

# The Illegal Immigration Law: A Regime of Law, Discourses, and Police Practices

*The law is illegal*  
(Graffiti seen in Bologna)

## 1. Introduction

This article analyzes three levels at which Italian immigration law, particularly the control of undocumented migrants, can be said to be illegal. According to Richard Ericson, an illegal law is a form of counter law that comes into being when “new laws are enacted and new uses of existing law are reinvented to erode or eliminate traditional principles, standards and procedures of criminal law that get in the way of preempting imagined sources of harm” (Ericson 2007, 24). Following Ericson’s definition, I identify a first level of illegality in the large discretionary power the immigration law accords to the police and in the creation of rules that do not always follow the rules—so to speak. A second level of illegality pertains to the public discourse on the so-called illegal immigrants present in the territory. Illegality here is not a quality of the law but an attribute of the subject of the law, whereby illegality becomes a label for undocumented migrants with the ability to symbolically—and materially—exclude them from the legal order *tout court*. The label turns migrants into internal enemies: they are simultaneously inside society and outside the law. The third level of illegality of Italian immigration law is found in the space where interactions between police and undocumented migrants take place. In this “non-legal” space, the police make discretionary decisions about immigration control, and immigration law is enforced (or not) according to the practical needs of the police as well as the migrants’ power to negotiate, rather than to the law’s provisions. The room for discretion was not designed by the police but by the law itself. In effect, a space of non-legality is embedded in the legal system of immigration control.

In the title of this article, the adjective “illegal” can modify both “immigration” (the illegality of undocumented migrants) and “law” (the illegality of immigration law). This wordplay sheds light on the paradox of a discourse on undocumented migrants’ illegality originating from an immigration law that is itself illegal. On the one hand, labeling undocumented migrants illegal marks them as “non-persons” in law (Dal Lago 1999) and enables immigration law to place them in a constant “state of exception” (Agamben 1995); they become “bare life” (*ibidem*) immediately exposed to the police’s sovereign power and their large margins of discretion, granted by the law, in administering that power. On the other hand, this label enables the law to justify its illegal character on the grounds of necessity, emergency, exception. Therefore, if there are any limits to police power, they are not found in the law but in practical issues of police administration, more concerned with order maintenance than law enforcement (see Waddington 1999, Neocleous 2000). Thus, migrants have the power to negotiate an *acceptable form of illegality*. I suggest that an expansive loop of illegality is embedded in Italian immigration law: illegal norms establish the power to exclude undocumented migrants which, in turn, provokes undocumented migrants’ marginalization and otherness (see Calavita 2005) and ends up strengthening the discourse on their illegality; this discourse further legitimizes an even broader exclusion of undocumented migrants, in a circle that keeps expanding.

In Italy, the management of undocumented immigration takes the form of internal control rather than border control. Border control in Italy has always been ineffective. For one thing, even though about 500,000 undocumented migrants (EMN 2012) are currently present in Italy, Italian detention centers (where irregular third-country nationals are housed

for a maximum of 18 months before being deported) are currently equipped with 842 beds (February 2014)<sup>1</sup>. For another, at the end of the period of pre-removal detention, less than half of the total number of forced removals are actually executed each year; in 2010, 26.7 percent of all expulsion orders were executed (Colombo 2012). Finally, and more importantly, 75 percent of the migrants irregularly present in Italy are overstayers (EMN 2012) who immigrated lawfully but stayed past the limits of their permit. Clearly, border control is ineffective in intercepting them.

Unlike border control, internal control has been massively effective at managing immigration flows to Italy since the early 1990s. Internal control uses illegal norms, discourses on illegality, and police's discretionary power to exclude undocumented immigrants from within. Other European countries have recently shown a similar multiplication of measures of "internal immigration control" (Van der leun 2003), such as the exclusion of undocumented immigrants from public services, housing, and the labor market, harsher surveillance by the police, and increasing rates of incarceration and deportation (Broeders and Engbersen 2007, 2009; Van der Leun 2006). Such measures are aimed not just to deter and discourage potential immigrants but also to "complicate and frustrate [immigrants'] living and working conditions to such a degree that they will turn round and try their luck elsewhere" (Broeders and Engbersen 2007). Engbersen and Broeders argue this kind of internal surveillance on irregular immigrants has recently intensified, especially in northern states of the European Union (EU) such as Denmark, Germany, and the Netherlands.

It seems the Italian strategy to contain and control immigration has always included attempts to frustrate the lives of both documented and undocumented immigrants, even by means of illegal laws. One Italian peculiarity, however, is that the exclusion of undocumented immigrants is mainly symbolic, as long as it comes together, as we will see, with police informally allowing undocumented immigrants to live irregularly in the country and work in the underground economy. By referring to symbolic exclusion, I do not mean undocumented immigrants' exclusion in Italy is imaginary: it is concretely manifested in material conditions of deprivation. Rather, I mean symbolic exclusion is the consequence of a punitive discourse on immigration mainly used to gain political consent; such discourses are not accompanied by actual physical exclusion but by a form of hierarchical inclusion.

This article is composed of three parts, each focusing on one of the levels of illegality of the Italian immigration law identified above. The first analyzes the illegality of the Italian immigration law, giving an account of its history and describing the space for police discretion. The second section deals with the development of the discourse on illegal immigration in Italy, and its consequences in terms of symbolic and material exclusion of undocumented immigrants. The third touches on the results of empirical research I conducted on the interaction between police and undocumented immigrants in Bologna (Italy), to show the negotiations of possible forms of illegality in the non-legal space where encounters between police and immigrants occur. The conclusions will show how these three levels of illegality are connected and will raise the question of how to undermine the legitimacy of such a system of control.

