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Revisiting Forgotten Histories:
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Abstract

The regulation of irregular migration in EU law operates in a web of other instruments which exclude or make it extremely difficult for non-EU migrants to reach EU territory. The relevant legal area is characterised by and criticised for its security-based approach, the dehumanization of migrants and the continuous failure to uphold human rights. These complicated characteristics of EU migration law are usually traced back to its historical development during the 1990s in transnational fora of intergovernmental cooperation where closer police cooperation was negotiated in parallel to migration law harmonization. However, as this chapter will show, there is a longer past of attempts to regulate irregular migration in EU law already in the 1970s which is rarely discussed in EU law scholarship. And this past matters for both a practical and a methodological reason. First, at a time when EU migration law is developing towards further migrant exclusion and the electoral policies across EU Member States are turning to the right, the chapter suggests a turn to the past as a way of reimagining alternative potentials EU law could offer for undocumented migrants. Second, the chapter makes a methodological contribution in the study of EU migration law through critical legal history by presenting a deviant storyline about the regulation of irregular migration.

Keywords: Irregular migration, migrants, human rights, social rights, legal history

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1. Introduction

The regulation of irregular migration in EU law takes place in accordance with Article 79 TFEU. Article 79(1) provides that the EU immigration policy should aim at the prevention and combatting of illegal migration, while article 79(2)(c) TFEU provides competence for the adoption of measures in relation to unauthorized residence, removal and return. Against the background of these provisions, the EU has adopted various instruments related to irregular entry, presence, and removal from the EU territory in the form of the EU anti-smuggling rules, the anti-trafficking rules, the Employers' Sanctions Directive and the Return Directive.[1]

The relevant measures operate in a web of other instruments which exclude or make it extremely difficult for non-EU migrants to reach EU territory.[2] Overall, EU law making in the field of migration has been criticized for its security-based approach, the dehumanization of migrants and the continuous failure to uphold human rights.[3] Indeed, in the current legal framework the humanity of the migrant is subsumed into a complex web of considerations related to security, border management and fight against crime.

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[1] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/17; Council framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/ 1. Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L 26/19; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1. Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L 168/24. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

[2] See Schengen area, Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016] OJ L 77/1 and visa policy under Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L 243/1. These instruments operate in parallel to a digital infrastructure of control, see VAVOULA, N., *Immigration and Privacy in the Law of the European Union: The Case of Information Systems*, Immigration and Asylum Law and Policy in Europe, volume 51, Leiden Boston: Brill Nijhoff, 2022.

[3] SPIJKERBOER, T., "Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice," *Journal of Refugee Studies* 31, no. 2 , June 1, 2018, 216–39; BALIBAR, E., *Nous, citoyens d'Europe ?*, Paris, La Découverte, 2001; BIGO, D., WALKER, R.B.J., CARRERA, S., *Europe's 21st Century Challenge : Delivering Liberty*, Farnham, Surrey, England: Routledge, 2010; Cf David Scott FitzGerald, "Remote Control of Migration: Theorising Territoriality, Shared Coercion, and Deterrence," *Journal of Ethnic and Migration Studies* 46, no. 1, January 2, 2020, 4–22; DEN HEIJER, M., RIIJPMA, J., SPIJKERBOER, T., "Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System," *Common Market Law Review* 53, no 3, 2016 607–42.

These complicated characteristics of EU migration law are usually traced back to its historical development during the 1990s in transnational fora of intergovernmental cooperation where closer police cooperation was negotiated in parallel to migration law harmonization.[4] However, as this chapter will show, there is a longer past of attempts to regulate irregular migration in EU law already in the 1970s which is rarely discussed in EU law scholarship.[5] And this past matters for both a practical and a methodological reason. First, at a time when EU migration law is developing towards further migrant exclusion and the electoral policies across EU Member States are turning to the right, the chapter suggests a turn to the past as a way of reimagining alternative potentials EU law could offer for undocumented migrants.[6] Second, the chapter makes a methodological contribution in the study of EU migration law through critical legal history. In EU law, the appearance of critical legal histories has allowed the interrogation of the functional determinist narratives often put forward by EU law scholarship which explain how every part of the EU integration process has been part of a coherent linear puzzle toward the creation of a more constitutional Union.[7] In the field of EU migration law, the purpose of this chapter is to present a deviant storyline about the regulation of irregular migration, thereby relativizing the main story line of EU migration law which scholars today take for granted.[8]

By looking back to the 1970s, the chapter shows that the present state of EU law on irregular migration is not the determinist evolution of a past linear history, but rather one among the many possible evolutions of the EU legal framework. The contribution questions not only the historical narrative behind the evolution of EU migration law, but also the understanding of

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[4] WALKER, N., ed., *Europe's Area of Freedom, Security, and Justice*, Collected Courses of the Academy of European Law, Oxford, New York: Oxford University Press, 2004; O'KEEFFE, D., "Recasting the Third Pillar," *Common Market Law Review* 32, no. 4,1995, 893–920; THYM, D., *European Migration Law*, Oxford, New York: Oxford University Press, 2023, 24–28.

[5] See CHOLEWINSKI, R., "The EU Acquis on Irregular Migration: Reinforcing Security at the Expense of Rights," *European Journal of Migration and Law* 2, no. 3–4, January 1, 2000, 361–405,; MAAS, W., "Unauthorized Migration and the Politics of Regularization, Legalization, and Amnesty," in *Labour Migration in Europe*, ed. MENZ G., CAVIEDES, A., London: Palgrave Macmillan UK, 2010, 232–50, among the rare exceptions.

