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**THE REMOVAL OF IRREGULAR MIGRANTS
IN EUROPE AND AMERICA**

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Introduction

Throughout the world, the subject of irregular migration is at the epicenter of the public discourse on immigration. In Europe, it competes for dominance with such other volatile issues as asylum and legal family-based immigration, while in the United States irregular immigration has virtually monopolized the larger immigration debate.

Irregular migration reflects a convergence of local, national, and world forces. Some are the familiar push factors - economic need, armed conflict, deprivation of fundamental human rights, natural catastrophe, and family separation. Others are pull factors – economic opportunity, personal freedom and security, and other attractions in the receiving countries. The combination spurs migration; growing national restrictions on legal immigration and the enhanced popularity of smuggling networks help explain the increased resort to *irregular* immigration.

Eurostat reports that in 2009 almost 600,000 irregular migrants were ordered removed from the European Union.¹ The vast majority come from the Southern Mediterranean region by sea or from elsewhere across the Turkish-Greek border.² In 2010, an estimated 90% of the irregular migrants to the EU had entered through Greece. In the first quarter of 2011, however, the flow suddenly shifted, with Italy (mainly through Lampedusa) accounting for approximately two-thirds of those who entered the EU illegally.³ Some fear that the impending addition of Bulgaria and Romania to the Schengen regime will offer a further pathway for irregular

¹ European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM(2011) 248 final, 4 May 2011, 22, available at http://ec.europa.eu/home-affairs/news/intro/docs/1_EN_ACT_part1_v11.pdf.

² EC Communication, May 2011, 4.

³ “Italy passes Greece as main immigrant gateway to EU”, *Reuters*, June 14, 2011, available at <http://af.reuters.com/article/libyaNews/idAFLDE75D1A620110614> (citing Frontex).

migrants.⁴ At this writing, the massive refugee flows spawned by the revolutions in North Africa and the Middle East have taken center stage.

As of March 2009, approximately 11 million irregular migrants lived in the United States, a drop from the estimated 12 million at which this population had peaked in 2007.⁵ About 60% of these individuals are from Mexico, 20% from other parts of Latin America and the Caribbean, and 11% from Asia.⁶ Importantly, more than one-half of the irregular migrants living in the United States in 2009 had been present in the country more than ten years.⁷ In fiscal year 2010 (the year ending 30 September 2010), the U.S. Department of Homeland Security (DHS) reported 517,000 apprehensions (90% of them at the border) and 387,000 actual removals.⁸ Those figures, however, include all removable noncitizens – including lawful permanent residents removable because of criminal convictions - not just irregular migrants.

On the one hand, States' resistance to irregular migration is understandable. The current fiscal crisis exacerbates worries about irregular migrants' receipt of public benefits. The unemployment crisis heightens concerns about their impact on the jobs, wages, and working conditions of native workers. Domestic populations often fear the racial, ethnic, religious, linguistic, cultural, or environmental implications of irregular immigration. And they worry, rightly or wrongly, about irregular migrants' effects on public safety and public health. Philosophically, native populations cite concerns about the rule of law. They resent large-scale violations of their laws by outsiders, particularly those violations that they perceive as undermining their borders and therefore their national sovereignty.

On the other hand, the conditions that irregular migrants seek to escape are compelling ones. The humanitarian case for a compassionate response to irregular migration is correspondingly powerful; some argue it is less about charity than about moral obligation.⁹ Moreover, the process of apprehending, processing, and ultimately removing irregular migrants

⁴ "Bulgaria, Romania Schengen entry to boost illegal immigration – Europol", *Sofia News Agency*, June 14, 2011, available at http://www.novinite.com/view_news.php?id=129297.

⁵ Jeffrey Passel & D'Vera Cohn, "U.S. Unauthorized Immigration Flows are Down Sharply Since Mid-Decade", 1 Sept. 2010, 1, available at <http://pewhispanic.org/files/reports/126.pdf>.

⁶ *Ibid.*, 4.

⁷ *Ibid.*, 5.

⁸ U.S. Dept. of Homeland Security, Annual Report, "Immigration Enforcement Actions: 2010", June 2011, 3,4, available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>.

⁹ Joseph H. Carens, "The Case for Amnesty: Time Erodes the State's Right to Deport," *Boston Review*, May/June 2009.

is difficult and expensive; for every possible strategy, States need to balance the benefits and the costs. In some instances, the responses to mass violations of law should include not only enhanced enforcement, but also a realistic appraisal of whether the level of non-compliance is evidence that the law itself is insufficiently accommodating the relevant competing interests.

In this passionate discourse, even the terminology is contentious. In this chapter, I use the term “irregular migrant” to describe a person who is present in a State’s territory without a legal right to be there. So defined, the term encompasses both individuals who entered the country illegally – for example by stealth or fraud – and those who entered legally but overstayed or otherwise violated the conditions of their stays. Because asylum seekers have the right to remain in the State’s territory while their applications are pending, they do not fall within this definition of irregular migrant unless and until their claims are finally and legally rejected.¹⁰ Consequently, except for occasional references, the treatment of asylum seekers is beyond the scope of the present discussion.

Similarly, this brief chapter does not explore the origins, demographics, or impact of irregular migration. Rather, it focuses narrowly on removal and other policies or proposals for reducing the irregular migrant population. Examples are drawn principally from the practices of the European Union and the United States. Finally, as important a subject as it is in the United States and in other federations, space constraints do not permit an extended discussion of the “who decides?” question – i.e., the proper allocation of policymaking and enforcement responsibilities as between national governments and their political subdivisions. The Arizona statute that attracted worldwide publicity in 2010, and subsequent developments in other U.S. states, are a large part of the overall immigration debate in the U.S., but because of the breadth of that subject, it is beyond the scope of the present chapter.¹¹

Section I will summarize the removal processes in the EU and the U.S., with special attention to the subject of readmission agreements. Section II then describes the main strategies

¹⁰ Directive 2008/115/EC of the European parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 Dec. 2008, available at <http://eur-lex.europa.eu8/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN.PDF> [the Return Directive], preamble, para. 9.

¹¹ For some thoughtful discussions, see, e.g., Cristina M. Rodríguez, “The Significance of the Local in Immigration Regulation”, *Michigan L. Rev.*, 106, 2008, 567-642; Peter H. Schuck, “Taking Immigration Federalism Seriously”, *Univ. Chicago Legal Forum*, 2007, 57-92; Peter J. Spiro, “Learning to Live with Immigration Federalism”, *Connecticut L. Rev.*, 29, 1997, 1627-46; Michael J. Wishnie, “Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism”, *NYU L. Rev.*, 76, 2001, 493-569.

employed in the United States for deterring, apprehending, and removing irregular migrants, with comparisons to the EU when applicable.

1. The Removal process

1.1 Removals in the European Union

Each of the EU Member States has its own substantive grounds for removal and its own procedures for the apprehension, prosecution, preventive detention, and return of irregular migrants. There are, however, a number of joint enterprises. One is FRONTEX, a common EU border patrol agency, though EU Home Affairs Commissioner Cecilia Malmstrom recently suggested that Frontex needs both broader powers and greater resource commitments from the Member States.¹² The EU has also negotiated various readmission agreements with leading source countries; those agreements are discussed separately below.

A related EU initiative is Directive 2009/52/EC of the European Parliament and of the Council providing for minimum sanctions and measures against employers of illegally staying third-country nationals [the Employer Sanctions Directive].¹³ The theory is that penalizing employers for hiring irregular migrants will deter them from doing so, and that the migrants, in turn, will stop coming once the job magnet dries up. Moreover, border enforcement fails when third country nationals enter EU territory legally but then overstay; employer sanctions address that problem.

