



## IMMIGRATION PAPER SERIES **2010**

### ALL OR NOTHING?

WHAT THE UNITED STATES CAN LEARN FROM EUROPE AS IT CONTEMPLATES CIRCULAR MIGRATION AND LEGALIZATION FOR UNDOCUMENTED IMMIGRANTS

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The German Marshall Fund of the United States

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IMMIGRATION PAPER SERIES

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# INTRODUCTION

Imagine a country, which its new inhabitants have reached since their first settlement in the 17th century by sea as if it was an island. Furthermore, imagine that the country from which these inhabitants inherited and borrowed their laws was an island. In the latter, borders were controlled at the ports of entry and freedom of circulation was guaranteed and cherished once within the territory. Then, imagine that suddenly in the middle of the 20th century, the former is less and less reached by sea and becomes aware of its significant land border.

From the point of view of immigration policy, geography and politics do not always correspond. Australia and New Zealand are geographically and politically islands; Canada is not geographically an island, but politically and in the management of its immigration policy, it is a de facto one: immigrants cannot travel very easily to Canada via its northern land border. From the south, i.e. from the United States, there are not many immigrants who wish to leave the land of opportunity and forfeit their easy access to the labor market.

From the point of view of its immigration flows and policy, the United States was an island until the middle of the 20th century, as a large majority of immigrants and visitors arrived by boat.<sup>1</sup> Moreover, the United States inherited a number of its legal traditions and structures from the island ways of Great Britain.

However, the political geography of the United States has now changed. In the aftermath of the Bracero Program, immigration from the Western Hemisphere has become the largest source of new migrants.<sup>2</sup> Based on an agreement signed on April 4, 1942, by the United States and Mexico, the

Bracero Program was initially developed to reduce the labor shortage in American agriculture that existed because of the country's involvement in World War II. However, the program was extended far beyond the end of the war, finally ending in 1964. At its peak, in the middle of the 1950s, it brought more than 400,000 Mexican workers a year to the United States.<sup>3</sup> "The increase of illegal immigration was part of the side effect of Bracero policies:" 'returning Braceros spread the word of employment opportunities in the U.S.' and "the preference given [by many employers] to illegal aliens for Bracero employment provided little incentive for aspiring Braceros to remain in Mexico until they were legally contracted."<sup>4</sup>

In theory, the Immigration and Nationality Act of 1965 was the first to limit immigration from the Western Hemisphere (120, 000 persons). In practice, migratory flows from this region—both legal and illegal—continued to increase and exceed those numbers. In 2008, Mexico was by far the largest sending country of legal immigrants to the United States, sending 188,000 of the 1,107,000 newly admitted migrants.<sup>5</sup> Hundreds of thousands of undocumented migrants also cross the Mexican-American land border each year, contributing to the estimated 11 million irregular migrants in the country.

No other country has experienced such a dramatic shift in the political geography of its immigration policy.<sup>6</sup> Especially during the interwar period,

*However, the political geography of the United States has now changed. In the aftermath of the Bracero Program, immigration from the Western Hemisphere has become the largest source of new migrants.*

<sup>3</sup> Cf. Kitty Calavita, *Inside the State, The Bracero Program, Immigration and the I.N.S.*, Routledge, London, New York, 1992.

<sup>4</sup> Calavita, *idem*, 32.

<sup>5</sup> *2008 Yearbook of Immigration Statistics*, DHS, Office of Immigration Statistics, 10.

<sup>6</sup> The only other examples are Germany and Austria when the Iron Curtain fell. But, the Iron Curtain lasted 40 years and the legal culture of Austria and Germany was built over centuries so the change was not as drastic as in the United States.

<sup>1</sup> The main port of entry was Ellis Island. For the others see *Forgotten Doors, the Other Ports of Entry to the United States*, M. Mark Stolarik Ed. Philadelphia, 1988.

<sup>2</sup> L Aleinikoff, 65.