<sup>1</sup> [http://www.repubblica.it/solidarieta/immigrazione/2014/02/07/news/napolitano\\_cie-77989648/](http://www.repubblica.it/solidarieta/immigrazione/2014/02/07/news/napolitano_cie-77989648/)

## 2. The illegality of Italian immigration law<sup>2</sup>

Italian immigration law is “inconsistent, scattered, and changeable” (Ferraris 2013, 1), for three reasons. First, in the last twenty-odd years, political parties have been using the immigration law as a political resource to gain electoral consensus, so that laws keep on changing depending on the political orientation of the major parties. Second, Italian immigration law developed at two different levels, a criminal and an administrative one (Ferrajoli 2009), with criminal law being used in defense of “the administrative activity of expelling immigrants”<sup>3</sup> (Caputo 2007, 58), thereby creating confusion in the “traditional tripartite division of the law's branches: criminal law, civil law, administrative law” (Savio 2013, I), with regards to the principles pertaining to each branch (Caputo 2003; Ferrajoli 1989); 3). Finally, immigration law has changed as a consequence of the continual changes in national laws, European legislations, international treaties, and labor law, not to mention the many decisions of the European Court of Justice and the Constitutional Court.

This section analyzes the illegality of immigration law. It begins by describing its historical evolution, providing some details about the disputes between the Italian government and the Constitutional Court, and, more recently, between domestic lawmakers and the European Court of Justice; both institutions have been constantly intervening to make Italian immigration law comply with higher principles and legislations. Then, the section will take a closer look at the discretionary power of police. A major part of the illegality of Italian immigration law originates in the amount of discretion the law has granted to the police. In effect, the immigration law places the police — not the judiciary — at the center of the mechanisms of control.

### 2.1. The history of law's illegality

The entire history of Italian immigration law is one of illegality, but it can be divided into four stages. The first includes the legal regulations before the early 1990s, when immigration became a concern. During this stage, immigrants were mentioned only in the *Testo unico sulle Leggi di Pubblica Sicurezza* (TULPS)<sup>4</sup>, that is, the code regulating police power. Here, migrants were mentioned with respect to their possible expulsion if considered a threat to state security. At this point, they were either not of concern or were treated as “dangerous others” (Calavita 2005). As there were no rules regulating immigration, immigrating to Italy was not difficult before the 1990s: immigrants could easily cross the borders, enter the labor market in the country, and stay. The original focus of the police on immigrants' possible dangerousness persisted in the subsequent immigration law (Ferraris 2012) which, just like TULPS, pays attention to removal procedures rather than the living conditions of migrants.

Preliminary attempts to regulate characterized the second stage of Italian immigration law, between 1990 and 2002. For example, law no. 39 of 1990, the so-called

<sup>2</sup> This section is built on the analysis of both the normative text and the jurisprudence by Guido Savio (2011, 2012a, 2012b, 2014), Angelo Caputo (2003, 2006, 2007), Giuseppe Campesi (2011, 2012, 2013), Valeria Ferraris (2012), Caterina Mazza (2013).

<sup>3</sup> Caputo (2007) identifies one “special law of the alien” in Italian immigration laws, aimed at punishing not a behavior but a status - namely that of being an immigrant irregularly present in the state territory. The special law of the alien gives “immigration crimes” (ibidem) harsh punishments, disproportionate when compared to the punishment for other more serious crimes.

<sup>4</sup> TULPS is the consolidated act of public safety laws, Regal decree no. 773 of 18 June 1931.

Martelli Law<sup>5</sup>, regulated visa policies, flow decrees, border control, and family reunification. At the same time, it broadened the category of crimes for which an expulsion order could occur. Administrative expulsion occurred when immigrants disobeyed *any* of the legal norms issued. It also introduced expulsion for dangerous people and expulsion for public order and state security. In other words, the core of the management of immigration remained expulsion procedures (Caputo 2006)<sup>6</sup>. The same can be said about law n. 296 of 12 August 1993<sup>7</sup>, which raised the number of the crimes for which expulsion could occur<sup>8</sup>. In 1995, the Dini Government Decrees<sup>9</sup> continued to broaden the category of expulsion orders, by introducing expulsion as measure of prevention. They established that removal orders would be the rule to execute expulsion orders, and forced removal would be the exception. They also opened up the possibility that the judiciary could restrict an immigrant's residence to a particular location to identify the person and prepare his/her return. Allegedly, the Dini Decrees laid the foundation for pre-removal detention, which was fully established three years later.

The Turco-Napolitano law<sup>10</sup> was issued in 1998 and represented the most articulate effort to create an efficient, coherent system for immigration management in Italy, as it was aimed at both expelling undocumented immigrants and integrating documented ones<sup>11</sup>. In the context of the present analysis, this law is particularly important because it introduced the detention centers for undocumented immigrants. According to the Turco-Napolitano law, a returnee receiving an expulsion decree from the Prefect of police<sup>12</sup> and who had to be expelled by means of forced removal<sup>13</sup> could be "hosted" in a detention center for a maximum period of 30 days before being removed. However, all police decisions on expulsion orders, forced removals, and detention orders required judiciary validation before being executed.

The third stage is marked by harsh, frequent disputes between the Italian government and the Constitutional Court, with the latter constantly intervening to make immigration law consistent with constitutional principles. During this stage, immigrants' living conditions in Italy deteriorated as a result of the severe immigration laws. Law no. 189 of 30 July 2002, better known as Bossi-Fini law<sup>14</sup>, was particularly severe: it considered both

<sup>5</sup> Law 39/1990, 28 February 1990, Regulations on the matter of asylum (Conversion into law, with amendments, of Decree-Law 416 of 30 December 1989)

<sup>6</sup> Caputo claims that the perspective that the Martelli law adopted was still one that mainly sees immigration as a concern of State security. For deeper analysis see Pastore 1998.