The Employer Sanctions Directive thus provides a set of minimum standards for the Member States. It mandates two types of prohibitions. First, it requires Member States to pass laws that prohibit employers from hiring third country nationals staying illegally in the country.¹⁴ Second, in order to give practical effect to that prohibition, the Directive requires Member States to require employers to require prospective *third country national* employees to present their residence permits or other authorization; the employers are then required to keep copies of the

¹² “Frontex can’t do miracles without member states – Malmstrom”, *The Times of Malta*, 10 June 2011, available at <http://www.timesofmalta.com/articles/view/20110610/local/frontex-can-t-do-miracles-without-member-states-malmstrom.369928> .

¹³ 18 June 2009, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:168:0024:0032:EN:PDF>.

¹⁴ Employer Sanctions Directive, 2009, preamble, para. 5 & arts. 1, 3.1. Note that Member States need not apply this prohibition to those third country nationals whose stays are legal but whose employment is not. *Ibid.*

authorizations for the durations of employment.¹⁵ Interestingly, employers are not required to demand this documentation from all applicants, and the question thus arises how employers are to determine which applicants are third country nationals in the first place. The potential for discriminatory demands for documentation of status based on foreign accent, appearance, or ethnic surname thus seems apparent. The Directive mandates sanctions that include payment of fines, the costs of returning the irregular migrants, and, for certain aggravated violations, criminal penalties.¹⁶ Member States were required to comply by 20 July 2011,¹⁷ and the European Commission has called for “full and timely transposition”.¹⁸

The EU Member States have also agreed, directly or indirectly, to various human rights constraints, many of which are relevant to the return of irregular migrants. All of the EU Member States are also members of the Council of Europe and therefore bound by the Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR).¹⁹ They have also ratified most of the major generic human rights conventions.²⁰ The European Court of Justice has held, moreover, that EU law itself requires Member States to respect fundamental human rights, thus effectively incorporating into EU law not only the rights embodied in the ECHR, but also those laid out in the more universal conventions.²¹ In addition, the Lisbon Treaty makes the European Charter of Fundamental Rights directly binding on all the EU Member States whenever they implement EU law, subject to opt-out provisions for the United Kingdom, Ireland, and Denmark.²²

¹⁵ *Ibid.*, art. 4.

¹⁶ *Ibid.*, arts. 5, 9.1.

¹⁷ *Ibid.*, art. 17.1.

¹⁸ EC Communication, May 2011, 9.

¹⁹ Pieter Boeles, Maarten den Heijer, Gerrie Lodder & Kees Wouters, *European Migration Law*, Antwerp, Intersentia, 2009, 36 n.56.

²⁰ *Ibid.*, 36.

²¹ *European Parliament v. Council of the European Union*, Case C-540/03 (ECJ, Grand Chamber, 27 June 2006), paras. 35-39.

²² Boeles et al., 2009, 46-47; Meijers Committee, Standing committee of experts on international immigration, refugee and criminal law, Memorandum on immigration and asylum in the WD-CDA Coalition Agreement of 30 September 2010 (8 Nov. 2010), para. 2.1, available at http://www.commissie-meijers.nl/assets/commissiemeijers/Commentaren/2010/CM1016%20Note%20Meijers%20Committee%20regarding%20immigration%20and%20asylum%20in%20the%20Dutch%20coalition%20agreement%20VVD-CDA%202010_Eng.pdf; Charter of Fundamental Rights of the European Union, Doc. 2010/C 83/02, Official Journal of the European Union at C 83/389 et seq. (30 Mar. 2010), replacing text adopted on 7 Dec. 2000, effective upon date of entry into force of the Treaty of Lisbon [per p. 403], <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF>, art. 51(1).

The primary EU instrument for harmonizing removal and return practices is Directive 2008/115/EC of the European parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals [the Return Directive].²³ Premised on the importance of international cooperation “at all stages of the return process”,²⁴ the Return Directive generally requires Member States to issue return decisions on any third country nationals who are illegally present in their respective territories, with some exceptions.²⁵ One such exception is that the State may dispense with return “for compassionate, humanitarian or other reasons.”²⁶ That exception should be considered together with article 5, which requires Member States to consider the best interests of the child, the individual’s health and family life, and of course the principle of non-refoulement.²⁷ Certain procedural rights – for example a right to appeal or obtain review of the return decision, and access to legal and linguistic assistance – are required,²⁸ though many of the Member States have adopted accelerated procedures, particularly for apprehensions in the border regions.²⁹ Detention is permitted only to carry out the removal and return, only when the individual hampers the return process or is at risk of absconding, only when no other less coercive means would be sufficient, only while there remains a “reasonable prospect of removal”, and only when specified procedural safeguards are provided.³⁰

Even after a return decision, the Directive encourages voluntary departures in lieu of forcible returns.³¹ When voluntary departure is not appropriate, however, or when the individual does not return within the period specified, Member States are directed to “take all necessary measures to enforce the return decision”, including the use of “reasonable force”.³² The sending State may ban the individual’s reentry for up to five years (or longer if the person “represents a serious threat to public policy, public security or national security”), and “shall” ban reentry if

²³ Return Directive, 2008.

²⁴ *Ibid.*, preamble, para. 7.

²⁵ *Ibid.*, art. 6.

²⁶ *Ibid.*, art. 6.4.

²⁷ *Ibid.* art. 5. See also *ibid.*, preamble, para. 8 (requiring fair asylum systems).

²⁸ *Ibid.*, art. 13.

²⁹ European Commission, Communication from the Commission to the European parliament and the Council, Evaluation of EU Readmission Agreements, COM(2011) 76 final, Brussels, 23 Feb. 2011, 12, available at http://ec.europa.eu/home-affairs/news/intro/docs/COM_PDF_COM_2011_0076_F_EN_COMMUNICATION.pdf.

³⁰ Return Directive, 2008, art.15.

³¹ *Ibid.*, preamble, art 10 & art. 7.

³² *Ibid.*, arts. 8.1, 8.4.

the person either was not permitted to depart voluntarily or did not comply with the terms of such an order.³³

All that said, the actual effects of the Return Directive remain uncertain. In May 2011, the European Commission expressed “serious concern” over “the low level of implementation of the Directive”. It thus urged all Member States to enact the necessary national legislation without further delay.³⁴

1.2 Removals in the United States

The law of the United States lays out numerous grounds on which noncitizens may be removed from the country.³⁵ While some of the grounds relate to post-entry misconduct, others specifically cover irregular migrants.³⁶

As a result of legislation enacted in the wake of the September 11 attacks, Congress reorganized the immigration bureaucracy in two ways. First, it transferred almost all the immigration functions from the former Immigration and Naturalization Service (INS), which had been in the Department of Justice, to the newly created Department of Homeland Security (DHS).³⁷ Second, within DHS, Congress separated the service and benefit functions from the law enforcement functions.³⁸ The latter are in turn sub-divided between two separate agencies: Customs and Border Protection (CBP) is generally responsible for the Border Patrol, the immigration and customs inspectors at ports of entry, and other operations in the vicinity of the borders. Immigration and Customs Enforcement (ICE) is concerned primarily with interior enforcement, including investigation and prosecution of removal cases.³⁹

Apprehensions of irregular migrants occur in both border areas and the interior. If DHS believes there is “prima facie” evidence that someone’s presence is unlawful, it may initiate removal proceedings.⁴⁰ At the same time, DHS decides whether to detain the individual during

³³ *Ibid.*, arts. 11.1, 11.2.

