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Interest Representation on Segmented Labor  
Markets: À propos irregular migrants in Sweden

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## THE LAWS OF “ILLEGAL” WORK AND DILEMMAS IN INTEREST REPRESENTATION ON SEGMENTED LABOR MARKETS: À PROPOS IRREGULAR MIGRANTS IN SWEDEN

Niklas Selberg<sup>†</sup>

### I. LABOR MARKET RELATIONS AND IRREGULAR MIGRANT WORKERS: CHALLENGES AND RESPONSES

The presence of undocumented migrant workers, living precariously and performing underpaid labor outside the organizational control and protection of the unions, has severely challenged the representation of Sweden as a generous and tolerant welfare state without inherent tensions and with a stable labor relations' model based on mutual understanding and high union density.<sup>1</sup> The ambivalence and conflicts that have arisen between unions, between labor market parties, and between social movements and the labor market parties, reflect some of the challenges that globalization, new patterns of migration, neoliberalism, and E.U. harmonization have posed in relation to the Swedish social democratic welfare state regime.<sup>2</sup> “The situation of undocumented migrants,” research has shown, “is qualitatively different from those with a regular status and, because status pervades everyday life, the result is insecurity, fear and

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1. Shahram Khosravi, *Territorialiserad mänsklighet: irreguljära migranter och det nakna livet [Territorialized Humanity—Irregular Migrants and Bare Life]*, Statens Offentliga Utredningar [SOU] 2006:37 Om välfärdens gränser och det villkorade medborgarskapet [government report series], at 283 (Swed.); Sharam Khosravi, *An Ethnography of Migrant “Illegality” in Sweden: Included Yet Excluded?*, 6 J. INT'L POL. THEORY 95 (2010).

2. CARL-ULRIK SCHIERUP, PEO HANSEN & STEPHEN CASTLES, *MIGRATION, CITIZENSHIP, AND THE EUROPEAN WELFARE STATE: A EUROPEAN DILEMMA* (2006); Anders Neergaard, *Migration, rasifiering och former för ofritt arbete—den fackliga solidaritetens dilemma [Migration, Racialization, and Forms of Unfree Labor—Dilemmas of Trade Union Solidarity]*, in BORTOM HORIZONTEN: FACKETS VÄGVAL I GLOBALISERINGENS TID [BEYOND THE HORIZON: THE PATH OF TRADE UNIONS IN TIMES OF GLOBALIZATION] 191 (Ingemar Lindberg & Anders Neergaard, eds., 2013) (Swed.).

anxiety.”<sup>3</sup> Foremost, these qualitative differences are played out in working life. Known as one of the most egalitarian and inclusive nations in the world, Sweden has been described by postcolonial scholars as employing a strategy of “inclusive subordination,” in which “racialized groups have been granted citizenship, but have been forced to subordinated positions in the labor market and the welfare state.”<sup>4</sup> Unions have, during the entire twentieth century, played a uniquely important role in the labor market and in the political arena in Sweden, and the strategy of “inclusive subordination” in which migrant workers were granted citizenship but never challenged either the position of white Swedish workers, or the labor relations model as such.<sup>5</sup> Since the 1990s, the Swedish economy has shifted from an industrial mode of production to a “knowledge economy”<sup>6</sup> with an expanding service sector, and the welfare state has experienced a “circumscribed neoliberalism,” which has reduced its levels of inclusion and weakened its redistributive qualities.<sup>7</sup> Shifts in migration policy have coupled the introduction of a strict policy regarding asylum<sup>8</sup> with the adoption of what the OECD calls “an almost entirely demand-driven system” for labor migration that “appears” to be “the most open labour migration system among OECD countries.”<sup>9</sup>

In the wake of these changes, the number of people present and working in Sweden, despite the lack of permits, has increased. It is estimated that between 31,000 and 75,000 so-called undocumented

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3. Alice Bloch, *The Labour Market Experiences and Strategies of Young Undocumented Migrants*, 27 WORK, EMP. & SOC. 272, 284 (2013).

4. Diana Mulinari, *Postcolonial Encounters: Migrant Women and Swedish Midwives*, in CHANGING RELATIONS OF WELFARE: FAMILY, GENDER AND MIGRATION IN BRITAIN AND SCANDINAVIA 155 (Janet Fink & Åsa Lundqvist eds., 2010).

