INIURIA MIGRANDI.
CRIMINALIZATION OF IMMIGRANTS AND THE BASIC PRINCIPLES OF THE CRIMINAL LAW

- Draft -

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SUMMARY: 1. Introduction. – 2. A Brief Overview of the Relevant Legislation. – 3. A Criminal Ban on Persons, not on Deeds. – 4. Criminal Law as a Camouflage. – 5. Concluding Remarks.

1. Introduction

When, in 2008, the former Italian Ministry of the Interior, Roberto Maroni, publicly announced Italian government's intention to pass a statute[1] criminalizing "illegal entrance into, or stay on, the state's territory", the left-oriented public opinion, as well as the great majority of the academic criminal lawyers, cried scandal on the footing that such a political choice would have been merely populist and highly discriminatory. Ministry Maroni candidly replied that many other countries, both inside and outside Europe Union (henceforth: EU), were already criminalizing illegal immigration. Unfortunately (throughout this paper I shall try to justify my using this adverb here), he was right. The criminalization of irregular immigrants is not at all an Italian speciality; it is rather a widespread trend all over the world.

It was not always so. To be true, hostile social and political attitudes towards immigrants, strangers, foreigners, have always existed;[2] in a way, they constitute an unavoidable step in the social and historical construction of communities and communities' identity:[3] something like a necessary chapter in the *roman de formation* of every social self. There are moments in history, however, in which this attitudes undergo an exacerbation. And this is undeniably what has been happening in recent years (not only) in Europe, and which has now led, as a result, to a «a shift in the perception regarding the moral worthiness of [*illegal*] migrants[*, so that*] those who enter and remain without authorization are increasingly perceived as "criminal" in a

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[1] In reality, according to Italian constitution, governments cannot pass statues. However, one of the (many) subversions of the recent political and constitutional Italian history was (and it is not clear, at the moment, if it will continue to be) that the government has had a strong, even compelling, influence on the parliament's orientations, so that, in fact, parliament itself did not actually play any "check and balance" role with respect to the government's decisions, but rather a merely "executive" role – that is: the role of translating into formal statutes/laws the political decisions previously taken by the government.

[2] See B. Honig, *Democracy and the Foreigner*, ….

Surely enough, immigrants, and foreigners more generally, are not the sole paradigmatic figure of "otherness". Another telling example, for instance, are "witches". See, e.g., M Gaskill, *Witchcraft. A Very Short Introduction*, Oxford: OUP, 2010, 1: "Witches are monsters haunting our dreams, confirming who we are through what we are not."

[3] See, e.g., S. Krasmann …; K. Calavita …; D. Melossi …. *Contra*, however, A. Abizadeh, ….

mala in se sense.»[4]

In this paper I will be specifically concerned with a normative assessment, from the perspective of a principled criminal law theory, of the way in which this "shift in perception" has been translated into norms criminalizing illegal immigration. The overarching question I will dwell on is one specifically regarding the way of *using* criminal law which is implied in the very fact of criminalizing illegal immigration. My thesis will essentially be that it incarnates a veritable *abuse of the criminal law*. In two senses at least: first, in the sense that by criminalizing illegal immigration the criminal law puts a ban on (certain categories of) persons, rather than on their actions/omissions, in a way in which a principled criminal law should not do (because in so doing it violates some basic liberal principles which should be thought of as compelling for any just criminalization – of course, insofar as we assume that a just criminalization should be inspired by such liberal principles); and – second – in the sense that the criminalization of illegal immigrants represents what in Antony Duff's terminology might be called a *perversion of the criminal law*,[5] being a case in which criminal norms are (unjustifiably) used as means to attain extra-penal aims.

I will carry out this critical task having as my test case the Italian regulation on illegal immigration: I will do it not only because Italian law is the one with which I am more familiar, but also because it presents some features that strike me as particularly revealing of a more general attitude towards irregular immigrants (and, in any event, of an attitude that needs to be pointed out and stigmatized). I will assume, however, (and to some extent I will also try to show) that (at least, many of) its distinctive traits can also be found in other legal systems. In particular, I will assume as a telling circumstance the fact that many (if not all) of the relevant traits of the Italian migration law are in fact implementations of, or in accordance with, EU principles on the matter.

2. An Overview of the Relevant Legislation

Let me thus begin by briefly sketching what is required in order to regularly migrate in (or even just enter) Italy, and what would happen instead in the case of an irregular (either successful or merely attempted) entrance or sojourn therein. The great bulk of the relevant regulation is to be found in the *Decreto Legislativo* no. 286/1998, the Italian "Consolidated Law on Immigration" (henceforth: CLI).[6] The first part of this paragraph will then amount to nothing more than a general overview of the contents of this act, with particular reference to those aspects which are most strictly entailed by, or related to, illegal immigration.

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[4] C. Dauvergne, *Making People Illegal* …, 16.

[5] See R.A. Duff, 'Perversions and Subvertions of Criminal Law', in R.A. Duff, L. Farmer, S.E. Marshall, M. Renzo, V. Tadros (eds.), *The Boundaries of the Criminal Law*, New York: OUP, 2010, 92 («The criminal law is perverted when it is used for purposes that are not proper to it»).

[6] An act that, since its first enactment, has been strongly and repeatedly modified both by subsequent laws and by the Italian constitutional court's judgements. In what follows, however, I will essentially refer to its current shape.

Later on, I will rush through both the most relevant EU normative acts on migration (that is: the so-called "Schengen Borders Code"; henceforth: SBC;[7] and the so-called "Repatriations-Directive"; henceforth: RD)[8] and some other European countries' legislations, in order to show how Italian migration law, under the relevant aspects I am interested in here, is far from being an exception.

2.1. Italy (or the Italian Way of Banning Illegal Immigrants)

The general rule governing the foreigners' regular entrance into the Italian territory is a rule quite common among modern states: if we put aside some limited – even if relevant – exceptions,[9] no one should be admitted in unless she has a regular visa and/or (it depends on the situations) a regular residence permit, that is: unless she is explicitly and specifically *permitted*, *authorized*, to enter (or to stay) therein. This need for specific *permission*, or *authorization*, to enter (or to stay) is clearly an entailment of the fact that, not only modern states deem themselves to be holding a right to exclude foreigners (*ius excludendi alios*),[10] but their general attitude towards foreigners is *by default* one of exclusion, not of inclusion: foreigners will be *automatically* excluded, unless special, authorizing, conditions apply in specific cases.

Italian law, in particular, makes the obtainment of such an authorization conditional upon the following presuppositions: *a)* that the foreigner's entrance or stay be designed to pursue a legitimate end (a pretty obvious condition, indeed); *b)* that her purported sojourn be of a limited duration (although the possible length varies according to the different aims of the foreigner's visit); *c)* that she have money enough both to keep herself during her stay and to return back home when the time of her purported stay will be elapsed.

The very same principles – including, most notably, the last one – also apply to those persons who aspire to enter Italy in order to find a job. Those of them who are not already provided with sufficient means of subsistence, indeed, should at least be in a position to acquire such means "lawfully" (i.e., by a regular work): in particular, a guest-worker will not be admitted in, unless – before her entrance into the state's territory – an Italian (or a regularly residing foreign) employer has specifically requested the authorization to employ her (art. … CLI). Hence, no foreigner should enter Italy *in search of a job*: would-be guest-workers can only enter if at the time of their entrance they are already engaged in an official and authorized commitment with their future employers.

This whole system is highly artificial and hypocritical: as is well-known, the largest number of those who aspire to migrate in Italy and in Europe are nationals

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[7] *Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders*, OJEU, 13.4.2006, L. 105.

[8] *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*, OJEU, 24.12.2008, L. 348.

[9] EU citizens, nationals of visa exempt third-countries, and – but this is an exception tending today to be merely theoretical rather than practically relevant – asylum seekers and refugees.