³⁴ EC Communication, May 2011, 9.

³⁵ 8 USC §§ 1182(a) (removal grounds for noncitizens who are at the frontier or are in the interior without having been admitted), 1227(a) (removal grounds for noncitizens who have previously been admitted).

³⁶ 8 USC §§ 1182(a)(6)(A), 1182(a)(7)(A), 1227(a)(1)(B,C).

³⁷ Homeland Security Act, Pub. L. 107-296, 116 Stat. 2135, 25 Nov. 2002), § 471(a).

³⁸ *Ibid.*, §§ 442, 451.

³⁹ 72 Fed. Reg. 20131, 23 Apr. 2007.

⁴⁰ 8 CFR § 287.3(b).

the pendency of the removal proceeding, which can take anywhere from several hours to several years to complete. For certain categories of noncitizens in removal proceedings, including most of those alleged to be deportable on criminal or national security grounds, detention is mandatory.⁴¹ Otherwise, however, detention is discretionary; DHS may release the individual if it finds he or she “would not pose a danger to property or persons and ... is likely to appear for any future proceeding.”⁴²

Because government resources are finite, and because many cases present particularly compassionate circumstances, both police and prosecutorial discretion play important roles. The present Administration has made clear that it wishes to prioritize the removal of those noncitizens who have committed serious crimes or who otherwise represent dangers to public safety.

Guidance on whether to commence removal proceedings has been supplied in a series of internal DHS (and, earlier, INS) memoranda, in a program commonly called “deferred action”. Only when John Lennon and Yoko Ono arrived in the United States in the early 1970s and retained attorney Leon Wildes did the details of the deferred action program (then called the “non-priority program”) become widely known. Wildes successfully used the Freedom of Information Act to pry loose the then INS’s unpublished description of the criteria for non-priority status and the facts of cases in which it had previously been granted.⁴³

The most recent government pronouncement on the subject is a memorandum of 17 June 2011, from ICE Director John Morton.⁴⁴ The Morton memo lays out, among other things, the factors that ICE prosecutors and other officials should consider in deciding whom to stop, question, arrest, detain, or place in removal proceedings. Mr. Morton identified certain individuals as warranting “particular care.” On the positive side, these include long-time lawful permanent residents, veterans, minors, the elderly, those present since childhood, pregnant or nursing women, victims of domestic or other violence, and those with serious disabilities or health conditions. On the negative side, he identified those who pose a clear risk to national

⁴¹ 8 USC §§ 1225(b)(1)(B)(iii)(IV), 1225(b)(2)(A), 1226(c)(1)(A,B,C,D), 1231(a)(1,2,3). The Supreme Court held mandatory detention constitutional in *Demore v. Kim*, 538 U.S. 510 (2003).

⁴² 8 CFR § 236.1(c)(8).

⁴³ Leon Wildes, “The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act”, *San Diego L. Rev.*, 14, 1976, 42-75, at 44-45.

⁴⁴ Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel, 17 June 2011, available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

security, certain serious or repeat criminal offenders, and those with an “egregious record of immigration violations”. He also generally cited the need to consider the agency’s already announced priorities (an apparent reference to the emphasis on pursuing serious criminal offenders), the person’s pursuit of education in the United States, family and community ties, ties to the home country and conditions there, and the likelihood that the individual will be granted temporary or permanent status or other relief from removal.

The removal proceeding itself takes place under the auspices of the Executive Office for Immigration Review (EOIR), an agency of the Department of Justice. EOIR contains, among other components, a corps of geographically dispersed “immigration judges” who preside over the initial hearings, and a centralized Board of Immigration Appeals (BIA), an administrative appellate body.⁴⁵ The hearing before the immigration judge is a quasi-formal, evidentiary proceeding in which the opposing parties are DHS and the noncitizen. DHS is represented by one of its attorneys; the noncitizen has the statutory right to counsel, but not at government expense.⁴⁶ In practice, slightly fewer than one-half of the noncitizens in removal proceedings are able to procure counsel.⁴⁷ If the individual requires an interpreter, EOIR will supply one.⁴⁸ Today, many of the hearings are done by video conferencing.⁴⁹ DHS has the burden of proving by “clear and convincing evidence” that the person falls within one of the statutory removal grounds.⁵⁰ Typically, the noncitizen concedes “deportability” and the hearing focuses on whether the person qualifies for asylum or any of the other affirmative remedies scattered throughout the statute. As to those remedies, the noncitizen has the burden of proof.⁵¹ At the close of the hearing, the immigration judge hands down a decision. The decision can be an order to remove the noncitizen, an order terminating the proceedings, or an order permitting the person to depart voluntarily within a designated time period, usually 30-60 days.⁵²

⁴⁵ 8 CFR § 1003.

⁴⁶ 8 USC §§ 1229a(b)(4)(A), 1362.

⁴⁷ *Interpreter Releases*, 85, 2008, 2445.

⁴⁸ *El Rescate Legal Services v. EOIR*, 959 F.2d 742 (9th Cir. 1991) (amended opinion); William R. Robie, “The Purpose and Effect of the Proposed Rules of Procedure for Proceedings Before Immigration Judges”, *Georgetown Immigration L.J.*, 1, 1986, 269-90, at 279.

⁴⁹ See Regina Germain, “Putting the ‘Form’ in Immigration Court Reform”, *Denver L. Rev.*, 84, 2007, 1145-49.

⁵⁰ 8 USC § 1229a(c)(3)(A).

⁵¹ 8 USC § 1229a(c)(4)(A).

⁵² 8 CFR § 1240.12(c).

Either side may appeal the immigration judge's decision to the BIA.⁵³ The BIA reviews the immigration judge's legal conclusions and exercise of discretion *de novo*, but the immigration judge's findings of fact are affirmed unless they are "clearly erroneous".⁵⁴ The Attorney General has the power to review and reverse any BIA decision,⁵⁵ though typically that power is exercised only when cases raise important issues of law or policy. In general, the noncitizen may obtain further review of the BIA decision by filing a petition for review in the appropriate U.S. court of appeals, but as a result of sweeping restrictions enacted in 1996, large categories of decisions are now immune from judicial review other than for issues of law.⁵⁶ The major categories for which judicial review is barred include most cases in which removal is predicated upon criminal convictions and almost all discretionary decisions (other than asylum).⁵⁷

Of major importance here is another change introduced in 1996. Before that year, the filing of a petition for review automatically stayed the noncitizen's removal until the court had rendered a decision, unless (as was extremely unusual) the court affirmatively dissolved the stay. The 1996 legislation reversed the presumption, allowing DHS to remove the individual while the review is still pending, unless the court affirmatively issues a stay.⁵⁸ As a result, courts of appeals must now examine every case twice – first to decide whether the merits are strong enough to justify granting a stay and then again, often months later, when it is time to render a final decision on the merits. This duplication would seem inefficient under any circumstances, but it is particularly problematic today because of an overwhelming volume of petitions for review in the courts resulting from the elimination of several procedural safeguards at the BIA stage.⁵⁹ The presumption against stays of removal is also highly problematic for the noncitizen, who must leave the country before the court decides whether the removal order is legally valid.

