and children).

By using these frames we understand the extent of the impact of irregular migration on the social fabric. When we use the typical equation of modern states there is no room to recognize health care access for undocumented immigrants. These persons evade any contact with authorities (local, state, federal authorities); they are seen as a possible damage to the public budget. Besides, what drives unauthorized immigrants' social and political exclusion stems not from the realm of citizenship – that is, the realm of “biopolitics” and governmental practice – but, rather, from the realm of collective moral judgment, understood here in terms of “biolegitimacy”.<sup>94</sup>

The analysis of other factors – related either to public safety or prevention – allows us to better understand the ‘deservingness’ of public care for undocumented immigrants – especially those who deserve particular protection. Although the specific directions of the frames we present differ from each other, they all are important evidences of the insufficiency of liberal paradigms of self-sufficiency and individual responsibility. By denying basic health care for undocumented immigrants authorities could lead to deleterious consequences for native populations in two directions. First, the direction that leads to the protection of public health and safety. Second, “bio-exclusion” is an important producer of vulnerabilities. The accumulation of weakness factors shapes migrants' subjectivities by leading them to adopt behaviors and practices, self-concepts and world views that are inextricably linked to networks of power and that crucially compromise their capacity to afford their everyday needs. In this situation relations with social structures and authorities become distorted, even impossible.

Using these words we don't want to talk only against anti-immigrant sentiments, but only stress that there are likely drawbacks if we leave a

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<sup>93</sup> See George Lakoff & Sam Ferguson, *The framing of immigration*, The Rockridge Institute, <http://academic.evergreen.edu/curricular/ppandp/PDFs/Lakoff%20Framing%20of%20Immigration.doc.pdf>.

<sup>94</sup> In seeking causal arrows, then, we must look both at and beyond the state, for determinations of biolegitimacy are not made or enforced by states alone. Rather, they emerge in the public sphere, where social institutions, the media, public opinion, and civil society all play leading roles. See Sarah S. Willen, *Do “Illegal” Im/migrants Have a Right to Health? Engaging Ethical Theory as Social Practice at a Tel Aviv Open Clinic*, 25 *Medical Anthropology Quarterly*, 303-330 (2011)..

large part of the labor force “unprotected”. What is important in these conclusions is not just to highlight the distance from the notion of health care as a human right, but to focus on the necessity of a new approach that considers problems using an overarching new paradigm – primarily to recognize the number of issues that are left behind in usual relationships between large parts of the population as a matter of fact<sup>95</sup>.

#### 4. *The right to receive an education*

The debate over the recognition of social rights for undocumented immigrants involves also legislation on education. Here the major issue is whether undocumented students are able to attend public schools and colleges and, if so, whether they should pay in-state rates. The most important argument for preventing undocumented immigrants’ children access to public education is economic. Estimates say that undocumented children impose high costs on taxpayers in every State.

Because these issues are inescapably tied to a Supreme Court decision thirty years old, *Plyler v. Doe*, I need to make some brief remarks about this case.

In *Plyler v. Doe* the US Supreme Court established the legal norm that States may not restrict access to public education based on immigration issues.<sup>96</sup> The Court struck down a Texas statute which denied funding for education to illegal immigrant children and simultaneously struck down a municipal school district’s attempt to charge illegal immigrants an annual \$1,000 tuition fee for each illegal immigrant student to compensate for the lost state funding. The Court found that where a State limits the rights afforded to people (specifically children) based on their status as immigrants, this limitation must be examined under an “intermediate scrutiny standard to determine whether it furthers a substantial goal of the State”<sup>97</sup>.

As a result, this Supreme Court’s decision compels a State to provide the children of undocumented aliens with a free public education<sup>98</sup>.

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<sup>95</sup> As documented, a more comprehensive approach to the problems of health care for undocumented immigrants and generally for the weakest part of the population have been proposed during the public hearings on health reform in 2010. Public Law 111–152, *Health care and education reconciliation act of 2010*. US Government Printing Office, Washington DC (2010). Available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ152/content-detail.html>

<sup>96</sup> 457 U.S. 202 (1982).

<sup>97</sup> 457 U.S. at 216.

<sup>98</sup> The Court held in the affirmative, using an elevated form of rational basis review. The Majority stated that: “[i]t is difficult to understand precisely what the State hopes to

Justice W. Brennan, writing for the majority, maintained that these children were entitled to equal protection under the Constitution<sup>99</sup>, stressed the pivotal importance of education, and cited the need to avoid the creation of a subclass of illiterates, potentially costly to society in terms of unemployment, welfare and crime. He used the doctrine of *Brown v. Board of Education*<sup>100</sup>. Education is recognized as one of “the most important function of state and local government”, and is important for the education of the democratic society itself. Education is a “principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment”. The Court also found that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms”<sup>101</sup>. Justice W. Brennan also refused the Texas’s objection about the cost of undocumented students, characterizing these efforts as “ludicrously ineffectual”<sup>102</sup>.

Therefore, the Court decided that the State’s refusal of an education to undocumented students could hardly be considered rational unless some substantial State goal<sup>103</sup>.

Justice W. Burger dissented. He disagree not with the reasoning of the majority, but on the grounds that it is not the role of the Court, but of the “political branches”, to remedy social problems in the nation<sup>104</sup>.

In broader sense the decision may mark a fundamental break with classical immigration law’s concept of national community and of the scope of congressional power to decide who is entitled to the benefits of membership. *Plyler* held that equal protection clause could deny the state and other jurisdictions the authority to differentiate between citizens and non-citizens. Enforcing this doctrine, the Court acknowledged the

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achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to problems and costs of unemployment, welfare, and crime“. See Maria Pabon Lopez, et al., *The Prospects and Challenges of Educational Reform for Latino Undocumented Children: An Essay Examining Alabama’s H.B. 56 and Other State Immigration Measures*, Loyola New Orleans Law Research Paper, <http://ssrn.com/abstract=1987046> or <http://dx.doi.org/10.2139/ssrn.1987046>.

<sup>99</sup> “The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.” 457 U.S. at 213.

<sup>100</sup> 347 U.S. 483 (1954).

<sup>101</sup> *Plyler* 457 U.S. at 223

<sup>102</sup> 457 U.S. at 228.

<sup>103</sup> *Id* at 224..

<sup>104</sup> H. BISCHOFF, IMMIGRATION ISSUES 343 (2002).

unevenness of federal policy that encouraged foreign workers to migrate into the US<sup>105</sup>.

Nevertheless, *Plyler* may be also read narrowly as nothing more than an equal protection case in which the state failed to adduce a “substantial purpose” for treating the children of irregular aliens differently than it treated their documented alien or citizen peers. In this view the question of how the national community ought to be defined was not at issue.

In our view the doctrine introduced by Justice Brennan is a cornerstone among cases that recognize a different way to deal with immigration. Since *Plyler* it has become usual in the US either to accept or to consider normal the presence of undocumented children into civic life - even with different opinions among people<sup>106</sup>.

The same rationale of *Plyler* was used many years later to introduce a new federal statute allowing undocumented children, who entered or remained in the US irregularly, to achieve their American Dream<sup>107</sup>. The DREAM Act (acronym for: Development, Relief, and Education for Alien Minors)<sup>108</sup> is an American legislative proposal – never passed – first introduced in the Senate on August 1, 2001, by O. Hatch<sup>109</sup>. The text of this bill was also included in various other immigration-related bills – the Comprehensive Immigration Reform Act of 2006 (S. 2611) and the Comprehensive Immigration Reform Act of 2007 (S. 1348). With the failure of these overarching reform bills, R. Durbin, the chief proponent of the DREAM Act in the Senate, made its passage a top priority for 2007. Senator D. Durbin introduced the latest version of this Act in the Senate in May 11, 2011 aiming to “To authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as children and for other purposes”. On June 15, 2012, President Obama announced that his administration would stop deporting young undocumented immigrants who match certain criteria previously proposed under the DREAM

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<sup>105</sup> For this comment see Michael A. Olivas & Kristi L. Bowman, *Plyler's Legacy: Immigration and Higher Education in the 21st Century*, 2011 Michigan State Law Review (2012). Available at SSRN: <http://ssrn.com/abstract=1992080>

<sup>106</sup> “It is evident that there is a large portion of the U.S. community that bears no ill will towards immigrants, even in an attenuated fashion, and accepts that immigration is in the nation’s interests, provided it is done in a lawful manner”. Cf. *Id.*, p. 266.

<sup>107</sup> MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYLER V. DOE AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN* (2012).

<sup>108</sup> The DREAM Act, Immigration Policy Ctr. Am. Immigration Council, <http://immigrationpolicy.org/just-facts/dream-act#do> (updated 5/18/11).

<sup>109</sup> A very similar version of the DREAM Act was first introduced on April 25, 2001 by Representative Luis Gutiérrez as the "Immigrant Children's Educational Advancement and Dropout Prevention Act of 2001" - H.R.1582 during the 107th Congress.

ACT. However, this change in policy does not cover most individuals who arrived in the U.S. *legally*.<sup>110</sup> On August 15, 2012, the U.S. Citizenship and Immigration Services (USCIS) began accepting applications under the new “Deferred Action for Childhood Arrivals program”<sup>111</sup>.

The legacy of *Plyler* and the enactment of the Dream Act are a good field to discuss the importance of a policy devoted to inclusion of undocumented immigrants. Strictly speaking the rationale used in *Plyler* is very close to that doctrine of “deservingness” described before in the paragraph about health care protection. I think it is good here to recall one of the most important parts of the opinion Justice Brennan wrote in *Plyler*: “This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.”<sup>112</sup>

It is interesting to note that the Court held that this exclusion was not limited to the undocumented students excluded from education, but would impact the society at large. As a result of education’s fundamental role in society, persons excluded from educational opportunities would be unable to socialize, to be incorporated into the community, or succeed in life in any way<sup>113</sup>.

Even the conventional wisdom about the societal cost imposed by the doctrine of *Plyler* is not able to reverse this achievement. The effort to assess the cost of this decision arises most commonly by way of opponents’ arguments to revisit the decision. Opinions like this are common in periods of economic recession, as it was during the campaign for Proposition 187 in California<sup>114</sup>. They reduce the issue surrounding this case to a mere cost-benefit equation, estimating the costs of educating undocumented children

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<sup>110</sup> Should be noted that the DREAM Act do not authorize the US Citizenship and Immigration Services to refer information to the ICE (Immigration and Custom Enforcement) for removal – both for the applicant and family.

<sup>111</sup> See the Announcement of Secretary Janet Napolitano about “Deferred Action Process for Young People Who Are Low Enforcement Priorities”: <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>

<sup>112</sup> 457 U.S. at 218-19

<sup>113</sup> Id. at 223.

<sup>114</sup> Jack Citrina, et al., *Public opinion toward immigration reform: The role of economic motivations*, 59 *Journal of Politics*, 858 (1997).

and weighing these costs against much-needed improvements to public schools that could be otherwise achieved with these funds<sup>115</sup>.

Recent social studies about the implementation of *Plyler* show the power of this decision. Descriptions of surveys and interviews of schoolteachers highlight the many ways undocumented students have enriched schools and flourished as a result of their educational opportunities<sup>116</sup>. As well as powers, there are also limitations in this decision. In my opinion the most important limit in it is rooted in the Court's opinion itself. *Plyler* has not provided a strong constitutional foundation for building on the rights of the undocumented in spheres other than public education<sup>117</sup>. Although this idea is not new in the doctrinal discussion, I believe it has been reinforced with the introduction of the Dream Act – an express use of *Plyler's* doctrine that calls undocumented students “innocent children”<sup>118</sup>. My findings suggest that it is sometimes discriminating to have contenting visions of undocumented aliens – illegals parents and children victims of illegality. In my opinion the first are beneficiaries of the decisions of the latter. Therefore, it is impossible to extend the firm notion of human traffic to people who are seeking a better life for their families. Moreover, our thesis is supported by the above-mentioned authors, who demonstrate the “reverse effect” made by the term “don't ask, don't tell” in school. Extra-legal social norms seem to have imposed the “don't tell” corollary, suggesting that the undocumented students have to remain invisible, hiding their real legal status.<sup>119</sup>

By speaking of the side-effects of *Plyler*, I am not suggesting a stop to programs like the Dream Act. A halt to the deporting of young undocumented immigrants would go long way towards fulfilling *Plyler's* vision of possibility for all students in public schools. This act will free students of the secrecy and insecurity imposed by the reality of their precarious status, instead permitting them to be honest about their condition and assert control over their future potential. However, the Dream Act is not a remedy for all problems of fear and vulnerability of undocumented immigrants – and not only because it is limited to primary and secondary schools. Construction and implementation of a safety zone for immigrants

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<sup>115</sup> See, e.g., Jack Martin, *Breaking the piggy bank: How illegal immigration is sending schools into the red*, Federation for American Immigration Reform Report (2005). <http://www.fairus.org/site/PageServer>

<sup>116</sup> Nina Rabin, et al., *Understanding Plyler's legacy: voices from border schools*, 37 J.L. & Educ., 15-82 (2008).

<sup>117</sup> BOSNIAK, 66.

<sup>118</sup> 457 U.S. at 202-30, CITRINA, et al.

<sup>119</sup> RABIN, et al., 57-58.

needs support from both the school and community to which persons belong – such as local entities, churches, associations, etc.<sup>120</sup>

### 5. *Immigration federalism: new ways to protect immigrants' social rights*

The legal and normative questions emerging in the case of education for undocumented students, as well as in the health care protection for all migrants and in *Arizona*, are good “thermometers” of issues related to the presence of irregular migration in the US. All these innovations portend a new “immigration federalism”<sup>121</sup> or a balkanization<sup>122</sup> of immigration policy for the future. In addition, the void of federal action on immigration reform has opened space for the emergence of an anti-immigrant political crusade at the state and local level. As a matter of fact, these are not examples of a brand new phenomenon in the US history. As *Plyler* shows, Americans’ changing and complicated attitude towards immigrants and immigration is normally manifested in state and local laws as well as in private citizens’ actions. Paradoxically, in the early twenty-first century, there has been a rise in the country’s anti-immigrant sentiment, especially in the growing enactment of state and local ordinances, some of which are playing themselves out in courts and legislatures.

However, state and local efforts to assert authority over immigration matters appear also in another way, in laws and measures designed to limit immigration exclusion and to foster immigration inclusion. At state and local levels immigration lawmaking also includes measures designed to integrate and assimilate immigrants. Commentators quite often overlook this aspect of immigration laws and policies<sup>123</sup>.