[10] A right that they assume to be an obvious part of their – auto-proclaimed – internal and external sovereignty.

of poor countries who seek to escape famine and hunger, or, anyway, extremely needy life's conditions; migration for them is precisely the way (to try) to gain some minimal means of subsistence, so that they *cannot* be already provided with such means at the very moment of their migration. Furthermore, while these persons generally decide to migrate exactly *in search of a job*, it is highly unrealistic that – before entering into Italy – they be already in touch with Italian employers eager to hire them regularly.[11]

As a result, in many (indeed, in the great majority of the) cases the only way would-be immigrants (who aren't wealthy enough to keep themselves during their stay) have to enter the Italian territory is by trying to do it *irregularly*.

This leads us directly to our critical point. What does happen to foreigners who enter, or try to enter, irregularly the Italian territory? As a matter of generalization, they will be *criminalized* and made *liable to expulsion*, the overarching legal attitude towards these people being indeed one of *stigmatization* and *repulsion*.

A first kind of repulsion is suffered by those foreigners who present themselves at border crossing points without the required documents or visas or permits: unsurprisingly enough, these will be denied entry – and thereby pushed away – directly by the border guards (so-called: *respingimento*, repulsion, *refoulment*).

It is plausible to think, however, that foreigners who, although lacking in the required documents etc., *really* desire to enter the Italian territory do not present themselves at border crossing points, but rather try to bypass them, or in any other way try to avoid border controls and surveillance. These persons, if succeeding in their aspiration to enter the state's territory, will thereby commit the crime of "illegal entrance in the state's territory", which is made punishable by art. 10-*bis* CLI with a minimum fine of 5,000 euro to a maximum of 10,000 euro. (The very same punishment is also attached to the crime of "illegal sojourn in the state's territory", committed by those persons who illegally stay on the state's territory once their visas or residence permits have expired, or once they have been denied a residence permit, or once their sojourn permission has been revoked.)

Moreover, illegal immigrants – either if they are apprehended or intercepted by the border guards, at the very moment of their crossing the state's borders or immediately afterwards,[12] or if they are denounced and seized when they have already succeeded in (although precariously) settling in the state's territory –[13] should undergo an "administrative expulsion" directly decided and executed by the

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[11] This causes that the Italian dispositions on guest-workers are highly ineffective as they are normally circumvented both by employers and guest-workers: what normally happens is that migrants irregularly enter in search of a job, and when they find it – provided that the employer is inclined to hire them regularly (which, however, is not what normally happens) – they will arrange things as though their encounter had taken place as the law requires.
See, e.g., K. Calavita, *Immigrants at the Margins: Law, Race, and Exclusion in Southern Europe*, New York, Cambridge University Press, 2005.

[12] Or if, although liable to being denied entry at border crossing points, they are provisionally admitted in "for necessities of public aid": art. 10.2 *b)* CLI. However, it is clear that in this case no crime of illegal entrance would be committed.

[13] This category includes: *a)* those foreigners who were not stopped by the border police at the moment of their entrance, or immediately afterwards, and thus were not repelled; ; *b)* those foreigners who had entered regularly the state's territory, but have remained irregularly in it after their visas or residence permit have expired.

police (arts. 10.2 and 13 CLI). Administrative expulsion is immediately executing, irrespective of whether the expelled foreigner be or not on trial for her (alleged) illegal entrance or sojourn. No authorization (*nulla osta*) is required by the trial judge in this case; rather, if the judge receives an official police information that the defendant has been administratively expelled (art. 10.4 CLI), he must apply a no case to answer (art. 10.5 CLI).

In those cases in which an administrative expulsion cannot be immediately performed (which frequently happens), because, for instance, it is not clear which is their country of origin, illegal immigrants will be confined in so-called "Centres for Identification and Expulsion" (henceforth: CIE), with the perspective of remaining therein for up to 18 months (art. 14.5 CLI), if it is necessary in order to identify them and to carry out their coercive expulsion. Importantly enough – while it does not presuppose a criminal conviction, nor is functional to the possible future execution of a criminal punishment (since *administrative* expulsion is *not* a punishment) – such a confinement in a CIE is nonetheless a veritable form of imprisonment:[14] foreigners are indeed *coerced* to get in; they do not freely choose to do so, nor may they escape from there: if they did, the police were legitimated to restore their confinement.[15]

Furthermore, a judicial order for immediate expulsion (which is exactly the same thing as administrative expulsion, except for the fact that the relevant decision is here in the hands of a judge, and not of the police) is expressly provided by the law as a substitute for the fine (art. 16.1 CLI; see also art. 62-*bis*, D.Lgs. 274/2000).[16]

2.2. *EU (or the European Way of Banning Illegal Immigrants)*

Importantly, this set of norms – to the extent that I have set it out here – is not at all in conflict with the EU principles on immigration; on the contrary, the first seems to be a rather accurate and resolute translation of the others.

To realize how much this is true, it will suffice a rather minimal overview of the "Schengen Borders Code" (SBC) and of the "Repatriation-Directive" (RD),

[14] Cite Italian constitutional court.

[15] In cases in which immigrants cannot be confined in a CIE (for instance, because of a lack of beds), or, even though confined, they could not have been identified nor coercively expelled, they will be *ordered* by the local police's chief (*questore*) to voluntarily and autonomously abandon the state's territory (art. 14.5-*bis* CLI). (If violated, this order will result in a crime, made punishable with a fine: art. 14.5-*ter* CLI.)

[16] But, when it comes to immigrants, expulsion pops up from other places, and in many other different forms. First, in convicting and sentencing a foreigner for an intentional crime (even though different from illegal entrance or sojourn), the judge may substitute expulsion for detention in those cases in which she would have otherwise sentenced the defendant to a two years detention or less (art. 16.1 CLI). Second, the *magistrato di sorveglianza* (that is, the judge supervising the enforcement of custodial judgements) *must* (– not a mere encouragement, in this case: an obligation –) substitute expulsion for detention as soon as the remaining duration of the detention to be served by illegal immigrants does not exceed two years. Finally, expulsion should be applied as a so-called "security measure" (which, in the Italian criminal law, is a specific kind of penal sanction) against those (legal or illegal) immigrants who, having committed a (relatively) serious crime, are judged to be socially dangerous persons (arts. 15 CLI, and 235 and 312 Italian Penal Code [henceforth: IPC]).

which are – as I have already said – the two most important EU documents on the matter. According to them, not only each EU member state has a wide-ranging right to exclude non-EU foreigners, but, in a way, it is obliged to do so, since "[b]order control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control" (6th Whereas, SBC). Therefore, it is required that "[t]he Member States […] assist each other and [maintain] close and constant cooperation with view to the effective implementation of border control" (art. 16.1 SBC).[17]

Foreigners aspiring to legally enter into the EU territory (and to stay therein for a maximum of three months-per six months) should present themselves at a border crossing point provided with valid travel documents and, if required, visas, but they also should either "have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin […], or [be] in a position to acquire such means lawfully" (art. 5(c) SBC): a set of requirements we have already met. Most noteworthy, from my point of view, the SBC seems to be particularly worried about the economic requirement, since it impliedly states – in a quite crude and clumsy, if sincere, way – that, in view of a legal crossing of EU borders, some "cash, travellers' cheques [or] credit cards [should be found] in the third-country national's possession" (art. 5.3, 2nd sub-paragraph). Border guards are thus required to thoroughly check case-by-case the recurrence of these conditions (art. 7.3(v) SBC), but it is easy to see how hypocritical and discriminatory such a requirement can be, since normally the persons to subject to border guards' economic checks will be picked out on presumptive grounds (country of origin, appearance, etc.): it is pretty hard that a well-dressed North American be actually subjected to thorough economic checks by EU border guards.