The preceding discussion summarizes the general procedure in place for the removal of irregular migrants (and other deportable noncitizens). U.S. law, however, provides several exceptions to that procedure. One of them requires elaboration. Similar to some of the

⁵³ 8 CFR § 1003.1(b)(3).

⁵⁴ 8 CFR § 1003.1(d)(3).

⁵⁵ 8 CFR § 1003.1(h).

⁵⁶ 8 USC § 1252(a).

⁵⁷ 8 USC § 1252(a)(2)(B,C).

⁵⁸ 8 USC § 1252(b)(3)(B).

⁵⁹ See, e.g., Stephen H. Legomsky, "Restructuring Immigration Adjudication", *Duke L.J.*, 59, 2010, 1635-1721, at 1657-65.

accelerated procedures in force in Europe, an “expedited removal” process is in place in the United States. The genesis of expedited removal can be found in a national television program called “60 Minutes”, which in 1993 informed viewers that many noncitizens were arriving at New York’s JFK Airport without documents and filing asylum claims. Because the number of applicants exceeded the number of available detention beds, they were released pending their hearings and often absconded, melting into the general population. Intense media coverage ensued,⁶⁰ and public pressure for a solution began to mount. Several congressional bills to establish a summary procedure were filed, but they were included in more comprehensive reform proposals that could not garner majorities. It thus took three years for expedited removal to become law,⁶¹ by which time the former INS had solved the JFK problem by expanding the detention facilities.

Here is how expedited removal works in the United States: When an immigration inspector at a U.S. port of entry – land border, airport, or seaport – determines that the noncitizen either lacks the required entry document or is engaged in a fraud, the person is ordered removed immediately, without the hearings or appeals described earlier.⁶² The fraud prong is exceptionally serious, because a finding of fraud renders the person inadmissible for life,⁶³ and because it can be found easily – very commonly, for example, in cases where the person seeks to enter on a temporary visitor’s visa and the immigration inspector believes that the person secretly intends to stay permanently.⁶⁴

Because asylum seekers typically arrive without U.S. visas or other valid entry documents, and because the interests at stake for asylum seekers are unusually strong, Congress modified the expedited removal process for asylum cases. If a person who would otherwise be subject to expedited removal either requests asylum or otherwise indicates a fear of persecution, a specially trained asylum officer will be summoned promptly to conduct an interview. The officer performs a preliminary screening to determine whether the applicant has a “credible fear” of persecution, a term defined to mean a “significant possibility” that he or she will be able to

⁶⁰ See, e.g., David Crosland, *Washington Post*, 8 Aug. 1993, C-7; David Cole, *Legal Times*, 27 Dec. 1993, 26.

⁶¹ 8 USC § 1225(b)(1).

⁶² 8 USC § 1225(b)(1)(A)(i).

⁶³ 8 USC § 1182(a)(6)(C)(i).

⁶⁴ Almost all the temporary visitor (“nonimmigrant”) visa categories require either that the person be coming only for a temporary period or that the person has no intention of abandoning his or her overseas residence, or both. 8 USC § 1101(a)(15).

establish eligibility for asylum.⁶⁵ If the officer is satisfied that there is a credible fear, the person then enters the regular asylum procedure – a removal hearing before an immigration judge, a right of appeal to the BIA, and a right of judicial review.⁶⁶ Otherwise, the officer orders the person removed.⁶⁷ In the latter case, if the individual knows of the right to make a request, he or she may receive a prompt review by an immigration judge based solely on the written record,⁶⁸ but no other administrative review⁶⁹ and no judicial review.⁷⁰

Although the principal use of expedited removal is at the border, Congress has also granted the Attorney General an unreviewable discretion to invoke the process against irregular migrants in the interior, unless the individual can prove continuous physical presence in the United States for the immediately preceding two years.⁷¹ Attorneys General have invoked this authority on several occasions – for boat people who entered the country without inspection,⁷² and for those who are apprehended within 100 miles of a land border and cannot prove continuous physical presence for the preceding 14 days.⁷³

Apart from expedited removal, special procedures are in place for the removal of noncitizens (both irregular migrants and those legally present) based on criminal convictions. Under the “Institutional Removal Program”, the removal hearings are to be conducted in the prison facilities for most categories of noncitizens who are removable because of criminal convictions.⁷⁴ The idea is to prevent the person, upon completing his or her criminal sentence, from failing to appear for a future removal hearing. There are, however, substantial costs. The physical remoteness of those federal and state penitentiaries that have been designated for removal hearings makes it extremely difficult for the person to obtain counsel or locate witnesses.

Another special procedure is reserved for those noncitizens (other than lawful permanent residents) who have been convicted of what the statute calls “aggravated felonies,” a term defined to include a long (and growing) list of crimes and categories of crimes that range widely

⁶⁵ 8 USC §§ 1225(b)(1)(B)(i,ii,v).

⁶⁶ 8 USC § 1225(b)(1)(B)(ii); 8 CFR § 208.30(f).

⁶⁷ 8 USC § 1225(b)(1)(B)(iii).

⁶⁸ 8 USC § 1225(b)(1)(B)(iii)(III).

⁶⁹ 8 USC § 1225(b)(1)(C).

⁷⁰ 8 USC §§ 1252(a)(2)(A), 1252(e).

⁷¹ 8 USC § 1225(b)(1)(A)(iii).

⁷² 67 Fed. Reg. 68924, 13 Nov. 2002.

⁷³ 69 Fed. Reg. 48877, 11 Aug. 2004.

⁷⁴ 8 USC § 1228(a)(1).

in level of seriousness.⁷⁵ In those cases, Congress authorized the Attorney General to establish informal removal procedures that displace the usual immigration judge hearings and appellate rights.⁷⁶ The Attorney General has done so, adopting a procedure based solely on written records.⁷⁷

Yet another special procedure for noncitizens convicted of crimes is called “judicial removal.” Upon the combined requests of the criminal prosecutor and DHS, the sentencing judge has the discretion to hold what amounts to a mini-removal hearing and decide whether the defendant is to be removed.⁷⁸ Either side may appeal the judge’s decision to the court of appeals.⁷⁹

Other special removal procedures also abound. *In absentia* removal hearings may be held if the noncitizen fails to appear,⁸⁰ and opportunities for judicial review are very limited.⁸¹ Noncitizens who have previously been removed but then reenter unlawfully are subject to a cursory special procedure in lieu of the usual removal adjudication process.⁸² Special procedures are also provided for members of airline or boat crews; they can be removed without any formal hearings.⁸³ In 1996, Congress authorized a special court for removing noncitizens on terrorism-related grounds,⁸⁴ but to date the jurisdiction of that court has never been invoked.

Under both the general removal adjudication procedure or any of these special procedures, there remains the question of actual, physical execution of the removal order. Normally, the law requires DHS to remove the person within 90 days of an administratively final removal order.⁸⁵ The statute appears to say – there is some ambiguity – that (unlike in Europe), detention is mandatory from the time of the order until the time of actual removal.⁸⁶

But various events can thwart timely removal. A noncitizen has the right to file a motion to reopen removal proceedings upon discovery of previously unavailable evidence, or a motion

⁷⁵ 8 USC § 1101(a)(43).

⁷⁶ 8 USC § 1228(b).

⁷⁷ 8 CFR § 1238. A good description and critique of this procedure is Lory D. Rosenberg, “Administrative Deportation Proceedings: Accomplishment or Abomination?”, *Interpreter Releases*, 72, 1996, 721-31.

⁷⁸ 8 USC § 1228(c).

⁷⁹ 8 USC § 1228(c)(3)(A).