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<sup>120</sup> A very close perspective is presented in Roger M. Mahony, *Dream Act: We All Benefit, The*, 26 Notre Dame JL Ethics & Pub. Pol’y, 459-472 (2012).

<sup>121</sup> See, e.g., Peter J. Spiro, *Learning to live with immigration federalism*, 29 Conn. L. Rev., 1635-37 (1996). Claire Huntington, *Constitutional Dimension of Immigration Federalism, The*, 61 Vand. L. Rev., 787 (2008). Peter H. Schuck, *Taking Immigration Federalism Seriously*, U. Chi. Legal F., 57 (2007).

<sup>122</sup> See Kristina M. Campbell, *Imagining a More Humane Immigration Policy in the Age of Obama: The Use of Plenary Power to Halt the State Balkanization of Immigration Regulation*, 29 ST. Louis U. Pus. L. REV, 416 (2010). ([T]he “balkanization” of immigration law that has occurred at a rapid and frightening pace over the last several years).

<sup>123</sup> See Peter H. Schuck, *The Disconnect between Public Attitudes and Policy Outcomes in Immigration*, in DEBATING IMMIGRATION 17, (Carol Swain, ed. 2007).

In the last decades states' participation in the framework of immigration policies has taken many forms, some of them implying "cooperation"<sup>124</sup> with the federal government, others revealing the creativity of states and local entities in introducing different approaches in the alienage policy. Both solutions imply the answer to an important question: which role should states and localities play in making and implementing law and policy relating to immigration and immigrants?

As we know from the opinion of Justice Kennedy about Section 2 (B) of Arizona S.B. 1070, in the framework of immigrations power states and localities are actively involved in the direct enforcement of federal immigration laws following an agreement with the federal authorities that delegates responsibility for the implementation of such laws<sup>125</sup>. However, the Supreme Court confirmed the federal government's "extensive and complex"<sup>126</sup> power over immigration and highlighted the wide discretion that the federal government has to determine whether and how to reinforce immigration law. Under the new immigration doctrine, the chance for states to continue in independent enforcement of immigration law is considerably reduced and may be restricted even further in the future. Provisions that mirrored or exceeded the Arizona S.B. 1070 will be struck down immediately and considered preempted by state or federal Courts<sup>127</sup>.

As a matter of fact, the new emerging power continues to allow states and local governments to make rules designed to integrate and include immigrants in local communities. In this situation we can see two opposite forces – one is directed toward the periphery (centrifuge) and the other to

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<sup>124</sup> That means states operate under, and are obliged to respect, federal immigration policies and supervision. *See*, SCHUCK, 66.

<sup>125</sup> Federal Government has delegated direct enforcement authority of immigration laws to state and local law enforcement agencies using: a) agreements under Section 287(g) of the Immigration and Nationality Act; b) agreements under ICE's "Secure Communities" Program. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009-562, 3009-563 (codified at 8 U.S.C. § 1357(g)) (adding section 287(g) to the Immigration and Nationality Act).

<sup>126</sup> *Arizona*, 567 U. S. (2012)

<sup>127</sup> Although Arizona's S.B. 1070 has garnered the most media attention, five other states – Utah, Georgia, South Carolina, Alabama and Indiana – enacted legislation that either mirrored or exceeded the Arizona statute. In five other states – Wisconsin, Illinois, Michigan, Pennsylvania, and Ohio – is pending a similar legislation. It seems highly unlikely for any of these state laws, either enacted or pending, to survive following the Supreme Court's decision in *Arizona v. United States*. States that rejected or refused to consider such legislation in 2010 or 2011 are: Washington, California, Nevada, Wyoming, Colorado, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Iowa, Louisiana, Mississippi, Kentucky, Tennessee, Florida, North Carolina, Virginia, New Hampshire, and Maine. *See* La Raza, *SB 1070 Copycats. Arizona-related legislative developments*[http://www.nclr.org/index.php/issues\\_and\\_programs/immigration/state\\_local\\_immigration\\_initiatives/arizona-related\\_legislative\\_developments/](http://www.nclr.org/index.php/issues_and_programs/immigration/state_local_immigration_initiatives/arizona-related_legislative_developments/).

the center (centripetal) – which are both devoted to curtailing state and local action to exclude immigrants, but at same time permitting state and local measures intended to foster immigrant inclusion among communities, schools, and universities. Whenever the proliferation of state activism is a response to the absence of clear leadership or policy direction at national level<sup>128</sup>, the movement among the states to legislate immigration appears synchronized with the federal attempt to solve the problem of undocumented immigrant through integration and openness to them. Decisions to bolster existing “sanctuary” measures<sup>129</sup>, as well as bills like the Trust Act that the California Senate passed this summer, and state laws facilitating the access to education for the undocumented<sup>130</sup>, are examples suggesting that the aim of inclusion is one of the best solutions available to solve problems related to the presence of unauthorized immigrants.

Within the *post*-Arizona framework there emerges the need to reconsider the rationale for state and local powers not to regulate immigration but to attempt to formulate more subsidiary laws devoted to give undocumented immigrants social rights (education, house, health care, etc.). In recent years a flurry of federal, state, and local rulemaking pertaining both to immigration and alienage law has contributed to a decidedly more complex legal landscape wherein, despite well-established doctrine mandating federal primacy, states and localities have acted either under the supervision of the federal government or in dissent from the federal government.

Although in the immigration enforcement context the federal government enjoys extraordinarily powers, within the domain of alienage law and policy, by contrast, the balance of power between government and states is

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<sup>128</sup> See Lina Newton, *Policy Innovation or Vertical Integration? A View of Immigration Federalism from the States*, 34 *Law & Policy*, 115 (2012).

<sup>129</sup> With this term we refer normally to provision – whether statutes, resolutions, ordinances, or executive orders – designed to encompass the provision of a number of services to immigrant communities (including the undocumented members of those communities) on a par with those provided to U.S. citizen residents. Although sanctuary laws are unquestionably controversial, their evolution from a means of signaling expressive dissent from federal government policy to an integrated regulatory scheme for the inclusion of immigrants into their local polity is one of the most interesting way to solve problems related to the local presence of undocumented immigrants. Sanctuary Measures have been promulgate by almost different seventy jurisdictions. For an overview of this phenomenon see Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 *Yale L. J.*, 1256 (2009).

<sup>130</sup> In the aftermath of each failed attempt to pass a federal Bill enacting the Development, Relief, and Education for Alien Minors Act (“DREAM Act”) many states have passed legislation relaxing his own state laws restrictions on immigrants’ access to state-administrated higher education benefits. See, e.g., *In-State Tuition and Unauthorized Immigrant Students*, Nat’l Conf. of St. Legislatures (July 8, 2011), available at <http://www.ncsl.org/issues-research/immig/in-state-tuition-and-unauthorized-immigrants.aspx>

more complex. The constitutional commitment to “personhood” as the fundamental basis of rights – in combination with the will of localities to serve both as a vehicle for immigrant integration across many strata and as a locus for the protection of immigrants’ individual rights<sup>131</sup> – has produced certain zones of protected status for the undocumented, notwithstanding their irregular status under the immigration law. Additionally, as Linda Bosniak has noted, “undocumented immigrants have been extended certain rights and protections for instrumental reasons, borne of a desire to avoid some of the social pathologies associated with the existence of an entrenched marginalized class”<sup>132</sup>.

#### *6. Reformation and political concerns: fixing the bug in the US immigration*

The examples we discussed before describe contemporary immigration control as governed by two contenting forces: from one side, the devolution of authority whereby states and local actors become involved in determinations of an immigrant’s legal status; from the other, states and local governments increasingly creating immigration policies that lack federal approval.

Subnational and restrictionist anti-immigrant policies are most likely in areas that experience a sudden growth in the immigrant population and when national rhetoric about immigrant is most salient and threatening<sup>133</sup>. In the last decade immigration in the US has become a sort of moral panic. A big part of the panic is produced by the problems of enforcement. After the 9/11 terrorist attacks, immigration discourses became inextricably linked to national security. Another big part of the issue is strictly related to the risk of a destabilization of social order, and with the fear that immigrants are stealing jobs to peer nations. Anti-immigrant feeling is supplied by the perception of immigrants as taking jobs from deserving US citizens, lowering wages, placing a great burden on social welfare programs and threatening American culture. Immigrants, both legal and undocumented, are taking jobs away from citizens. The number of

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<sup>131</sup> See, e.g., Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 Yale L.J., 1564 (2006). SEYLA BENHABIB, *TRANSFORMATIONS OF CITIZENSHIP: DILEMMAS OF THE NATION STATE IN THE ERA OF GLOBALIZATION: TWO LECTURES* 63 (2001).

<sup>132</sup> L. Bosniak, *The Undocumented Immigrants. Contending Policy Approach in DEBATING IMMIGRATION* 86, (C.M. Swain, ed. 2007).

<sup>133</sup> See Daniel J. Hopkins, *Politicized places: explaining where and when immigrants provoke local opposition*, 40 American Political Science Review, 40 (2010).

immigrants seeking and holding jobs reduces the wages of citizens, especially those in already disadvantaged groups.

The moral panic is sometimes balanced by the will to include and to express solidarity towards illegal immigrants and their condition. Politicians developed a consciousness about illegal immigration problems, and the enormous financial burden they impose on many cities and towns around the nation, after large public demonstrations occurred in April 2006 and then again on May 1, 2006 when immigrants in many cities organized a national boycott called “A day Without Immigrants”, which was intended to hold down the US economy. Although this event had little economic impact, immigrants’ assertiveness did achieve the aim of forcing members of Congress to ease in the overhaul of immigration law.

As the nation’s approach to the treatment and handling of unauthorized migration shifted from solidarity and inclusiveness to requests of restriction, criminalization, and deportation, politicians began to interrogate which solution would best solve this problem. The first voice to consider is that of US President Mr. Barak Obama. In his first speech devoted entirely to immigration he recognized that “the system is broken and everybody knows it”<sup>134</sup>. The decision to sue Arizona for enacting S.B. 1070, the correlated program to expand local police involvement in enforcing immigration law, and records in prosecutions and deportations of immigration violation are among others the most interesting examples of Obama’s administration strategy against unauthorized immigration<sup>135</sup>. This policy principally tries to use the intensification of immigration enforcement (i.e. interior enforcement) as one feature of a broader strategy to legalize and better regulate immigrant labor markets. Ideally this system would respect opinions of US voters for stricter immigration controls (a nation-state, or the people through the political process, has the right to exclude or decide who is to exclude) and fix the failure of border enforcement to eliminate irregular immigration. Policy devoted to border patrol has reduced the unauthorized flow of migrant workers. But, as a consequence, it is ineffective towards migrants’ behavior<sup>136</sup>, especially towards that part of them who are much more responsive to fluctuations in Mexican and US wages.<sup>137</sup>

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<sup>134</sup> Peter Baker, *Obama Urges Fix to ‘Broken’ Immigration System*, N.Y. Times July 1, 2010, <http://www.nytimes.com/2010/07/02/us/politics/02obama.html>.

<sup>135</sup> For a broad comment of Obama strategy on immigration see PHILIP KRETSEDEMAS, *THE IMMIGRATION CRUCIBLE: TRANSFORMING RACE, NATION, AND THE LIMITS OF THE LAW* (2012).

<sup>136</sup> DOUGLAS S. MASSEY, *BACKFIRE AT THE BORDER: WHY ENFORCEMENT WITHOUT LEGALIZATION CANNOT STOP ILLEGAL IMMIGRATION* (2005).

<sup>137</sup> Even though these trends are not definitive, they are far from the opposition between immigration enforcement strategies and laissez-faire (or neoliberal) regulatory priorities. In

In order to understand the problem of irregular migration and to consider possible solutions I think it is decisive to start by identifying what establishes the ground for undocumented immigration. I call this the “socio-economic reason”. The most part of undocumented people are not in the US because they inherently yearn to live in this Country or because they desire to break rules or commit crimes or to exploit the welfare system<sup>138</sup>. How Joseph Heathcott have argued, many undocumented immigrant come to US because they have run out of options in their country<sup>139</sup>. The universe of reasons in which people make such choices is vastly more complex than anti-immigration advocates tend to represent. Many undocumented immigrants are refugee not only from war or violence, but also from not economic developed countries. Migration policies focused attention only on the impact of immigrants on the receiving societies. Concerns on how to assimilate or incorporate foreign nationals minorities do not take into account the long-distance relations that migrants maintain with their home countries; or, if these relations were acknowledged, they were often interpreted negatively as preventing migrants from integrating successfully. Migratory policies tended subsequently to find a way to maximizing resources and minimizing risks. In this balance irregular migration is a product of the new way to conceptualize both migration as a fluid movement of people and migrants as geographically mobile persons, engaged in continuous cross-border practices<sup>140</sup>. Migrants develop transnational identities, practices and living strategies that challenge the notion of migration as involving settled populations crossing political borders in order to establish in a new nation-state<sup>141</sup>.

At this level the recognition of problems related to irregular migration brings me to propose reconsidering two important points.

Firstly, studies and cases I have presented from the US system suggest that irregular immigrants have become aware of the fluid and contextual nature of their status as they attempt to integrate into their destinations without full access to the rights and privileges of native population.

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this light, the danger is that the intensification of immigration enforcement will only increase the desperation (and exploitability) of the unauthorized migrant. Without a reform, and a broad plan for the future, Government risks to “play by ear” with an instrument too much sensible to public opinion.

<sup>138</sup> See GEORGE J. BORJAS, *HEAVEN'S DOOR : IMMIGRATION POLICY AND THE AMERICAN ECONOMY* 106-126 (1999).

<sup>139</sup> See Joseph Heathcott, *Moral panic in a plural culture*, 61 *Cross Currents*, 43 (2011).

<sup>140</sup> In this sense is correct the paradigm introduced by ALEJANDRO PORTES & RUBÉN G. RUMBAUT, *IMMIGRANT AMERICA: A PORTRAIT* (3rd ed. ed. 2006).

<sup>141</sup> See Ninna N. Sørensen, *Revisiting the Migration-Development Nexus: From Social Networks and Remittances to Markets for Migration Control*, 50 *International Migration* (2012).