<sup>7</sup> Law 296/1993 converts the Law decree n. 187 of 14 June 1993, better known as "Conso decree".

<sup>8</sup> Conso decree also introduced a category of expulsion on request for migrants who were under pre-trial detention or were sentenced for less serious crimes.

<sup>9</sup> Decrees-Law 489/1995, 22/1996, 132/1996, 269/1996, 376/1996, 477/1996. Decree-Law is a temporary law issued by the government; it is immediately enforceable, yet needs the approval of Parliament to become Law. Dini Decree was prolonged five times, until the Constitutional Court stopped it. It was implemented for the time it was in force but never became a proper law.

<sup>10</sup> Law 40/1998 shaped the Legislative Decree no. 286 of 25 July 1998, Comprehensive text on immigration law.

<sup>11</sup> For deeper analysis of Turco-Napolitano law, see Kitty Calavita 2005.

<sup>12</sup> Usually the Prefect is in charge of expulsion decrees.

<sup>13</sup> The chief of police is in charge of this decision. The expulsion decree can be executed as a removal order, voluntary return, or forced removal. If the forced removal cannot be immediately executed, it may require a pre-removal detention order.

<sup>14</sup> Law no. 189 of 30 July 2002 (Changes in regulations on the matter of immigration and asylum)

documented and undocumented immigrants dangerous *per se*, and was aimed at preventing them from entry<sup>15</sup>. The police perspective on immigration, previously softened by the l. 40/1998, was pushed to the extreme just three years later. It is especially noteworthy that the Bossi-Fini law introduced new (and illegal) procedures for pre-removal detention, triggering harsh disputes between government and the Constitutional Court.

To understand the point of view of the Constitutional Court, we need to take a step back. In 2001, before the enactment of the Bossi-Fini law, the Court passed judgment no. 105 on the constitutional legitimacy of pre-removal detention. It declared pre-removal detention was legitimate but warned it had to comply with the constitutional principle (Art. 13) of inviolability of personal liberty<sup>16</sup>: On the one hand, one's personal liberty could be violated only “by order of the Judiciary” and “only in such cases and in such manner as provided by the law”<sup>17</sup>; on the other hand, police could take provisional measures – which required validation of the judiciary — only “in exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be defined by the law”<sup>18</sup>. The Bossi-Fini law, issued a year later, completely ignored these provisions. First, it established that pre-removal detention was the rule for executing expulsion orders and increased the maximum period of administrative detention from 30 to 60 days. Second, it introduced new procedures for the judiciary validation of expulsion orders: the validation might occur once an expulsion order had already been executed, leading to a lack of judiciary control over police decisions to expel or deport someone. Third, it introduced mandatory arrest for immigrants disobeying removal orders<sup>19</sup>, along with a maximum period of prison detention ranging from six months to a year. Under the Bossi-Fini law, the violation of personal liberty due to administrative detention went far beyond the limits set by the Constitution. Hence, two years later, the Constitutional Court declared the constitutional illegitimacy of a large part of the expulsion procedures.

More specifically, with two judgments (no. 222 and 223 of 2004), the Court declared that the validation procedures established by the Bossi-Fini law<sup>20</sup> violated the constitutional right to defense (Art. 24 Const.), the constitutional right to cross-examination in due process (Art. 111 Const.), and, obviously, the constitutional right to personal liberty (Art. 13 Const.). In addition, the mandatory arrest for immigrants disobeying removal order<sup>21</sup> was constitutionally illegitimate, as arrest could be justified only by pre-emptive detention; yet pre-emptive detention was not suitable for such a minor offense (Caputo 2006, 316-7). Finally, instead of complying with the judgments of the Constitutional Court, the government immediately made three, mainly cosmetic, adjustments with Law-Decree no. 241 of 14 September 2004. First, disobeying a removal order turned from a minor offense into a serious crime, now punishable with a period of detention ranging from one to four years. This meant the crime was now serious enough to allow the use of pre-emptive

<sup>15</sup> The law made the legal entry of immigrant workers almost impossible by rendering employment a necessary pre-condition for obtaining a residence permit; by reducing the flown decree; by lowering the duration of residence permit from two to one year; by requiring a migrant to have proper accommodation, a regular job, and a certain amount of incomes, in order to ask for residence permit or its renewal; etc. For deeper analysis, see Calavita 2005.

<sup>16</sup> Art. 13 Const.

<sup>17</sup> Art. 13, par. 2, Const.

<sup>18</sup> Art. 13, par. 3, Const

<sup>19</sup> Art. 14, par. 5 Quinquies, Leg. D. 286/1998

<sup>20</sup> Art. 14, par. 5-bis, Leg. D. 286/1998

<sup>21</sup> Art. 14, par. 5 Quinquies, Leg. D. 286/1998



detention and, thus, of mandatory arrest. Second, the government accepted judicial validation had to occur before the expulsion was executed; but it transferred the entire process from ordinary judges to the Justice of the Peace<sup>22</sup>, rendering judicial control ineffective<sup>23</sup>. Note that these are still the validation procedures in force.

More detrimental changes followed the Bossi-Fini law, with two laws better known as the two “security packets” of 2008 and 2009. Law no. 125 of 2008<sup>24</sup> worsened the punishment for the crime of providing false ID and introduced irregularity as an aggravating circumstance<sup>25</sup> — with the latter declared constitutionally illegitimate<sup>26</sup>. Law no. 94 of 2009<sup>27</sup> increased the maximum period of pre-removal detention from 60 days to 6 months, and created the crime of “illegal entry and stay” (Article 10-*bis* TU), whereby lack of entitlement to stay is a criminal law offense *per se*, punished with a high fine (5,000–10,000 Euros) or with a judicial return decision instead of the fine. Article 10-*bis*, still in force, is a harsh punitive measure and a very symbolic one.