Those foreigners who do not fulfil the established conditions "shall be refused entry to the territories of the Member States" (art. 13.1 SBC). And, even though "[e]ntry may only be refused by a substantiated decision stating the precise reason for the refusal[,]" the decision itself "shall take effect immediately" (art. 13.2 SBC). Hence, even though "[p]ersons refused entry shall have the right to appeal[, l]odging such an appeal shall not have suspensive effect on a decision to refuse entry" (art. 13.3, 1st and 2nd sub-paragraphs).

If we now move to consider the position of those foreigners who have succeeded in illegally entering (or staying on) EU territories, we easily find that EU regulation provides but one major destiny for them, which is *expulsion* (or repatriation or return, according to the more politically correct language used in the RD): "to return illegally staying third-country nationals" is not only "legitimate for Member States (as, quite timidly, states 8th Whereas, RD), it is a *duty*:[18] "Member States *shall* issue a return decision to any third-country national staying illegally on their territory" (art. 6.1 RD). Which essentially means that member states are required by the RD to enact laws according to which illegally entering or staying

[17] Other EU documents are particularly instructive as well. See, for instance, the European Council 2003 [cited in Maas, 241] and European Commission 2004, in *COM(2004)* 412 [ibidem].

[18] Although it is also stated that "[w]here there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary return should be granted" (10th Whereas, RD).

persons will, in principle, be expelled (although they retain the power to grant case-by-case residence permissions "for compassionate, humanitarian or other reasons": art. 6.4 RD – something like a residual of the old King's Mercy). Moreover, "Member States shall take all necessary measures to *enforce* the return decision if no period for voluntary departure has been granted" (art. 8.1). Which basically means that, not only they have an obligation to coercively execute the illegal foreigners' expulsions, but, if necessary (i.e.: "[u]nless other sufficient but less coercive measures can be applied effectively in a specific case") "in order to prepare the return and/or carry out the removal process", they are also permitted to keep would-be expelled foreigners in detention, up to a maximum of eighteen months (art. 15.1 RD).

Finally, EU regulation does not require that illegal entry or sojourn be criminalized by the states. Neither, however, does it ban this possibility; which heavily contributes to draw the substantially unquestioned conclusion that a criminalization of illegal immigration does not conflict with EU law.

2.3. Rushing through Some Other European Countries

I am not going to dwell here on the ways in which other countries, either European or not, struggle against illegal immigration. For the sake of my argument, it will suffice a brief sketch.[19]

First, all EU member states are bound to apply both the SBC[20] and the RD, which entails that they all are obliged to conform their laws on migration to the principles that we have seen stated in those two EU acts:

(leaving asides asylum seekers) entry may only be permitted to those foreigners who fulfil certain essential conditions, such as: valid travel documents, visa or residence permit (if required), legitimate end of the visit, sufficient means of subsistence. Foreigners who do not fulfil these conditions should therefore be denied entry;

if they, nonetheless, succeed in entering the state's territory (or if they overstay their residence permit), they should be expelled;

if necessary in order to carry out their expulsion, foreigners may be legitimately confined.

Besides complying with these principles, many European states criminalize the very fact of foreigners illegally entering, or staying on, their territories. This happens, for instance, in: Belgium, Denmark, France, Germany, Greece, Ireland, UK. Other European countries – such as, for instance, Spain and Finland – make illegal immigration into a (pretty serious) administrative (or police) offense. In many cases, irrespective of the fact that illegal immigration be qualified as a criminal or as an administrative offense, expulsion is provided as a substitute for the established

[19 For the moment, this sketch is, not only brief, but also approximate and provisional: which means that it is the result of a still incomplete and superficial research I have dedicated to it so far. More and better scrituny of the relevant legislations is needed.]

20 More precisely: SBC, being a Regulation, is directly applicable inside the territories of all the EU member states: differently from (non-self-executing) Directives, it needs no national legislative act to comply with it.

(penal or administrative) sanction (so, e.g., in Finland, France, Germany, Greece, UK).

3. A Criminal Ban on Persons, not on Deeds

«The "illegality" of peoples is a new discursive turn in contemporary migration talk. People who transgressed migration law were recently referred to as "illegal aliens" or "illegal migrants." These labels are still current, but so is the simple descriptor "illegal." People themselves are now "illegal"; states are concerned about "illegals."»[21]

Although a criminalization of illegal immigration – at least inasmuch as it shares the features described in the last few pages – faces many possible political and moral questions (e.g.: Have states a right to exclude foreigners? Have migrants a *ius migrandi*? Is illegal immigrants' detention morally justifiable as a means to the end of their expulsion?), here, as I said earlier (in paragraph 1), I will be specifically concerned only with (some of) the problems it raises from the perspective of a principled criminal law theory. The remainder of this paper will then be exclusively focused on whether a so-fashioned set of norms fits the (or at least, some) basic traits or principles of the criminal law (more precisely: of the criminal law as it should be in "our systems").[22] I am inclined to think that it doesn't, and that it rather constitutes a *misuse*, an *abuse*, *of the criminal law*: first, because it is a system of norms designed to criminalize (certain) types of persons, rather than types of facts – and this, in turn, contradicts many traits and principles by which a liberal criminal law should be characterized; second, and more radically, because it is a perversion of the criminal law in that it (unjustifiably) uses criminal norms for extra-penal ends and reasons.

3.1. Is the Criminalization of Illegal Immigration a Criminal Ban on Persons?

Relying on a dichotomy which was particularly in vogue in the German criminal law debate [going on] during the 1930s, in this paragraph I am going to argue that a criminalization of illegal immigration (at least, insofar as it shares the relevant features and rationale as Italian and European regulation of immigration) represents an instance of *Täterstrafrecht* (or "author-centred" approach to criminal law), not of *Tatstrafrecht* (or "deeds-centred" approach criminal law): a kind of criminal law concerned, not so much with actions omissions and deeds, as with authors.

This is not an unprecedented critique. Since its political gestation, for instance, art. 10-*bis* CLI has been taxed with being an instance of *Täterstrafrecht*;[23] and, obviously enough, the very same complaint has been frequently repeated after its very introduction in 2009. In deciding about the constitutional legitimacy of this

[21] C. Dauvergne, *Making People Illegal*, …, 15.
[22] For a similar qualification, see R.A. Duff, 'Responsibility, Citizenship, and Criminal Law', in R.A. Duff and Stuart Green (eds.), *Philosophical Foundations of the Criminal Law*, New York: OUP, 2011, 126.
[23] M. Donini, …; Associazione magistrati, ….

norm,[24] however, the Italian constitutional court dismissed this critique rather hastily by arguing that art. 10-*bis* CLI isn't a true sample of *Täterstrafrecht*, since it does not actually criminalize a quality of persons, but instead the *fact* that a certain type of conduct be performed: "clandestines", or "illegal immigrants", - this was the Court's main argument on the point - are made punishable, not because of *who* they are, but because of *what* they do, that is: illegally entering (or remaining in) the state's jurisdiction. Which is apparently true insofar as one limits oneself to reading the formal texture of the article: the word "clandestine" does not even appear in it, and the whole structure of the crime is expressly focused on the commission of a conduct and on its illegality ("the foreigner who *enters* into, or *stays* on, the state's territory, *in violation of the norms of the present act*"). Hence, the court's conclusion that the "personal and social plight" of being a "clandestine" is nothing but a reflection of the performance of an illegal conduct by a person (in this case, a foreigner), as is "the personal and social plight" of being a housebreaker, a murderer, a thief, a rapist, and so on. Most importantly, from the Court's perspective, "clandestinity" is not a label attached to a person because of her birth or character, and regardless of anything she could have done: one only becomes a clandestine because of what she does, that is: violating the (Italian) regulation on migration.

Although seemingly sound, these arguments, in my view, miss some points, since they rely: first, on some flattering unclearness (vagueness and ambiguity) underlying the very notion of a *Täterstrafrecht*, and second, on an only partial and incomplete vision of the whole system of relevant norms. Let's dwell on these two points separately.