Findings from demographic studies describe unauthorized immigration as a “dynamic social construction that involves institutional actors and changes over time”<sup>142</sup>. In this framework the undocumented population is part of a fluid population, which is impossible to define by the “lack” of citizenship. In this context it is necessary to understand that legal status, as a dynamic social construction, extends beyond a binary concept (national/non-national), rooted in the production of laws with a wide-ranging effects that are mediated via other social and economic mechanisms<sup>143</sup>. Although unauthorized status is subject to national contexts, undocumented migrants who are technically not citizens may still be granted rights and membership because they are present in the same time and space as other immigrants.<sup>144</sup> In this light it is significant to take into account the difference between the condition of temporary workers and illegal immigrants. These two conditions give different bundles of rights. A temporary work visa gives an individual the right to work in the US for a determined period. The worker receives no other citizenship rights and is usually not permitted to bring along other family members. Undocumented immigration, on the contrary, confers no immediate membership. But in expectation irregular immigrants would be eligible for any future amnesty for unauthorized aliens, and they can be eligible for some entitlement in case authorities either forget or are kept from asking about citizenship qualification. In addition, the unauthorized may also be an “urban citizen” via state drivers’ licenses, access to local welfare system, in-state tuition, health care, etc.<sup>145</sup>

Secondly, in order to deal with the problems and solutions of undocumented immigration we need to switch the political discourse - from the micro-relationship between employers and employee to the macro-relationship between sending and receiving state.

I shall start from the most important economic effect of irregular immigration in the US: money sent home by migrant workers, on which labour-exporting economies in the South generally depend to an important degree (hereafter remittances)<sup>146</sup>. Official documents estimate that \$48

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<sup>142</sup> DONATO & ARMENTA, 535.

<sup>143</sup> Mostly based on the assumption that unauthorized are not citizens and for this reason they are marginalized. See KITTY CALAVITA, *IMMIGRANTS AT THE MARGINS: LAW, RACE, AND EXCLUSION IN SOUTHERN EUROPE* (2005).

<sup>144</sup> See BOSNIAK.

<sup>145</sup> See MONICA VARSANYI, *TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN US CITIES AND STATES* (2010).

<sup>146</sup> Remittances are payments sent by foreign-born workers back to their home country. Technically speaking these transfers can involve sending money through banks or other institutions to family members or others in the home country, making financial investments in the home country, or returning to the home country while retaining bank accounts or claims on other financial assets in the United States.

billion in the 2009 was transferred from migrants in the United States to households abroad<sup>147</sup>. Remittances are not only a private fact (that is related either to migrants self-interest to a better life or to the welfare of members of the family<sup>148</sup>). They are also a big source for the Countries where the money is received but reduce the receiving family members' incentive to work. The transfers provide a country's economy with foreign currency, help finance imports, improve the balance of payments in its international accounts, and increase national income.<sup>149</sup>

Among receiving countries, Mexico is the destination of the largest amount of remittances from the United States. According to BEA's (U.S. Department of Commerce's Bureau of Economic Analysis) estimates, of the \$33 billion (net) transferred from the United States to people in other countries in the Western Hemisphere in 2009 or earned as compensation by short-term migrants, about \$20 billion was identified in the international economic accounts as going to Mexico. For many other developed countries remittances far surpass development aids and form an important addition to their domestic income.

Studies and analyses reveal that by concentrating the focus on remittances we can discover a sort of 'complicity'<sup>150</sup> between sending and receiving countries in the market of immigration. In this sense, there is rhetoric in certain sending countries to conceptualize incoming remittances in more beneficial terms. By allowing the remittances of unauthorized migrants, the flow is an autonomous, gracious move of receiving to sending countries<sup>151</sup>.

To the contrary, a more accurate approach to the remittances economy reveals how this flow of money is likely to cause a deconstruction of economic systems, both for sending and receiving states<sup>152</sup>.

For the former (State of Destination/Receiving State) migration becomes one of the cheaper solutions to the necessity of workforce. They dope the job trade producing a distortion in their economic system with only short

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<sup>147</sup> *Migrants' Remittances and Related Economic Flows*, Congressional Budget Office Report 1 (2011).

<sup>148</sup> See TAYLOR & MARTIN. The average persons who moves from the latter to the former increases that person's income by ten to twenty times.

<sup>149</sup> Çağlar Özden & Maurice W. Schiff, *Overview*, in INTERNATIONAL MIGRATION, REMITTANCES, AND THE BRAIN DRAIN (Çağlar Özden & Maurice W. Schiff, eds., 2006).

<sup>150</sup> Some author talk about "tributary transaction" issued by sending countries to receiving countries. Gregory Noll, *Why Human Rights Fail to Protect Undocumented Migrants*, 12 European Journal of Migration and Law, 259-260 (2010).

<sup>151</sup> Id. at, 259.

<sup>152</sup> ÖRN B. BODVARSSON & HENDRIK VAN DEN BERG, *THE ECONOMICS OF IMMIGRATION: THEORY AND POLICY* (2009).

period profits. Moreover, these countries lose welfare produced by migrants while source countries re-gain a part of what they lose.

For the latter (State of Origin/Sending State) the economy of remittances produces a serious reduction of both work force and the remaining family members' incentive to work. In addition, for these countries migration becomes a cheap solution to poverty problems, rather than dealing with the problems and home state taking responsibility. In this case, migration becomes understood as negatively affecting local development: migration deprives local communities of their most productive members; due to remittances, former producers convert into consumers and, generally, resources stemming from migration are not productive but are, rather, channeled into conspicuous consumption that leads to further inequalities<sup>153</sup>. Remittances and the importance of this market must cause nation-states to be considered important players among others of the "migration industry"<sup>154</sup>.

### *B. European Union*

The European Union (hereinafter EU) is one of the biggest supra-national organizations and a paradigm case of post-national entity. The EU has been cited as a key reference point for post-national membership, described as the most comprehensive legal enactment of a trans-national status for migrants<sup>155</sup>. Using the language of international law, the EU is a 'transnational community' where 27 different countries have open borders for the purpose of free exchange of goods, services and persons. In tandem with the efforts to establish a single market, migration has been seen as a

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<sup>153</sup> Traces of this way of thinking can be found in classic "brain drain" concerns.

<sup>154</sup> See HERNÁNDEZ-LEÓN, 155-156. (Migration industry entrepreneurs include moneylenders, recruiters, transportation providers and travel agents, legitimate and false paper pusher, smugglers, contractors, formal and informal remittance and courier service owners, lawyers and notaries offering legal and paralegal counseling to migrants, and, under certain circumstances, promoters of immigrant destination. [...] Both sending and receiving states play a fundamental role in shaping the contours of the migration industry, the rise and fall of particular types of entrepreneurs and activities [...]. This is not to say that the state policies and regulatory regimes completely determine the profile and dynamics of the migration industry. Instead what I argue is that the intended and unintended consequences of such policies and regulations, including the strategies of both migrants and migration entrepreneurs to circumvent them, effectively influence why certain services become available, under what conditions such services are offered, and who provides them).

<sup>155</sup> Sandra Lavenex & Emek M. Uçarer, *Introduction: The Emergent EU Migration Regime and Its External Impact*, in *MIGRATION AND THE EXTERNALITIES OF EUROPEAN INTEGRATION* 5-7, (Sandra Lavenex & Emek M. Uçarer, eds., 2003).

necessary part of the move towards a free market. The Amsterdam Treaty in 1997 established a fundamental change by moving immigration and asylum legislation from the so-called “third pillar” to the first pillar of community competences<sup>156</sup>.

The creation of a law-making body which stands above the member states, whose laws have direct effect and override any inconsistency with domestic law, is perhaps the strongest manifestation of what normally is called a “global dynamic”<sup>157</sup>. Harmonization of migration regulation has made most progress in asylum and irregular migration; whereas legal migration has been significantly left in the hands of member states<sup>158</sup>. The control of persons at the borders common to 27 sovereign states is no longer permissible as a result of EU law. There is a common EU law on how the internal and external borders of the Union are managed for the purpose of movement of persons. The duties of border guards to admit or refuse admission to third country nationals at the external borders are now set out in EU law. EU law increasingly colonizes the administration, which carries out the control of the territory. Rules that officials must ensure are properly carried out by EU rather than the sovereign states. In the event of a conflict between national law and EU law on the borders the official is obliged to apply EU law and disregard national law, which is contrary.

In addition, European countries created during the last sixty years a new type of “social” space, which tends to mix free movement of labor and social policies. The boundaries between welfare state and labor market remain contentious.

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<sup>156</sup> For migration matters, this agreement has been vital to establishing a truly European agenda. Immigration and asylum were moved, partially, from the third pillar to the first, making them matters of central concern and subject directly to European regulatory capacity rather than cooperation and encouragement. The Treaty of Amsterdam also included a five-year transitional period, during which time both the Commission and member states could initiate regulations and the Council would act on such proposals unanimously.

<sup>157</sup> CHATERINE DAUVERGNE, MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW 144-146 (2008).

<sup>158</sup> See for example *Council recommendation of 22 December 1995 on harmonizing means of combating illegal immigration and illegal employment and improving the relevant means of control* (OJC 5, 10/01/1996); *Council and Commission Action Plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice* [1999] O.J.C. 19/1; *Communication from the Commission to the Council and European Parliament on a common policy on illegal immigration* [COM (2001) 672, final]; *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the regions 04/06/2004 - Study on the links between legal and illegal migration* [COM (2004) 412 final].

Legislation governing immigration, process of regularization and welfare rules unveils a clash between ostensible equal treatment, the overriding desire to protect welfare resources, and human rights commitments alongside restriction on entry. In this situation there are three questions to consider.

First, despite national resistance, and with little overt adjustment of the ideal, shifting populations and integration processes have challenged the nation as a territorial unit of cultural and civic membership.

Second, national welfare states have been gradually eroded at level of the single market. The ECJ ruled in the case of (student) that EU citizens could rely on the prohibition of discrimination on the ground of nationality in claiming access to non-contributory benefits<sup>159</sup>.

Third, the continuing migrant flows into Europe have been echoed, over the same period, by the appearance of international covenants for asserting the rights of migrants which many feel in themselves pose a test to national autonomy. Although these international instruments are in some case not part of the European legal framework<sup>160</sup>, they push individual member states to opt in or out of such agreements deciding to support or not a higher standard of protection of rights for immigrants. In this situation it is possible to see a different degree of protection of immigrants provided by member states.

Notwithstanding all these efforts, irregular immigrants' condition is normally beyond the sphere of protection provided by the European Union and the International agreements. The position of the undocumented raises the difficult question of whether they deserve some rights or whether they stand completely outside any relationship with the state and therefore any protection. It is not always remembered that the Charter of Fundamental rights and the European Convention of Human Rights (2000) stipulate rights applying to everyone, including irregular migrants.

Nevertheless, the disparity between formal recognition and access to these rights is clear. Exclusions and marginalization appear the rule for these people in many countries. One of the areas of major risk is related to work conditions. There is not only a problem in the availability of labor for inferior pay. The undocumented do not have any social protections. They are forced to work long hours, without any work insurance in case of

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<sup>159</sup> See ANNE PIETER VAN DER MEI, *FREE MOVEMENT OF PERSONS WITHIN THE EUROPEAN COMMUNITY: CROSS-BORDER ACCESS TO PUBLIC BENEFITS* (2003).

<sup>160</sup> Instruments of international law devoted to the protection of human rights, such as the Declaration of Human Rights (UDHR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR) set up a series of rights relating to all persons without borders. This is reinforced by the use of "no one" or "everyone" in many provisions of these treaties.

accident, and without the right to claim the enforcement of their labour rights; this makes them extremely vulnerable and leads in certain situations to cases of modern slavery.

In sum, migration policy in the EU poses more unique challenges to sovereignty, given the commitment the EU has already made to the free movement of persons and the open border. Although these 27 countries have already given up a lot of the control they have over their own borders to the EU, immigration is still a high-ranked concern. This is due in particular to the opening of borders between Western and Eastern countries, the debate on safety Europe<sup>161</sup>, and in recent times the implementation of Schengen Treaties from the massive arrival of people from Northern Africa. The condition of the undocumented follows the instability of migration policy and demonstrates the difference between formal attribution of rights and substantial protection.

The following part of this work gives a brief overview of the demographic situation and then analyzes legal regime of undocumented in the EU system – with an additional focus on the opinions of the European Court of Human Rights and the most important documents of the Council of Europe.

### *1. An ‘indefinite’ number of undocumented immigration*

The European Commission estimates the presence of 8 million undocumented immigrants in the EU<sup>162</sup>, many of whom are working in the informal economy. Recent academic research suggests significantly lower numbers. In 2002, there were estimated 3.1-5.3 million undocumented immigrants residents in the EU countries. By 2008 this number had dropped to 1.9-3.8 million in EU with 27 countries<sup>163</sup>. Data from the “Migration Policy Institute” in Washington show stock of undocumented in the EU-15 has significantly decreased; since 2007, data have been available for detected annual flow coinciding with an increase in border protection policies and the onset of the global economic crisis<sup>164</sup>.

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<sup>161</sup> A.M. Ceobanu, *Usual suspects? Public views about immigrants' impact on crime in European countries*, 52 *International Journal of Comparative Sociology*, 114-131 (2011).

<sup>162</sup> Commission Communication 262 (2009), p. 4.

<sup>163</sup> See the “Clandestino Project, Clandestino Project Final Report (Hellenic Foundation for European and Foreign Policy) (2009).

<sup>164</sup> See Christal Morehouse & Michael Blomfield, *Irregular Migration in Europe* Migration Policy Institute, <http://www.migrationpolicy.org/pubs/TCMirregularmigration.pdf>. (The Report suggests how large-scale investments in border control are the first way to reduce causes of irregular migration).

As we can easily understand, the European situation is very different from the US situation. In the EU undocumented immigrants represents 0,4-0,7 percent of an estimated 500 million total population (2009).

Studies from the Commission presume that the majority of these persons are from neighboring Countries<sup>165</sup>: North Africa, Middle East or South America. Many of them are moving either within the migration systems based upon post-colonial ties or similar links established after the Second World War – Turks in Germany and in Belgium or Moroccans in Netherlands. There are also undocumented immigrants who are related to refugee crises during the eighties and nineties, either rejected asylum seekers or because attracted further illicit chain migration.

Looking at the estimates recently issued, it is possible to understand a general decline of stocks and flows<sup>166</sup>. This is due to a mix of four legal, political and economic developments.