Nevertheless, the system remains broken and is felt as such: every year, the number of foreign migrants who get a legal residence permit equals the number of migrants who remain in the United States illegally.

the previous insular situation facilitated effective control of the number of immigrants arriving to the United States. The quota system began in 1921<sup>7</sup> and was restrictive as well as efficient because the United States government could set limits, and the numbers could never be exceeded. Despite all these new developments and the growth in immigration from neighboring countries, the legal culture and the framework of U.S. immigration legislation have remained structurally similar to what they were before World War II. When the Mexican border became an increasing source of immigration, the old system became less efficient. However, the political reaction has not been to change the immigration system but to tinker with it in order to recover its lost efficiency.<sup>8</sup> Legislators have not rethought either the most-entrenched (legal customs and the right to freely circulate on U.S. territory) or even the least-entrenched aspects of the system (the quota system); after undocumented migrants arrived in massive numbers it eventually became necessary to legalize them. One prominent example of legalization was the 1986 Immigration Reform and Control Act (IRCA). In exchange, the U.S. Congress imposed employer sanctions and began prosecuting fake marriages through the Immigration Marriage Fraud Amendments (IMFA).<sup>9</sup> It also reduced the power of the Executive

Branch to legalize undocumented immigrants.<sup>10</sup> The possibilities for suspending deportation in hardship cases “were virtually eliminated by Congress in 1996.”<sup>11</sup> Since that time, the right to detain asylum seekers or deportable aliens indefinitely has also expanded. Nevertheless, the system remains broken and is felt as such: every year, the number of foreign migrants who get a legal residence permit equals the number of migrants who remain in the United States illegally; but 51 percent of American citizens believe a majority of immigrants are illegal<sup>12</sup> and 63 percent agree that their government is doing a poor or a very poor job in managing immigration.<sup>13</sup> Today, legalization is necessary, but what is the political tradeoff that can make it happen?

Some of the more common reforms mentioned as possibilities for a comprehensive immigration bill include: a strong reinforcement of an efficient verify system for employers, elimination or restriction of some existing visas (most likely diversity visas and non-nuclear family member visas) in favor of visas for skilled workers admitted by quotas, or by a points-based system similar to those developed in Canada or in the United Kingdom, and the

<sup>7</sup> Cf. Son-Thierry Ly and Patrick Weil, “The Anti-racist Origins of the American Immigration Quota System.” *Social Research*, Volume 77, Number 1 (Spring 2010).

<sup>8</sup> This may be evidence of historical path dependency, which can often explain public policy development. Cf. Paul Pierson, “Increasing Returns, Path Dependence, and the Study of Politics,” *The American Political Science Review*, Vol. 94, No. 2 (Jun. 2000), pp. 251-267.

<sup>9</sup> 1.8 million immigrants filed applications under the program for illegal immigrants who had resided in the United States since 1982 and 1.3 millions under the Special Agriculture Workers Program (SAW). Cf. Aristide Zolberg, *A Nation by Design, Immigration Policy in the fashioning of America*, Harvard University Press, 2006, at 371.

<sup>10</sup> Cf. Adam B. Cox and Cristina M. Rodriguez, *The President and Immigration Law*, Yale Law Journal, 119:101 2009.

<sup>11</sup> Mae N. Ngai, “We Need a Deportation Deadline,” *Washington Post*, June 14, 2005, p. A2.

<sup>12</sup> Cf. *Transatlantic Trends: Immigration*, 2009, question 4. Only 34 percent of American citizens believe that most immigrants are in the country legally. The main EU countries citizens express the opposite view. A majority (56%) believe that most immigrants are in the country legally (35 percent have the opposite view).

<sup>13</sup> Cf. *Transatlantic Trends: Immigration*, 2009, question 26. Only 49 percent of the main EU countries citizens express the same opinion toward their own government.

creation of a independent Standing Commission on immigration.<sup>14</sup>

In addition to these commonly-discussed reforms, some proposals, coming from Europe might be interesting.

In the field of immigration policy, there are no easy answers and no scientific study that can tell you how to perfectly manage the flow of immigrants. Comparative studies between countries with similar immigration experiences are often the best approach in such contexts.

Similar to the United States, the four most populous countries in Western Continental Europe<sup>15</sup>—

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<sup>14</sup> These propositions are made by Demetrios G. Papademetriou, Doris Meissner, Marc R. Rosenblum, and Madeleine Sumption in MPI, “Harnessing the Advantages of Immigration for a 21st Century,” *Economy: A Standing Commission on Labor Markets, Economic Competitiveness and Immigration*, May 2009 and/or by William Galston, Noah Pickus, Peter Skerry, conveners of the Brookings-Duke Immigration Policy roundtable, “Breaking the Immigration Stalemate, From Deep Disagreements to Constructive Proposals,” 2009. For a critique of the idea of a Standing Immigration Commission, cf. Jorge G. Castaneda and Tamar Jacoby, “Why ‘Legalization Only’ Won’t Fly,” *Washington Post*, July 21, 2009.