[6] PEERS, S., "The New Asylum Pact: Brave New World or Dystopian Hellscape?," *European Journal of Migration and Law* 26, no. 4, December 16, 2024, 381–420, SLOMINSKI, P., TRAUNER, F., "Reforming Me Softly – How Soft Law Has Changed EU Return Policy since the Migration Crisis," *West European Politics* 44, no. 1, January 2, 2021, 93–113.

[7] NICOLA, F., "Critical Legal Histories in EU Law," *American University International Law Review* 28, no. 5, 2013, 1178; PHELAN, W., *Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period*, Cambridge, United Kingdom ; New York, NY, USA: Cambridge University Press, 2019; NICOLA, F., DAVIES, B.., *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*, 1st ed., Cambridge, United Kingdom ; New York, NY, Cambridge University Press, 2017.

[8] Robert W Gordon, "Critical Legal Histories," *Stanford Law Review* 36, no. 1/2, January 1984, 98 by analogy.

irregular migration as presented in this narrative in the form of a fight against criminality.[9] To do so the chapter traces the attempt to regulate undocumented migration at the supranational level further back in EU legal history already at the time of Community law. By presenting a legislative proposal to regulate irregular migration from the 1970s under an internal market basis and by comparing it with the current framework on irregular migration, the paper presents a more nuanced account of the ways in which the regulation of irregular migration was imagined under Community law. After providing an overview of the relevant proposal in Section 2, the chapter presents the main characteristics of the current framework regulating the rights of undocumented migrants in Section 3. Contrary to a more technical and economic centred approach followed by the initial proposals in the 1970s, the regulation of irregular migration became subsumed under the broader horizon of security considerations becoming an expression of the *crimmigration* phenomenon.[10] Section 4 analyses case law of the Court of Justice of the EU where the rights of undocumented migrants have been protected by reference to their market function and through arguments reminiscent of the 1970s proposals. Finally, section 5 concludes this chapter by reflecting on the longer historical trajectory of regulation of irregular migration and the potentials and limits of market related arguments.

Exposing a thread running through the early attempts to harmonize the response to irregular migration to more recent case-law addressing the rights of undocumented migrants, the paper asks whether there is a potential of protection for undocumented migrants when the focus is on their economic function in an internal market. The investigation does not suggest a fundamental reshaping of the system and is well aware of the limited potentials the market can have for substantive protection of human rights of peoples in general.[11] Nevertheless, shifting our focus to the market and its effects for an area of EU law which has been presented as detached therefrom can provide some strategic tools for rethinking how litigation claiming

[9] Cf DE BÚRCA, G., "The Road Not Taken: The European Union as a Global Human Rights Actor," *The American Journal of International Law* 105, no. 4, 2011, 650.

[10] DE LANGE, T., "Blurring Legal Divides: The EU Employer Sanctions Directive and Its Implementation in the Netherlands," in *Migrant Labour and the Reshaping of Employment Law*, ed. RYAN B., ZAHN R., Oxford, Hart Publishing, 2023, 189–202; PAHLADSINGH, A., *Crimmigration and the Return Directive: Fundamental Rights, Criminal Sanctions and the Legal Position of the Migrant*, The Hague: Eleven, 2023; STUMPF, J.P., "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power," in *Governing Immigration Through Crime: A Reader*, ed. DOWLING, J.A., INDA, J.X.. Stanford, Calif, Stanford University Press, 2013, 59–76.

[11] ASHIAGBOR, D., "Race and Colonialism in the Construction of Labour Markets and Precarity," *Industrial Law Journal* 50, no. 4, December 1, 2021, 506–31; MENZ, G. *The Political Economy of Managed Migration*, Oxford, New York: Oxford University Press, 2008; KOCHENOV, D., WILLIAMS, A.T, DE BÚRCA, G., eds., *Europe's Justice Deficit?*, Oxford, Hart Publishing, 2015.

rights based on economic activity can offer -an admittedly limited- challenge to the exclusionary approach characterising the Area of Freedom, Security and Justice.

2. The longer past of regulating irregular migration in the common market

The framework regulating irregular migration today is presented as tied to the intergovernmental networks of security cooperation which have shaped the agenda of what is now the Area of Freedom Security and Justice.[12] The relevant area of competence, and the regulation of migration as part of it, was introduced to ensure that a true Area of Freedom, Security and Justice would be available to EU citizens on the move.[13] In this context, the regulation of irregular migration is thought to date back to two Council Recommendations from the mid-1990s as well as the Tampere Council Conclusions.[14]

However, the regulation of irregular migration was a concern for Community institutions a lot earlier. Specifically, already in the 1970s, during a period when irregular migration amounted to approximately 10% of the total migration volume in the Member States, the Community institutions started discussing the need for a collective approach to irregular migration. [15] In the 1974 Action Programme in favour of Migrant Workers and their families, the Commission first suggested the need for a common approach on the matter of irregular migration.[16] In the relevant Communication, the Commission pointed to the vulnerability of irregular migrants to labour exploitation and the need for a common approach to the matter with emphasis on sanctions against exploiters. At the same time, the Commission suggested that addressing irregular migration was connected to the efforts of improving the social situation for workers in the Community in general.[17]

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[12] Indicatively see the ad hoc group on Immigration set up at the initiative of the UK presidency, Coordinator's group on the free movement of persons set up following the Rhodes European Council, Trevi ministers' group and Immigration ministers' group under the Belgian Presidency.

[13] This is also reflected in the wording of Article 3(2) TEU. COSTELLO, C., *The Human Rights of Migrants and Refugees in European Law*, Oxford Studies in European Law, Oxford, United Kingdom: Oxford University Press, 2016, 5; HAILBRONNER, K., *Immigration and Asylum Law and Policy of the European Union*, The Hague, Boston, Kluwer Law International, 2000, 1; CALLOVI, G., "Regulation of Immigration in 1993: Pieces of the European Community Jig-Saw Puzzle," *The International Migration Review* 26, no. 2, 1992, 353–72.