- Major sending countries of irregular migrants (Poland, Romania, Lithuania, Bulgaria) gained accession to EU.
- Special agreements and covenants have been signed among crossing countries and first accession EU states (e.g. Agreement Italy-Libya).
- Large scale regularizations in various countries (Belgium, Greece, Italy, Spain,).
- Last but not least, the economic crisis has deterred migrants from moving to Europe.

In Europe there are five ways in which non-nationals become irregulars<sup>167</sup>:

- Legal entry and stay whilst working or engaging in self-employment in breach of immigration regulations and legal entry and visa overstaying.
- Refused asylum seekers who do not return, are not removed and/or who are de facto non-removable because of lack of documents,

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<sup>165</sup> A set of general data about expulsion and border security are available on the website of the website of *Frontex*, the independent Agency based in Warsaw (Poland), that has the mandate to coordinate operation between member-state in the field of border control. See <http://www.frontex.europa.eu/>

<sup>166</sup> Franck Düvell & Bastian Vollmer, *Irregular Migration in and from the Neighbourhood of the EU. A comparison of Morocco, Turkey and Ukraine*, CLANDESTINO: Undocumented Migration, [http://clandestino.eliamep.gr/wp-content/uploads/2009/10/transit\\_report\\_compas\\_sept09.pdf](http://clandestino.eliamep.gr/wp-content/uploads/2009/10/transit_report_compas_sept09.pdf).

<sup>167</sup> For an analysis of this patterns see Franck Düvell, *The Pathways in and out of Irregular Migration in the EU: A Comparative Analysis*, 13 *European Journal of Migration and Law*, 247 (2011).

unclear identity, unsafe country of origin, family links or health, age and gender related constraints.

- Equally frequently reported is bureaucratic failure in processing residence and work permit applications, inefficient renewal and appeal procedures resulting in withdrawal or loss of status.
- Clandestine entry – often of individuals who subsequently apply for asylum and thus regularize their stay – is comparably low in numbers.
- Irregularity by birth, because a child is born to parents that are irregular immigrants and quasi inherits their non-status.

Because of the magnitude of this phenomenon in terms of people involved, countries affected, and level of legal restrictions to migration, it must be concluded that irregular migration has become even in Europe a significant problem. Given the scale of this phenomenon, realistically most immigrants will live permanently in receiving countries. Moreover, as a consequence of their residence situation, irregular migrants are a weak population – easy to exploit, especially in the case of abusive work conditions. This situation poses one important question. How is the EU responding to this de-facto population resident on a long-term basis within its boundaries? The evidence of exploitation calls into question whether it is acceptable to place irregular migrants completely outside the law, considering them as an “invisible” population.<sup>168</sup>

Although numerous surveys have been issued<sup>169</sup>, there does not exist in Europe a clear understanding of the consistence of irregular immigration. The lack of independent sources of information in much of Europe on the extent of irregular migration is definitely a problem. Nonetheless, it is commonly assumed in Europe that large-scale breaking of the rules alarms most members of the public. It is not unreasonable to suppose that the general public wants to see action taken against rising level of illegal migration.

According to the data I have selected a good source of information is represented also by the process of regularizations granted by many states.

In Europe, more than in the US, there has appeared a strange and unintended link between legal migration, restrictions to irregular migration,

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<sup>168</sup> A similar question is made by MALCOM ROSS & YURI BORGMANN-PREBIL, *PROMOTING SOLIDARITY IN THE EUROPEAN UNION* 154-156 (2010).

<sup>169</sup> European Migration Network, *Illegally Resident Third Country Nationals in EU Member States: State Approaches towards them, their Profile and Social Situation*, (2007), available at [http://www.emn.at/images/stories/TCN\\_AT.pdf](http://www.emn.at/images/stories/TCN_AT.pdf).

and continuing migration and its regularization<sup>170</sup>; the restrictions of migration enacted by many governments, instead of having a deterrent effect, rather provoke migrants to dive into deeper activities.

During the last ten years various European Countries have regularized the condition of clandestine migrants either without or with invalid permissions to stay<sup>171</sup>. Although there is a general understanding that these regularizations became a pull factor rather than a deterrent to stay irregularly in EU, these acts represent a huge data collection of irregular migration.

Above all the increasing number of regularizations<sup>172</sup>, along with EU enlargement, has created complex situations among people living irregularly. Due also to the huge labor demand in the last ten years, many countries have experienced difficulties in defining the legal status of illegal migrants<sup>173</sup>. The status of irregular migrants has become “flexible” as well as their work condition. There is a strong relation between the demand for an increasing flexible labor force and growing undocumented migration in the EU. Even in Europe, irregular migration is associated with participation in the underground economy. The expansion of the service sector has generated a constant demand for flexible, mobile, and cheap work (e.g. sectors as hotel, restaurants, bar, catering, assistance, agriculture, etc.)<sup>174</sup>. Almost every sector in Europe depends on irregular migration<sup>175</sup>.

To summarize, irregular workers display a kind of “elasticity” in the job market that indigenous workers lack<sup>176</sup>. Moreover, in certain sectors of the

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<sup>170</sup> Commission (EC), *A common immigration policy for Europe*, Press release MEMO/08/402, June 17, 2008.

<sup>171</sup> Spain, Italy, Greece and Belgium have carried out large scale of regularizations (3.5 million circa). Martin Baldwin-Edwards & Albert Kraler, *Regularisations in Europe. Study on practices in the area of regularisation of illegally staying third-country nationals in the Member States of the EU*, International Centre for Migration Policy Development (ICMPD)(2009), available at [ec.europa.eu/home.../regine\\_report\\_january\\_2009\\_en.pdf](http://ec.europa.eu/home.../regine_report_january_2009_en.pdf).

<sup>172</sup> Barbara Laubenthal, *The Emergence of Pro-Regularization Movements in Western Europe*, 45 *International Migration*, 101-131 (2007).

<sup>173</sup> F. Düvell, *Introduction and Background*, in *ILLEGAL IMMIGRATION IN EUROPE: BEYOND CONTROL?* (F. Düvell, ed. 2006).

<sup>174</sup> It is also important to recognize a significant “gender dimension” in the experience of irregular migration. Some kind of work, which is commonly associated with irregular migrants, tends to be performed by more women than men, such as cleaning. In particular, domestic work by irregular migrants is dominated by women; the private context in which this work takes place creates a high vulnerability to exploitation. Fabio Quassoli, *Migrants in the Italian underground economy*, 23 *International Journal of Urban and regional research* (1999).

<sup>175</sup> Colin C. Williams, *A critical evaluation of public policy towards undeclared work in the European Union*, 30 *European Integration* (2008).

<sup>176</sup> According to BOSWELL & STRAUBHAAR. circa 70% of irregular residents in the EU countries are estimated to be engaged in undocumented labor.

informal economy there takes place a process of substitution in favor of undocumented<sup>177</sup>.

## 2. European Union policy against irregular migration

In the last decades EU institutions have dedicated a great deal of effort to better controlling irregular migration. EU competence in this field stresses the importance of a common strategy against irregular migration, which remains a cross-border problem for states-parties of EU. By continuing a policy of integration in this sector each country is agreeing to delegate to the EU the competence to deal with one of the most important of cross-border issues.

The latest important EU act is the Directive the European Parliament and the Council of the European Union enacted on June 19, 2009 to provide a “minimum standard on sanction and measures against employers of irregularly staying third-control nationals”. This Directive aims to take actions against the obtaining of work in the EU without the required legal status. For this reason the directive “lays down minimum common standards on sanctions and measures to be applied in the Member States against employers who infringe that prohibition”.

The justification under the Directive is to reduce one of the main pull factors by targeting the employment of non-nationals who decide to stay in Europe without legal permission. For this reason article 4 contains a norm for EU members which requires employers to give jobs only to workers presenting a ‘valid residence permit or other authorization for his or her stay’ and then to notify the competent authority designated by member states the hire<sup>178</sup>.

Some authors have criticized the Directive<sup>179</sup>.

In general EU policy is fostering an artificial link between what is principally a social issue and criminal/repressive administrative law and practices. This link creates a critical overlap between the category of the

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<sup>177</sup> See Michael Samers, *The 'Underground Economy,' Immigration and Economic Development in the European Union: An Agnostic-Sceptic Perspective*, 6 International Journal of Economic Development (2005).

<sup>178</sup> Each Member State shall ensure that infringements of this prohibition is subject to the sanctions and measures laid down in the Directive (Article 3.2) including financial sanctions and payments of costs of return of illegally employed third-country nationals in cases where return procedures are carried out (Article 5.1.b). Furthermore, the Directive obliges Member States to hold both natural (Article 10) and legal persons (Articles 11 and 12) criminally responsible for employment of illegally staying third-country nationals when committed intentionally under certain aggravating circumstances (Article 9).

<sup>179</sup> See ROSS & BORGMANN-PREBIL, 164.

undocumented migrant and a potential criminal. The [in]security process this link gives rise to allows for the application of coercive public measures (e.g. return and readmission), and a progressive transition from the use of administrative law towards a criminalization of ‘third parties’ involved in the undocumented migration (sanctions for employers and individuals facilitating unauthorized entry, transit and residence, etc.) as well as of TCNs themselves.

The Directive produces a substantial burden on states and employers, imposing the creation of additional administrative procedures for both employers and the public sector in requiring employers to notify the authorities every time they recruit new third country national employees and in requiring compliance inspections. The directive also extends the legal definition of employment, creating further costs and liabilities to both employers and the authorities.

This Directive is only one of the numerous acts that EU has enacted to crack down on illegal immigration. EU legislation and policy in relation to irregular migration has to be understood within the wider context of the last two decades<sup>180</sup>.

We have to start from the Treaty of Amsterdam. This led to the ‘communitarisation’ (and not the supra-nationalisation) of immigration policy<sup>181</sup>. That is, it has brought the regulation of immigration policy closer to the community method of decision-making.<sup>182</sup>

After Amsterdam, the EU identified how to implement the provisions on an area of freedom, security and justice in two important policy documents. In December 1998, the JHA Council submitted an Action Plan of the Council and the Commission to the Vienna European Council (commonly

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<sup>180</sup> Nevertheless, the development of EU policy on irregular migration coincided with concerns expressed by international organizations at the growth of this phenomenon after the stop on immigration during the oil crisis in the early 1970s. See Ryszard Cholewinsky, *The Eu Aquis on Irregular Migration Ten Years On: Still Reinforcing Security at the Expense of Rights?*, in *THE FIRST DECADE OF EU MIGRATION AND ASYLUM LAW* 129, (Elspeth Guild & Paul Minderhound, eds., 2012).

<sup>181</sup> Article 63(3)(b) EC defined the competence of the Community in the following terms: “illegal immigration and illegal residence, including repatriation of illegal residents”

<sup>182</sup> The aim of Title IV TEC, entitled “Visas, Asylum, Immigration and other Policies related to Free Movement of Persons”, was to establish progressively “an area of freedom, security and justice”, although it did not use these terms. Amsterdam Treaty enabled the EU to develop a European asylum and immigration policy by identifying a number of areas, which were to be subject to measures adopted by the Council. Closely connected to irregular migration were the powers of the Council to adopt measures ‘on the crossing of the external borders of the Member States’, including rules on visas, and, more specifically, on “illegal immigration and illegal residence, including repatriation of illegal residents”. For analyses of the TEC, see Kay Hailbronner, *European Immigration and Asylum Law under the Amsterdam Treaty*, 35 *Common Mkt. L. Rev.* 1047–1067 (1998).

known as the Vienna Action Plan)<sup>183</sup>. Irregular migration was a key element also at the Tampere Summit of 1999 (European Council)<sup>184</sup> and the five year Action Plan on ‘how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice’ (1999-2004), resulted in the adoption of legislation and non-legislative measures in three key areas: legal migration, integration and illegal immigration<sup>185</sup>. The latter led to the adoption of an Action Plan to combat irregular migration and trafficking of human beings, encompassing areas such as visa policy, information exchange, readmission and repatriation policies and border management.<sup>186</sup>

In 2000, the EU started an unprecedented enlargement, which then involved 13 applicant States<sup>187</sup>. Enlargement constituted a significant challenge for preventing irregular migration into the EU’s future expanded territory and therefore the Council indicated to applicant countries the measures that needed to be adopted in the Justice and Home Affairs (JHA) field as part of their preparation for EU membership<sup>188</sup>.

The European Council Meeting in Laeken in December 2001 called for an action plan on illegal immigration. There were 8 actions to this plan as

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<sup>183</sup> The Vienna Action Plan injected a sense of urgency by specifying a number of priority measures to be taken within two years of the entry into force of the Amsterdam Treaty and, consequently, within a shorter time-frame than specified in the Treaty itself. These included the following measures of relevance to irregular migration: the establishment of “a coherent EU policy on readmission and return”; and preventing “illegal immigration through, inter alia, information campaigns in transit countries, and in the countries of origin”. Measures relating to external borders and free movement of persons, including visa policy and the further harmonization of Member States’ laws on carriers’ liability, were also identified in the Action Plan as constituting a priority. *Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice*, adopted by the JHA Council on 3 Dec. 1998, Of 1999 C 19/1.

<sup>184</sup> Tampere conclusions: “The European Council is determined to tackle at its source illegal immigration, especially by combating those who engage in trafficking in human beings and economic exploitation of migrants.... The rights of the victims of such activities shall be secured with special emphasis on the problems of women and children.”

<sup>185</sup> Michael Samers, *Emerging Geopolitics of Illegal Immigration in the European Union*, 6 Eur. J. Migration & L., 31-32 (2004).

<sup>186</sup> In addition, a Green Paper on a Community Return Policy for illegal residents, focusing on forced and assisted return of illegally resident migrants in the EU, and the Proposal for a Return Action Program were also adopted. Available from: [http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002\\_0175en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0175en01.pdf)

<sup>187</sup> Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, the Slovak Republic, Slovenia.

<sup>188</sup> These were identified in the accession partnerships and included both short- and medium-term measures in such areas as strengthening external border controls, progressive alignment of visa legislation and practice with that of the EU, and taking action to combat organised crime, including trafficking in persons.

outlined in the pre-Laeken document (CEC, 2001c)<sup>189</sup>. These action points were absorbed into, and their importance confirmed by, subsequent Commission communications. On February 28, 2002, the Council adopted the “Comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union” (otherwise known as the “Santiago Action Plan”).