<sup>15</sup> In 2007, 8.8 percent (7.2 million) of residents in Germany had a foreign citizenship. In 2004, 8.1 percent of the total population of France are immigrants (4.9 millions). Italy now has an estimated 4 million to 5 million immigrants—about 7 percent of the population. Since 2000, Spain has absorbed more than 3 million immigrants, growing its population by almost 10 percent. Immigrant population is now over 4.5 million.

France, Germany, Italy, and Spain—have significant land borders. Like the United States, many European countries are developed states in close proximity to developing countries with a lower GDP. In addition, most European countries and the United States share a trend toward courts increasing the legal protections extended to migrants.<sup>16</sup>

In this shared context, the United States and continental Europe face the new and common challenge of how to adapt to a world of globalization, where an increasing number of individuals wish to have the ability to freely cross borders. Between 1990 and 2010, the number of international migrants rose 37.5 percent (from 155 million to 213 million).<sup>17</sup> With these figures in mind, there are a number of possible and interesting actions based on the European experience.

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<sup>16</sup> Cf. Peter Schuck, “The Transformation of Immigration Law,” 84 *Col. L. Rev.* 1-90 (1984).

<sup>17</sup> In the meantime, the world population has grown from 5.3 to 6.91 billion, i.e. 30 percent. Source: The United Nations, Division of Population.

*The United States and continental Europe face the new and common challenge of how to adapt to a world of globalization, where an increasing number of individuals wish to have the ability to freely cross borders.*

## SEDENTARY IMMIGRATION VS. CIRCULATORY MIGRATION

*The modern 21st century state must learn to manage circulatory migration and adapt policies to address the legal rights and status of migrants in movement.*

Among the numerous reasons for undocumented migration are the poorly-designed regulations for circulatory migration, which nevertheless represent the desires and needs of some migrants. The lack of flexibility in granting circular residence status forces many migrants, both unskilled and skilled, to remain against their personal inclination. Nation-states of the 20th century were inert and liked stable populations, quotas, and permanent residents. However, the modern 21st century state must learn to manage circulatory migration and adapt policies to address the legal rights and status of migrants in movement.

### **The possibility of circulating and re-circulating on a permanent basis should be offered to seasonal workers.<sup>18</sup>**

Such measures would benefit the worker, his or her family, the home country and the receiving country with economic sectors (e.g. agriculture and construction) dependent upon seasonal migrant labor. It will reduce the number of illegal migrants. In addition, it could also address a problem that has divided many policymakers: should the United States admit temporary workers again?<sup>19</sup>

Not all unskilled workers want to settle in the United States with their families. If given the option, many would return to their home country after having worked in the United States for six to ten months. With the wages they had earned, their purchasing power would be much higher in their home country than in the United States.

<sup>18</sup> Seasonal workers are needed for seasonal jobs that are by nature temporary while temporary workers are hired for a fixed term contract in which the temporal character comes from the nature of the contract and not of the job. Cf. Booth, A.L., Dolado, J.J. & Frank, J., .2002, "Symposium on temporary work, Introduction, *The Economic Journal*, Vol.112, 182.

<sup>19</sup> Cf. Castaneda and Jacoby, footnote 9.

With the internet, Skype, and further advancements in communication technology, it is easier for a seasonal worker to stay in touch with his or her family at home.<sup>20</sup> But seasonal workers will only return to their home country and leave the United States if they have a guarantee that they will be able to return. Otherwise, there is a strong incentive to remain in the country as an undocumented worker. Both previous and existing seasonal workers' programs have shown that in the absence of this kind of guarantee, seasonal workers tend to remain illegally in the receiving country. However, the choice is not between a failed seasonal worker program and no program at all. Following a Franco-German Initiative,<sup>21</sup> since 2007, the European Commission has encouraged circular migration between the member states and third countries.<sup>22</sup> In addition, Italy, Spain, and France have developed new approaches to the management of seasonal workers.<sup>23</sup>

In Italy, a quota of seasonal workers is fixed every year. The following year, the seasonal worker who has returned to his or her country of origin at the end of his or her contract, has priority for returning in the next year's quota. Since 2009, there is no longer a quota on permanent foreign workers, but a specific quota remains set for seasonal workers at 80,000 for 2010.