[14] Council Recommendation of 22 December 1995 on harmonizing means of combating illegal immigration and illegal employment and improving the relevant means of control [1996] OJ C 5/1. Council Recommendation of 27 September 1996 on combating the illegal employment of third-country nationals [1996] OJ C 304/1.

[15] Action Programme in favour of Migrant Workers and their families COM(74)2250 final, 13,21; Council Resolution of 9 February 1976 on an Action Programme for Migrant Workers and Members of Their Families [1976] OJ C 34/2 point 5(b).

[16] Action Programme in favour of Migrant Workers and their families COM(74)2250 final, 13,21.

[17] Ibid 21.

Following up on the Action programme, the Council issued a resolution which confirmed the need for common action on the matter.[18] Point 5 (b) of the relevant resolution suggested that cooperation between Member States should be strengthened, that sanctions should be laid down to repress trafficking and abuses connected to irregular migration and that the obligations of employers and the rights of workers in relation to work already carried should be respected without prejudice to the unlawful nature of residence and employment. At the time, irregular migration, and the need to address it, was presented in connection to employer obligations and the imperative to protect migrant workers from undue abuse, the need to preserve a decent living for all the migrant population, and, finally, the need to ensure certain standards of employment both for national and for foreign workers.[19] Next to these Community evolutions, in 1975 the particular situation of migrant workers with irregular status was also addressed by the International Labour Organization.[20]

Against this background, in 1976 the Commission presented a proposal for a Directive on the harmonization of laws in the Member states to combat irregular migration and irregular employment.[21] According to the 1976 proposal, the harmonization of national legislation on irregular migration was necessary in order to ensure the Community's objective of improving the living and working conditions of workers.[22] The instrument was to have Article 100 EEC Treaty a legal basis which referred to the Community competence to harmonize national laws for the creation of a common market. In this, we see that the regulation of illegal migration did not -at least explicitly- intend to regulate population movements or to achieve human rights protection for migrants, but it was rather presented as a clear internal market measure.

While it was recognized that irregular migrants are extremely vulnerable due to the immediate threat of expulsion and their defencelessness against labour exploitation, the central purpose behind the proposed harmonization was to ensure a functioning labour market and a

[18] Council Resolution of 9 February 1976 on an Action Programme for Migrant Workers and Members of Their Families [1976] OJ C 34/2

[19] Ibid; 1974 Action Programme 21; Guidelines for a Community Policy on Migration COM(85)48 final; Council Resolution of 16 July 1985 [1985] OJ C 186/3; Commission Decision 85/381/EEC para 10.

[20] Convention (No. 143) concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers. Adopted by the General Conference of the International Labour Organisation at its sixtieth session, Geneva, 24 June 1975

[21] Proposal for a Council Directive on the Harmonization of Laws in the Member States to Combat Illegal Migration and Illegal Employment, COM(76)331 final.

[22] Ibid, explanatory memorandum, para 6.

level playing field for all the workers employed in the Member States. [23] At the same time the proposal connected the measure to Article 117 of the EEC Treaty which referred to the social aims of the Community to improve the living and working conditions across the Member States.[24] As to the provisions of the proposed Directive, they were focused on employer sanctions with a single article providing that Member States shall ensure that workers who are sentenced for taking up illegal employment can appeal against such sentence and that in case of deportation as a sentence, the appeal shall involve a stay of execution.

This first proposal did not go through. The European Parliament and the Economic and Social Committee were concerned that the proposal did not provide sufficient protection to irregular migrant workers. Specifically, the Committee suggested that Article 235 should be used as a legal basis together with Article 100 and it further demanded the alignment with the relevant ILO Convention which it suggested the Member States should ratify.[25] On the content of the proposed Directive, the Committee suggested that a focus on the migrant worker as the victim of labour exploitation who should be protected is necessary.[26] In this regard, the Committee asked the Commission to reconsider how the proposal could ensure greater protection for irregular migrant workers by ensuring the rights from work already carried and the fulfilment of employers obligation, as well as by providing the possibility to irregular migrants workers to stay once they have become de facto employees.[27] In parallel, the European Parliament suggested that more emphasis should be put on ensuring the employers' obligations are met for the work the irregular migrants have performed.[28] The Parliament Resolution further suggested that Member States should adopt a liberal attitude when it comes to regularizing the residence status of irregular migrant workers.

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[23] Vredeling Henk, Migrants and the E.E.C Full Text and Summary of a Speech by the Vice-President of the Commission of the E.C. for the Conference of the National Council of Social Services, London, 27 March 1979, 12.

[24] Proposal, recital 6.

[25] See Opinion on the Proposal for a Council Directive on the harmonization of laws in the Member States to combat illegal migration and illegal employment [1977] OJ C 77/ 9 points 1.1.1-1.1.3.

[26] Ibid point 1.4.1.

[27] Ibid 1.1.4.-1.1.6.

[28] Resolution embodying the opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for a Directive on the harmonization of laws in the Member States to combat illegal migration and illegal employment [1977] OJ C299/16 point 3.