The fourth and final stage of the history of the illegality of Italian immigration law is characterized by the changes promoted by a new European directive on common standards and procedures in Member states for returning third-country nationals (Directive 115/2008/CE), and the subsequent dispute between the Italian government and the European Court of Justice. The Return Directive introduces removal procedures that are very different from those implemented by the Italian government: it prioritizes voluntary return<sup>28</sup> over forced return, and considers pre-removal detention as the last choice in a gradation of measures to execute the forced removal. Italy, instead of changing its procedures, has tried to avoid enforcing the Directive, first by introducing Art. 10-*bis* mentioned above and then by transposing the Directive onto a domestic law (l. 129/2011) that ultimately frustrates its aims.

Art. 10-*bis* was introduced in 2009, shortly after the return directive was issued, and it should be mainly understood as an attempt to take advantage of one Article<sup>29</sup> of Directive 115/2008/CE, which prescribes that Member States may decide not to apply this Directive

<sup>22</sup> Justice of the Peace are honorary judges for minor offenses both in criminal and private law, and were issued with the law no. 374 of 21 November 1991. They are not proper judges; they are lawyers selected by the Italian Ministry of Justice and are in place for a maximum of eight years.

<sup>23</sup> The Justices of the Peace know little about the intricate immigration law; they do basic administrative work, and their wages depend on the number of trials they run; the trials are fast, and there is not a proper “evidence hearing”: they base their judgments on the evidence provided by the police, because, according to Mazza (2013), lawyers are generally called the day before the trial and cannot present much evidence. Finally, the justice of the peace is supposed to supervise the existence of the expulsion decree and removal order, not their content. These practices have been confirmed many times by the Court of Cassation. (SAVIO)

<sup>24</sup> Law no. 125 of 24 July 2008 (conversion into law, with amendments, of Decree-Law no. 92 of 23 May 2008)

<sup>25</sup> The punishment for crimes committed by immigrants when present irregularly in Italy is one third more severe than same crimes committed by Nationals.

<sup>26</sup> Constitutional illegitimacy of irregularity as aggravating circumstance is then declared by judgements no. 249 and 250 of 2010 of Constitutional Court, since it violates both the constitutional principle of equality (Art. 3 Const.) and the principle of *nullum crimen sine iniuria*.

<sup>27</sup> Law no. 94 of 15 July 2009. Dispositions on the matter of security

<sup>28</sup> The returnee can ask for a period of between 7 and 30 days in order to voluntarily leave the country.

<sup>29</sup> Art. 2, par. 2, ind. B of 115/2008/EU.

to third-country nationals who are being removed as a consequence of a criminal law sanction. Art. 10-*bis* describes the act of irregularly enter and stay as a criminal offense punishable with judicial expulsion and was intended as an instrument to exclude the majority of return decisions from the scope of the Return Directive (see also Campesi 2012), but to the disappointment of the Italian government, this plan did not succeed. In fact, the EU Court of Justice decision in the Sagor case<sup>30</sup> determined the judicial return decision cannot serve as an alternative punishment for a fine<sup>31</sup>, and domestic interpretation of the legislation must move in that direction<sup>32</sup>.

After Article 10-*bis* failed to achieve its goal, Italy issued law no. 129 in 2011<sup>33</sup> (long after the deadline of 24 December 2010) as a response to the judgment of the European Court of Justice in the El Dridi case on 28 April 2011. In this case, the Court declared Art. 14, co.5 *Quinquies*<sup>34</sup> of Italian immigration law was contrary to Directive 115/2008/CE and noted the considerable distance between Italian removal procedures and European ones.

As a result, Italy finally accepted the Directive, albeit with a law that manages to neutralize those points of the Directive most adverse to Italian procedures. L. 129/2011 uses two main tricks for this purpose. The first is a wide application of the “risk of absconding” exception: Art. 13, par. 4-*bis* of l. 129/2011 assumes the mere fact of the immigrant’s irregular presence in the territory constitutes a risk of absconding<sup>35</sup>. According to the Return Directive, when there is risk the returnee may abscond, the return decision must be executed by forced removal, and no period for voluntary return is granted. As a consequence, no deportation decree can be executed as voluntary return. The second trick is that even when there is no risk the returnee may abscond, there is no automatic application of voluntary return: the expulsion order may be executed as a voluntary return only if the returnee him/herself asks for it. We might expect (and the Return Directive prescribes) that expelled migrants are properly informed about the possibility of voluntary return and the consequences of not asking for it. Given the history to date, it should come as no surprise that they are not informed<sup>36</sup>. In sum, illegal provisions continue to dominate Italian undocumented immigration law even after the Return Directive.

<sup>30</sup> Judgment of 6 december 2012 of the European Court of Justice in the Sagor case.

<sup>31</sup> For an in-depth analysis, see Savio 2011

<sup>32</sup> This point is too complex to be developed here. For further analysis see Savio 2011.

<sup>33</sup> Law 129/2011, 2 August 2011, Conversion into law, with amendments, of Legislative Decree 89/2011, 23 June 2011, Implementation of European Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying non-EU nationals

<sup>34</sup> Art. 14 co. 5 *Quinquies* impose a prison sentence on undocumented immigrants solely on the grounds of their refusal to obey a removal order: this, according to the EU Court of Justice, defeated the purpose of executing the immigrants’ removal.