<sup>20</sup> Cf. DIMINESCU, Dana, (2005), Le migrant connecté : pour un manifeste épistémologique, in *Migrations Société*, Vol. XVII, n°102, Nov.-Dec., pp. 275-293

<sup>21</sup> On the initiative of Wolfgang Schauble and Nicholas Sarkozy, October 26, 2006, cf. Stefan Angenendt, *Circular Migration, A Sustainable Concept for Migration Policy?*, [http://www.swp-berlin.org/common/get\\_document.php?asset\\_id=4058](http://www.swp-berlin.org/common/get_document.php?asset_id=4058).

<sup>22</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions on circular migration and mobility partnerships between the European Union and third countries /\* COM/2007/0248 final \*/ 05. 16. 2007.

<sup>23</sup> Cf. for example, <http://www.caritas-europa.org/module/FileLib/080407Stakeholderquestionnaireseasonalworkers-CEreply.pdf>.

In Spain, a program has been negotiated with the Moroccan government permitting an increased number of Moroccans to come and work temporarily. They are guaranteed the same level of salary and social protection as permanent residents and natives. In exchange for returning to Morocco, they are offered the possibility of coming back to Spain the following year. The fact that Spanish authorities give priority to women with children remaining at home contributes to the 95 percent rate of return reached every year.<sup>24</sup>

The European Commission has suggested that member states develop multi-annual permits for seasonal workers.<sup>25</sup> In France, the Immigration and Integration Act of July 24, 2006 created a multi-annual permit of three years. Implemented in the summer of 2008, the permit has been offered to 6,500 seasonal workers. The government has recently emphasized “its adaptation to the targeted public” (public visé).<sup>26</sup>

For the United States, one could imagine a multi-annual permit of five or ten years, or even a green card for seasonal workers. These permits could be offered to citizens of all countries or negotiated with select ones such as Mexico. In exchange for the granting of seasonal green cards to thousands or tens of thousands of Mexican workers, Mexico could cooperate with the United States in the

control of its southern and northern borders.<sup>27</sup> These workers—in some way permanent—should have the right to unionize and to be protected by branch agreements between employers and unions.<sup>28</sup>

### **Permitting the highly-skilled to circulate and re-circulate**

On the issue of highly-skilled labor migration, the United States used to be more advanced than Europe. In many European countries such as France and Germany, there were reservations regarding skilled migration. Such views were, in some instances, based on racist or corporatist sentiments and the desire to reserve the most valuable professional positions in society for native citizens. Reservations about this type of migration were also based on the concept of “third-world-ism,” the notion that world justice and the development of less developed nations would be hindered by the recruitment and retention of highly-skilled workers from these nations.

This was both incoherent and absurd: If African, Asian, South American, or other students from outside of the European Union graduate with a degree from a European university and do not want to return home, they will not do so. If European countries refuse them permanent residency, they will migrate to the United States, Canada, or Australia and their countries of origin, and the country where they received their training would not benefit from their intellectual and professional capacities. This international competition encouraged the United Kingdom, Germany, and

*In exchange for the granting of seasonal green cards to thousands or tens of thousands of Mexican workers, Mexico could cooperate with the United States in the control of its southern and northern borders.*

<sup>24</sup> [http://www.magharebia.com/cocoon/awi/xhtml1/en\\_GB/features/awi/features/2009/01/19/feature-02](http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2009/01/19/feature-02)

<sup>25</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions on circular migration and mobility partnerships between the European Union and third countries /\* COM/2007/0248 final \*/ 05. 16. 2007.

<sup>26</sup> French Senate, Finances Committee, parliamentary question 36 of Pierre Bernard Reymond's 2010 budget.

<sup>27</sup> Similar cooperation exists between the countries that have entered the Schengen zone of free circulation and their border countries like Romania or Bulgaria.

<sup>28</sup> At some stage, for example at the end of the first five or ten years period they should be also able to transform their status.

*Despite their convergence, the United States and Europe do not approach the issue of high-skilled migration in the same way.*

later Italy and France to open their doors to highly-skilled workers.