⁸⁰ 8 USC § 1229a(b)(5)(A,B).

⁸¹ 8 USC § 1229a(b)(5)(D).

⁸² 8 USC § 1231(a)(5).

⁸³ 8 USC § 1282(b).

⁸⁴ 8 USC §§ 1531-37.

⁸⁵ 8 USC § 1231(a)(1).

⁸⁶ 8 USC § 1231(a)(2).

to reconsider for the purpose of challenging the original correctness of the removal order.⁸⁷ Neither motion automatically stays the removal order, but the immigration judge or the BIA (as the case may be) has the discretion to stay execution of the order while the motion is pending.⁸⁸ To minimize potential delays, Congress in 1996 placed severe constraints on the number and timing of motions to reopen or reconsider.⁸⁹ The Justice Department has issued a regulation that purports to bar both the filing and the continuation of motions to reopen once a person subject to removal proceedings has left the country,⁹⁰ but at least one court has held that regulation to be *ultra vires* on the ground it conflicts with the statutory authority for motions to reopen.⁹¹

Once there are no stays in effect, DHS is free to execute the removal order. The individual's cooperation in gathering the necessary travel documents is crucial, and there is now the possibility of civil fines on those who "fail to make timely application in good faith" for the necessary travel documents or who otherwise hamper their departures.⁹² If for some reason the person is not in detention pending execution of the removal order, DHS serves a formal notice to the person to report for removal at a specified time and place. Over the years, this letter has been known colloquially as a "bag and baggage" letter or, more cynically, a "run" letter.

There are complex statutory rules for determining where to send a noncitizen who has been ordered removed. In the case of a removal order issued upon the noncitizen's arrival at a U.S. port of entry, removal (with some exceptions) is to the country where the person boarded the vessel or aircraft on which he or she arrived.⁹³ If that country refuses to accept the person, then removal may be to his or her country of nationality, birth, or residence, or, if all else fails, to any other country willing to receive the person.⁹⁴ In the case of a removal order issued after the person's arrival in the United States, there is a multi-step selection process. At the removal hearing, the noncitizen has the right to designate the country to which he or she chooses to be removed, except that one may not designate a contiguous country of which one is not a native, national, or prior resident.⁹⁵ If, within 30 days, that country does not agree to accept the person,

⁸⁷ 8 CFR §§ 1003.2, 1003.23(b).

⁸⁸ 8 CFR §§ 1003.2(f), 1003.23(b)(1)(v).

⁸⁹ 8 CFR §§ 1229a(C)(6)(A,B), 1229a(C)(7)(A), 1229a(C)(7)(C)(i).

⁹⁰ 8 CFR § 1003.2(d).

⁹¹ *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007).

⁹² 8 USC § 1324D.

⁹³ 8 USC § 1231(b)(1)(A,B).

⁹⁴ 8 USC § 1231(b)(1)(C).

⁹⁵ 8 USC § 1231(b)(2)(A,B).

or if for any reason DHS believes that removal to that country would be prejudicial to the interests of the United States, then it may disregard the designation.⁹⁶ In that event, the person is to be removed to his or her country of nationality.⁹⁷ Finally, if the country of nationality does not indicate its acceptance within 30 days, the person may be removed to the country from which the person was admitted, from which the person initially embarked, the last country in which the person resided, the country of birth, the country that had sovereignty over the person's birthplace at the time of that birth, the country in which the person's birthplace is now located, or, failing all of those options, any country willing to accept the person.⁹⁸ At times, no such country will be found and no fully satisfying option presents itself. The related issues of prolonged or indefinite detention and readmission agreements then assume particular salience, and they are discussed below.

Finally, as in Europe, the preferred course for irregular migrants without criminal convictions is voluntary departure in lieu of removal. The prerequisites for voluntary departure vary depending on the stage of the proceeding at which it is granted, and they exclude most individuals with criminal or other significant blemishes, but generally voluntary departure is liberally granted in the exercise of discretion.⁹⁹ The maximum amount of time that the immigration judge or the BIA may allow a voluntary departure recipient to remain in the country is either 60 days or 120 days, again depending on the phase of the proceedings.¹⁰⁰ For the recipient, the most important advantage of voluntary departure is that it is not accompanied by any time bar on re-entry; a removal order, in contrast, bars reentry for five years in cases of removal upon arrival at the border, and ten years in cases of removal from the interior (twenty years for second offenders and forever for individuals convicted of aggravated felonies), though DHS may waive the reentry bar in its discretion.¹⁰¹ For the government, the principal advantage is that it saves the time and cost of all or part of the removal proceeding – especially, as is true in the vast majority of voluntary departures, when the order is issued before removal proceedings have formally begun.

⁹⁶ 8 USC § 1231(b)(2)(C).

⁹⁷ 8 USC § 1231(b)(2)(D).

⁹⁸ 8 USC § 1231(b)(2)(E).

⁹⁹ 8 USC § 1229c.

¹⁰⁰ *Ibid.*, §§ 1229c(a)(2)(A), 1229c(b)(2).

¹⁰¹ 8 USC § 1182(a)(9)(A).

1.3 Readmission agreements

International law clearly requires States to admit or re-admit their own nationals when those individuals *want* to return.¹⁰² The relevant legal relationship in such cases is between the individual and his or her State of nationality. As Professor Gregor Noll has carefully observed, however, whether customary international law requires States to readmit those of their nationals who do *not* want to return is a different question. The relevant relationship there is between the sending State and the State of nationality, and in the absence of a treaty, the existence of a duty to readmit is not as clear as is frequently assumed.¹⁰³ Some States in fact often refuse to accept their nationals under those circumstances or delay readmission for unacceptable durations. These practices impede the removal of irregular migrants, because sending States are rightly reticent to detain individuals for lengthy or indefinite durations pending the execution of their removal orders. Absent detention, of course, there is always the possibility that the individual will abscond by the time his or her country of origin grants readmission. Thus, in the EU in 2009, only about 42% of the irregular migrants who were ordered removed were actually returned.¹⁰⁴ For these and other reasons, States frequently negotiate readmission agreements. In these treaties, States explicitly agree to readmit either their own nationals or certain third country nationals who have transited their territories en route to the removing State, or both. Ordinarily, the source countries receive various benefits in return.

1.3.1 Readmission agreements in the United States

In the United States, the problem of indefinite detention of noncitizens who have been ordered removed has been addressed by Congress and the Supreme Court. Congress provided that such detention generally may not exceed 90 days, subject to specific exceptions. One exception is when the person has been found to be “a risk to the community or unlikely to comply with the order of removal.”¹⁰⁵ To avoid constitutional issues, the Supreme Court in *Zadvydas v. Davis* construed the statute as authorizing detention beyond the 90-day period only for a period reasonably necessary to secure the person’s eventual removal. Therefore, at the point when there

¹⁰² Universal Declaration of Human Rights, UNGA Res. 217 A(III), UN Doc. A/810, 1948, art. 13(2) (“Everyone has the right . . . to return to his country”); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), UN GAOR Supp. (No. 16), 21, UN Doc. A/6316, 1966, UNTS, 999, entered into force 23 Mar. 1976, 171.

¹⁰³ Gregor Noll, “Return of Persons to States of Origin and Third States”, in T.A. Aleinikoff & V. Chetail (eds.), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003, 61-74.

¹⁰⁴ EC Communication, May 2011, 22.