As a follow up, the Commission presented a new proposal in 1978, which enhanced the protection for illegal migrant workers and maintained the same legal basis.[29] Specifically, the proposal strengthened the procedural safeguards for migrant workers subject to sanctions for illegal employment, and guaranteed rights acquired under the work migrant workers had already carried out.[30] The amended proposal included a provision which demanded that employers would fulfil the obligations from previous employment as regards remuneration and social security contributions, that irregular migrants subject to deportation should still receive reimbursement for social security contributions paid by employers and that irregular migrants should have the opportunity to assert their rights before the authorities, have access to evidence and where applicable free legal aid.[31] The amended proposal was welcomed by the Parliament for combining measures to combat irregular migration while ensuring the protection of irregular workers.[32] Armed with the positive opinion of the Parliament, the Commission was pushing for the adoption of this proposal as the necessary means to avoid market problems related to the employment of irregular migrants. In this regard, the Vice-President of the Commission Henk Vredeling, explained the market distortion which could occur from lack of harmonization in case this legislative initiative failed to go through:

> A country which shirked its responsibilities in combating illegal immigration would continue to have a supply of cheap labour, and that would damage the competitive position of other countries which really were getting to grips with illegal immigration.[33]

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[29] Amended Proposal for a Council Directive concerning the Approximation of the legislation of the member states, in order to combat illegal migration and illegal employment, COM(78) 86 final, explanatory memorandum, para 1.

[30] Amended Proposal for a Council Directive concerning the Approximation of the legislation of the member states, in order to combat illegal migration and illegal employment, COM(78) 86 final explanatory memorandum para 5 and proposed Articles 6 and 7.

[31] See Article 7.

[32] See Report tabled on behalf of the Committee on Social Affairs, Employment and Education on the amended proposal from the Commission of the European Communities to the Council (Doc. 58/78) for a Directive concerning the approximation of the legislation of the Member States, in order to combat/illegal migration and illegal I employment, Rapporteur: Mr F. Pisoni, Document 238/78 of 27 September 1978, PE 53.869/fin. See also Resolution embodying the opinion of the European Parliament on the amended proposal from the Commission of the European Communities to the Council for a Directive on the approximation of the legislation of the Member States to combat illegal migration and illegal employment [1978] OJ C 261/18.

[33] Vredeling Henk, Migrants and the E.E.C Full Text and Summary of a Speech by the Vice-President of the Commission of the E.C. for the Conference of the National Council of Social Services, London, 27 March 1979, 12.

Despite the effort by the Commission and the alignment of the Parliament, the relevant proposal was never adopted, and it has not been possible to establish the specific reasons why the Council was against it. In a Communication from 1985 on the Community policy on migration, the Commission maintained the relevant proposal as a legislative goal while mentioning the difficulties of 'political and legal nature in the Council'.[34] It appears that the matter of irregular migration was discussed in the European Council in Hague in 1986, while in 1987 the Commission set up a working party on underground economy in order to further develop the matter.[35] However the second proposal was officially withdrawn in 1988.

From that point onward, attempts to regulate irregular migration moved to the field of intergovernmental cooperation. Essentially what is usually presented as the beginning for the regulation of migration under EU law took place after a twenty year period during which the Commission put forward different proposals to address migration, among which, also irregular migration.[36] There is a gap on how the transition took place between the first attempts to regulate irregular migration and the framework developed later and presented in the next section because all the soft law documents issued in preparation for the EU legal framework on irregular migration never make any reference to the proposal presented in this section. Even though the EU institutions are particularly apt to present the longer history of various legislative initiatives, there is arguably a type of institutional amnesia as regards tracing the longer history of law-making in the area of irregular migration. What will become clear in the next section, which presents and analyses the current framework, is that as long as there was an intention to regulate the matter from the perspective of the common market and with due regard to the distortion caused by irregular work, the economic objective behind the proposals somehow led to more liberal approach to workers with irregular employment, and an emphasis on of the precarity of their position.

3. The shift to the fight against irregular migration

The emphasis on combatting irregular migration in view of security considerations and through criminal cooperation came into the picture with the evolution of the Treaty framework and the introduction of the pillar structure after the Maastricht Treaty. A Council

[34] Guidelines for a Community Policy on Migration COM (85)48 final point 24.

[35]Commission of the European Communities, Bulletin of the European Communities (1987) 1 Section 2.1.53; Commission of the European Communities, Bulletin of the European Communities (1987) 3 section 2.1.91.

[36] See also LOXA, A., *Sustainability and EU Migration Law, What Place for Migrants' Rights*, PhD thesis, Media Tryck Lund 2023, Chapter 4.

Recommendation spurred from the intergovernmental fora of cooperation of that period and was adopted on 22 December 1995 on harmonizing the means of combating illegal immigration and illegal employment and improving the relevant means of control.[37] The recommendation suggested various measures to be followed by Member States to verify the legality of residence of migrants and to ensure appropriate penalties for employers. A second recommendation was issued in 1996 with emphasis on the need for authorization to reside and work in Member States, penalties for employers and collaboration between law enforcement agencies.[38] Towards the end of the 1990s, the Tampere Council conclusions confirmed the determination of the European Council to 'tackle at its source illegal immigration, especially by combating those who engage in trafficking in human beings and economic exploitation of migrants.'[39] Eventually the legislative framework on the matter was built by the adoption of various instruments which complement each other in a security apparatus to migration. These are the EU anti-smuggling rules,[40] the anti-trafficking rules,[41] the Employers' Sanctions Directive and the Return Directive.[42]

The analysis will focus on the Employer Sanctions Directive as well as the Return Directive, as these two instruments reproduce to an extent some of the considerations of the 1970s Commission proposals. As regards, first, the Employer Sanctions Directive, the rationale of the instrument is very closely connected to market related considerations. Specifically the proposal to the Directive referred to the vulnerability of irregular migrants to work exploitation, the losses caused to public finances and the distortion of competition that result from irregular

[37] Council Recommendation of 22 December 1995 on harmonizing means of combating illegal immigration and illegal employment and improving the relevant means of control [1996] OJ C 5/1.

[38] Council Recommendation of 27 September 1996 on combating the illegal employment of third-country nationals [1996] OJ C 304/1.

[39] Tampere European Council, Presidency Conclusions, 15 and 16 October 1999, Point 23.