3.2. Täterstrafrecht *vs.* Tatstrafrecht

Is the criminalization of illegal immigration an instance of *Täterstrafrecht*? Before answering this question, I must be clear on a crucial point. My evocation here of the *Tatstrafrecht/Täterstrafrecht* dichotomy is not a merely stylish, or studied, xenophilic choice. By resorting to it, I want to underscore some deeper political (and moral) implications it underlies. Even though there may be authors inclined to attribute a more polite and noble meaning to the notion of *Täterstrafrecht*,[25] for the sake of my discussion here I will intentionally rely, instead, on the infamous version of the concept, the one paradigmatically represented by (but, as we will see, not certainly limited to) some samples of Nazi criminal legislation and thought.[26] This entails that I will be using the *Täterstrafrecht* ideal-type as corresponding to an authoritarian and anti-liberal (or, at least, non-liberal) set of political values, amounting, in a way, to the translation of authoritarian and anti-liberal/non-liberal arguments into criminal law "principles"; and that, by contrast, I will be using the opposite *Tatstrafrecht* model as encompassing some of the most distinctively liberal ideas about criminal

[24] Decision n. 250/2010.

[25] See, e.g., C. Roxin, …; J. Baumann, …; R. Maurach, …. More recently, among American criminal law theorists, J. Whitman, 'The Failure of Retributivism …'.

[26] CITE: G. Dahm, *Verbrechen und Tatbestand*, Berlin: Junker und Dünhaupt Verlag, 1935; F. Schaffstein; Freisler; ….

law, as they were advocated, for instance, by such pioneers of the penal liberal thought as Cesare Beccaria and Jeremy Bentham, among others.[27] (Although liberal doctrines of criminal law are obviously themselves debatable and, to some extent and on certain points, criticisable, I will assume here that they are to be preferred to authoritarian and anti-liberal ones, at least insofar as the contrast between them tracks the lines that I will be tracing in what follows.)

This choice is not aimed at caricaturing the very notion of *Täterstrafrecht*, while exalting that of *Tatstrafrecht*. Rather it is aimed at showing that the criminalization of illegal immigrants (insofar as it is so shaped as we have seen so far) is exactly an example of this infamous version of the *Täterstrafrecht*'s idea, and as such should be criticised and repealed.

With this caveat in mind, I suggest to define *Täterstrafrecht*, as opposed to *Tatstrafrecht*, as a criminal law ideal-type according to which criminalization should have types of offenders (*Tätertypen*), rather than types of offences (*Tattypen*), as its intentional objects, so that punishment should be inflicted on persons, not so much because of something they might have done, as because of *who* they are – or, better still: because of their fitting a *Tätertyp*, the ready-made (either criminological or legal) image of a certain type of person. In brief: an "author-centred" criminal law focuses not on wrong*doings* (as *Tatstrafrecht* does instead) as on wrong*beings*: the fact of being a certain kind of person (better still: of corresponding to a certain *Tätertyp*) is directly made into a wrong that triggers the infliction of a punishment. The "criminality" of a person is assumed to be *inherent* to her, in *her being wrong* (*the wrong type of person*), and not dependent on the fact that she acts "criminally" (that is, that she commits crimes, or, more generally, behaves in deviant or anti-social ways).

3.2.1. Pure vs. *Spurious Versions of* Täterstrafrecht

The *Täterstrafrecht* ideal-type can theoretically assume either pure or spurious forms, depending on the role, if any, they attribute to the actual behaviour of the "criminal" in the assessment of her "criminality".[28]

The most obvious forms of an "author-centred" approach to criminal law are clearly those according to which a person's "criminality" does not at all relate to anything "criminal" she might have done. On these views, not only "criminality" is a person's inherent quality, but it is a quality that can be individuated by directly observing the person, independent of her actions. Cesare Lombroso's theory of "natural born criminals" (according to which persons' "criminality" can be plainly

[27] A *caveat* is in point here. Even if in what follows I am contrasting *Tatstrafrecht* and *Täterstrafrecht* as two opposite ideal-types basically corresponding, respectively, to a liberal and an anti-liberal and authoritarian criminal law model, this does not mean that in fact these two models do not coexist. On the contrary, in the real life of legal and political systems, the achievement of liberal or authoritarian inspirations only comes in degrees, so that even the most liberal systems nurture illiberal norms; and when it comes to criminal law, this means that even systems generally inspired by the *Tatstrafrecht* model will more or less frequently host norms and practices inspired instead by the opposite *Täterstrafrecht* model. Which is exactly what happens, as I will try to show, with the way in which many Western, liberal, regimes (or, at least, the Italian criminal law) actually deal with illegal immigration.

[28] For a similar distinction, see M. Donini, ….

and fairly established on the basis of their physiognomic features) is a striking example of a pure "author-centred" approach.

Täterstrafrecht, however, can also come in spurious forms assigning a (though limited) role to the author's actual actions. These versions are, in a way, more insidious than pure ones in that they formally defer to the idea that criminal responsibility should be grounded in the criminals' actions or omissions: they do not exclude that crimes' formal structure can revolve around the description of conducts, instead of, directly, types of persons. This, however, is an only formal deference: on these accounts indeed the actions actually performed by a person are not *constitutive* of her own "criminality"; they cannot make her into the "criminal" she already is; a "criminal" is inherently so, independent of the fact that she performs "criminal" actions. A person's actions/omissions only appear in the assessment of her criminal responsibility as *symptoms* of her "wrongbeing" (of her being a wrong kind of person); they do not matter *per se*, as the intentional object of her criminal responsibility, but rather for what they (allegedly) reveal about their author: hence as proofs, or manifestations, of her inherent criminality, dangerousness, deviancy, disloyalty, etc. They are only nets to catch the relevant *Tätertypen*.

Nazi-jurist Georg Dahm provides us with a telling example. Dahm argues that, according to an "author-centred" approach to criminal law, «die Art des Verbrechens [bestimmt] sich nach dem Wesen des Täters»; which means, in Dahm's view, that «[e]in echtes und wesenhaftes Täterstrafrecht sieht Tat und Täter als Einheit.» The qualities of the author – her corresponding to a certain *Tätertypus* or not – change the very meaning of the fact: «Der Diebstahl, vom Kameraden begangen, ist nach Täter und Handlung ein anderer als der Diebstahl gegen den Fremden. Der Vater, der dem Sohn, der Ehemann, der seine Frau etwas wegnimmt, begeht nicht an sich einen Diebstahl, der aber nach § 247 Abs. II StGB straflos bliebe, sondern von vornherein überhaupt keinen Diebstahl. […] Die Entwendung wird hier durch das Wesen des Täters verändert.»[29] And, some pages later:

> das Gesetz hat […] nicht nur praktische Zwecke im Auge, sondern es soll Verbrechen und Täter in ihrer Gemeinschaftswidrigkeit und Entartung, in ihrer Bedeutung für die Völkische Ordnung Gehalt, erfassen. Dem gesetzlichen „Tatbestand" entspricht ein bestimmter Typus des Täters, der in seinem Wesen erfasst werden muß[…].
> Nur so kommt man, so scheint uns, zu richtigen Entscheidungen. So soll § 242 StGB nach Schwinge doch wohl das Eigentum schützen. Daher müßte Schwinge Diebstahl annehmen, wenn die Hitler-Jugend einer katholischen Jugendorganisation die Fahne entreißt und als Trophäe verbrennt. Wir nehmen keinen Diebstahl an, weil *Dieb* nicht ein jeder *ist*, der „eine fremde beweglich Sache einem anderen in der Absicht wegnimmt, dieselbe sich rechtswidrig zuzueignen", sondern *nur, wer seinem Wesen nach Dieb ist*. Das Wesen des Diebstahls erschöpft sich nicht in der Summe seiner Merkmale.[30]

Other instances of a spurious *Täterstrafrecht* approach can also be found in certain pieces of Nazi-legislation – most notably, in the so-called

[29] Dahm, *Verbrechen und Tatbestand*, …, 35-6.
Importantly, however, «[d]ie Art des Verbrechens bestimmt aber nicht nur die „äußere" Stellung des Täters in der Gemeinschaft, sondern zugleich seine innere Haltung und die Gesinnung, die das Verbrechen zum Ausdruck bringt.» (Id., at p. 36.)
[30] Id., at p. 45 (emphasis added).