Despite their convergence, the United States and Europe do not approach the issue of high-skilled migration in the same way. Both sides limit the rights of highly-skilled migrants they wish to attract, but they do so in different ways. In the United States, once legal permanent status is granted, a foreign highly-skilled resident is prevented from returning to Africa, the Caribbean, or Latin America for a significant period of time: the permanent resident card (i.e. green card) is considered invalid if the person has been outside for more than a year.<sup>29</sup>

Some European countries limit the right of highly-skilled workers to obtain permanent residency. France, for example, has created a new type of three-year residence permit for this category of workers. But if the worker is a citizen of a country belonging to the poorest region of the world<sup>30</sup> this special permit cannot be renewed more than once (for a total possible stay of six years) and can be only delivered under approval of the sending country authorities. This policy is a response to the strong reservations and concerns expressed by African leaders to the European Union on policies that would increase the emigration of their higher-skilled workers. It is true that among developing countries the poorest (e.g. Haiti, Congo, Rwanda, or Cambodia) are most in need of their highly-skilled citizens. In comparison, countries already considered to be global powers, such as China, India, and Brazil, are less concerned

<sup>29</sup> In addition, the government is required to look at the totality of circumstances, i.e. the ties that they have maintained in the United States (e.g. payment of U.S. taxes, residence, bank accounts, etc). In practice, officers begin to ask questions after about three to five years of infrequent returns to the United States.

<sup>30</sup> The “zone de priorité solidaire” created in 1998 includes the majority of African Countries, Vietnam, Laos, Kambodgia, Haiti Cuba, Dominican Republic etc.

about losing highly-skilled citizens and some countries (e.g. the Philippines) even encourage the migration of their skilled workers. Yet, African, Asian, South American, or students from other non-EU countries with a degree from a European university are on the world market, and any selective restriction or discrimination is ineffective and counterproductive. The initial assessment of the French policy is not good. It has discouraged higher-skilled workers from the poorest countries in the world to apply for these French permits.

However, it is in the interest of the United States like Europe to have poor and unstable underdeveloped countries develop democratic civil societies. The highly-skilled workers trained in European or American universities can be important agents of this democratic development.

Once their permanent status secured in the United States, they should not be prevented from returning to their home country—for a few months to few years—while retaining their status.

The European Commission is encouraging circular migration between the member states and third countries for higher-skilled workers.<sup>31</sup> It wishes to give “people the opportunity to engage in an activity (business, professional, voluntary, or other) in their country of origin while retaining their main residence in one of the member states. This covers groups such as business persons working in the EU and wishing to start an activity in their country of origin (or in another third country), and doctors, professors, or other professionals willing to support their country of origin by conducting part of their professional activity there.

<sup>31</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions on circular migration and mobility partnerships between the European Union and third countries /\* COM/2007/0248 final \*/ May 16, 2007.

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In the United States, three proposals could be made with the purpose of facilitating circulation of the higher skilled:

1. Permanent legal residents should be able to leave the United States for a maximum period of three years without forfeiting their legal status.
2. When public institutions—hospitals, universities, research centers, etc—recruit highly-skilled workers from countries receiving U.S. development aid, these foreign-skilled workers should be offered the possibility of practicing and working in their countries of origin. With the agreement of United States Agency for International Development, these

individuals' salaries would be covered by the recruiting institutions for the duration of their stay in their home country. This would allow professors or doctors from Haiti, Rwanda, Mali, or Cambodia recruited by a university or hospital in the United States to utilize their expertise in their native country and contribute to its development, while also retaining the right to return to the United States to work, after an agreed period of time.

3. Long-term exit and re-entry visas for circulation should be offered to graduate students with diplomas from American universities

# HOW TO DEAL WITH ILLEGAL MIGRANTS

*The American democratic model, and the opportunities provided by its market economy attract more migrants seeking permanent residency status than any legislation will allow.*

Irrespective of the rules in place for the legal migration, and regardless of the enforcement of the law, and however tough the penalties against employers and traffickers will be with the enactment of new legislation, some undocumented migrants will come and remain in the United States as they do in the European Union.

There are two main reasons for this. The American democratic model, and the opportunities provided by its market economy attract more migrants seeking permanent residency status than any legislation will allow. The United States, like the European Union, respects basic individual human rights and is a major destination for tourism and international business. Thus, legal limits have been set for the ability of the State to “control” migration.