¹⁰⁵ 8 USC § 1231(a)(1,6).

is no reasonable likelihood of removal (because, for example, U.S. negotiations with the country of origin have broken down irretrievably), the person must be released.¹⁰⁶ While the Court in *Zadvydas* was concerned only with those noncitizens who had previously been admitted but found deportable, it later extended its ruling to noncitizens who had not yet been admitted.¹⁰⁷

In 2002, the United States and Canada entered into a readmission agreement for handling asylum applicants who had transited the territory of one of the two countries before seeking asylum at a land border port of entry of the other.¹⁰⁸ With some exceptions, this agreement obligates the country that the individual first entered to readmit that person and decide his or her asylum claim. A Canadian court initially held the agreement unconstitutional, finding that U.S. refugee practices did not meet international refugee and human rights standards, but Canada's Federal Court of Appeal reversed that judgment and thus the agreement is fully in effect.¹⁰⁹

1.3.2 Readmission agreements in the European Union

It is in Europe, however, that readmission agreements have become especially popular. Many of the EU Member States have entered into bilateral agreements with particular source countries. The European Commission, however, strongly prefers European Union Readmission Agreements, or EURAs, in which the EU negotiates agreements between the EU itself and specific source countries. As of June 2011, thirteen EURAs were in force.¹¹⁰ The EU would like to negotiate more of them and also stimulate fuller implementation of existing agreements.¹¹¹ EURAs typically obligate the source country not only to honor its obligation to readmit its own nationals, but also to readmit third country nationals who transited its territory en

¹⁰⁶ 533 U.S. 678 (2001).

¹⁰⁷ *Clark v. Martinez*, 543 U.S. 371 (2005).

¹⁰⁸ Agreement Between the Government of Canada and the Government of the United States of America Regarding Asylum Claims Made at Land Borders, 15 Dec. 2002, reproduced in *Interpreter Releases*, 79, 2002, 1446.

¹⁰⁹ *Canadian Council for Refugees v. The Queen* [2007] F.C. 1262, reversed, 2008 FCA 229.

¹¹⁰ Council of the European Union, Council conclusions defining the EU strategy on readmission, 3096th Justice and Home Affairs Council meeting, Luxembourg, 9 and 10 June 2011, 1, available at

http://www.consilium.europa.eu/eudocs/cms_Data/docs/pressdata/en/jha/122501.pdf. The thirteen countries are Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, the Former Yugoslav Republic of Macedonia, Bosnia and Herzegovina, Montenegro, Serbia, Moldova, Pakistan, and Georgia. At this writing, negotiations are ongoing with Morocco, Turkey, Cape Verde, China, and Algeria. For the full citations to the treaties, see Vincent Chetail & Céline Bauloz, "The European Union and the Challenges of Forced Migration: From Economic Crisis to Protection Crisis?", Research Report Background Paper, EU/US Immigration Systems 2011/07, Robert Schuman Centre for Advanced Studies, San Dominico di Fiesole (FI): European University Institute, 2011, 22-23.

¹¹¹ *Ibid.*, 2; EC Communication, Feb. 2011, 4; Council Conclusions, 2011, 2.

route to the removing country.¹¹² This feature is in contrast to the bilateral readmission treaties, which seldom cover third country nationals.¹¹³

Negotiating new EURAs and achieving compliance with existing ones, however, pose major challenges. Source countries are particularly reticent to admit third country nationals.¹¹⁴ Some are either so short of resources or so encumbered by bureaucracy that, by the time they grant the removing country's request to admit even one of their own nationals, the individual often has had to be released from detention and subsequently fails to appear for his or her return.¹¹⁵ These difficulties prompt source countries to demand, and the EU to provide, a *quid pro quo*, such as visa facilitation for that country's nationals or some form of economic assistance.¹¹⁶

The linkage between migration and development is multi-pronged. Does development reduce the incentive for migration? Conversely, does migration itself, by relieving population pressures among other things, stimulate development?¹¹⁷ As Chetail and Bauloz have demonstrated, the line between carrots and sticks is also blurred. Is development assistance a carrot, or is the threat to discontinue it a stick? Visa facilitation as a reward is especially interesting, since the returning State is agreeing to accept some of the source country's nationals in order to return other nationals to the same source country.¹¹⁸ From the standpoint of the returning State, this arrangement, while superficially ironic, is perfectly rational; the State is essentially trading irregular migrants for legal ones, and the latter are those who possess the substantive attributes that the returning State's laws reflect a conscious willingness, if not an affirmative desire, to receive. Given all these complications, it is not surprising that the EU Member States cannot always agree on common conditions for entering into a EURA.¹¹⁹

To comply with the Member States' various international human rights obligations, EURAs (and bilateral readmission agreements) must contain numerous safeguards. These

¹¹² EC Communication, Feb. 2011, 8.

¹¹³ *Ibid.*, 9.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, 8.

¹¹⁶ *Ibid.*, 7; Council Conclusions, 2011, 3.

¹¹⁷ For a thoughtful exploration of these relationships, see Vincent Chetail, "Paradigm and Paradox of the Migration-Development Nexus: The New Border for North-South Dialogue", *German Yearbook of International Law*, 2008, 52, [beginning & ending pages?].

¹¹⁸ Chetail & Bauloz, 2011, 23-24.

¹¹⁹ EC Communication, Feb. 2011, 8.

include special protections for asylum seekers,¹²⁰ other vulnerable populations (including particularly children, the elderly, and those with health problems),¹²¹ as well as limitations on returns to countries in which fundamental human rights are threatened.¹²² There are additional constraints on the appropriateness and duration of detention pending return; those constraints vary from one Member State to another.¹²³

2. U.S. Strategies for Deterring, Apprehending, and Removing Irregular Migrants

As in Europe, opinions on the solutions to illegal immigration are sharply divided among both the American public and American policymakers. This section will describe and synthesize the actual and proposed policy responses in the United States, with comparison to the EU when applicable. These various strategies can be thought of as falling within four categories – enforcement, legalization, “self-deportation”, and positive alternatives. The prevailing assumption is that any significant changes to U.S. immigration law will have to combine two or more of those elements to be politically viable, but at this writing the prospects of such “comprehensive immigration reform” appear dim.

2.1 Enforcement

In the United States, law enforcement has dominated the strategic response to illegal immigration. The centerpiece of the enforcement approach, in turn, has been the removal of those irregular migrants who are apprehended, as discussed above. As virtually all participants in the U.S. immigration debate now acknowledge, however, any attempt to remove anything close to the entire irregular migrant population would be both cost-prohibitive and futile.¹²⁴ Debate, therefore, has shifted to supplementary strategies.

One trend has been to criminalize more and more immigration-related misconduct. Congress has expanded the number of immigration-related crimes and increased the sentences

¹²⁰ Return Directive, 2008, preamble, para. 8.

¹²¹ *Ibid.*, art. 5.

¹²² EC Communication, Feb. 2011, 12.

¹²³ Directive 2008/115/EC, Preamble, para. 16, art. 15.