[40] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence [2002] OJ L 328/17; Council framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence [2002] OJ L 328/ 1.

[41] Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L 26/19; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1.

[42] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L 168/24. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

work.[43] Despite this tight connection to market considerations the proposal was presented a clear part of an EU immigration policy and not of labour or social policy because, as the Commission suggested, irregular employment is a pull factor for irregular migration.[44] The Directive sets out the obligations of employers to check the residence status of migrants and lays down sanctions in case of irregular employment. As regards migrants who find themselves in irregular employment, the Directive provides for the obligation of employers to make back payments under Article 6, and it prescribes that the migrants can pursue such payments even after return. However, the Directive does not provide for any right to stay during the relevant procedures nor for any right to entry, stay or access to the labour market because of the past irregular employment or the claim to back payment, social security contributions or taxes.[45]

At this stage it should be reminded that the 1970s proposals provided for the possibility of stay in case of appeal against a decision to deport the irregular migrant. Specifically, Article 6 of the 1978 proposal provided that

> Member States shall take the necessary measures to ensure that migrants who have been sanctioned according to the provisions of Article 4 may appeal against such sentence. Where the sentence is of deportation, appeal shall involve a stay of execution.

The relevant possibility or lack thereof is now regulated under the Return Directive which establishes a common set of rules for all migrants who do not fulfil the conditions to stay in the Member State. The Directive provides for the possibility of remedies against a decision to return under Article 13(2) which reads as follows:

> The authority or body mentioned in paragraph 1 [judicial or administrative authority or a competent body deciding on remedy against return decision] shall have the power to review decisions related to return, as referred to in Article 12(1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.

Unlike the wording of the 1970s proposal, the appeal against a return decision is taken to be a possibility which is neither automatic nor necessary consequence of the appeal decision as

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[43] Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, COM(2007)249 1.
[44] Directive 2009/52/EC, Recital 1 and Proposal COM(2007)249 1.
[45] See also recital 15.

the Court has also confirmed.[46] Overall, the approach to irregular migration today as shaped already from the 1990s is focused on security, exclusion and criminal law approaches.[47] There is little concern to the vulnerability of the migrant as a worker, unless such vulnerability is extreme and a potential return decision could expose the migrant to risk of being subjected to ill treatment.[48] The Recommendations of the 1990s which set the background for the development of the relevant framework focused on fighting irregular migration as another tool for control of population movement, rather than as an instrument aimed at protecting vulnerable migrants rights.[49] While the instruments presented in section 2 and debated in the 1970s also focused on control, the issue was not population control, but rather labour market control. It is thereby argued that when the focus is the market rather than the border, there is some limited potential for more protection of the individual. The reason for this is that the individual is not framed as a threat to the security, which materializes at the border crossing. Rather the individual is seen in the light of their contribution to the market which -even if irregular- still adds to some abstract idea of EU growth. The next section will focus on case law from the Court of Justice of the EU which has dealt with irregular migrants in employment. In so doing it will investigate whether there is more potential for protection for the individual who can argue that despite the irregularity of their status, they still make a clear contribution to the market.

4. Irregular migration at the intersection of the border and the market

This section analyses a set of cases where the Court has dealt with irregular migrants who have provided with their work to Member States' economies. To my knowledge the Court has not yet addressed the Employer's Sanctions Directive. By looking at cases related to irregular migrant workers, and which were referred to the Court for interpretation of other instruments of EU law, my attempt is to trace what the market can do for the protection of irregular migrants. In the complex reality that irregular migration represents for Member States, it is not surprising

[46] See Judgment of 18 December 2014, *Abdida,* C-562/13, ECLI:EU:C:2014:2453, para 44

[47] PAHLADSINGH, *Crimmigration and the Return Directive*; DE LANGE, "Blurring Legal Divides: The EU Employer Sanctions Directive and Its Implementation in the Netherlands." See facilitators package but also penalties for border crossing under Article 5(3) Schengen Borders Code Regulation (EU) 2016/399.

[48] See *Abdida,* C-562/13, paras 45-46; Judgement of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paras 52-53. See also article 9 of the Return Directive.

[49] See Council Recommendation of 22 December 1995 on harmonising means of combating illegal immigration and illegal employment 3.

that the adjudication of their rights has entered the arena of EU case law through disputes not connected to the security apparatus on irregular migration.[50]

The first case in which the Court engaged with the rights of irregular migrants concerned the interpretation of the scope of application of Directive 80/987/EEC on the protection of employees in the event of insolvency of their employer.[51] *Tümer* concerned a Turkish national living in the Netherlands, who had worked for a company that was declared insolvent. His application for insolvency benefit was rejected on the ground that he was not legally resident in the Netherlands. In that case, the Netherlands argued that since the Directive was based on Article 137 EC, which provided the Union with competence to adopt Directives with a view to achieving social objectives related to the improvement of working conditions, it could not apply to migrants, even regularly resident ones.[52] If regularly resident migrants were to be protected under the relevant Directive, the state argued that the concept of employee should be construed under national law to exclude irregularly resident migrants.

Advocate General (AG) Bot suggested that excluding migrants workers from protective measures adopted for employees would not be compatible with the purpose of the EU social policy, as it would encourage the recruitment of foreign labour in order to reduce wage costs.[53] Additionally, with reference to *Germany and others v Commission*, he emphasized that the Court had already in the 1980s acknowledged the close relation of the Community social policy to the policy applicable to migrant workers.[54] The AG proceeded to suggest that the crucial factor triggering obligations under the relevant Directive was the employment relationship of a person to an insolvent employer.[55] Importing a condition of nationality in the scope of the Directive would go against its objective to guarantee all employees in the EU a minimum level of protection.[56] The AG then went on to examine whether there was discretion on the part of Member States to exclude irregularly resident migrants. In this examination, he suggested that

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[50] On the complicated reality and an attempt to unpack its conceptual entanglements, see NEERGAARD, A. Niklas SELBERG, N., "Unpacking (Ir)Regular Labour Migration," in *Research Handbook on Migration and Employment*, ed. MEARDI, G., Cheltenham, UK Northampton, MA Edward Elgar Publishing, 2024, 338–58,

[51] Judgment of 5 November 2014, *Tümer*, C-311/13, ECLI:EU:C:2014:2337. Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer [1980] 283/23.