One has therefore to admit that immigration policy is like any other policy—with a certain level of “fraud.” No one would imagine tax legislation, or a traffic code, that would totally eliminate tax fraud or traffic accidents. Therefore, even with the development of fair and efficient systems to process asylum applications, improved family reunification methods, the issuance of better designed employment visas coupled with effective law enforcement could reduce illegal migration, no measure can completely eradicate it.

Can states address the issue of non-residents who have illegally settled in the country, sometimes for many years, either because they have found a job or because they have joined or created a family?

When the numbers are too high and the impacts become politically, economically, and socially too widespread, most states are forced to organize exceptional and all encompassing legalization. The most recent examples are in Europe: Italy (with

800,000 applicants in 2002, and 300,000 in 2009<sup>32</sup>) and Spain (in 2005 with 500,000 applicants).

In 1989–1990,<sup>33</sup> Italy enacted immigration legislation that focused on respecting family life, guaranteeing Geneva Convention protection to those persecuted in regions outside of Europe, allowing for labor migration to fulfill labor shortages in the Italian economy, and mitigating illegal immigration. But above all, the total number of immigrant admissions became subject to a national quota fixed after consultation with professional organizations of employers and trade unions. The quotas included immigrant workers for the first time in 1995.<sup>34</sup> Between 1995 and 2008, the quota was raised from 25,000 to 150,000. In parallel, from the mid 1980s to 2009, six *sanatorie*—regularizations [of illegal immigrants]—were organized: in 1986 (120,000), in 1990 (220,000), in 1996 (246,000), in 1999–2000 (250,000), in 2003–2004 (750,000), and finally in 2009 (300,000 applications were submitted). But since 2008 the government has ceased the announcement of any quotas. In exchange for the most recent legalization concerning only domestic workers, a new law has redefined illegal entry and over-staying as criminal offenses to be punished with a pecuniary sanction

<sup>32</sup> Colombo, A., *La sanatoria per le badanti e le colf del 2009: fallimento o esaurimento di un modello?*, FIERI – Gli approfondimenti, November 25, 2009, Torino: Forum Internazionale ed Europeo di Ricerche sull’Immigrazione, <http://www.fieri.it/download.php?fileID=301&lang=ita>.

<sup>33</sup> Through a decree of 1989 that became law in 1990 under the impulsion the then deputy Prime Minister Claudio Martelli.

<sup>34</sup> After the Turko-Napolitano law of 1998, the prime minister’s office fixed the quotas directly each year See Ferruccio Pastore, “Quote et Gestione degli ingressi per motivi economici. Primi elementi per una valutazione dell’esperienza italiana (1998-2003),” in *Consiglio Nazionale dell’Economia e del Lavoro (CNEL), Regolazione dei flussi migratory tra programmazione e precarietà degli interventi*, (Dec. 2003), pp. 45-57.

and immediate expulsion.<sup>35</sup> Nevertheless, other undocumented immigrants are legalized under the remaining spots of the 2007 and 2008 quotas.

Spain adopted its first comprehensive immigration law in 1985, in the lead up to its accession to the European Union. Highly restrictive and focused on the control of borders and illegal immigration,<sup>36</sup> it was followed by a regularization of illegal immigrants (23,000 permits were issued for 44,000 applicants). The government proceeded in a similar vein in 1991. The imposition of visa requirements for citizens of South American and North African countries to enter the Schengen area was accompanied by a second regularization covering 116,000 foreigners for 133,000 applicants. It was at this point that immigration became a political and social phenomenon. In trying to regulate this flow of illegal immigrants and to respond to the needs of the labor force, quotas were instituted at the level of 20,000 to 30,000 per annum from 1993, divided almost equally between seasonal and permanent workers.<sup>37</sup> This system allowed thousands of

hidden workers to obtain legal status each year, but failed to regulate migratory flows. After legislation was enacted in April 2000 aimed at developing an integration policy, a new regularization brought in 164,000 foreigners out of 250,000 applicants, as happened after the law created in August of 2002 (184,000 regularizations for 350,000 applicants).

In August 2004, the government of José Luis Zapatero announced the legalization of all foreigners working illegally, provided they had a work contract for a minimum of six months. At the end of 2005, 576,000 of the 690,679 applications submitted were accepted.<sup>38</sup> Additionally, between 20,000 and 30,000 permits set in the quotas are used in the legalization process each year.