Polenstrafrechtsverordnung (*VO über die Strafrechtspflege gegen die Polen und Juden in den eingegliederten Ostgebieten*), enacted on Dec. 4, 1941 (according to which the Polish and the Jews in the Eastern annexed territories should have been subjected to a far harsher version of the German criminal law as that applicable to other persons, so that, for instance, they should have instead been sentenced to death in many cases in which other persons would have been sentenced to detention), or, more recently, in art. 61, no. 11-*bis* IPC[31] (according to which punishment should have been aggravated for crimes committed by illegal immigrants, no matter how the fact of being an illegal immigrant could have affected, or facilitated, the very commission of the crime). In both these cases, the increased amount of punishment to inflict on certain categories of persons for their crimes depended, not just on some relevant feature of the deed, nor on the way in which the authors' personal plight might have reflected on its commission, but directly on *who* the authors were (resp.: Polishes or Jews in the annexed Eastern territories, illegal immigrants), and this unquestionably makes them into instances of the *Täterstrafrecht* ideal-type.[32]

Another example of a spurious approach to *Täterstrafrecht* can finally be seen in norms against vagrancy and idleness. These norms are basically founded on the *presumption* that, since idles and vagrants are lacking in "legal", "official", "regular" means of support, they *must* be committing crimes (notably, against other persons' goods and property) in order to support themselves. From the *fact* that certain persons lead a "dishonest life" the conclusion is thus drawn that they *are* (they *must be*) dangerous for society, and therefore deserving criminalization.

3.2.2. Dealing With Stereotypes

Whatever the form it may concretely assume (either pure or spurious), a first major characteristic of the *Täterstrafrecht* ideal-type is that it is not really concerned with authors *as individuals*, but *as stereotypes*: *Tätertyp* is its specific focus, not human beings with their personal and possibly unique traits.[33] The *Täterstrafrecht*'s *Täter*, in other words, is not pointed out *qua* person, but simply in virtue of her possessing some traits that link her to a certain stereotyped image.

The mechanism works approximately as follows. First, a stereotype (*Tätertyp*) is constructed by singling out certain (allegedly) descriptive traits (country of origin, racial characteristics, the bare fact of being regularly unoccupied and lacking in means of support, and so on) to which – based on social and political prejudices (largely unwarranted and hardly backed by empirical data) – a corresponding normative judgement, or qualification, is tied (dangerousness, deviancy, disloyalty, enmity, etc.). A so construed stereotype is a formidable instrument for

[31] First introduced with the *Decreto-legge* no. 92/2008, but then nullified by the Italian constitutional court (Decision no. 249/2010).

[32] See Italian constitutional court's decision no. 249/2010. See also M. Donini, ….

[33] It is not by accident, therefore, that Nazi criminal theorists were strongly critic of Franz von Liszt's account and of the "individualizing turn" he advocated for criminal law – a turn which, on their view, would have meant a weakening and an excessive humanization of the criminal law itself. See, e.g., G. Dahm, F. Schaffstein, *Liberales oder autoritäres Strafrecht*, …, 14 ff.

"descriptively" identifying types of persons to whom – in the deceiving form of a logic entailment (if A, then B: if A is a Polish, then he is – he *must be* – an enemy of the German people) – a (negative) moral qualification is assumed to be necessarily and appropriately corresponding (Polishes and Jews are disloyal persons, enemies of the German people; vagrants and idles are dangerous persons, enemies of the bourgeois; and so on).

The stereotype is then applied in its entirety by merely subsuming under it those persons who simply happen to possess those "descriptive traits" on which basis the stereotype had been previously constructed. When an individual's traits match the "descriptive" part of the stereotype, then the perverse syllogism is at hand: that person will be picked out as a concretization – as an instance – of the relevant *Tätertyp*; and, as a consequence, she will be automatically deemed the appropriate target of the normative judgement that is assumed to be necessarily connected to the stereotype (dangerousness, deviancy, and so on).

Paradoxical as it may seem, therefore, in the *Täterstrafrecht*'s model it is the authors – as individuals, as human beings – that are missing, submerged by the intrusive and cumbersome caricature of the *Tätertyp*, the stereotype. The presumptive and unwarranted reasoning on which the *Tätertyp* is built conceals the author's individual qualities. It substitutes stereotypes for authors, and thus transforms *real* authors in *men and women without qualities*. The logic of the "author-centred" model turns out to be exactly opposite to what one would have imagined at first: it is not really focused on authors, it is not really interested in emphasizing *this* author's character or moral personality; it is not designed to attain a better individualization of both the criminal responsibility and the penal response; on the contrary: it is geared to *de-humanize* authors by resolving their whole personality in the mere fact of their being subsumable under a ready-made stereotype.

3.2.3. Prevention Through Practical Reason vs. *Prevention as De-Humanized Pre-emption*

To such a de-humanized concept of authors/criminals corresponds, almost inescapably, an as much de-humanizing view of the criminal law's aims.

To be true, both the *Tatstrafrecht* (i.e., liberal, Enlightened) and the *Täterstrafrecht* (i.e., non-liberal, authoritarian) ideal-types are expressly concerned with the aim of preventing the occurrence of socially harmful or dangerous or undesirable deeds or states of affairs. *Täterstrafrecht* will hardly present itself as merely discriminating among persons; it will always claim instead to be a means to secure social order and protect society.

Where the two ideal-types strongly diverge is in the *kind of prevention* they purport to pursue, and in the costs they are ready to impose on individual liberties in order to pursue their purported preventive aims.

Tatstrafrecht's prevention of social harms comes through practical reasoning. One of the distinctive claims of the 18th century Enlightenment penal reformers (such as the Italian Pietro Verri and Cesare Beccaria, or the English philosopher Jeremy Bentham) and the 19th century post-Enlightenment liberal reformers (such

as the German criminal law theorist Anselm von Feuerbach or the English philosopher John Stuart Mill) was indeed the attribution of a general capacity of reason to everybody (including potential criminals). This very assumption informs the *Tatstrafrecht* ideal-type. The main idea at work here, indeed, is that criminal law's addressees should be treated as rational – hence moral – beings, and that prevention should be attained by seeking to elicit a practical – thus moral – reasoning from them, so as to influence their orders of preferences and make them prefer refraining from a punishable conduct (for the sake of escaping the correlative punishment) rather than performing it at the risk of being punished.

Insofar as *Tatstrafrecht*'s prevention is *rational* prevention (or better still, prevention by means of practical and moral reasoning), it clearly shows *respect* for the criminal law's addressees as rational/moral beings.[34]

The rationality – and thus the moral capacity and worth – of the criminal law's addressees, by contrast, are not amongst the *Täterstrafrecht* ideal-type's underlying assumptions. Criminals – and more generally, criminal law's addressees –, are seen instead as mere (potential) sources of social harms or disorders, not really different – at least, in this respect – from (dangerous) natural events. This leads thus to a substantial *de-humanization*, at least partly descending (sometimes explicitly, often implicitly) from a deterministic account of (criminals') human actions, or at least from a pessimistic view of the individuals' capacity to resist their (allegedly) inner/born, or socially induced, criminal urge or inclination. Being "criminals" inherently so (because of "nature" or social compulsion), state and society could/should not expect them refraining from committing "crimes": criminals can't help themselves from being who they are; it thus makes no sense providing them with good reasons to refrain from acting "criminally." This clearly rules out any reliability of general preventive mechanisms: being the criminal law's addressees' rationality and morality irrelevant and beside the point, the state should not try to engage in a practical and moral dialogue with them – the kind of practical and moral dialogue entailed by (liberal) general prevention.