<sup>35</sup> According to Art. 13, par. 4*bis*, immigration law, the risk of absconding occurs “in at least one of the following circumstances based on which the Prefect establishes, case by case, the danger that the alien might escape the voluntary execution of the expulsion order: a) failure to have a passport or other equivalent valid document; b) lack of suitable documentation to demonstrate the availability of housing where the alien can be easily traced; c) have previously stated false personal data; d) have failed to fulfill one of the orders issued by the competent authority pursuant to paragraphs 5 (on voluntary departure) and 13 (on re-entry in the national territory), and Art. 14 (on expulsion enforcement); e) have violated one of the measures referred to in paragraph 5.2 (measures linked to voluntary departure).

<sup>36</sup> For in-depth analysis see Mazza 2013.

## 2.2. Police discretion

Simply stated, the illegality of Italian immigration law mainly resides in the discretionary power granted to the police. Police, not the law or the Justice of the Peace, are at the core of the entire removal procedure. First, police regulate pre-removal detention. The law states that police may decide to use pre-removal detention if forced removal is not immediately implementable due to “transitory conditions”<sup>37</sup>. These transitory conditions are not specified, so anything can potentially be a condition for pre-removal detention. Second, police decide who will be held in the detention center, and police decisions are generally confirmed by the ensuing validation; in 2011 only 609 pre-removal detention were not validated out of a total of 773,524 (Savio 2014). In fact, validation procedures have become routine and ineffective since 2005, when the judicial oversight of immigration detention was transferred to the Justices of the Peace (see above). Third, police supervise the entire period of administrative detention in practice. A regular review of the detention takes place every two months,<sup>38</sup> and at that point, police explain why the detention should or should not be prolonged due to the execution of forced removal and ask for judiciary validation. Given the ineffectiveness of Justice of the Peace oversight<sup>39</sup>, their suggestions are usually validated. Notably, the trials that should accompany the scheduled reviews do not even take place in certain cities, because the Justices of the Peace are not paid for them<sup>40</sup>. According to Mazza (2013, 63), the decision not to pay was a political one, an attempt to push judicial control outside administrative detention and to keep it as a separate system of deprivation of liberty, not pertaining to judiciary power (Savio 2011, p.22), but to policing. Administrative detention is contrary to the Italian Constitution. Although the Constitution limits the violation of personal liberty by setting limits of time and methods to both state and police power to detain, the immigration law does not respect any of these<sup>41</sup> thus, in Italian detention centers, “police liberties” (Brossat 2007) continue to grow, escaping judicial control (Campesi 2011, 187).

Police have always played a preeminent role in immigration control in Italy. Early in 1975, Franco Bricola—a well-known Italian jurist—noticed the constitutional legitimacy of the legal norms regulating immigration inside police law had never been questioned, despite the lack of any judicial oversight on police decisions in matters of immigration control. The jurist suggested three possible explanations of this bizarre circumstance: 1) these provisions are at the intersection of two different branches of the law, administrative and penal, and, thus, are overlooked; 2) these provisions are immediately executed, which precludes judicial

<sup>37</sup> Art. 14, par. 1, D.Lgs 40/1998

<sup>38</sup> Recently trials are taking place in the regular review of the detention, due to the Judgement of Cassation no. 4544 of 24 February 2010. Before then, the judge simply signed a form filled in by police, asking for a prolonged detention period.

<sup>39</sup> The immigrants are not allowed to request reviews during their detention.

<sup>40</sup> These trials are not regulated by law but were introduced by a judgment of the Italian court of Cassation (no. 4544 of 24 February 2010)

<sup>41</sup> First, judges do not determine the length of detention: their only decision is whether to validate or not a period of detention of 30 or 60 days. Second, the law does not regulate life within the detention center (i.e., the methods of detention): private governing institution of each detention center do. Furthermore, the living condition in Italian detention centers have been condemned as inhuman and degrading by the European Committee for the Prevention of Torture. For deeper analysis see: Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 25 May 2012 (<http://www.cpt.coe.int/documents/ita/2013-32-inf-eng.htm>).



control; 3) there may be a secret, collective persuasion that immigration is a political issue and its regulation should be entrusted to the executive which can better guess and adapt to changes in political will. The latter is the main reason immigration laws have always left ample room for discretion.

In conclusion, the condition of undocumented immigrants in Italy is probably best described as a permanent state of exception (Agamben 1995). Being an immigrant is already an exception that allows the law to break the law. Immigrants move in a permanent state of exception because they are themselves a permanent exception. As Campesi says, the war on immigration in Italy has been fought as “a kind of low intensity, yet constant, emergency” (Campesi 2011, 225).

### **3. The discourse on the illegal immigrants**

A law that is illegal and does not follow the rules needs the support of a strong discourse to gain public legitimacy. In the last twenty-odd years, public discourse on dangerousness of undocumented immigrants in Italy seems to have given legitimacy to the immigration law. The discourse on immigration in Italy has always considered immigration (especially undocumented immigration) as a threat to citizens’ security, thereby justifying harsh immigration policies and the criminalization of migrants (Melossi 2002, 2007, 2008).

The word “illegal” officially became part of Italian political discourse when the crime of illegal entry and remain in the country was created in 2009. Italy is not the only country where this terminological change has occurred: in recent times, politicians, media, and lawmakers in most European countries have made massive use of the adjective “illegal” when speaking of third-country nationals present irregularly in the territory (Dauvergne 2003). Similarly, most European countries share a tendency to equate immigration with criminality and, thus, to manage immigration flows as “security” issues (Bosworth 2008).