The Hague Programme<sup>190</sup> (2004) built on Tampere’s achievements, focusing on strengthening efforts to reduce the informal economy, identified as a ‘pull factor’ for irregular migration, and on the development of common standards and procedures for the return of illegally staying third-country nationals. These key policy priorities were reflected in a number of legislative measures, such as the proposals for the Return Directive and the Employer Sanctions Directive (see also below). In addition, the Commission adopted a Communication on policy priorities in the fight against illegal immigration<sup>191</sup>, proposing a set of concrete actions, including developing co-operation with third countries, further strengthening of external borders; stepping up the fight against human trafficking, tackling illegal employment, establishing an effective return policy, and improving information exchange.

The European Pact on Immigration and Asylum<sup>192</sup>, adopted by the European Council in October 2008, includes five basic commitments focusing *inter alia* on organizing legal immigration, making border controls more effective, improving the asylum system and developing partnerships with countries of origin and transit. One of the commitments focused specifically on the need to “*control illegal immigration by ensuring that illegal immigrants return to their countries of origin or to a country of transit.*” In this respect, the Pact outlines eight action points, which include: concluding readmission agreements and other forms of cooperation with third countries, devising incentive systems to assist voluntary return, and

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<sup>189</sup> The 8 actions were: visa policy, information exchange and analysis, pre-frontier measures, financial support of actions in third countries, border management, improvement of co-operation and co-ordination at the operational level, the advanced role of EUROPOL, aliens law and criminal law (including illegal employment) and finally readmission and return policy.

<sup>190</sup> The Hague Programme: strengthening freedom, security and justice in the European Union. Available from:

[http://ec.europa.eu/justice\\_home/doc\\_centre/doc/hague\\_programme\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/doc/hague_programme_en.pdf)

<sup>191</sup> Available from: <http://eur->

[lex.europa.eu/LexUriServ/site/en/com/2006/com2006\\_0402en01.pdf](http://lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0402en01.pdf)

<sup>192</sup> Council of the European Union, European Pact on Immigration and Asylum September 2008.

introducing dissuasive penalties against those who exploit irregular migrants<sup>193</sup>.

In March 2009, the Commission published its third annual report on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders, and the return of illegal residents<sup>194</sup>. The document delineated recent developments in EU Policy to reduce irregular migration including developments in control at external borders, visa policy, return policy, trafficking in human beings, mitigating ‘pull factors’ for irregular migration, such as access to irregular employment and increasing cooperation with third countries. The report also provides data on trends in irregular migration to the EU 2004 - 2008 and concludes that the evidence does not “support the idea that illegal immigration to the EU is increasing.” Indeed, the report shows that 2004 – 2007 there were fewer refusals at the border than in previous years, and that levels of apprehensions and removals remained stable. The report, however, drew attention to the different experience of irregular migration in each of the Member States – i.e. that Mediterranean Member States had seen increases in numbers migrants found to be illegally present in the EU.

Articles 77 to 80 of the Lisbon Treaty (Treaty on the Functioning of the European Union) gives a general summary of the European Union’s policies on border checks, asylum and immigration. Article 79 focuses on immigration and states that the Union “shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings” (Art. 79(1)). In addition, part 2c) states that the European Parliament and the Council “shall adopt measures (in the area of) illegal immigration and unauthorized residence, including removal and repatriation of persons residing without authorization”. Part 2d) refers to “combating trafficking in persons” and Article 79(3) refers to agreements with third countries for the readmission of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in a Member States.

The Stockholm Programme, which was adopted in December 2009, commits to providing “*an open and secure Europe serving and protecting citizens.*” The goal of effective policies to combat illegal migration is

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<sup>193</sup> Available from <http://register.consilium.europa.eu/pdf/en/08/st13/st13440.en08.pdf>

<sup>194</sup> Available from: [http://ec.europa.eu/anti-trafficking/download.action;jsessionid=2TKhNy5GNSjXbBnDXYsrWHW4Nm9yksWJfZ ZXpxGh1TQmZWhJ5VVV!-403728570?nodeId=0ad8439b-eb9f-451d-ac95-8d16d9d07bb3&fileName=SEC%282009%29+320+Report+from+Commission\\_en.pdf&fileType=pdf](http://ec.europa.eu/anti-trafficking/download.action;jsessionid=2TKhNy5GNSjXbBnDXYsrWHW4Nm9yksWJfZ ZXpxGh1TQmZWhJ5VVV!-403728570?nodeId=0ad8439b-eb9f-451d-ac95-8d16d9d07bb3&fileName=SEC%282009%29+320+Report+from+Commission_en.pdf&fileType=pdf)

specifically included as an essential item within a common immigration policy, and in consolidating and implementing the goals of the Global Approach to Migration. The specific commitments that the Programme outlines are, amongst others, that: the exchange of national information on regularization should be improved; voluntary return encouraged; and Member States facing a disproportionate pressure due to large numbers of irregular migrants should be assisted by working closely with the Commission, FRONTEX and Member States on a voluntary basis to ensure the effectiveness of their return policies towards certain third countries.<sup>195</sup>

The Action Plan Implementing the Stockholm Programme<sup>196</sup> declares that “The prevention and reduction of irregular immigration in line with the Charter of Fundamental Rights is equally important for the credibility and success of EU polices in this area (of migration).” The Action Plan outlines a number of specific actions to be undertaken between 2010 and 2014 in relation to the Program’s commitments to combating irregular migration.

These are as follows, with the envisaged year as given in the Action Plan:

- 2011: Communication on the evaluation of readmission agreements and on the development of a coherent strategy on readmission taking into account the overall relations with the country concerned, including a common approach towards third countries that do not cooperate in readmitting their own nationals (published as COM(2011) 76<sup>197</sup>);
- 2011: Communication on the evaluation on the common policy on return and on its future development (including support measures for return and reintegration of persons readmitted, capacity building in third countries; disseminating information in destination countries regarding returning and reintegration opportunities, network of liaison officers in countries of origin and transit);
- 2012: Legislative proposal amending Directive 2002/90/EC, defining the facilitation of unauthorized entry, transit and

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<sup>195</sup> Stockholm Programme: An Open and Secure Europe serving and protecting citizens, available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF>

<sup>196</sup> COM(2010) 171, available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0171:EN:NOT>.

<sup>197</sup> Available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011DC0076:EN:NOT>, plus its accompanying Staff Working Papers SEC(2011) 209, 210, 211 and 212.

residence (and possibly merge with Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence; and extending existing provisions);

- 2014: Report on Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals;
- 2014: Report on the implementation of the Return Directive 2008/115/EC;
- On-going: Further efforts on negotiating and concluding readmission agreements with relevant third countries and exploration of the possibilities of concluding readmission agreements with other third countries.

Other recent developments have included the Justice and Home Affairs Council meeting in 2010, where the Council concluded 29 measures for reinforcing the protection of the external borders and combating illegal immigration.<sup>198</sup> These comprise recommendations to strengthen the abilities of the FRONTEX Agency and its Rapid Border Intervention Teams (RABITs<sup>199</sup>); to develop a European Border surveillance system called EUROSUR; to increase cooperation with third countries, in particular so as to increase the effectiveness of return; to increase information exchange and to work with Europol, Eurojust and Frontex to ensure the dismantling of networks of irregular immigration and trafficking.

In a Communication of March 2011, the Commission outlined its approach to building a "Partnership for Democracy and Shared Prosperity with the Southern Mediterranean" and highlighted EU actions undertaken in response to recent political changes in North Africa.<sup>200</sup> The document encourages Member States to create mobility partnerships. However it also states that, "*in return for increased mobility [...] partners must be prepared*

<sup>198</sup>

Available

from

[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/113065.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/113065.pdf)

<sup>199</sup> Rapid Border Intervention Teams (RABITs) made up of 'guest officers' from 26 Member States were sent to Greece between November 2010 and March 2011 to support Greece in controlling the large number migrants irregularly entering Greece through its border with Turkey. The operation helped the Greek authorities to apprehend and identify irregular migrants and to gather information on migration routes and facilitator networks. Since the deployment of RABITs, the numbers of irregular crossings have dropped by approximately 75 %. More information is available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/130&format=HTML&aged=0&language=EN&guiLanguage=fr>

<sup>200</sup> Available from: [http://www.eeas.europa.eu/euromed/docs/com2011\\_200\\_en.pdf](http://www.eeas.europa.eu/euromed/docs/com2011_200_en.pdf)

*to provide appropriate financial support for border management, preventing and fighting against irregular migration and trafficking in human beings, including through [...] the return of irregular migrants (return arrangements and readmission agreements).”*

More recently, on 4<sup>th</sup> May 2011, the Commission published a Communication on Migration,<sup>201</sup> in part as a result of the events in the Southern Mediterranean. Sections 2.2 and 2.4 of this Communication respectively address external border controls and preventing irregular migration. In June 2011, the European Council will also address latest developments in respect to migration policy, including *inter alia* irregular.

A different situation appears when we move to the cases of the European Court of Justice of the European Union in Luxemburg and the European Court of Human Rights of the Council of Europe in Strasburg.

### *3. Rights for undocumented immigrants in ECJ Cases*

Observing the development of EU competences and policies around irregular migration in the last decade, it is possible to see the European Court of Justice (hereinafter ECJ) enlarging its powers on irregular migration. The first cases ECJ judged are related to the right of entry for spouses who have immigrated irregularly into the country of the husband or the wife. The other cases have interpreted dispositions of the Returns Directive<sup>202</sup>. In *Kadzoev*<sup>203</sup> the ECJ ruled about safeguards for the irregular immigrant that cannot be bargained with Member-States. The Court elucidated the way in which the maximum periods of detention in Article 15(5) and (6) are to be considered, and it explained the concept of a “reasonable prospect of removal” in paragraph 4 of that provision. This judgment highlights also the high complexity and incoherence of legal differences between asylum and immigration. As one scholar said, “While the Court insisted upon a clear demarcation between the two legal regimes, we will see that this is not always possible due to a lack of coherence in the immigration and asylum harmonization agenda”<sup>204</sup>.

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<sup>201</sup> COM(2011) 248, available from [http://ec.europa.eu/home-affairs/news/intro/news\\_intro\\_en.htm](http://ec.europa.eu/home-affairs/news/intro/news_intro_en.htm). further related Commission papers are planned for end May 2011.

<sup>202</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 Dec. 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, O.J. 2008, L 348/98.

<sup>203</sup> Case C-357/09 PPU, Said Shamilovich Kadzoev (Huchbarov), Judgment of the European Court of Justice (Grand Chamber) of November 30, 2009.

<sup>204</sup> G. Cornelisse, *Case C-357/09 PPU (Comment)*, 48 Common Mkt. L. Rev, 925 (20).

In 2011 the EJC ruled on another important case, again about the application of Returns Directive<sup>205</sup>. The case originated in proceedings brought against Mr. El Dridi, who was sentenced to one year's imprisonment for the offence of having stayed illegally on Italian territory without valid grounds, contrary to a removal order made against him by the Chief of Police in Udine (Italy).

The Court decided that articles 15 and 16 of that Directive must be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period. In this case the ECJ also ruled that the order in which the phases of the return procedure established by Directive 2008/115 are to take place corresponds to a "gradation of the measures to be taken in order to enforce the return decision". This gradation goes "from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility". In the light of these considerations the Directive precludes national legislation impose felonies (criminal penalty) during administrative procedures concerning the return of a foreign national to his country of origin.

Judgments on Returns Directive are not the only cases involving the rights of irregular migrants. In a recently issued case, the ECJ has been confronted with fundamental questions regarding the implications of the fundamental status of EU citizenship of young children in relation to the rights of their third-country national parents.

In the *Ruiz Zambrano* case the ECJ faced the question whether a national of a Member State who had not left his home Member State (Belgium), had a right in virtue of EU law to reside in the territory of the Member State of which he was a national. Mr. and Ms. Zambrano are a Colombian national, father of two children of Belgian nationality born during their irregular stay in that Member State, whose asylum and subsequent residence applications since 2001 were repeatedly rejected by Belgian authorities. For the Court, the denial by a Member State to grant the right of residence and a work permit to a third-country national with dependent minor children who are themselves nationals of that Member State would deprive the children in question of the substance of the rights conferred on them by virtue of their status as citizens of the Union. Such a refusal would have led to a situation where those children would have to leave the territory of the Member State

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<sup>205</sup> Case C-61/11 PPU, El Dridi, Judgment of the European Court of Justice (First Chamber) of April 28, 2011

in question in order to stay with their parents. Meanwhile it disregarded the strong objection related to the “purely internal character of the situation”, and the Court declared the need under EU legislation to grant a residence and work permit for ascendants of minor European citizens in the State whose nationality they possess in order to safeguard “the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union”.<sup>206</sup>

It is interesting to note that on April 14<sup>th</sup>, 2011, the Commission launched an “EMN ad-hoc query” to investigate whether or not Member States must grant nationality to a child born on its territory, and if so, under which conditions.

The entry into force of the Treaty of Lisbon brings important innovation for the ECJ competence and for the EU cooperation in the area of irregular migration, making the Charter of Fundamental Rights of the EU legally binding. One of the most important improvements is the fact that now many rights are applicable to everyone, independently from the legal status of the migrant.

#### 4. ECtHR cases on irregular immigration

A specific protection of irregular migrants’ human rights could be found in instruments of the Council of Europe, which have been ratified by all EU member-states, and in the jurisprudence of the European Court of Human Rights (hereinafter ECtHR)<sup>207</sup>.

Differently from the ECJ, the ECtHR has developed a long list of opinions about irregular migration status and rights – typically situations where an undocumented migrant is contesting a national decision to remove him/her to a third country. Despite the few references to aliens in the original rights afforded by the Convention – and in some Articles the deterrence to recognize rights to irregulars<sup>208</sup> – the ECtHR developed a

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<sup>206</sup> Michaela Hailbronner & Sara I. Sanchez, *European Court of Justice and Citizenship of the European Union: New Developments towards a Truly Fundamental Status*, 5 Vienna J. on Int'l Const. L., 498-537 (2011).

<sup>207</sup> The European Court of Human Rights is an international court set up in 1959. It rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights (ECHR). The ECHR is an international treaty under which the member States of the Council of Europe declare to secure fundamental civil and political rights, not only to their own citizens but also to everyone within their jurisdiction. The Convention, which was signed on 4 November 1950 in Rome, entered into force in 1953.

<sup>208</sup> Article 5, paragraph 1 (Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is

wide understanding of its case law extending Article 2 about “right to life”, Article 3 on “prohibition of torture”, and Article 8 about “family life”, to immigration cases alike.