Insofar as *Täterstrafrecht* aims at preventing socially harmful or undesirable states of affairs, this can only come in the form of specific prevention, better said: of an incapacitating and neutralizing *pre-emption*, according to which crimes should be averted by directly selecting and picking out those persons who, because of their matching a given author stereotype (*Tätertyp*), can be assumed/presumed to be dangerous, deviant, disloyal, and so on, and thus inclined to act so as to cause socially harmful or undesirable states of affairs: persons should thus be punished in order to pre-empt them from manifesting, actualizing, their inherent criminality, in order to avoid that their potential criminality comes true.[35] [36]

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[34] A different question is whether, and to what extent, this "show of respect" is always sincere in real life applications of the model.

[35] *Täterstrafrecht*'s prevention is thus a form of police prevention: «Police law concerned itself with the identification and abatement of causes of a state of poor police, preferably before they manifested themselves in an actual disturbance of the peace. Police, after all, served – and still serves – to prevent dangers of any kind – natural, manmade, human, animal, dead, alive – and in this sense is essentially ahuman.» M.D. Dubber, 'Preventive Justice: The Search for Principles', ….

[36] *Täterstrafrecht* and "situational crime prevention": analogies.]

3.2.4. Prevention at the Cost of Individual Liberty

But *Tatstrafrecht*'s and *Täterstrafrecht*'s prevention also differ as to the costs they are willing to accept in terms of restrictions on individual liberties.

Tatstrafrecht, as a liberal criminal law ideal-type, is based on the presupposition that persons are in principle free both to choose how to act and to act how they choose to, and that this freedom – *per se* and insofar as it is compatible with other persons' freedom – represents a value that should be respected (i.e., not arbitrarily violated) and secured by the state. Furthermore, persons are also provided with an inviolable sphere of privacy, within which an individual's exercise of her freedoms should count as nothing but that very same individual's exclusive business. Even though the very existence of the criminal law necessarily entails some "trade-offs" between individual liberty and privacy, on the one hand, and the protection of society, on the other, the stress is here explicitly laid on the first corn of the dilemma: being society an instrumental good, a means of securing individuals' liberties coexistence, its protection is thus conceived of as a sort of an indirect protection of individuals. Consequently, a prevention of socially harmful or dangerous conducts/events by means of criminal law will only be seen as legitimate insofar as it does not degenerate in an annihilation of the individuals' freedoms and rights.

As a result, prevention by means of criminal law could only be concerned with those cases in which persons make substantial steps towards the commission of a crime: that is, with those cases in which individuals exceed the privacy of their exclusive business's sphere by moving unequivocally towards the commission of a socially dangerous or harmful conduct, and so abuse of their own liberties. Insofar as a reasonable doubt remains as to whether an individual is going to use her liberty in lawful or unlawful ways, the importance attached to the values of individuals' liberty and privacy will always represent, from a liberal perspective, a compelling reason for limiting criminal law's intervention. Hereby the *Tatstrafrecht* ideal-type originates.

From a *Täterstrafrecht* perspective, by contrast, individuals are not really free to choose how to act, nor are they free to act how they choose to; or, even if they are, their freedom is not a sufficiently important good to overcome the society's general and pervasive interests. The stress is here clearly laid on society's stance, rather than on individuals': the whole comes first, the single later; it is their being part of a community, of a whole overarching social project, that gives individuals their specifically human standing and sense. As a result, the prevention of social harms and disorder is deemed a far more important end than the protection of, and respect for, individual liberties and privacy. The relevance of individuals' interests is only derivative, a reflex of society's interests, so that the protection of society encounters no real obstacle in the individual's liberty and privacy. Consequently, there is no need to make the criminal law's intervention dependent on the fact that the individual actually undertakes the commission of a prohibited conduct: the

dangerous subject can, and must, be neutralized quite independent of the fact that her dangerousness actually manifests itself in a socially dangerous conduct.

(Alternatively said, both *Tatstrafrecht*'s and *Täterstrafrecht*'s prevention aim at averting the occurrence of socially harmful or undesirable states of affairs "from the outset". Where they differ is in the identification of this "outset": each of them, indeed, do it in accordance with a radically different political conception of the relationships between individual's freedom and society's standing. From a *Tatstrafrecht*'s perspective, the relevant "outset" – the moment from which prevention by means of criminal law is legitimated to operate – coincides with that in which a person performs a substantial step towards the commission/omission of a crime. Before this moment, society would not really, or significantly, or unequivocally, be in danger so that any preventive claim by means of criminal law would appear as an illegitimate intrusion in the highly-valued sphere of individuals' peace (privacy and freedom). From a *Täterstrafrecht*'s perspective, by contrast, individuals' peace (privacy and freedom) has no autonomous standing in the face of the society's standing: the first is only functional to the second.[37] The "outset" from which prevention can legitimately take place can thus be straightforwardly identified with the very *existence* of a subject whom a disposition or an attitude is attributed to cause socially harmful or undesirable states of affairs.)

3.3. The Criminal Ban on Illegal Immigration as a Case of (Spurious) Täterstrafrecht

I think we have gathered by now a sufficient number of reasons for being hostile to the *Täterstrafrecht* ideal-type, as well as to its possible concrete manifestations – at least insofar as we assume, as I am doing here, that the values encompassed in the opposite ideal-type (*Tatstrafrecht*) deserve a general (though qualified and not unconditioned) appreciation and approval. But, is the criminalization of illegal immigration one of these concrete manifestations? As we have seen, one way (probably the *only* one) to try to reject this conclusion is by arguing (as the Italian constitutional court did) that criminal norms on illegal immigration expressly focus on the commission of a certain type of conduct and on its illegality (in the case of art. 10-*bis* CLI: "the foreigner who *enters* into, or *stays* on, the state's territory, *in violation of the norms of the present act*"), rather than merely criminalizing certain types of authors: if clandestines are made punishable – this was the argument – it is not just because of *who* they are, but because of what they do: violating the state regulation on (legal) migration.

We are now in a position to see how this argument misses the point. That the definition of a crime be formally focused on the commission, or omission, of a conduct does not *per se* immunize the corresponding norm against the fact of being a sample of *Täterstrafrecht*. It still remains the possibility that it be a case of spurious *Täterstrafrecht*, if, in the logic of that norm, the conduct only enters the picture, not really as the intentional object of criminal responsibility, but as a way to point out the (allegedly) inherent criminality of those persons fitting a certain *Tätertyp*.

[37] S. Krasmann 307 f., and O. Lepsius, quoted there.

This, in my view, is exactly what happens with norms criminalizing illegal immigration, at least in those systems sharing the very same relevant features I have been describing in paragraph 2.

To figure this out, we need to go behind the mere structure of the norms criminalizing illegal immigration, and expand our view so as to encompass the more general traits of the states' regulations on legal and illegal migration. From this more comprehensive perspective, it should become quite clear that those regulations are usually so set up as to make that only certain categories of migrants qualify as "illegal." Indeed, putting aside the (more and more exceptional) possibility of obtaining the asylee or refugee status, regular entry in many (not only European) states' territories depends, as we have seen, either on the fact of being national of a visa exempt country (which, from the point of view of many Western rich societies, basically means being national of another Western rich society), or from the fact of being provided with sufficient means of subsistence (or, at least, of being in a position to acquire such means lawfully).

As a result, only certain categories of persons qualify as the possible targets of a crime illegal immigration: basically, the poor coming from non visa exempt countries.