According to Catherine Dauvergne, illegal is a “false liberal legal neutral category” (Dauvergne 2008), with the power to enforce the exclusion by means of law, while covering the racialization underpinning that very exclusion. I see the word illegal as a new label with the power to push a preexisting mechanism of exclusion to an extreme: once undocumented immigrants are turned into illegal immigrants, they are outside the law and its legal guarantees. If exclusion has always been at the core of the immigration discourse in Italy<sup>42</sup>, the new label of illegal has definitely increased state power to exclude by means of “nam[ing] the other not only as an outsider to a particular nation, but as an outsider to any nation. As such, the other is outside the law itself, in a word, illegal” (Dauvergne 2003).

The prevalence of a discourse on dangerousness and concomitant policies of exclusion and criminalization in immigration law in Italy seems mainly due to political convenience. Italian political actors have promoted the criminalization of undocumented immigrants since the huge political crisis of the early 1990s, when almost the entire Italian political class went on trial for corruption<sup>43</sup>. This occurred in the middle of an economic crisis, terrorist attacks perpetrated by the mafia against important judges, and the first wave of immigration to Italy. The trial for corruption exacerbated public disaffection with political parties and undermined government's legitimacy (Cornelli 2008). But Italian politicians used

<sup>42</sup> This was the case when immigrants were racially labeled “vu cumprà” (literally meaning “do you want to buy?”) in the 1990s, and afterwards, when they were labeled “extra-comunitari” and “clandestini”.

<sup>43</sup> The trial titled “Mani pulite” (literally, clean hands) was complicated; it went on for months, causing political crises and public disaffection with political parties.

the discourse on immigrants' dangerousness and criminality as a symbolic resource to foster a feeling of insecurity among citizens, to persuade them something had to be done and the government was essential to citizens' security. In this way, political elites attempted to regain the consensus they had lost (ibidem). In other words, one response to the political crisis was the development of a securitarian ideology against immigration. Such an ideology necessitates an internal enemy, and immigrants—especially undocumented ones—were identified as that enemy. In the 1990s they were regularly represented in the public arena as dangerous criminals and as posing a serious threat to citizens' safety and state security (Dal Lago 1999). Since then, the discourse on undocumented immigrants' dangerousness and austere immigration policies has become common political tools, especially during elections.

It seems that in Italy the discourse on dangerous immigrants did not emerge as an *ex-post* justification of an illegal immigration law. Rather, the reverse seems to be true: the discourse came first, and the law followed. In Italy, the illegal immigration law was issued in response to a public discourse on immigrants' dangerousness, otherness, and, finally, illegality; it was a populist law, totally ineffective in its official aim of removing undocumented immigrants. At the same time, once a law is issued, it necessarily becomes productive of meanings (Mosconi 1986). In Italy, the law creates an image of undocumented immigrants as dangerous and illegal others; this prompts insecure citizens to ask for protection from the threat; this, in turn, enables lawmakers to issue even more severe laws. And so on.

The close interaction of law and common sense is explained by Luigi Ferrajoli: “There is a relation between integration and legal equality as, conversely, there is one between legal inequality and the fact that no-rights people are perceived as unequal and subordinate” (Ferrajoli 2009, 124). As long as undocumented immigrants are granted no rights and considered non-person by the law, they will also be perceived as *anthropologically* unequal and even as a safety threat (ibidem). This engenders a racist perception of undocumented immigrants, which justifies their legal discrimination. The higher the social exclusion produced by legal discrimination, the more extensive the public desire for racist laws.

I propose adding one element to the interaction of law and common sense, as explained by Ferrajoli. Here, I look to Calavita (2005) who proposes if a racist immigration law is the product of racism in society, the reverse is also true: the law produces racism. This is why the symbolic dimension of the law is so important. Otherness finds its place in the common imaginary because the illegal law provokes very material consequences which produce otherness and distance. In Calavita's view, the otherness of undocumented (and even documented) immigrants in Italy is created by three intertwined elements: the law, economic marginality, and racialization. The immigration law brings about the economic marginality of documented/undocumented immigrants, which produces their otherness. Marginality and otherness strengthen racialization processes that, in turn, make the immigrants even more marginal. In effect, the marginality and otherness of immigrants are way produced and reproduced from within (Calavita 2005).

Clearly, the disproportionately repressive response to the criminal offenses committed by immigrants (such responses always accompany the discourse on dangerousness and illegality) has a symbolic dimension. This repressive response is a separate mechanism that “reaffirms collective stereotypes of the immigrants as potential criminals” (Calavita 2005, 144). Even though administrative law affects immigrants' everyday life more than criminal law, the latter is more powerful than the former from a communicative and symbolic point of view (Ferrajoli 2009). Using criminal law has never

been an efficient strategy for managing immigration flows to Italy; however, it has always been useful as a symbolic resource (and a political tool) to reassure the public (Maserà 2009). In my view, political convenience is one of the main reasons why immigrants in Italy are principally “governed through crime” (Simon 2007). The other, of course, is economic.

In conclusion, while immigrants (both documented and undocumented) have always been addressed as other, dangerous, and criminal, more recently, they have become illegal, non-persons by law (see Gunter Jakobs 2005). Referring to undocumented immigrants as *illegal* immigrants is rhetorical trickery used by governments to reinforce their power to exclude (or hierarchically include, as Calavita shows). Law is not made solely of legal norms; it includes both legal norms and symbolic meanings. Saying undocumented immigrants are illegal represents a way to turn immigrants into the enemies within, clearing the way for a punitive immigration law.

#### **4. The non-legality space of police practices**

Saying police practices in undocumented immigration control are illegal is not sufficiently rigorous, as the practices of immigration control are far too complex to be described as either legal or illegal. The majority of the interactions between police and undocumented immigrants do not result in any legal action; therefore, police actions neither break the law nor comply with it<sup>44</sup>. It is more correct to say the policing of undocumented immigrants takes place in a space of non-legality defined by the law. More importantly, undocumented immigrants and police are collocated in this non-legal space.