[52] Opinion Of Advocate General Bot delivered on 12 June 2014 in *Tümer*, C-311/13, ECLI:EU:C:2014:1997, para 34.

[53] Ibid, para 52.

[54] Ibid; Judgment of the Court of 9 July 1987, *Federal Republic of Germany and others v Commission of the European Communities*, Joined cases 281, 283, 284, 285 and 287/85, ECLI:EU:C:1987:351.

[55] AG Bot Opinion in *Tümer*, C-311/13, para 54.

[56] Ibid, para 54.

since the employee status was the crucial status, making it conditional to legal residence would go against the principle of non-discrimination.[57] According to the AG, irregular migrants who had worked and paid contributions were in a comparable situation to other employees, and there was nothing to justify a differentiated treatment.[58]

The Court confirmed the AG Opinion and noted that EU social policy was concerned with promoting the living and working conditions of both nationals of the EU Member States and migrants from third countries.[59] It held that Member States could not define the term 'employee' in such a way as to undermine the social objective of the Directive.[60]As a result, the Directive was found to preclude national laws, such as the Dutch one, which strip irregular migrants of protection in their work relations. As long as somebody is in employment, the social rights they derive therefrom should not be undermined because their residence is not authorised. This case is crucial for showing how the economic contribution made by a migrants' work is at the heart of the protection afforded by EU law. In parallel this case is important for showing that EU law guarantees in the field of workers' protection also extend to those without authorised residence.

An equally important case from the perspective of irregular migrants and their rights to regularise their stay is *Bajratari*.[61] The case concerned irregular migrants who were parents of an EU child and who claimed derivative residence rights in accordance with well-established case law of the Court.[62] In order to establish such residence rights the Court has held that the migrant parents of an EU child need to meet the conditions of Article 7 of Directive 2004/38, that is to have sufficient resources and comprehensive sickness insurance.[63] As regards the *Bajratari* family, the sufficiency of resources was based on income obtained from irregular

[57] Ibid, para 60
[58] Ibid, para 89.
[59] *Tümer*, C-311/13 para 32.
[60] Ibid, paras 42,45.
[61] Judgment of 2 October 2019, *Bajratari*, C-93/18, ECLI:EU:C:2019:809.
[62] See Judgment of 19 October 2004, *Zhu and Chen*, C-200/02, ECLI:EU:C:2004:639; Judgment of 8 March 2011, *Ruiz Zambrano,* C-34/09, ECLI:EU:C:2011:124 and Judgment of 13 September 2016, *Rendón Marín*, C-165/14, ECLI:EU:C:2016:675 in purely internal situations. Judgement of 13 September 2016, *CS*, C-304/14 ECLI:EU:C:2016:674; Judgment of 10 May 2017, *Chavez- Vilchez* and others, C-133/15, ECLI:EU:C:2017:354; Judgment of 8 May 2018, *KA and Others*, Case C-82/16 ECLI:EU:C:2018:308.
[63] See also Judgment of 10 October 2013, *Alokpa and Moudoulou*, C-86/12, ECLI:EU:C:2013:645. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

employment, as the parents had lost their residence permit and were irregularly working in the host state. The Court had to strike a balance between the social and economic objectives pursued by Directive 2004/38, more specifically, the objective of strengthening the rights of Union citizens to move and reside freely in the Member States and promoting social cohesion on the one hand, while protecting the public finances of the Member State on the other.[64]

In this case, the Court found that resources from irregular employment can be considered as sufficient resources for the purpose of establishing residence rights. Specifically, the Court held that when the migrant parent is in a precarious situation due to unlawful residence, the risk of losing the sufficient resources required and of the Union child becoming a burden on the social assistance system would be greater.[65] While on first reading the exclusion of income from unlawful employment could achieve the objective of protecting public finances, this objective is already ensured by the safeguards provided in Article 14 Directive 2004/38, which allows Member States to check if the conditions of the Directive are fulfilled throughout the period of residence.[66] In light of this, introducing a condition regarding the lawfulness of income of the parent was found to constitute a disproportionate interference, which went beyond what is necessary to achieve the objective pursued.[67] The finding in this case is not heavily based on the contribution of the irregular migrants through their work, but rather on their connection to a child with EU citizenship which is considered to be a fundamental status for the purposes of EU law and EU integration.[68] Still the finding that income from unlawful employment can count as income for the purposes of establishing a residence right under Directive 2004/38 can have a significant impact on irregular migrants who form families in the host state and whose children acquire the nationality of the host state.