In particular, while Article 2 did not produce many legal issues, article 3 provides a powerful addition to the *non-refoulement* principle of the Refugee Convention. *Soering* represents the first case of indirect protection for a foreign citizen on the basis of the Convention’s norms<sup>209</sup>. In *Soering*<sup>210</sup> the ECtHR addressed for the first time whether extradition of an indicted criminal by a Convention member-state to a country where the criminal faces the death penalty and a potentially lengthy delay on death row constitutes a breach of Article 3 of the Convention prohibiting “torture or inhuman or degrading treatment or punishment”<sup>211</sup>. With the case *Cruz Veras* the ECtHR opened to declare the violation of the Convention in cases of an expulsion of irregular migrants. Even in the case of the irregular presence of an alien the member-state should respect the *non-refoulement* principle.

This latter principle has been interpreted in a broad way by the ECtHR, not only allowing that a person can suffer exposure to “torture or inhuman or degrading treatment or punishment” by state’s authority or political parties, but also by persons<sup>212</sup>. In addition, in several recent cases the ECtHR has developed a doctrine that pretends the protection of minimum core rights for the aliens in a not regular condition<sup>213</sup>.

There is, however, much more to say about the application of Article 8 as the most appropriate tool the ECtHR has used to give rights to undocumented migrants. This Article pretends respect for family and private life. In the case *Abdulaziz*<sup>214</sup>, the ECtHR ruled that whilst there is no right for foreigners to locate a matrimonial home in a country of their choice, and states have rights to control their frontiers, the exercise of

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being taken with a view to deportation or extradition) and Protocol 7 that prescribes procedural safeguards in case of expulsion only for an alien lawfully resident in the territory of a State.

<sup>209</sup> See David L. Gappa, *European Court of Human Rights-Extradition-Inhuman or Degrading Treatment or Punishment, Soering Case*, 161 *Eur. Ct. HR (Ser. A)*(1989), 20 *Ga. J. Int'l & Comp. L.* (1990).

<sup>210</sup> *Soering Case*, 161 *Eur. Ct. H.R. (ser. A)* (1989) at 1.

<sup>211</sup> The Court held that if *Soering* were extradited to the United States, he faced a real risk of exposure to treatment or punishment contrary to Article 3.

<sup>212</sup> *Vilvarajah et al. v. The United Kingdom*, *Eur. Ct. H.R. (ser. A)* (1991).

<sup>213</sup> *Saadi v. United Kingdom*.

<sup>214</sup> *Abdulaziz Cabales and Balkandali v. The United Kingdom* (1985) 7 EHRR 481.

migration control should be compatible with the state's obligation under Article 8.<sup>215</sup>

In this line one of the most interesting cases is *O'Donoghue*<sup>216</sup> in which the ECtHR recognizes the right to marry for the undocumented. The Court sets forth:

84. The fundamental nature of the right to marry is reinforced by the wording of Article 12. In contrast to Article 8 of the Convention, which sets forth the right to respect for private and family life, and with which the right "to marry and to found a family" has a close affinity, Article 12 does not include any permissible grounds for an interference by the State that can be imposed under paragraph 2 of Article 8 "in accordance with the law" and as being "necessary in a democratic society", for such purposes as, for instance, "the protection of health or morals" or "the protection of the rights and freedoms of others". Accordingly, in examining a case under Article 12 the Court would not apply the tests of "necessity" or "pressing social need" which are used in the context of Article 8 but would have to determine whether, regard being had to the State's margin of appreciation, the impugned interference has been arbitrary or disproportionate (*Frasik v. Poland*, no. 22933/02, § 90, ECHR 2010-... (extracts)).

Finally, I need to recall the seminal case *Siliadin v. France*,<sup>217</sup> a case concerning an unlawful migrant performing domestic work for almost two years without pay, and in slavery conditions. Fear that she would be arrested and expelled by the police forced her into a situation in which she had no freedom of movement or time. The ECtHR found that in this case there had been a violation of the respondent State's positive obligations under Article 4 of the ECHR. Moreover, this decision censured France for its indifference to the treatment of irregular migrants in the labor market.

In addition to the opinions of the ECtHR, even the Council of Europe (hereinafter CoE) has produced material aiming to improve the protection of human rights for undocumented migrants. The Parliamentary Assembly of CoE in its resolution of May 4<sup>th</sup>, 2006,<sup>218</sup> stresses the importance of clear guidance and standard-setting in the area of socio-economic rights:

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<sup>215</sup> See further Daniel Thym, *Respect for private and family life under Article 8 ECHR in immigration cases: a human right to regularize illegal stay?*, 57 *International and Comparative Law Quarterly* (2008).

<sup>216</sup> *O'Donoghue and Others v. United Kingdom* (2010)

<sup>217</sup> *Siliadin v. France*, 26 July 2005, 43 E.H.R.R. 16.

<sup>218</sup> The human rights of irregular migrants, PACE Doc.10924 <http://assembly.coe.int>

“It should be noted that as a starting point, international human rights instruments are applicable to all persons regardless of their nationality or status. Irregular migrants need protection and are entitled to certain minimum human rights in order to live in a humane and dignified manner. These rights include certain basic civil and political rights and social and economic rights.”

In another Recommendation 1509 (2006) Parliamentary Assembly invited the Committee of Ministers to draw up a list of rights. The minimum standard is considered to be that set out in the ECHR:

“In terms of civil and political rights, the Assembly considers that the ECHR on Human Rights provides a minimum safeguard and notes that the Convention requires that its Contracting Parties take measures for the effective prevention of human rights violations against vulnerable persons such as irregular migrants.”

In the socio-economic arena, the recommendation (in addition to the rights considered above) outlined the following minimum rights (at para 13)<sup>219</sup>:

1. adequate housing and shelter guaranteeing human dignity should be afforded to irregular migrants;
2. emergency health care should be available to irregular migrants and states should seek to provide more holistic health care, taking into account, in particular, the specific needs of vulnerable groups such as children, disabled persons, pregnant women and the elderly;
3. social protection through social security should not be denied to irregular migrants where it is necessary to alleviate poverty and preserve human dignity. Children are in a particularly vulnerable situation and they should be entitled to social protection, which they should enjoy on the same footing as national children;
4. irregular migrants who have made social security contributions should be able to benefit from these contributions or be reimbursed if expelled from the country, for example;
5. in relation to irregular migrants in work, they should be entitled to fair wages, reasonable working conditions, compensation for accidents, access to a court to defend their rights and also freedom to

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<sup>219</sup> For an analysis of single rights *see* Stefano Valenti, Protecting the human rights of irregular migrants: the role of national human rights structures, Council of Europe(2008), available at [http://www.coe.int/t/dg3/migration/Source/migration/proceedings\\_Padua\\_June2008.pdf](http://www.coe.int/t/dg3/migration/Source/migration/proceedings_Padua_June2008.pdf).

form and to join a trade union. Any employer failing to comply with these terms should be rigorously pursued by the relevant authorities of the member state;

6. all children have a right to education, extending to primary school and secondary school levels, in those countries where such schooling is compulsory. Education should reflect their culture and language and they should be entitled to recognition, including through certification, of the standards achieved;

7. all children, but also other vulnerable groups such as the elderly, single mothers and more generally single girls and women, should be given particular protection and attention.

*5. Some concluding considerations about negative attitude toward undocumented in Europe*

There are some aspects of contemporary EU migration policy that lead me to consider it as a good way to respond to those individuals who wish or try to migrate. In general the European integration process is an example of success for several reasons<sup>220</sup>. Many countries share economy, markets, workforce, and resources. Factually irregular immigration has been overcome sharing the European membership with eastern countries, as in the case of Poland, Lithuania, Romania, etc. By a process of political integration, involving the extension of comprehensive rights to free movement to previous outsiders, any form of migration has, in principle, become legal and the idea of irregular immigration between these countries has been abolished (Germany and Poland; Italy, Austria and Romania). On one hand, European integration reduces the need to migrate; to the other, European integration grants a right to freedom of movement and encourages mobility as a strategy of economic growth and social progress.

There are also arguments against EU migration policy.

First, the inclusion is never completed: many other countries are waiting at the gates to become members of the Club of Europe: Albania, Turkey, Ukraine, Belarus, Georgia, etc. These countries' nationals are within EU borders in many cases irregularly.

Secondly, the process of inclusion lacks complete unanimity: there are in Europe several states that oppose this kind of policy (England and Ireland); each member is eager to use its own different national policy (e.g. regularizations).

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<sup>220</sup> DÜVELL, 242, (

Thirdly, integration has to consider the movement of people as productive of new burdens for social systems in receiving countries.

In addition, the recent EU strategy of inclusion has been criticized from many parts of academia. Europe and migration become linked as sources of “instability”. Anxiety about Europe and migration are linked with fears of a “clash of civilizations” and anxiety about social securities<sup>221</sup>.

The trajectory I have described of EU law and ECJ opinion, along with the cases of ECtHR, shows how complex and confusing it can be to determine the status of irregular migrants and to protect their rights. EU policy largely facilitates the mobility of European citizens, but it places severe limits on other categories of trans-border migrants. Returns are the cornerstones of the policy, combined, more recently, with an extinguishing of the possibility for regularization. There is an important risk in this policy. The focus on immigration control could dominate, compromising measures designed to combat the exploitation of undocumented migrants. By using these words, I do not suggest abandoning border controls. The existence of a social conflict is clear. Even in Europe migration should be interpreted as a kind of “social movement towards global social justice”<sup>222</sup>.

A clear example of this opposition is the clash between legislature and judiciary. Europe is a very good testing ground of this conflict. On one hand the political and administrative institutions of the Union are inclined to exclude migrants from social benefits. On the other hand judicial institutions may seek a way to reconcile the phenomenon of irregular migration with constitutional values regarding equality of treatment and the access to social rights for everyone. Cases of the ECJ and ECtHR are examples of these opposing forces. When a situation goes under-protection – i.e. below the standard of rights – migrants can invoke European judicial protection in order to re-expand their position. Indeed, in this area Courts have played a major role in the integration of the undocumented and in the improvement of a more human rights-oriented policy. The presence of a consistent European jurisprudence in this matter highlights the dynamic nature of the law governing social rights for migrants.

#### *6. Access to social rights in the EU member-states: some European dilemma*

In this article I have chosen to study the situation of undocumented immigrants from the perspective of the EU legal system. As a matter of fact,

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<sup>221</sup> See Gerard Delanty, *Fear of others: social exclusion and the European crisis of solidarity*, 42 *Social policy & administration*, 676–690 (2008).

<sup>222</sup> BILL JORDAN & FRANCK DÜVELL, *IRREGULAR MIGRATION* (2002).

the creation of the Communities, in the Treaty of Rome, and the European Union, after the Maastricht Treaty, entailed not only the economic integration among European countries but also fostered a shared “European identity”<sup>223</sup> that has been capable, in a certain way, of embracing the differences between “Europeans citizens” and “others”. There are many contradictions in this system. One of the most important incongruities concerns the unclear attribution of legislative powers among states and Union in the matter of the welfare system. Although the harmonization of states’ legislation covers a part of the system, states have the duty to provide benefits for persons in areas such as school, social security, health care, housing, etc. For this reason EU countries have different situations in terms of protection of social rights for the undocumented. While the law regulating immigration and expulsion in Europe are now uniform, the social treatment of the undocumented varies widely.

In general Southern European Countries act more generously with the undocumented, permitting the presence of “others”.<sup>224</sup> Conversely, Northern countries have mostly restrictive policies. Spain, Greece and Italy are the member-states where the undocumented normally have access to free social rights (health care and education)<sup>225</sup>. France, Germany, England and Sweden restrict the access to basic social rights except primary care.

It is necessary to focus on causes and consequences that are producing this division. I think the first difference rests on the different amounts of money these countries spend in social protection, which are based on the different models of social security states have chosen. In Northern European countries there prevails a mix of Bismarck and Marshall welfare regimes. In states such as Germany, Austria, and Sweden habitation and lawful presence in the state is not sufficient to provide a right to social security, which is mostly dependent on employer and employee contribution (e.g. compensation of care). The average these member-states invest in social security is normally five/seven point GDP higher than Southern European countries. However, a policy devoted to undermining undocumented immigrants’ access to social services is not primarily the result of an

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<sup>223</sup> See Deborah R. Altamirano, *Illegal Immigration in Europe: Balancing National and European Union Issues*, in *ILLEGAL IMMIGRATION IN AMERICA: A REFERENCE HANDBOOK* (David W. Haines & Karen E. Rosenblum, eds., 1999).

<sup>224</sup> This policy became more controversial in time of economic crisis.

<sup>225</sup> For the Spain see generally Crisitna M. Rodríguez & Ruth Rubio-Marín, *The constitutional status of irregular migrants: testing the boundaries of human rights protecting in Spain and the United States*, in *ARE HUMAN RIGHTS FOR MIGRANTS? CRITICAL REFLECTIONS ON THE STATUS OF IRREGULAR MIGRANTS IN EUROPA AND THE UNITED STATES* (Marie-Bénédicte Dembour & Tobias Kelly, eds., 2001). For Italy see FILIPPO SCUTO, *I DIRITTI FONDAMENTALI DELLA PERSONA QUALE LIMITE AL CONTRASTO DELL'IMMIGRAZIONE IRREGOLARE* 272-309 (2012).

explicit strategy against irregulars, but a product of the rules governing the access to benefits in Northern European countries.

In these latter countries there is great concern over discrimination against irregular migrants, especially in the area of health care. These concerns are about the gap between international law dictating access to the highest attainable standard of health and failure to respect, protect, and fulfill this right. The most interesting example is the Sweden system<sup>226</sup>. Denial of health care for migrants raises practical and political problems. As Alexander has reported, discrimination against undocumented migrants and asylum seekers is nearly impossible to reconcile either with international treaties about human rights or with doctors' ethical obligations in Sweden. One cornerstone of their medical ethics is that care should be based on medical need. Other factors such as economic, social or legal status should not affect medical professionals' work.<sup>227</sup>

Another interesting example comes from the Italian system.