Since immigration flows to Italy have always been represented as a security issue, immigrants have always been a police concern (Mosconi 2007). The legal status of immigrants in Italy entirely depends on police decisions: police decide who receives a residence permit and police who is expelled. Since I am focusing on the policing of undocumented immigration, I only consider those practices of control that occur once the immigrant has crossed the border and is remaining irregularly in the country. I consider the interaction between undocumented immigrants and police during police patrols, looking specifically at how police officers use their stop and search powers, carry out ID checks for the purpose of immigration control, arrest undocumented immigrants, confine them in detention centers, and expel them.

The results of my research show police constantly make decisions about whether to enforce the law when they encounter an undocumented immigrant<sup>45</sup>. They decide which immigrant to stop for an ID check; when an immigrant is found to be undocumented, police decide whether to take him/her to the police headquarters or turn a blind eye and release him/her; when an expulsion order is issued, police decide whether to execute it through a removal order, forced removal, or administrative detention and then expulsion. Joseph Goldstein (1960) points out that decisions made by police officers while “dealing with the public” are inevitably discretionary as long as they are of “low visibility.” Authorities and supervisors cannot control police decisions made at the street level, “particularly where [the

<sup>44</sup> Even when a police decision results in the trial of an undocumented immigrant, a “restricted relevance of culpability” (Bittner 1969) permeates police decisions. According to Bittner, law always enables police to find a legal justification *ex post* for their practices, to such an extent that police appear to comply with law even when they do not.

<sup>45</sup> Other research, even if it does not focus on police, shows similar use of discretionary power by Italian police in undocumented immigration control (see Mosconi and Padovan 2007, Campesi 2003).

police officers] have decided not to arrest someone” (Goldstein 1960, 10). The police department is different from any other bureaucratic organization in that “discretion increases as one moves down the hierarchy” (Wilson 1968, 7), to such a point that “the rank-and-file officer is the primary determinant of policing where it really counts: on the street” (Reiner 2000, 86).

Enforcement of the Italian immigration law has to be selective, because police cannot carry out ID checks on all undocumented immigrants; moreover, the shortage of beds in Italian detention centers makes it impossible to accommodate all undocumented immigrants present in Italy—not even all those arrested by the police. Thus, the discretionary power of the police in implementing immigration control is decisive for the actual shape of Italian immigration law.

I conducted empirical research in Bologna, in a bid to determine the logic behind the selectivity of the police. I conducted sixteen one-to-one in-depth interviews with immigrants (both documented and undocumented), and eleven with city police officers. Immigrants were asked how often they had been stopped by the police, where, and whether they were undocumented at the time of the ID check. They were also asked to talk about police behavior during the checks. Police officers were asked how often they had checked immigrants, where, and how they make decisions about which immigrants to stop. They were also asked to talk about their decision processes when they encounter an undocumented immigrant<sup>46</sup>.

Based on my research (Author, 2012), it seems pressures coming from the police headquarter, judges, and residents play an important role in police decision-making. Residents generally complain about immigrants occupying public space in their neighborhoods and ask the police to remove them, but police headquarters ask that police officers not arrest undocumented immigrants who have not committed any crimes other than being present irregularly in the territory. Finally, judges may acquit undocumented immigrants whom they do not consider dangerous, thus sending an implicit message to the police not to charge all undocumented immigrants with the crime of illegal entry (ex Art. 10-*bis* TU), only the dangerous ones. Despite these pressures, city police officers are still allowed to subjectively decide when an undocumented immigrant is dangerous. In other words, evaluation of dangerousness leaves room for an enormous amount of discretion in Italian immigration law.

Such judgments by the police are based on five main elements: the immigrant’s nationality; his/her age; the place where the police meet him/her; whether or not he/she complies with police authority; whether or not he/she speaks Italian. Police are aware that it is necessary for them to select among undocumented immigrants. They also know the way they select is likely to be based on their own prejudices, and these derive from their encounters, or clashes, with immigrants. In fact, prejudice is a useful “tool for work” according to one police officer I interviewed. In his view, nationality is an indicator of one’s propensity for crime and, thus, is helpful in police work. For instance, he said, Roma people are usually labeled “car stealers.” Therefore, when he notices a Roma person driving a beautiful car, he stops him/her because of the very high probability of it being a stolen car. Sometimes, of course, it is not; even so, he thinks the fact that sometimes a Roma is driving a stolen car is enough to justify his selectivity process.

Police make discretionary decisions at the very first stage of criminalization, and

<sup>46</sup>The attempt is to build up a sort of collective story about ID checks in Bologna: despite the lack of broadness in the sample, cross-checking shows these stories tend to confirm each other’s veracity.

these decisions are generally in accordance with police rationale and patrolling needs rather than with the rationale of immigration law. The rationale as written in the law is a dichotomy between undocumented immigrants/outside and documented immigrants/inside. By way of contrast, the police dichotomy distinguishes between “functional” and “dysfunctional” undocumented immigrants (Sbraccia 2007). The former find irregular jobs in the black economy. The lack of a residence permit makes them cheap, exploitable workforce, very useful for a struggling Italian economy and its widespread black sector. Police informally allow undocumented immigrants to stay in Italy even without a residence document as long as they are irregular workers and do not cause problems. Police officers frequently stop undocumented immigrants and ask them whether they have jobs, turning a blind eye to an immigrant's illegality if he/she is an irregular worker. The latter, dysfunctional immigrants, are considered either dangerous or just plain annoying by police. These undocumented immigrants work in the Italian illegal economy<sup>47</sup> instead of the irregular one; some cannot speak proper Italian and, thus, are considered not integrated; they may live on the street and create a public nuisance; or they may simply not comply with police authority. In contrast to the “functional” immigrant, this is an undocumented immigrant who is not disciplined.