Importantly, such a selection of the possible authors of the crime is an intentional aim, the result of a system of norms knowingly geared to: *a)* discriminate among different categories of potential migrants (on the basis of their countries of origin and their wealth); *b)* exclude – as non-admitted migrants – those who possess certain characteristics that – in the social and legal construction of the illegal migrant stereotype – qualify them as undesirable (see *infra*); *c)* impress a criminal ban on those migrants who, although being undesired, all the same seek to enter the state's territory.

A crime of illegal immigration, in fact, – at least in Italian legal system – underlies poor migrants coming from Africa, near East, and, in part, eastern Europe as its specific type of author (*Tätertyp*). The fact that it is formally built upon the commission, or omission, of a certain type of conduct does not save it from ending up being nothing but a criminal ban on (certain) types of persons because of their poverty and geographical provenance. Alternatively said: while, on the one hand, the crime's formal structure revolves around a specific type of conduct (illegally entering into, or staying on, the state's territory), the state's regulation of legal/illegal migration, on the other hand, is so construed as to make the illegality of such a conduct – and thus its being a crime – a function of the personal and social conditions of those who commit it, of their being nationals of certain countries and of their being lacking in sufficient means of support.

Furthermore, in coherence with the *Täterstrafrecht* ideal-type, the illegal immigrant *Tätertyp* encompasses both a "descriptive" and a normative side. Given the descriptive traits of the stereotype (the immigrant's poverty, but also her arriving from non-Western – i.e., more or less "non-civilized" – areas of the world), the normative assessment – better still: stigmatization – of illegal immigrants as dangerous and deviant persons is at hand and ready-made. That migrants coming from poor countries and lacking in sufficient means of subsistence, once they will

have entered the state's territory, will either "steal the work to nationals" (and reduce the portion of state and social assistance that will fall to their lot) or be compelled by their very poverty (and not refrained by their being non-civilized) to commit crimes in order to support themselves, is a pretty easy conclusion to draw.

Hence, dangerousness and criminality are inescapably tied to the illegal immigrant stereotype.

More precisely, the stigmatizing force of the illegal immigrants' *Tätertyp* takes effect in two different stages, each one reinforcing the other, so that the final effect is a vicious circle in which the very fact of stigmatizing a certain category of persons ends up confirming the reliability of the reasons why it was stigmatized in the first place. In a first stage, the stigmatization of certain categories of immigrants works as the (social and anthropological) basis of the very *Tätertyp*'s construction, and, therefore, as the purported justification for criminalizing illegal immigration: "we punish illegal immigrants because, being poor and non-civilized, they are dangerous to our societies." In a second stage, however, the very existence of the crime of illegal immigration, and the fact that only certain categories of migrants (can) commit it, serves to confirm and reinforce the *Tätertyp*'s normative side (and thus the reliability of the sociological and anthropological hypothesis purportedly justifying the very choice to criminalize illegal immigration): that is, the idea (*recte*: the prejudice) that illegal immigrants are inherently criminal, that they cannot help committing crimes.

The impression of a criminal stigma on illegal immigrants works, then, both as a presupposition (a grounding reason) and as an effect of the criminalization of illegal immigration. By criminalizing the very fact of irregularly entering the state's territory, the social stigma of being "criminals" is attached to certain categories of persons. And this, transitively, invests these persons with the very same invidious meanings, labels, qualifications that are socially attached to the concept of "criminality": criminals are deviants, dangerous persons, threat to society and individuals; clandestines are, *per definitionem*, criminals (being authors of the crime of illegal entrance or stay); hence, clandestines are deviants, dangerous persons, threat to society and individuals.[38]

Nihil novi sub sole, one might say. What I have been telling so far is the very same history of stigmatization, criminalization, and "stereo-typifying", that, at least from the 17th century[39] through the mid-20th century, had as its main characters idles and vagrants: a logic based on the *suspect* that these persons, being lacking in "lawful" means of support, couldn't but support themselves by committing thefts, robberies, and the like.[40] The ban on illegal immigrants draws approximately, and at least in part, on the very same logic: those migrants who are not well set up will not be admitted in on the basis of the presumption that they will probably become idles

[38] See also D. Melossi, "In a Peaceful life.' Migration and the Crime of Modernity in Europe/Italy', …, 376: "…."

[39] M. Foucault, *History of Folly*, …. But see also K. Marx (quoted in D. Melossi, Peaceful, 371-2).

[40] See G. Corso, *L'ordine pubblico*, Bologna: il Mulino, 1984, 263 ff., 278.

or vagrants, once they have entered the state's territory.[41]

There is, however, an important difference between the criminalization of irregular immigration and the prohibition of idleness and vagrancy. The (preventive and punitive) measures against idles and vagrants had their foundation in the way in which certain persons lived their lives: at the end of the day, idleness and vagrancy are concepts that bear on a person's past and actual conduct: no one could be properly defined an "idle" unless she acted idly; and no one could be properly defined a "vagrant" unless she acted as such. It was thus the person's past and actual behavior that (reasonably or not) gave raise to the suspect that she was – *actually* – used to committing crimes.

Things are pretty different with irregular migrants – at any rate, with those (irregularly) entering *for the first time* the state's territory. These persons haven't even been given the time to behave suspiciously. As regards them, the suspect is raised, not even because of the way they actually live their lives, but directly because of their – abstract, formal – status of irregular immigrants (and thus, in fact, because of their poverty and geographical origin). The suspects stems from their *being* irregular immigrants. Their mere status suffices in order to make them suspect, presumptively dangerous, deviant.

4. Criminal Law as a Camouflage

I want now to make a step further and argue that, paradoxical as it may appear, the most relevant reason to be worried about here is, not just that illegal immigrants are subjected to criminal law, but, on the contrary, that they are *not really* subjected to it: that their criminalization is functional precisely to take them away from criminal law (from its rules and principles) and subject them to non-penal, administrative, "purely preventive" power.

In a way, there is too little criminal law at work here. To be sure, I am not advocating the introduction of more criminal norms dealing with illegal immigration; I am rather complaining that those criminal norms that in fact exist are nothing but façades, merely functional to cover and legitimate other kinds of practices and mechanisms that have nothing to do with criminal law. In normative systems of the sort I have been describing here, criminal law is a *corpus extraneus*, an "intruder", which *per se* has nothing to do with the very logic underlying the whole system itself. It simply appears but for symbolic reasons. The job for which these criminal norms are designed is not the proper criminal law's job – that is: punishing wrongdoers, calling them to answer to society for their wrongdoings, and so on – but merely that of covering with its legitimating mantle a completely different – and, in a sense, anti-penal – set of practices and mechanisms going on below deck.

[41] Curiously enough, it is the very legal discipline that in a way perpetuates this situation: it entails, indeed, that, once these persons have irregularly entered the state's territory, they are deprived of the possibility of lawfully finding a job. Which compels them either to find an irregular job or to commit crimes.

4.1. Criminalization of Illegal Immigration and the Aims of the Criminal Law

The previous conclusions can be easily drawn if one considers that norms such as art. 10-*bis* CLI are so structured as to be completely unable to attain the "canonical" criminal law's aims. If one looks at them from the criminal law's own perspective, they appear to be completely useless. My point is that they are designed to be so: their uselessness is a legislator's intentional end. In the system's logic, indeed, their role is not really that of subjecting illegal immigrants to criminal law, but that of criminalizing them as *Tätertypen* so as to legitimate the non-penal, merely repulsive and expulsive, treatment that the system provides for them.