Both *Tümer* and *Bajratari* involved irregular migrants but not irregular migration legislation. The common element connecting these cases is the intimate connection of the irregular migrant to the internal market. This connection to the market and the contribution through one's work is construed by the Court as a legitimating factor which brings them into the scope of EU law. How does the Court approach the rights of irregular migrants in the interpretation of instruments part of the apparatus on irregular migration and is there any room

[64] Cf Opinion of Advocate General Szpunar delivered on 19 June 2019 in *Bajratari*, C-93/18, ECLI:EU:C:2019:512 paras 36-47.
[65] *Bajratari*, C-93/18 para 37.
[66] *Bajratari*, C-93/18 paras 38-41. See also Judgment of 14 June 2016, Commission / United Kingdom, C-308/14,ECLI:EU:C:2016:436.
[67] *Bajratari*, C-93/18 paras 42.
[68] Judgment of 20 September 2001, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458.

for the market relation therein? The Court has produced extensive case law on the Return Directive, which at least in principle has led to protective interpretation and application thereof.[69] In the relevant case law, the market participation does not seem to play a particular role. Rather, the Court is guided by the Charter in its interpretation and application of the Return Directive.[70]

The question which remains to be resolved is to what extent the Court could extend the protective elements of the Return Directive in case of arguments put forward on the contribution of the irregular migrant by their work. It is true that the current state of EU migration law in general and on the rights of irregular migrants is far from perfect with no potential of reform in the near future.[71] However, at a time when human rights related arguments do not seem sufficient to challenge that status quo of exclusion in Europe, there is value in examining whether market-related arguments could offer some room for protection to irregular migrant workers. [72]

5. Conclusion: Market Potentials and Market Limits in the Regulation of Irregular Migration

The purpose of this chapter was to trace a longer history of attempts to regulate irregular migration in view of its connection to the internal market. In so doing the chapter aspired to both challenge the linear historical narrative presented behind the development of EU migration law and to examine to what extent the market contribution of a migrant can deliver more protection under EU law.

Historically the market has played an integrating function in EU law and has set the basis for extension of individual rights in the case law of the Court.[73] As regards particularly migrant

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[69] MORARU, M., "EU Return Directive: A Cause for Shame or an Unexpectedly Protective Framework?" in *Research Handbook on EU Migration and Asylum Law*, ed. TSOURDI, E., DE BRUYCKER, P. Research Handbooks in European Law Series, Cheltenham, UK: Edward Elgar Publishing, 2022; MORARU, M., CORNELISSE, G., DE BRUYCKER, P., eds., *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union*, Modern Studies in European Law, volume 99, Oxford ; New York: Hart, 2020.

[70] See Judgment of 30 September 2020, *CPAS de Seraing*, C-402/19, ECLI:EU:C:2020:759.

[71] See Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) COM(2018) 634 final which is unlikely to overcome the deadlock in the negotiations. See also MORARU, M., LÓPEZ ESQUITINO, C., "The Impact of the 2024 CEAS Reform on the EU's Return System: Amending the Return Directive Through the Backdoor", EU Migration Law Blog, 25 September 2024, https://eumigrationlawblog.eu/the-impact-of-the-2024-ceas-reform-on-the-eus-return-system-amending-the-return-directive-through-the-backdoor/.

[72] See PINTO DE ALBUQUERQUE P., ""Children of a Lesser God": The rights of migrants and refugees under the European Convention on Human Rights", European Human Rights Law Review, no 3, June 2023, 217-42.

[73] WEATHERILL, S., "The Beauty and the Beast: Is European Union Internal Market Law 'Over-Constitutionalised'?," in *The Changing European Union: A Critical View on the Role of Law and the Courts*, ed.

workers, the Court has historically drawn on the principle of equal treatment as regards working conditions to furnish a broad sphere of social entitlements for EU and non-EU migrant workers.[74] These developments have been both celebrated as setting the foundation for EU equality law and criticised for the failure to furnish a more substantive justice ideal.[75] Somek has specifically related the extensive protection of individual rights in the context of free movement and migration for EU workers and he has suggested that the EU ideal of justice in reality refers to equal access to opportunities.[76] According to Somek, in the EU, the only distributive mechanism of relevance is the market and the debate shifts from questions of justice to questions of inclusion in the form of 'the elimination of arbitrary factors that prevent voluntary access by those who meet non-arbitrary conditions'.[77] Irregular migrants have a particular place in such a context. That is because they cannot claim equal access to opportunities to begin with as they are the EU's outsiders and there is no duty to include them to the market in contrast to EU migrants. However, after irregular migrants have accessed the EU territory and they have contributed with their work, can financial solidarity extend to them and lead to more protection in and around their work circumstances? I would suggest that this can be the case, and it would lead to better alignment of EU migration policy to the demands of Article 80 TFEU.

ĆAPETA, T., GOLDNER LANG,I., PERIŠIN, T.. Oxford, Hart Publishing, 2022, 105–46; WEATHERILL, S., *The Internal Market as a Legal Concept*, The Collected Courses of the Academy of European Law, volume XXV/1, Oxford, United Kingdom: Oxford University Press, 2017.

[74] On the equal treatment for EU migrant workers see Judgment of 25 May 1971, *Defrenne / Belgian State*. 80/70, ECLI:EU:C:1971:55; For migrant workers covered by association agreements, see Judgment of 4 May 1999, *Sürül*, C-262/96, ECLI:EU:C:1999:228; Judgment of 31 January 1991, *Office national de l'emploi / Kziber*, C-18/90, ECLI:EU:C:1991:36; Judgment of 2 March 1999, Eddline El-Yassini, C-416/96, ECLI:EU:C:1999:107. For the importance of equal treatment in regular migration see most recently Judgment of 19 December 2024, *Caisse d'allocations familiales des Hauts-de-Seine*, C-664/23, ECLI:EU:C:2024:1046.

[75] WILLIAMS, A. T., "The Problem(s) of Justice in the European Union," in *Europe's Justice Deficit?*, eds. KOCHENOV, D., WILLIAMS, A.T, DE BÚRCA, G., Oxford, Hart Publishing, 2015, 33, who suggests that reliance on human rights cannot resolve substantive justice issue; SOMEK, A., "The Preoccupation with Rights and the Embrace of Inclusion: A Critique," in *Europe's Justice Deficit?*, ed. ds. KOCHENOV, D., WILLIAMS, A.T, DE BÚRCA, G., Oxford, Hart Publishing, 2015, 297; MUIR, E., "The Essence of the Fundamental Right to Equal Treatment: Back to the Origins," *German Law Journal* 20, no. 6, September 2019, 817–39; MUIR, E., *EU Equality Law: The First Fundamental Rights Policy of the EU*, First edition, Oxford Studies in European Law, Oxford, Oxford University Press, 2018; Friðriksdóttir, B., *What Happened to Equality?: The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration*, Leiden, Brill Nijhoff, 2017.