¹²⁴ The hypothetical costs are well outlined in Rajeev Goyle & David A. Jaeger, Center for American Progress, “Deporting the Undocumented – A Cost Assessment”, July 2005, available at http://www.americanprogress.org/kf/deporting_the_undocumented.pdf.

for existing crimes; in addition, the number of actual federal criminal prosecutions of immigration violations has risen dramatically.¹²⁵

Border enforcement resources – especially on the southern border with Mexico - have escalated in recent years. Total border patrol officer hours (known as “linewatch hours”) began rising significantly in the early 1990s.¹²⁶ In almost every year since, Congress has upped the appropriations for border personnel, for border fences that are longer, higher, and sturdier, and for enhanced border patrol technology.¹²⁷

These border fortification measures have been hotly debated. On the one hand, it seems clear that they have reduced total illegal entries, though it is impossible to quantify with precision how much of the reduction can be attributed to enhanced enforcement and how much to the economic downturn. Critics argue that these initiatives have merely diverted irregular migrants to other, less secured crossing points.¹²⁸ Border deaths are a related concern. The increased resources, understandably enough, are targeted at the most popular crossing points for clandestine entries. But the reason for the popularity of those particular crossing points is that they tend to be the least physically hazardous. Thwarting entries at those pressure points prompts more people to attempt entries in more dangerous places, where they die from falling in precipitous terrain, drowning in the Rio Grande River, dehydration in the desert, or criminal assaults. Critics assert a positive correlation between intensified border enforcement and the number of annual border deaths.¹²⁹

Some also argue that enhanced border enforcement is potentially counter-productive, for two reasons. First, by diverting the flow to the less heavily patrolled areas, these measures reduce the chances of apprehension.¹³⁰ Second, again because of the heightened difficulty of crossing at the more traditional points, irregular migrants have resorted increasingly to hiring professional smugglers. Since the fees are high, those who succeed in achieving surreptitious

¹²⁵ For the details, see Stephen H. Legomsky, “The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms”, *Washington & Lee L. Rev.*, 64, 2007, 469.

¹²⁶ *Interpreter Releases*, 73, 1996, 101.

¹²⁷ In 2010, for example, Congress did all of the above. Border Security Emergency Supplemental Appropriations Act of 2010, Pub. L. 111-230, 124 Stat. 2485, 13 Aug. 2010.

¹²⁸ The latter result is suggested by Douglas Massey, Jorge Duran & Nolan J. Malone, *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration*, New York, Russell Sage Foundation, 2003, 108.

¹²⁹ See, e.g., Wayne A. Cornelius, “Controlling ‘Unwanted’ Immigration: Lessons from the United States, 1993-2004”, *J. Ethnic & Migration Studies*, 31, 2005, 775-94; Wayne A. Cornelius, “Impacts of Border Enforcement on Unauthorized Mexican Migration to the United States”, *Bender’s Immigration Bulletin*, 11, 2006, 1135-40.

¹³⁰ Massey, Duran & Malone, 2003, 109.

entry are remaining in the U.S. for longer periods rather than returning home for periodic visits with family.¹³¹ The high smuggling fees have also forced many irregular migrants into large debts that they must repay with long periods of involuntary servitude to their smugglers.¹³²

In addition to border enforcement, interior enforcement has gained traction among U.S. policymakers. Congress has frequently increased appropriations for overstay investigators and employer sanctions investigators.¹³³ Until recently, DHS had made increased use of workplace and home raids.¹³⁴ The home raids had especially severe side effects on the arrestees' children – both those lawfully present and those unlawfully present.¹³⁵ For these and other reasons, the Obama Administration has shifted the emphasis from workplace raids, which are intended to apprehend irregular migrants, to audits of employer records, which are targeted primarily at the offending employers.¹³⁶ At the same time, Congress has prioritized counterfeit-resistant documents to reduce forgery, counterfeiting, and identity theft.¹³⁷

Employer sanctions have been a large piece of the U.S. anti-illegal immigration strategy since 1986, when Congress enacted the legislation familiarly known as “IRCA”.¹³⁸ Like the analogous EU law, the U.S. version of employer sanctions essentially imposes two sets of requirements on employers – refraining from knowingly hiring unauthorized workers and affirmatively verifying job applicants' identity and work authorization before hiring them.¹³⁹ Violations result in fines, and, in the case of a “pattern or practice” of violating the prohibitions on knowingly hiring or knowingly continuing to employ unauthorized workers, the law prescribes criminal prosecutions punishable by imprisonment.¹⁴⁰

Two differences from the EU approach stand out. First, unlike in the EU, the U.S. hiring prohibition applies not only to irregular migrants, but also to noncitizens who are lawfully

¹³¹ *Ibid.*, 128-32; Cornelius, 2006, 1135.

¹³² Jennifer M. Chacón, “Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking”, *Fordham L. Rev.*, 74, 2006, 2977, at 3023-40, 3027.

¹³³ E.g., Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208, 110 Stat. 3009, Div. C, 30 Sept. 1996, §§ 131, 132 (IIRIRA).

¹³⁴ From 2002 to 2007, workplace arrests increased by 1000 per cent. U.S. Dept. of Homeland Security, *Estimates of the Undocumented Immigrant Population Residing in the United States: January 2006 Population Estimates*, 2007.

¹³⁵ David B. Thronson, “Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families”, *Wake Forest L. Rev.*, 43, 2008, 391-418.

¹³⁶ Julia Preston, “Illegal Workers Swept from Jobs in ‘Silent Raids’”, *New York Times*, 10 July 2010, A1.

¹³⁷ IIRIRA, §§ 656, 657.

¹³⁸ Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359, 5 Nov. 1986 (IRCA).

¹³⁹ 8 USC § 1324a(a)(1).

¹⁴⁰ 8 USC §§ 1324a(e)(4,5), 1324a(f)(1).

present but lack permission to work.¹⁴¹ Second, while the EU law appears to require employers to request only third country nationals to present the relevant documents, the U.S. law explicitly extends this obligation to all applicants, including U.S. citizens.¹⁴² The obvious reason is that, without requesting documents, the employer will ordinarily have no way to know whether the applicant *is* a foreign national and therefore a person whose immigration status must be checked. Relegating the threshold citizenship determination to employer instinct would exacerbate the potential for racial or ethnic profiling by employers; hence, Congress’s decision to make the requirement universal.

The United States, it must be borne in mind, does not have the kinds of national identity cards that are in common use throughout most of Europe. As a result, one of the immediate impediments to the operation of the U.S. employer sanctions regime was the proliferation of false documents. Mainly to address that problem, the government has created a program now called “E-Verify”.¹⁴³ At this writing, Congress has authorized its continuation until at least 30 September 2012.¹⁴⁴ E-Verify is a government-maintained, electronic database that theoretically stores the names and social security numbers of all individuals – U.S. citizens and noncitizens alike – who are authorized to work in the United States. When a participating employer contemplates hiring a new employee, it accesses E-Verify online and enters the name and social security number that the applicant has provided. The system then informs the employer whether, according to the database, the name and the social security number match. If they do, the employer may then hire the applicant without fear of liability. If they do not, the system advises further inquiry. Errors can result from misspelling of names, inconsistent transliterations of surnames from other alphabets, changes of name upon marriage or divorce, and delays in updating, but the government has been working hard to minimize the error rate and indeed accuracy has steadily improved.¹⁴⁵

E-Verify does not solve the problem of identity fraud. If the name and social security number that the applicant fraudulently presents to the employer belong to an authorized worker,

¹⁴¹ 8 USC § 1324a(h)(3).

¹⁴² The relevant statutory language refers to hiring “an individual” without performing the specified document checks. 8 USC § 1324a(a)(1)(B).

¹⁴³ The origins of E-Verify are in the “Basic Pilot Program” mandated by IIRIRA, § 401.

¹⁴⁴ Pub. L. 111-83, 123 Stat. 2142, 28 Oct. 2009. § 547.