Consider art. 10-*bis* CLI. How could such a norm ever claim to have, for instance, any (either general or specific) preventive effects? Punishing illegal immigration with a fine ranging from 5,000 to 10,000 euro is a very curious way of attempting to prevent illegal entrance by persons (such as illegal immigrants) who are, *by* (legal) *definition*, lacking in sufficient means of support. From the very crime's legal presuppositions (poverty as a constitutive requisite of the illegal immigrants' *Tätertyp*) stems therefore the practical impossibility of enforcing the punishment officially tied to the commission of the crime itself. The norm amounts in fact to the announcement of a non-punishment. And, being practically non-enforceable, and thus non-punitive, the provision of a fine as a "punishment" for illegal immigration cannot even have any preventive effects. No one will obviously be deterred (neither generally nor specifically) by it, since – according to the very logic of deterrence – no one could be deterred by the prospective non-infliction of, or by the fact of not being subjected to, a sanction.[42]

But there is more to this point that deserves to be highlighted. Not only the punishment for illegal immigration seems to be completely unable to attain any kind of preventive effects. Everything in this micro-system's texture seems to conjure against its judicial application, favouring instead the application of expulsive mechanisms. In the law's general design, indeed, immigrants' expulsion is clearly preferred to their actual punishment, as can be easily inferred from some simple circumstances. First, as we have seen, as soon as they enter (or irregularly stay on) the state's territory, illegal immigrants are liable to an administrative expulsion directly decided and inflicted by the police, which is immediately executing *irrespective of whether the foreigner has or not been already charged for the crime of illegal immigration*. Importantly, even if the foreigner is already on trial for the crime of illegal immigration, the judge must apply *a no case to answer* as soon as she receives an official information by the police that the defendant has been administratively expelled. Administrative expulsion, in other words, pre-empts illegal immigrants' punishment: as soon as the (allegedly illegal) immigrant is expelled, the state is no longer interested in prosecuting and trying her; her (alleged) crime vanishes with her expulsion.

Secondly, a stratagem is also provided by the law in order to *avoid* that illegal immigrants be actually subjected to the threatened fine even in those cases in which

[42] This is why, for instance, the classic liberal advocates of deterrence (starting, at least, from Cesare Beccaria) claimed that punishment should be, among other things, *certain*.

they are convicted for their crime: the judge indeed may *substitute* the fine with (judicial) expulsion; which in practice means that the fine, abstractly announced as the official penal sanction for the crime of "clandestinity" (but *de facto* unenforceable), ends up being only a sort of a *prima facie* punishment, one that is clearly destined to remain merely theoretical and "in the books."

4.2. Resentment vs. *Annoyance*

At this point, one might be tempted to think that the judicial expulsion, and not the fine, is the *real* punishment for the crime of illegal immigration, and that the first does not undergo the very same observations raised as to the second. This, however, is only partially true. It is true and evident that, when it comes to illegal immigrants, the real law's aim is their expulsion – or, at least, their *liability to expulsion*. Under closer scrutiny, however, it emerges that *administrative* expulsion, and not *judicial* expulsion, is the law's crucial point, as should be made clear by the fact that also judicial expulsion (as well as fine) is pre-empted by the execution of an administrative expulsion. The system seems to be geared to put illegal immigrants under the state's administrative dominion (which includes their liability to administrative expulsion and, if this is not immediately possible, to confinement in CIEs) and not really to expel them as a – substitutive – *punishment* to be inflicted by a judge instead of fine.

More generally, it seems that punishing illegal immigrants (either by fine or by judicial expulsion), and thus putting them on (criminal) trial, is not among the crucial points of the regulation of illegal immigration. The system seems to be uninterested in subjecting these persons to criminal justice and criminal law *for the crime of illegal immigration*.[43]

This is, I argue, a particularly telling circumstance, overtly indicative of the way in which our legal systems (or, at least, Italian legal system) conceive of illegal immigrants and of their personal and moral standing. However paradoxical it may appear at first glance, it confirms and reinforces that very same de-humanized approach to illegal immigrants that I have outlined earlier, when, in paragraph 3, I have been arguing that the criminalization of illegal immigration is a (spurious) version of the *Täterstrafrecht* ideal-type. Both the criminalization of illegal immigration and its intended judicial unenforceability (or, at least, "residual" enforceability) manifest the very same de-humanized conception of illegal immigrants as *non-persons*.[44] Criminalizing them as *Tätertypen* and taking them away from a criminal trial ascertaining their "crime" are both circumstances that, although seemingly contradictory, conjure towards the very same end of denying illegal immigrants any human and moral worth.

Let me dwell on this point. Criminal law is in a way based on (social) resentment, insofar as it revolves around the commission of public wrongs and thus

[43] This last caveat is particularly important, because, when it comes to other crimes (such as, most notably, drug crimes), the law seems instead to be particularly eager to put immigrants in the penal systems' ward.
[44] A. Dal Lago, *Non-Persone*, Milano: Feltrinelli, 1999.

entails a public condemnation against those who are deemed responsible for committing them. The act of punishing wrongdoers is an expression of such a public resentment, and the criminal trial is a way of "coming to terms" with it – a "grieving process" for social resentment. This makes criminal law into a kind of law strictly intertwined with morality, being resentment a moral emotion that triggers moral reactions,[45] and helps explain why, at least in many contemporary Western societies, criminal law is so construed as to track morality (not necessarily in the definition of the wrongs,[46] but) in the attribution of responsibility.

Because of its being a moral emotion, resentment also expresses *concern* for the person against which it is directed. Feeling resentment against a person entails attributing her a *moral standing*, treating her as a *moral subject*. We are *interested* in her moral world, and this is why we call her to *answer* for what she did. We expect – or even require – that she explain her behaviour, justify herself, plea for an excuse, and so on: in brief, that she engage in a moral dialogue with us, the "public", the society. Therefore we put her on (criminal) trial, which is in fact a manifestation of our *interest* in what she did and in what she has to say about it. Criminal law and criminal process are, thus, for persons: putting someone on (criminal) trial means crediting her with a *personal* standing, acknowledging *her being a person*. Thereby all the basic principles of (i.e., all the principled limitations and constraints on) the criminal law derive: from the assumption that the criminal law's addressees are in fact *persons*.

When it comes to the crime of illegal immigration, however, resentment seems to be supplanted by annoyance, or indifference at most. The legal system, as we have seen, shows no real interest in prosecuting the (alleged) authors of the crime, nor in punishing them, the real aim being instead that of expelling these people as soon as possible, or at any rate making them liable to expulsion so as to put them under the administrative dominion of the state: a dominion far more extensive and less principled than that to which a criminal conviction may give raise. From this point of view, criminal process and criminal punishment cannot be but a *last resort* in the "states' struggle against illegal immigration." After all, trying and punishing illegal immigrants would mean including them, although temporarily, into the public and social space represented by a criminal process, making them part of the community and freeing them from mere subjection to administrative dominion.

Those criminalizing illegal immigration seem thus to be criminal norms designed to be enforced, not so much through criminal process and punishment, as through administrative force and measures. This matches very well the fact that they be samples of the *Täterstrafrecht* ideal-type. By criminalizing illegal immigrants for their irregular entrance or stay, while at the same time taking them away from the judicial ascertainment of their "crime" and responsibility, the law shows to be merely interested in constructing these people as *Tätertypen*, as "illegals", as instances of a de-humanized stereotype, but not in calling them to answer, as moral agents, for the crime they are charged for. The legislator is content with the *mere* impression of a criminal stigma on illegal immigrants, for this enables it, politically and socially, to retain these people under legal and administrative dominion, in a purgatory where

[45] E.g. P.F. Strawson, 'Freedom and Resentment', ….
[46] The highly controversial claim of legal moralism.

they can be easily managed for the state's own purposes: a largely populated limbo where they will remain until they either "see the light" (by emerging to a civil condition in virtue of one of the ever-recurring regularizations)[47] or are – more or less causally – picked out to be expelled (which means that they will sooner or later return).

Criminal law is thereby abused, perverted: used as a mere camouflage geared to pursue, or to legitimate the pursuit of, non-penal aims radically conflicting with those that a principled criminal law should properly pursue: a mere façade designed to cover with the typical criminal law's legitimating mantle a system of administrative measures aimed at reducing illegal immigrants to a de-humanized condition of non-persons at the mercy of the state.

5. Concluding Remarks

[YET TO COME]

[47] See, e.g., Maas, ….