Undocumented immigrants are invisible to immigration law until police find them: if they are dysfunctional immigrants, police will try to discipline or remove them. Functional immigrants, however, do not pose problems to the police in terms of order maintenance or protection of other residents' safety; therefore, they are likely to be ignored during patrols. Whenever police decide not to expel undocumented immigrants who have irregular jobs, they send a message that undocumented immigrants are allowed to stay as long as they follow the more important rules of the game and enter the informal labor market (Author 2012).

Bittner (1967) explains that, to a certain extent, law is nothing but one resource among many to solve “certain practical issues” police encounter when patrolling. The control of undocumented immigration takes place through the interaction of police and undocumented immigrants in a non-legal space. The actual control mechanism is shaped in this interaction, beyond the reach of the law. During the interaction, the undocumented migrant is not just a victim; immigrants also have a sort of agency because the primary task of police is not to enforce the law but to maintain the order—or to manage the disorder (Palidda, 2000). Police cannot always use repression against undocumented migrants, mainly due to lack of energy, in terms of both money and time. To maintain order, therefore, police negotiate an acceptable *level of illegality* with undocumented immigrants. In this negotiation, the traditional pattern of power/resistance relationships is transformed.

## 5. Conclusions

The history of the illegality of Italian immigration law is inextricably linked to contingent political needs. During the political crisis of the early 1990s, the discourse on the dangerousness of undocumented immigrants was used by the ruling political parties to regain the public legitimacy they had lost. This discourse (which became the discourse on the illegality of undocumented immigrants) resulted in severe immigration laws, producing the marginality and otherness of immigrants. Both law and the public discourse contributed to worsening immigrants' living conditions in Italy (Calavita 2005).

At the same time, Italian immigration law itself can be said to be illegal. The illegality

<sup>47</sup> The illegal economy is mainly represented by drug dealing and selling counterfeit goods on the street.



of the law mainly rests on the large discretionary power of the police and the weak judiciary oversight. Police interact with undocumented immigrants in a non-legal space and negotiate acceptable levels of illegality. As a result, police manage immigration in an almost exclusive way. They make decisions at the street level about whether to enforce the law against undocumented immigrants they encounter when patrolling, according to their own rationales and needs. Police decisions are not in line with the rationale of the law but reflect the actual system of immigration control in Italy.

The illegality of Italian immigration law is undeniable. This article has examined several interconnected levels at which the control of undocumented immigration in Italy can be considered outside the law (although inscribed in it), including the illegality of the law itself, the discourse on illegal immigrants, and the non-legal space of police practices. As the article shows, the first level of illegality (illegal norms within the immigration law) is directly linked to the second (discourse on illegal migrants), with each strengthening the other's power to exclude. The interaction between the first and the third (non-legality of police practices), while undeniable, is more tricky and poses a crucial theoretical and political problem. According to my empirical research, police in Bologna enforce Italian illegal immigration law in a minority of cases. They neither deport all the undocumented immigrants they encounter nor do they take them all to police headquarters; rather, they choose against whom to enforce the law, for instance, deciding not to expel undocumented immigrants with irregular jobs. This may be an issue for critical thinkers. How can we criticize the illegality of the law as long as such illegality is (in part) nullified by police action during control operations? Some may argue that the illegality of the immigration law exists only "on the books", insofar as undocumented immigrants are not subjected to the illegal immigration law when they follow the rules of the game. Clearly, such misinterpretations will result if the sociologist does not look at the bigger picture.

I argue Italian immigration law establishes an impossible legality, whose real effect is an illegality that produces a useful underclass of exploitable irregular workers. Even though undocumented immigrants can negotiate levels of acceptable illegality and be informally authorized to remain in Italy, they are subjected to unfavorable conditions. They are not granted the same rights as citizens and legal immigrants; instead, they are forced to be underpaid and obedient irregular workers in order to stay in the country. The only chance for undocumented immigrants to stay is to negotiate acceptable levels of illegality with police: of course, this may be a disciplinary effect (Author 2012) of police decisions, and part of the mechanisms of control.

The third and final relation in my model, that between non-legal police practices and the discourse on illegal immigrants, is tangled. Such discourses provide public legitimacy to the Italian immigration law and should be a primary target of critical analysis. My analysis of the non-legal space where police practices occur suggests that the discourses have little correspondence with how police enforce the law. Contrary to what the law prescribes, police do not seem to have committed themselves to the fight against undocumented immigration *per se*<sup>48</sup>. Therefore, my question is the following. Can we use the third level of illegality (the space of non-legality) to undermine the discourse on illegal immigrants? This is tricky terrain. Empirical research can be a useful tool to interrupt the loop of illegality embedded in Italian illegal immigration law. The argument that police do not enforce the immigration law in the majority of cases may suggest control is inefficient and migrants remain dangerous. In other

<sup>48</sup> This circumstance confirms much literature suggesting police may be intended as the interpreters of a much broader concept of order (see Neocleous 2000)

words, if we keep this argument unrelated to the bigger context, we run the risk of strengthening the discourses we aim to undermine.

Nullifying the discourses over the illegality of undocumented immigrants is, I think, the ultimate goal of empirical research on the matter, but such analysis cannot succeed if it is not inserted into a much deeper critique in which all levels of illegality of the immigration law, their mutual relationships, and their effects are taken into account. This article represents a first effort to move in that direction.

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