[76] SOMEK, A., "From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination," *European Law Journal* 18, no. 5, 2012, 724.

[77] SOMEK, 'From Workers to Migrants, from Distributive Justice to Inclusion' 718.

In 1961, when the first framework of free movement was introduced, with significant clauses limiting the rights of EU migrants, Lionello Levi Sandri suggested that the rights attributed to EU migrants derived from the 'new spirit of European solidarity'.[78] It was presented as a concession made by the Member States with a view to creating a labour market which would ensure the best use of the Community's human potential.[79] Even though irregular migrant workers are in the shadow and do not count as part of the EU human potential, the reality is very different. Irregular migrant workers contribute with their work to the economic development of Europe. Guaranteeing more extensive protection for them could fit with interstate solidarity based on the promotion of the economic objectives of this legal order. This admittedly utilitarian approach to rights for irregular migrant workers might at first appear out of touch with the reality of EU law, the central position of EU citizens and the relegation and exclusion of non-EU migrants.[80] However, a closer investigation of the relevant legal framework shows that the dividing line of EU migration law is not exclusively nationality based, but rather incorporates considerations related to the economic contribution of all migrants.[81] This becomes clear if we think of the exclusion EU law furnishes for all the precarious EU migrants who can make no market contribution.[82]

And while it would be extremely challenging to make the case for an EU right to entry or residence of economically inactive migrants from third countries, such a case could be made in relation to migrants who have already contributed to the project of growth also in the form of irregular work. This will not lead to a revolutionary rethinking of the rights of irregular migrants, and it would continue on a conservative trend of emphasizing the deservingness of

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[78] Lionello Levi Sandri, The free movement of workers in the countries of the European Economic Community, Commission of the European Economic Community, Bulletin of the European Economic Community (1961) 66.
[79] ibid.
[80] SPIJKERBOER, "Bifurcation of People, Bifurcation of Law."
[81] LOXA, A., "EU Law, Migration and Racial Capitalism Encounters at the Neoliberal EU (b)Order," *Retfærd. Nordisk Juridisk Tidsskrift* 4, no. 4, forthcoming 2025.
[82] PERSDOTTER, M.E., *Free to Move along: On the Urbanisation of Cross-Border Mobility Controls - A Case of Roma "EU Migrants" in Malmö, Sweden*, Dissertation Series in Migration, Urbanisation, and Societal Change, Roskilde: Roskilde Universitet, 2019; NIC SHUIBHNE, N., "What I Tell You Three Times Is True: Lawful Residence and Equal Treatment after Dano," *Maastricht Journal of European and Comparative Law* 23, no. 6, December 21, 2016, 908–36; MANTU, S., GUILD, E., MINDERHOUD, P. "Transforming Migrants into 'Real' Citizens — EU Citizenship and Some Unfulfilled Promises," *European Journal of Migration and Law* 21, no. 3, 2019, 283–87; O'BRIEN, C., "The Great EU Citizenship Illusion Exposed : Equal Treatment Rights Evaporate for the Vulnerable," *European Law Review*, December 6, 2021, 801-17; O'BRIEN, C. "Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights," *Common Market Law Review* 53, no. 4, August 1, 2016, 937–78; LAFLEUR, J.M.,MESCOLI, E., "Creating Undocumented EU Migrants through Welfare: A Conceptualization of Undeserving and Precarious Citizenship," *Sociology* 52, no. 3, June 1, 2018, 480–96.

migrants as a basis for rights.[83] However it could provide the basis for creative argumentation and legal mobilisation with the support of other relevant actors, such as trade unions.[84] It could also form the basis for concentrated regularization efforts similar to those that have taken place in Member States over the years and it would bring an end to the migration related vulnerability of irregular workers.[85]

[83] JOPPKE, C., "Neoliberal Nationalism and Immigration Policy," *Journal of Ethnic and Migration Studies* 50, no. 7, April 20, 2024, 1657–76; NEERGAARD, SELBERG, "Unpacking (Ir)Regular Labour Migration"; KOSTAKOPOULOU, D., CARRERA, S., JESSE, M. "Doing and Deserving: Competing Frames of Intergration in the EU," in *Illiberal Liberal States : Immigration, Citizenship, and Integration in the EU*, ed. GUILD, E., GROENENDIJK, K., CARRERA, S., Farnham, Surrey ; Burlington, VT, Ashgate, 2009; DAVIES, G., "Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication," *Journal of European Public Policy* 25, no. 10, October 3, 2018, 1442–60.

[84] See for example SCHOULTZ I., MUHIRE, H. "Mobilizing the Rights of Migrant Workers: Swedish Trade Unions' Engagement with Law and the Courts", Nordic Journal of Human Rights 42, no 1, January 2024 70-88; See also ANDREETTA, S. "Litigation as a Governance Strategy: Courts, Bureaucracies and the Welfare Rights of Irregular Migrants" Soc Policy Adm, 4 December 2024; 01-10.

[85] BARRON, P. et al., "State Categories and Labour Protest: Migrant Workers and the Fight for Legal Status in France," *Work, Employment & Society* 30, no. 4, 2016,631–48; Maas, "Unauthorized Migration and the Politics of Regularization, Legalization, and Amnesty."