Let's return to the judgments I have taken as touchstones to use in this article, the judgment of the Italian Constitutional Court about the extension of welfare benefits to all foreign nationals who legally reside in Italy. Using that case my aim was not only to show an important example of policy contrast in irregular migration field. My aim was also to show how different are the positions of the institutional actors playing in the "industry of migration" in Italy.<sup>228</sup>

In judgment (docket 269/2010) the Constitutional Court heard an application from the President of the Council of Ministers challenging legislation enacted by the Tuscan Region concerning the "acceptance, integration, participation and protection of foreign nationals" on the grounds that it infringed upon the State's legislative competence over immigration, failed to comply with the fundamental principles set out in State legislation and purported to establish new powers to establish relations

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<sup>226</sup> TJERNBERG.

<sup>227</sup> Shannon Alexander, *Humanitarian Bottom League? Sweden and the Right to Health for Undocumented Migrants*, see *id.* at

<sup>228</sup> Among other European countries, Italian immigration system is specific, even with the case of Spain. In the industry of migration Italy has traditionally played as sender country. Only in the last twenty-five/thirty years Italy has attracted large numbers of immigrants workers from other countries. The first positive balance between emigration and immigration (return immigration included) dates to 1973. Despite the fact that the overall percentage of the immigrant population residing in the country remains low by comparison to other EU countries, like Germany, France, England, the immigration is yet a social problem. Moreover, the immigrant population has been undergoing a process of stabilization and settlement in the last few years. Further information is present in Giovanna Zincone, *The case of Italy*, in *MIGRATION POLICYMAKING IN EUROPE. THE DYNAMICS OF ACTORS AND CONTEXTS IN PAST AND PRESENT* (Giovanna Zincone, et al., eds., 2011).

with international organizations. The Court rejected the question on the reason, *inter alia*, that the legislation was “limited to guaranteeing also to citizens of new Member States of the Community those services due to them under the terms of Community law obligations and relating to matters under their jurisdiction” and was aimed at furthering fundamental rights under the Constitution, such as healthcare, which were available irrespective of a person’s status as a lawful resident.

In this case and in the facts remaining in the shadows of it, we can see all the difficulties related to ambiguous Italian migration policies in which restrictive procedures coincide with acts of regularization. To continue the process of regularization, irregular migration in Italy has become a sort of preparation of the ground for applying for regularized status.

First, in a certain way the Tuscan Region has been forced to enact such a bill. Pressure from NGOs and other lay and religious organizations is prompting a reform of Italian immigration laws to let irregulars use public services and obtain social security benefits. Second, the case is an example of the difficult role of courts in the protection of social rights. In this case – as well as in many others already discussed in the analysis of the US and EU system – it is clear the role the Constitutional Court is playing: it provides an avenue for the poor and vulnerable to have their voice heard, which political fora do not always secure. While the “an” and “quid” of rights’ protection could not be discussed because it is matter of constitutional and international principles, the “quando” and “quomodo” of protection are under the responsibility of legislative and under the supervision/control of judiciary.

### III. ANALYSIS: COMPETITION AMONG SOCIAL REGIMES OR A DIFFERENT IDEA OF HUMAN DEVELOPMENT?

The two main legal environments under analysis show the big clash between global migration and democratic self-governance in our society<sup>229</sup>. Findings I have drawn suggest that the picture is more complex and that there is a case for reconsidering the extent to which irregular migrants should receive some social rights.

Reconciling democratic politics with global egalitarian aspirations is not easy. I think this is part of the *internal* complexity of justice our legal systems are dealing with.

Migration laws are essential to nations, as they need both members and boundaries.

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<sup>229</sup> CHRISTOPHER H. WELLMAN & PHILLIP COLE, *DEBATING THE ETHICS OF IMMIGRATION: IS THERE A RIGHT TO EXCLUDE?* (2011).

It is a matter of fact that society is held to be undergoing a ‘stretching process’ whereby different social contexts and regions become networked across the globe, albeit with no definite direction of change and displaying some unexpected conflicts.

Several arguments force us to recognize national welfare policy as part of this clash.

In many countries the granting of welfare benefits to migrants has been seen as a privilege, and to people who don’t deserve it.

Following are some questions that drive me to reconsider the relationship between human welfare and irregular migration.

- Is the current formula of Welfare State or Social State able to bear the burden of modern immigration?
- How could social systems better integrate the strategies of mobile populations into an overall policy of economic growth and social progress for the mutual benefits of all?
- How can liberal calls for 'freedom of movement' and the 'management of migration' be reconciled by facilitating, instead of restricting, human mobility?
- “Migration management” is increasingly becoming a euphemism for new forms of control and restriction. Authors are suggesting instead considering the concept of 'facilitating migration'<sup>230</sup>.

In the previous part we saw the situation of irregular immigration in the USA and in Europe.

The study has shown how the two different approaches to irregular immigration have to deal with the same problems. It is impossible to say that irregular immigration in the US is only an economic problem and that, on the other hand, in Europe it raises only humanitarian issues. Both Europe and the US have to deal with these two issues.

#### *A. Social rights as entitlements (Economic approach)*

This article aims to present an argument for why we should reconsider the situation of irregular migrants and in particular their social rights. In this part I study theories of social rights to better respond to problems of irregular migration.

I must start from the idea of social rights as entitlements. I have also called this theory in the light of immigration studies the “economic

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<sup>230</sup> DÜVELL, 242, (

approach". I take T.H. Marshall's idea of social rights as a better definition of social rights as entitlements<sup>231</sup>. The substance of social rights is a minimum supply of certain essential goods and services or a minimum income available to be spent on essentials provided by the state. The "social minimum", as Marshall recognizes, consists of cash benefits (including tax credits), services, or benefits in-kind (e.g. housing, medical equipment, school facilities)<sup>232</sup>. The most significant question relates to the quantum of such resources. Clearly, the quantum varies according to communities and regions of a large community, but is related to the idea of a basic threshold. As part of the idea of citizenship, benefits are provided only for nationals. Membership acts as the lock of the circle of trust made imposing taxation.

In this concept, states must secure our social rights "from the cradle to the grave"; it has the duty to provide or to regulate for this provision. The state is the institution through which national communities act collectively to secure important public and private goods (welfare state<sup>233</sup>).

This brief exploration of welfare state theory helps to understand why in this light irregular migrants are not entitled to the protection of social rights. When social rights are considered only as entitlements, they are subject to the will of governments and in particular their decisions about budget allocation. For this reason, in times of economic crisis social expenditures are normally one of the first items cut in a budget.

When the idea of social rights implies the recognition of entitlements, claims can be made against the state/government. An expansive approach in the awarding of entitlements could undermine government's policy. The emphasis on the role of government for the protection of social rights and the distribution of wealth among citizens leads to the exclusion of immigrants. In this theory can be seen the roots for most of the arguments made to prevent the awarding of social rights for immigrants. These arguments are related to the so-called 'national paradigm'<sup>234</sup>. Opponents of rights for irregular migrants assert that states should not be compelled to provide undocumented aliens anything more than minimal human rights protections because they are not part of the social contract, which binds the national community<sup>235</sup>. Curtailment of social rights for irregular immigrants has become, in the last decades, an essential tool for restrictive immigration policies. By making life more difficult for those already present, these

<sup>231</sup> T.H. Marshall, *Class, citizenship and social development*, New York (1964).

<sup>232</sup> JEFF KING, *JUDGING SOCIAL RIGHTS* (2012).

<sup>233</sup> RICHARD M. TITMUS, *ESSAYS ON "THE WELFARE STATE"* (1976).

<sup>234</sup> See Lydia Morris, *An emergent cosmopolitan paradigm? Asylum, welfare and human rights I*, 60 *The British journal of sociology* (2009).

<sup>235</sup> Linda Bosniak, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrant Workers Convention*, 25 *International Migration Review* (1991).

measures aim to deter potential candidates and prompting voluntary returns to countries of origin or third countries while protecting the public purse.<sup>236</sup>

*B. Social rights as human rights (Humanitarian approach)*

I would start this paragraph with a long quotation from a speech by French philosopher Jacques Derrida.

I do not know who came up with the locution "sans-papiers," nor do I know how this terrifying expression "sans-papiers" has become established little by little and even has found legitimation in recent days. An entire process has taken place here, a process that was sometimes slow and insidious, at other times explosive, brutal, accelerated like a police raid on a church. This terrifying habituation that has acclimatized this word to our lexicon would deserve long analyses. One assumes that what one calls, in a word, a "sans-papiers," is lacking something. He is "without." She is "without." What is he or she lacking, exactly? Lacking would be what the alleged "paper" represents. The right, the right to a right. One assumes that the "sans-papiers" is in the end "sans droit," "without right" and virtually outside the law. By contesting his normality and civic identity, one is not far from contesting his very identity. One might say that he is lacking more than a determined thing, one thing among others: he is naked and exposed, without right, without recourse, deficient [en défaut] in the essential. Without anything. What he is lacking, in truth, the lack he is being imputed and that one wants to sanction, that one wants to punish—let us not deceive ourselves, and I would like to show this, intentionally using this very precise word—is a dignity. The "sans-papiers" would be lacking dignity. What dignity? What is a "sans-papiers" unworthy [indigne] of? And why is a "sans-papiers" assumed to be unworthy? Why, in the name of what, is he or she refused dignity? For the law and the French police do not content themselves with mistreating the "sans-papiers"; with forcing them to cram themselves into places that are barely livable, before concentrating them into triage camps of sorts, "transition" camps; with hunting them down; with expelling them from churches and

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<sup>236</sup> Sylvie Da Lomba, *Fundamental Social Rights for Irregular Migrants: The Right to Health Care in France and England*, in *IRREGULAR MIGRATION AND HUMAN RIGHTS: THEORETICAL, EUROPEAN, AND INTERNATIONAL PERSPECTIVES* (B. Bogusz, et al., eds., 2004).

from the territory; with treating them often in defiance of the rights of man, I mean precisely of those rights guaranteed by the Geneva convention and by the European convention of the rights of man (Article 3), in defiance of the said rights of man and in defiance of human dignity-which is (I say this weighing my words) literally denied them, explicitly refused them. One refuses this dignity to those one is accusing (I am citing an ancient but topical text here and one to which I will turn for a moment) of being "unworthy of living on our soil."

Derrida's speech clearly stigmatizes the lack of effectiveness of international covenants and states' constitutions which proclaim rights for irregular migrants. Undocumented migrants represent the hard case for those arguing protection of social rights as part of the "family" of human rights.

Scholars in favor of the extension of social rights to immigrants offer several arguments in favor of this idea.<sup>237</sup>

Firstly, they emphasize the "absolute nature" of all human rights, no matter the generation they belong to. Since the 1990s, the idea of the interdependence and indivisibility of the different kinds of rights (civil, political and social) has gained broad recognition. The Declaration adopted by the 1993 second World Congress on Human Rights in Vienna referred to the covenants and the two sets of rights as "universal, indivisible, and interdependent and interrelated"<sup>238</sup>.

Secondly, they claim that social rights are not different from civil and political rights. They are not a "second class" of rights. For many years the Lockean idea of rights, as merely limiting the power of the state to act, had reinforced the notion that social welfare is a supposedly unique sphere insofar as it involves matters of policy and distribution that belong outside the sphere of rights and judicial enforcement. Even the enforcement of civil rights requires in practice positive government actions, as well as the allocation of resources. Prioritizing the role of human rights over policy concerns leads also to a rediscovery of the importance of these rights. Hence, social rights have a specific role in realizing civil and political rights because they allow all humans to attain a substantial form of equality.

By taking this path scholars reach the conclusion that it is better to exclude questions of distribution from the rights discourse. Social rights do

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<sup>237</sup> ASBJØRN EIDE, ET AL. EDS., *Economic, Social and Cultural Rights: A Textbook* 3-130 (2 ed. 2001). DAPHNE BARAK-EREZ & AEYAL GROSS EDS., *Exploring social rights: Between Theory and Practice* (2007).

<sup>238</sup> Vienna Declaration and Programme of Action (adopted June 25, 1993 by World Congress on Human Rights) para 5.

not differ from other kind of rights. Rather, any right has a direct dependence on human dignity as a core part of every person. For this reason protection of human rights is particularly important for those people in vulnerable positions such as the poor, the undocumented, and asylum seekers.

If we turn from an idealistic point of view to an empirical analysis, this conclusion discloses an aporia. Swedish professor G. Noll has noted the most interesting example of this irresolvable internal contradiction, talking about the U.N. Convention on the Rights of the Child (hereinafter CRC)<sup>239</sup>, one of the most successful human rights treaties in terms of the large number of states being parties to it.<sup>240</sup> Despite its importance CRC is quite irrelevant for migrant children. It reflects “the unstable relationship between exclusionary sovereign power and a migrant child’s human rights claim.”<sup>241</sup> Technically no state member seems to deny the applicability of human rights to undocumented children. What they do is “rather to reserve the right to create and uphold laws regulating the entry, presence, and exit of non-citizens.”<sup>242</sup> Belgium, for example, has filed reservations with the ratification of the Convention and has taken care to explain in an interpretative declaration that the quoted provision “does not necessarily imply the obligation for states automatically to guarantee foreigners the same rights as their nationals.”<sup>243</sup>

It is interesting to compare these reservations with the opinion Chief Justice W. Brennan wrote in *Plyler*, where immigrants – no matter whether they are authorized or not – are considered a source and not a threat for the US Nation.

In sum, I can see seven main issues concerning the application of human rights doctrine as a way to grant social rights to undocumented immigrants.

First. Although human rights are extended to everyone, their implementation still depends on the venue in which claims to them are made.<sup>244</sup> Irregulars see the proliferation of human rights as sometimes unhelpful. Although the proliferation of venues, or the so-called multilevel approach, is part of the legend of the globalization, it has not always been linked to a real right to access in those venues.

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<sup>239</sup> Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3.

<sup>240</sup> 193 states out of 203 states worldwide.

<sup>241</sup> NOLL, 245.

<sup>242</sup> *Id.* at.

<sup>243</sup> Belgian Interpretative Declarations, 16 December 1991, paragraph 1.

<sup>244</sup> SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996).

Second. This approach seems to have made important gains only in the European Human Rights Convention's legal system<sup>245</sup>, where it has been used as a tool to force some states to improve immigration laws.

Third. On the contrary an opinion like Plyler – not dependent on a human rights approach to migrants – seems to be more responsive to the idea that irregular migrants deserve social rights.