Just as in Italy, the quota system in Spain has been an instrument of legalization for undocumented immigrants. The quotas were never big enough, so there was always a need for new immigrants and always an argument for massive legalization. The political, social, and administrative impacts of these massive processes are often harmful. The civil service is disorganized, the impact on migration is often to favor the sudden and massive arrival of new applicants from neighboring or sending countries, and governments and parliaments are perceived as having created poorly structured immigration policies. Furthermore, massive legalizations can create opportunities for xenophobic and populist reactions.

<sup>35</sup> In addition, the status of legal immigrants has been weakened through the enactment of a points-based system for the renewal of residence permits or more restrictive housing requirements for family reunion. Law July 15, 2009, No. 94, entitled "Disposizioni in materia di *sicurezza pubblica*," Cf. Ferruccio Pastore, *The impact of the economic crisis on migrants and migration policy in Italy*, IOM Paper, Dec. 2009.

<sup>36</sup> The information that follows is taken from Francisco Javier Moreno Fuentes, *The Evolution of Migration Policies in Spain. Between External Constraints and Domestic Demand for Unskilled Labour*, CEACS Working Paper no. 211 (Madrid: Instituto Juan, March 2004), p. 37.

<sup>37</sup> Except in 1996, 2000, and 2001, 20,600 in 1993 and 1994, 25,000 in 1995, zero in 1996, 24,690 in 1997, 28,000 in 1998, 30,000 in 1999, zero in 2000 and 2001, 32,079 in 2002, and 2004, 337 in 2003. *Source*: L. Einaudi, *Programmation de quotas, régularisations et travail au noir : les politiques de l'immigration en Italie et en Espagne (1973-2003)*, in Blanc-Chaléard, Dufoix, et Weil, *manuscrit.com*, 2005.

<sup>38</sup> Joaquín Arango, *Complutense University of Madrid*, Spain. Hearing before the Migration, Refugees and Population Commission, Parliamentary Assembly of the Council of Europe, Paris, Dec. 11, 2006.

# HOW TO ESCAPE THESE MASSIVE LEGALIZATIONS?

*Not having a penalty for illegal migration would open avenues to massive illegal migration.*

Legal admission of immigrants in France and Germany are not based on quotas, but on criteria such as family reunification and having a job offer, which provoke less illegal migration. In addition, these two countries have a permanent mechanism for legalization, which allows them to escape massive regularization.<sup>39</sup> France has been through numerous exceptional and massive legalizations in: 1972, 1981, 1991, and 1997. Yet since 1998, a mechanism of permanent (vs. exceptional) and individual (vs. collective) legalization of illegal aliens has been created and implemented. Today, seven categories of non-legal foreign residents who created strong links in the country or have strong reasons to stay can apply to the French Immigration Service and can get a permit. These include:

1. Foreigners who can prove they have been living in the country for ten years<sup>40</sup>
2. Foreign parents of French children
3. 18-year olds who arrived in France before the age of 10
4. Implementation of Article 8 of the ECHR<sup>41</sup>
5. Medical patients who can prove that deportation would prevent their access to life saving medical treatment<sup>42</sup>

<sup>39</sup> In the U.K., two legalization mechanisms exist also for those in the country for over 14 years illegally or for families with children in the country for over seven years illegally.

<sup>40</sup> Since 2006, foreigners who can prove they have been living ten years in the country can still apply for their legalization, but the decision to legalize them is no longer a right and is subject to the discretionary power of the government.

<sup>41</sup> Article 8 of the ECHR affirms the right to respect for private and family life. Expulsion or deportation of an illegal alien can be a violation of Article 8 if it separates an existing family or separate partners.

<sup>42</sup> The four first categories were included in the May 11, 1998 law.

6. Immigrants present for humanitarian reasons (without any delay, Article 32 of the law 2006-911, July 24, 2006)

7. Illegal workers (Article 12 of the law 2007-1631, November 20, 2007)

Every year, 25,000 to 30,000 permits (20 percent of the total) delivered in France are legalization permits.