¹⁴⁵ Office of the Inspector General, Social Security Administration, “Congressional Response Report: Accuracy of the Social Security Administration’s NUMIDENT File”, Dec. 2006, available at <http://socialsecurity.gov/oig/ADOBEPDF/audittxt/A-08-06-26100.htm>.

E-Verify will report a positive match. To address that gap, DHS is currently in the process of adding digital photographs to the database. The employer will hopefully be able to verify that the applicant's face matches the photo displayed in the government website.

2.2 Legalization

One way of reducing the irregular migrant population is to make part of it “regular”. Occupying the opposite end of the political spectrum from heavier enforcement, legalization is derided by its opponents as “amnesty.” A large-scale amnesty was indeed enacted in 1986, as part of the political compromise that produced IRCA, with its employer sanctions regime.¹⁴⁶ Almost 2.7 million irregular migrants ultimately became permanent residents via IRCA.¹⁴⁷ Unlike IRCA, the proposals advanced in recent years have all included heavy fines as conditions for eligibility. For today's proposals, therefore, the word “amnesty” seems inapt; “legalization” seems more accurate and will be used here.

Whatever the label, legalization has multiple rationales. It would offer security for many of the millions of irregular migrants who have been in the United States long enough to have formed strong community ties and to build new lives for themselves and their families. There is an acknowledgment by most people that the vast majority of the irregular migrants will not depart voluntarily and that the government will never be able to apprehend and remove such a large population. And there is recognition that having millions of individuals living a shadow, underground existence is unhealthy for everyone. Legalization would promote their integration and not only maximize their own welfare but also enhance their capacity to contribute to the larger community.

Opponents grudgingly concede most of those advantages but argue, first, that the premise of inevitability is not true. They believe there are ways to drive irregular migrants to return to their countries of origin. These methods are discussed below in the subsection on “Self-deportation”. Opponents also object to rewarding people for violating the law and worry that a grant of legalization – even if eligibility is limited to those already present for some specified number of years – will encourage future irregular migration by individuals hoping for a subsequent legalization.

¹⁴⁶ IRCA, §§ 201-04.

¹⁴⁷ U.S. Immigration and Naturalization Service, *Statistical Yearbook*, 1994, 32 (Table 4).

One limited form of legalization, known as the “DREAM Act”, has figured prominently in the U.S. debate. The DREAM Act, which has been proposed in various forms over the years, would offer legalization to young irregular migrants who came to the United States as children and who want to either pursue higher education or enlist in the armed forces. In addition to the general arguments in favor of legalization, DREAM Act proponents make the point that the beneficiaries have special equities. Being young, they have spent higher proportions of their lives in the United States and thus are less prone to retain any meaningful connections to their countries of origin. Perhaps more important, they are morally innocent; no one could convincingly fault children for accompanying their parents to their new homes. Moreover, the lack of legal status has made it nearly impossible for even the most talented and the most diligent undocumented high school students to attend university, as federal law renders them ineligible for financial aid for education¹⁴⁸ and the vast majority of the states charge them the much higher non-state-resident tuition fees.¹⁴⁹

2.3 “Self-Deportation”

In recent years, anti-immigrant organizations have begun to urge what they have called the “third way” – an implicit reference to their acknowledgment of the insufficiency of enforcement and their philosophical objections to legalization. This strategy has also been called “attrition by enforcement” or “self-deportation”.¹⁵⁰ The theory is that, given the implausible prospects of locating, arresting, detaining, adjudicating, and forcibly removing some 11 million people, the law should make the lives of irregular migrants in the United States so unsustainable that they will leave voluntarily, or “self-deport”. To that end, proponents of this strategy advocate a combination of heavier enforcement – less for the purpose of actually apprehending irregular migrants than for the purpose of making them conscious of their perpetual vulnerability – and taking action to make essential daily transactions difficult or impossible. Examples of the latter might include more rigorous enforcement of employer sanctions to choke off employment opportunities; further restrictions on public benefits (though current law already leaves irregular

¹⁴⁸ 20 USC § 1091(a)(5).

¹⁴⁹ For a succinct account by one of the nation’s leading champions of the DREAM Act, see Michael A. Olivas, “Undocumented College Students, Taxation, and Financial Aid: A Technical Note”, *Rev. of Higher Education*, 32, 2009, 407-16.

¹⁵⁰ See, e.g., Kris W. Kobach, “Attrition through Enforcement: A Rational Approach to Illegal Immigration”, *Tulsa J. Comparative & Internat’l L.*, 15, 2008, 155-63.

migrants ineligible for almost all public assistance other than emergency medical treatment);¹⁵¹ barring irregular migrants from public elementary and secondary schools;¹⁵² denying drivers' licenses and other forms of identification;¹⁵³ perhaps prohibiting banks from opening accounts for irregular migrants or giving them loans or credit cards; and prohibiting landlords from renting premises without verifying lawful immigration status. Objections start with the obvious humanitarian concerns, but additional difficulties inherently arise in conscripting so many private actors and non-immigration-related public employees as immigration inspectors. One might also question whether, despite the severity of some of those restrictions, they would succeed in persuading irregular migrants to return to the often dismal conditions that drove them to the United States in the first place.

2.4 Positive alternatives to irregular migration

Although elaboration is beyond the scope of this chapter, there are strategies designed to afford individuals enticing alternatives to illegal immigration. These include economic aid to stimulate the economies of the primary source countries,¹⁵⁴ as well as using U.S. influence to improve the human rights and other security concerns that frequently motivate people to leave their homelands. Many scholars have advocated more stringent enforcement of U.S. labor laws, so as to diminish employers' powers to exploit unauthorized workers and therefore their incentives to hire them.¹⁵⁵ Expanding the avenues for legal immigration – particularly those relating to family reunification and labour – would also reduce the need for individuals to migrate illegally.

Conclusion

In both Europe and the United States, the subject of irregular migration has taken center stage. Indeed, in the U.S. it has practically drowned out all other dimensions of the public discourse on

¹⁵¹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105, 22 Aug. 1996, §§ 401(a,c), 411.

¹⁵² In *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court held that a Texas law allowing local public school districts to exclude undocumented children from elementary and secondary schools violated the constitutional guarantee of equal protection.

¹⁵³ The REAL ID Act of 2005, Pub. L. 109-13, Div. B, 119 Stat. 231, 11 May 2005, § 202(c)(2)(B), now prohibits states from issuing any drivers licenses or any other documents valid for federal identification purposes, but the deadline for state implementation has been repeatedly extended to allow them time to prepare.

¹⁵⁴ As to the migration-development nexus, see note 117 above, and the accompanying text.

¹⁵⁵ E.g., Peter Margulies, "Stranger and Afraid: Undocumented Workers and Federal Employment Law", *DePaul L. Rev.*, 38, 1989, 553-626; Lori A. Nessel, "Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform", *Harvard Civil Rights – Civil Liberties L. Rev.*, 36, 2001, 345-405.

immigration. In both regions, and throughout the world, passions are running high and the positions taken by elected leaders on this subject are becoming core components of their political campaigns.

The EU has stressed the importance of international cooperation in responding effectively and humanely to irregular migrants. The result has been a combination of national and EU-wide initiatives, including increased use of readmission agreements with leading countries of origin. The United States, in contrast, has approached the subject unilaterally, with far less reliance on readmission agreements and a package of actual and proposed policy responses that include enforcement, legalization, so-called “self-deportation”, and positive incentives to pursue alternatives other than irregular migration. This chapter has sought to summarize the principal strategies deployed and proposed on both sides of the Atlantic and to highlight some of the more striking differences in approach.