Fourth. One particular concern is related to the EU legal system, where the extension of human rights appears at the same time incomplete and weak, despite the common refrain of Europe as a “polity community based on rights”.<sup>246</sup> An essentially civic conception of Europe is posited as the ideal. This vision of Europe is based on rights as opposed to efficiency. This highly pertinent vision of the EU has been used to address the challenges facing European society in integrating diverse groups of people. Given the dimension of human mobility in the EU, a rights-based idea of the political has a huge relevance<sup>247</sup>. “Europeanization” is a term used to address the “transnationalization” of the nation state in the direction of a supranational state. Nevertheless the economic and political approach to migration in many European countries may easily undermine the human rights dimension of migration. The principal focus on effective migration management, which is not rooted in a human rights approach even though it may contain elements of human rights protection, has weakened – except for some cases – the situation of irregular migrants.

Fifth. The human rights approach assumes the abstract and undifferentiated equal atomic individuals of classical liberalism. It tends to abstract persons from human relations (every kind of relation, even domination, exploitation, coercion, oppression, etc.).

Sixth. By giving human rights to the undocumented we do not give them the space where those rights can be exercised. Boundaries create membership and together delimit the public sphere of the state (polis), to which irregular migrants cannot gain access.

Seventh. Conclusively, the doctrine of human rights has done little to assist illegal migrants. This is due to two motives: “law’s power and its impuissance”.<sup>248</sup> Despite the “human” in human rights, being merely human is not enough to ensure legal standing in many instances.

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<sup>245</sup> DAUVERGNE, 613.

<sup>246</sup> There is in Europe a largely leftist position that considers Europe in terms of a civic conception of the polity as a political community based on rights. As best illustrated by Jürgen Habermas, the European project exhibits some signs of a postnational democracy based on the rights of the individual and a constitutional order. J. HABERMAS, *THE INCLUSION OF THE OTHER* (Ciaran Cronin & Pablo De Greiff eds. 1998).

<sup>247</sup> E.O. ERIKSEN ED., *Making the European polity: reflexive integration in the EU* (2005).

<sup>248</sup> DAUVERGNE, 21.

*C. Social rights as responses to needs (Relational approach)*

Recent economic and social studies around the world tend to represent the immigration industry and in particular irregular migration in a different way. One of the most important findings comes from the economic analysis of irregular migration and concerns the link between job demands related to an informal economy and informal immigration.

There is another important outcome from sociological studies. Informal/irregular migration is not only linked to an informal/underground economy, but also to practices of informal welfare. A recent study conducted by Italian sociologists discovered some interesting data about “survival resources and practices” of irregular migrants living and working as care givers and housemaids<sup>249</sup>. In this research are identified eight groups of resources that allow undocumented immigrants to survive, to integrate to some extent in the receiving society, and to prepare the ground for applying for regularized status. These resources are related in particular to the work of irregular woman engaged in household chores and care:

1. networks among migrants of the same country or region;
2. work;
3. access to some public services;
4. support various solidarity institutions;
5. lack of effectiveness of the repressive apparatus;
6. emotional ties and marriage alliances, that is, the establishment of sentimental relationships with Italian men, sometimes leading to marriage;
7. the involvement in ‘familiar’ relationships with the Italian families for whom they work;
8. the pursuit of a better life for those who they love.

Extrapolating from these indicators a picture of the social behavior of illegal immigration and mixing it with data and findings from the description of the two cases examined in this paper, I think there emerges a new view of irregular migrants discursively constructed as flexible, competitive, willing to adapt to changing conditions, and driven by entrepreneurial self-perception. Irregular migrants are both vulnerable

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<sup>249</sup> Maurizio Ambrosini, *Surviving underground: irregular migrants, Italian families, invisible welfare*, International Journal of Social Welfare, 1-11 (2011).

people and the most capable of meeting the need for informalization and mobility that labor markets all over the world today are expressing<sup>250</sup>.

A more effective way to express this assumption has been made by Kretsedemas, when he talks about the “marginal type”. This type, he said, “appears to violate the assumptions of liberal assimilation theory, including Park’s own writing on the subject. The marginality of the immigrant renders her useful to the host society, but this marginality also makes it difficult for her to be fully integrated”.

For this reason it cannot be assumed that the “immigrant becomes modern by assimilating the cultural norms of the host society”. She is already a “hypermodern subject by virtue of the dislocation and complex social negotiations that characterize her experience. The immigrant’s conditions of living force her to adopt a new orientation toward her inherited culture and the culture of the new land. As a result, the process of assimilation becomes inverted. The host society is only partly successful in assimilating the immigrant to its way of life (and remains ambivalent about incorporating the immigrant as a social equal). But the immigrant innovates new solutions to the antagonisms of modern life that are eventually assimilated by the host society”<sup>251</sup>.

Thus the question shifts on which field best helps in recognizing protection for immigrants. I think scholars must restart from the consideration of work as the first place where undocumented migrants are accorded a strictly limited legal standing in the system. Let me give two examples of this. First. The advisory opinion the Inter-American Court of Human Rights held in 2003 under a request of United Mexican States remarked by G. Noll. Speaking of the problems of discrimination against irregular immigrants in the labor market the Court said:

“134. In this way, the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment. On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular

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<sup>250</sup> NOLL, 263. (The undocumented migrant worker incarnates those ideals. She is the proto- type worker of informalization: maximally mobile, minimally dependent on the welfare state and incapable of collective bargaining. Simultaneously, her case proves that the structural imposition of mobility is at work independently of a legal freedom of movement. This is, I think, of some importance to the question why a minimalist labour rights protection kicks in for undocumented migrant workers. If mobility and informality are discursively idealized, those behaving in conformity with these ideals are given legal means to defend themselves to the degree necessary to defend these ideals).

<sup>251</sup> KRETSEDEMAS, 118.

or irregular status in the State of employment. These rights are a consequence of the employment relationship.

135. It is important to clarify that the State and the individuals in a State are not obliged to offer employment to undocumented migrants. The States and individuals, such as employers, can abstain from establishing an employment relationship with migrants in an irregular situation.

136. However, if undocumented migrants are engaged, they immediately become possessors of the labor rights corresponding to workers and may not be discriminated against because of their irregular situation. This is very important, because one of the principal problems that occurs in the context of immigration is that migrant workers who lack permission to work are engaged in unfavorable conditions compared to other workers.”

The second example comes from the EU Directive 2009/52/EC on sanctions and measures against irregular employment of undocumented migrants<sup>252</sup>. Article 6 compels EU member-states to enact mechanisms to ensure that illegally employed third-country nationals “may introduce a claim [...] against their employer and eventually enforce a judgment against the employer for any outstanding remuneration, including in cases in which they have, or have been, returned”.

It is clear how close this idea is to the cases I have analyzed in the US system, where the importance of undocumented presence could be explained only with the narrative of the capabilities immigrants have developed to survive. I am thinking of the idea of “responsiveness” that I have mentioned in the section where I discussed protection of health care. There are many reasons inducing me to recognize that a person’s economic contribution to a state should entail some possibility of getting economic and social benefits from it. There should at least be congruency between the liability to pay tax, most often based on the territorial principle, and the right to residence-based social benefits. It is important to point out that this is not a question of whether the amount of tax people pay should relate directly to the benefit they obtain from the provision of a particular good or service. It is instead an examination of the basic prerequisites for liabilities and rights or, in other words, an exploration of a state’s principles for

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<sup>252</sup> See Directive 2009/52/EC of 18 June 2009 *providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals*, adopted on 18 June 2009. OJ L 168/32 of 30 June 2009, art. 6. See Andreas Inghammar, *The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law*, 12 European Journal of Migration and Law, 193–214 (2010).

inclusion and exclusion regarding who is liable to tax and who is to benefit from the social system.

According to these findings I think it is necessary to build a more comprehensive theory of rights to use in cases like irregulars' rights. In order to understand social rights we must start both from the situation where people express the specific needs that are fulfilled by social rights and from the relations people are able either to create or to use to fulfill their needs. This approach to social rights is a more relational centered paradigm at its origins.

Five arguments can be made in favor of a relational centered paradigm for social rights.

First. Social rights have reference to socially-situated persons. Rights are not abstract or absolute. They are related to concrete situations.

Second. Social rights necessarily have reference to the need they tend to respond. People should be free to pursue answers to their needs. Institutions' first concern should be to give people this freedom and to improve persons' capacities.

Third. Social rights are structurally different from civil and political rights. Responding to social needs it is possible only through relations with other people in socially situated places (e.g. Health, Education, Social Security)

Fourth. Therefore, it is correct to extend social rights but only when the entitlements or the benefits respond to real needs.

Fifth. A relational centered approach improves the capacities of people. A relational approach can help us understand when there is not an improvement of capacities and instead there is only an exploitation of advantageous positions.

## CONCLUSION

Although the purpose of this article was to give a better understanding of the welfare undocumented immigrants enjoy, my study suggests broader conclusions and avenues for future research worth emphasizing.

As we have seen, we have here two cases under analysis, the American case and the European one. Both these two cases show the big clash between Global Migration and democratic self-governance in modern society. It is hard to find an exact match between democratic politics and global egalitarian aspirations. This is a part of the internal complexity all of our justice systems have been dealing with for a long time. Migration laws are essential to nations since they need a definite population as well as borders for this population to live within. Moreover, migration law

challenges and transforms sovereignty. Irregular migrants are seen as an affront to sovereignty because they are evidence that the nation is not controlling its borders

This may be the reason why cooperation among EU Countries has been so slow to develop in this area, because the capacity to take severe measures against irregular immigration is related to the new last bastion of sovereignty, and is the hardest to surrender.

So far, the question is all but complex: each nation is composed of a population living on a territory with boundaries, and a population has its own rights and obligations. But what happens when other people tear down the walls to step into these territories, pursuing a better life than they had before? Ever since the very beginning, human beings have been moving in search for food or better climatic conditions but eventually, some centuries ago, with the birth of nations, boundaries were created too. Notwithstanding this, people kept moving throughout the entire world. In the very last decades, though, massive movements, especially from former colonies of European states, began to generate issues for the hosting countries. One of the major issues has always been the extension to immigrants of bestowing privileges, and natives began to ask themselves and their own authorities whether or not these people rights as well as services they were not paying for through taxes. But what if we reconsider the welfare state itself, trying to understand if this model still fits with the social shift generated by migrations? Is the current formula of Welfare State or Social State able to bear the burden of modern immigration? Given recent migration flow it seems unrealistic to try to stop migrations. Many scholars argue that it is time to adjust the welfare state to migration flow instead of trying to stop illegal immigrant. Welfare states should be updated to liberal calls for 'freedom of movement' and the 'management of migration' can be reconciled by facilitating, instead of restricting, human mobility.

Modern authors are also analyzing the possibility of 'facilitating migration instead of a 'migration management' as this concept is increasingly becoming a euphemism for new forms of control and restriction. Facilitating migration would imply the definition of a consensual process, including all parties, also migrants, and thus addressing the migration dilemma as a future (research) program in its own direction.

In the previous section we went through the situation of irregular immigration in the USA and in Europe. The study has shown how these two different approaches to irregular immigration have to deal with the same problems. It is impossible to say that irregular immigration in the US is only an economic matter and that, on the other hand, in Europe it raises only humanitarian issues. Both Europe and the US have to deal with these two issues.

The second part of the analysis has discussed the approaches to social rights.

The theory of entitlements considers social rights only as benefits on behalf of native citizens provided by their governments. This view, though, lays itself open to some criticism: if social rights are merely considered as entitlements, they only depend on the availability of resources to provide them and for this, in certain cases, they might cease to be “rights” and disappear under the weight of state’s spending haircuts in troubled times of financial crisis. The arguments to cut off immigrants from social rights might be also related to the theory of the so-called ‘national paradigm’. Under this theory, social rights are seen as mere entitlements and these entitlements are used on behalf of citizens, funded through public expenditure. The power to decide who is in and who is out from these rights is in the hands of the government and any “expansive” approach could easily undermine government policies.

In the light of a different theory that considers social rights as human rights and not merely as entitlements, an absolute nature for them might be appraised. Social rights, seen more as human rights, would become a priority even for the fulfillment of civil and political rights. In addition to this, it is worthy of note that a wide range of human rights is recognized in supranational charters as well as in national constitutions. Cutting through complexity, the consideration of the welfare state as an economic matter becomes irrelevant when a matter of life and death arises. Up to the moment when destinations chosen by migrants are still willing to consider themselves as culturally advanced or simply as “civilized societies”, a different judgment for social rights needs to be applied. If such destinations wish to preserve human dignity, they must be aware that this choice is made also conceding social rights. In short, this theory relies on the correspondence between social and human rights.

This theory, though, is not immune from some issues. The most relevant is surely the impossibility of reclaiming social rights as human rights when we talk about the undocumented. The unauthorized migrant, in his/her contingent existence, is not the man or the woman of human rights. He/she lives in an informal condition.

Failure of theories of social rights as both entitlements and human rights ask for a new paradigm. The case of irregular immigrants highlights the importance of social rights as responses to needs requiring the development of relations among people. The men or the women of social rights are not the individuals that ask either for a negative liberty or for a positive obligation of institutions granting some benefits. The men/woman of social rights rather than these kinds of rights need the freedom to express the

power of their relations as a substantive answer to that needs. Immigration is one of the most important paradigms of this way to consider social life.

I want to finish this essay using a quotation from K. Bücher:

“The migrations occurring at the opening of the history of European peoples are migrations of whole tribes, a pushing and pressing of collective units from east to west which lasted for centuries. The migrations of the Middle Ages ever affect individual classes alone; the knights in the crusades, the merchants, the wage craftsmen, the journeymen hand-workers, the jugglers and minstrels, the villeins seeking protection within the walls of a town. Modern migrations, on the contrary, are generally a matter of private concern, the individuals being led by the most varied motives. They are almost invariably without organization. The process repeating itself daily a thousand times is united only through the one characteristic, that it is everywhere a question of change of locality by persons seeking more favourable conditions of life.”<sup>253</sup>

Migration as a social and legal phenomenon could not be studied merely in its grosser effects, as manifested in changes in custom, in mores, and in law. It may be envisaged in its subjective aspects as manifested in the changed type of both personality and behavior that it produces. When the traditional organization of society and the legal system break down, as a result of contact and collision with a new invading culture, the effect is, so to speak, to emancipate the individual man. Instead that is the moment when energies that were formerly devoted to repeating custom and tradition should try to change the paradigm, reflecting an acceptance to be much more inclusive than exclusive.

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<sup>253</sup> KARL BÜCHER, INDUSTRIAL EVOLUTION (1901).

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