In Germany, the July 31, 2004 Law (section 25) allows the granting of a permit for “humanitarian reasons.” This measure is meant to apply, in particular, to all those persons protected by the European convention of human rights. In 2009, 169,782 people benefited from this permit. The law adds to, and completes, a measure already in place in German law (section 60) that permits around 100,000 people to live with a “Duldung” certificate of residence<sup>43</sup> because the German state cannot deport them.<sup>44</sup> Why have these systems been adopted?

1. By legalizing the aliens who have shown the strongest will to integrate into the host society, it allows an escape from the cycle of massive legalizations and their political and social tensions and costs.
2. This individual process is smoothly managed in cooperation with the civil service, unions, and NGOs who play the role of gatekeepers. It doesn't, however, prevent the enforcement of the laws. On the contrary, before any application for

<sup>43</sup> In the new law, the Duldung has become the “Bescheinigung über die vorübergehende Aussetzung der Abschiebung” (certificate of temporary suspension of expulsion).

<sup>44</sup> In addition, the German Ministry of Interior registers 465 811 foreigners without permit, <http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Content/Statistiken/Bevoelkerung/MigrationIntegration/AuslaendischeBevoelkerung/Tabellen/Content75/AufenthaltsrechtlicherStatus,templateId=renderPrint.psml>.

legalization can be filled, there is an official delay during which an undocumented alien faces and risks deportation.

3. Finally, it makes the system more assessable and more accountable. A good comparison is immigration law and taxation law. If there were no penalty for not paying state taxes, nobody would pay them. But if state controllers could investigate your income on your bank accounts 20 years after they had been received, it would mean living in a totalitarian regime. It is the same with immigration policy. Not having a penalty for illegal migration would open avenues to massive illegal migration, but having no prospect for amnesty after living for ten years in a country would lead to the accumulation of anger and collective solidarity toward the illegal immigrant population.

The first mechanism of individual legalization in the United States had its origin in the First Quota Act of May 19, 1921. Prior to 1921, an immigrant who had not had his entrance in the United States registered and who was interested in becoming naturalized could follow an easy procedure: go to Mexico or Canada and subsequently have his re-entry into the United States officially recorded. The First Quota Act of 1921 barred the entry of an alien whose country had already reached its established annual quota. The problem was that a large number of aliens for whom a record of permanent admission did not exist had entered the United States prior to June 3, 1921. Due to missing records, these aliens were ineligible for naturalization.

The Registry Act of March 2, 1929 resolved this impasse. The law authorized the creation of a record of lawful permanent residence for any alien ineligible for citizenship and whose case was not recorded, as long as the alien made a satisfactory showing that he had entered the United States prior to June 3, 1921, had resided continuously in the United States since then, and was not subject to deportation.<sup>45</sup>

Today, Section 249 of the INA reads that a record of lawful admission for permanent residence may be attributed to an alien who entered the United States prior to January 1, 1972, and who has held continuous residence in the United States since such entry. Unfortunately, this would not apply to most illegal migrants.

To complete the scheme of comprehensive immigration policy, the United States could borrow from the Franco-German system and from the Spanish-Italian system. As in France and Germany, mechanisms of individual legalization could be set. Like in Italy and Spain, permits given on this basis could come out of the numbers of permits fixed within the different quotas. The independent standing Commission on Immigration, if created, could have the task to assess the impact and the criteria of the legalization tools.

<sup>45</sup> The law allowed immigrants to register as permanent residents for a fee of \$20 if they could show that they had resided in the country continuously since 1921 and were of good moral character. The law did not formally favor Europeans over Mexicans. But of the 115,000 immigrants that registered their prior entries into the country between 1930 and 1940, 80 percent were European or Canadian. Mae N. Ngai, "The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965," *Law and History Review*, Vol.# 21, No. 1.

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## CONCLUSION

For the nation-state, immigration is one of the challenges of the future and not a problem of the past. We do not believe in the maintenance of the state as it stands or in its diminution, but rather in its reconfiguration. Because immigration policies will become increasingly complex and diverse, they will require investments that were not made in the past in order to better coordinate the multiplicity of relevant administrative and private actors, to incorporate the wishes of migrant populations and to learn not only how to

control the flow of migration but how to manage migrants' "recirculation" over a longer period. This will demand the most radical innovations in immigration policy.

The facilitation of circulation and "recirculation," for citizens abroad or for foreigners at home, according to a regime adapted to each category of migrants—for seasonal workers and also for highly skilled workers—will be one of the new tasks for immigration policy in the 21st century.

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