5. DIANA MULINARI & ANDERS NEERGAARD, DEN NYA SVENSKA ARBETARKLASSEN: RASIFIERADE ARBETARENS KAMP INOM FACKET [THE NEW SWEDISH WORKING CLASS: RACIALIZED WORKERS' STRUGGLES WITHIN TRADE UNIONS] (2004) (Swed.); Wuokko Knocke, *Osynliggjorda och "fragmenterade"—invandrade kvinnor i arbetslivet [Rendered Invisible and "Fragmented"—Working Life of Migrant Women]*, in ARBETE: INTERSEKTIONELLA PERSPEKTIV [WORK: INTERNATIONAL PERSPECTIVES] 211 (Paula Mulinari & Rebecca Selberg eds., 2011) (Swed.).

6. Mats Benner, *The Scandinavian Challenge: The Future of Advanced Welfare States in the Knowledge Economy*, 46 ACTA SOC. 132 (2003).

7. DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2007).

8. See REBECCA STERN, NY UTLÄNNINGSLAG UNDER LUPP [A CLOSE LOOK AT THE NEW ALIENS ACT] (2008) (Swed.); Gregor Noll & Aleksandra Popovic, *Flyktingstatus—en marginaliserad resurs i svensk asylrätt? [Refugee Status—A Marginalized Resource in Swedish Asylum Law]*, JURIDISK TIDSKRIFT [LEGAL J.] 834 (2005) (Swed.).

9. OECD, RECRUITING IMMIGRANT WORKERS: SWEDEN 11 (2011), <http://www.regeringen.se/content/1/c6/18/28/67/fd2ab163.pdf>; Government Bill 2007/08:147 Nya regler för arbetskraftsinvandring [government report series] (Swed.); Zeki Yalcin, *Facklig Gränspolitik. Landsorganisationens Invandrings- Och Invandrarpolitik 1946–2009* (2010) (Swed.). This regime puts the worker in a strongly dependent position in relation to the employer. Catharina Calleman, *Arbetskraftsmigration, arbetsgivarmakt och mänskliga rättigheter*, in UTBLICK OCH INBLICK. VÄNBOK TILL CLAES SANDGREN 119, 128 (Tom Madell et al., eds., 2012) (Swed.).

migrants live in Sweden.<sup>10</sup> Despite changes in the labor migration regime, there seems to be a big demand for this particular kind of work. Thus, the Swedish example challenges explanations of this type of labor migration that hold irregular migration as the net outcome of migrants perceiving a high possibility of finding (irregular) work in the destination state combined with the state's migratory policy of denial of demand of low-skilled workers.<sup>11</sup> Illegal migration into the European Union is, quantitatively speaking, a bigger phenomenon than "legal" migration between Member States.<sup>12</sup> The trade union movement assumes that undocumented migrants in Sweden work in hotels and restaurants, shovel snow from inner city roofs, pick berries, pile products in stores, drive taxis, and demolish and clean in construction projects.<sup>13</sup> With new patterns of undocumented work-related migration, unions have been forced to react to new strategies. The interaction between unions and undocumented migrant workers is located within an existing legal framework regulating labor and migration respectively. These frameworks—notably the 2009 E.U. Directive providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals<sup>14</sup>—represent both restraining and enabling factors in relation to undocumented migrant workers.

There is a need for a deepened understanding of the ways in which labor markets function within welfare states in a globalized world, in terms of: relations between workers, documented and undocumented workers,

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10. OECD, INTERNATIONAL, MIGRATION OUTLOOK (2009), <http://www.oecd.org/els/mig/internationalmigrationoutlook2009.htm>; SIEPS Europapolitisk analys, 2010:8 *Papperslös, laglös, rättlös? [Undocumented, Outside the Law, Without Rights?]* (Swed.). Even though research has begun to investigate the precarious situations of undocumented migrants in Sweden, relatively little is known about the group. They are assumed to be persons of all ages and from all over the world. See REBECKA BOHLIN, DE OSYNLIGA: OM EUROPAS FATTIGA ARBETARKLASS [THE INVISIBLE: ON THE POOR WORKING CLASS IN EUROPE] (2012) (Swed.); ANNA GAVANAS, WHO CLEANS THE WELFARE STATE? MIGRATION, INFORMALIZATION, SOCIAL EXCLUSION AND DOMESTIC SERVICES IN STOCKHOLM (2010); HELENA HOLGERSSON, ICKE-MEDBORGARSKAPETS URBANA-GEOGRAFI [THE URBAN GEOGRAPHY OF NONCITIZENSHIP] (2011) (Swed.); ERIKA SIGVARSDOTTER, PRESENTING THE ABSENT: AN ACCOUNT OF UNDOCUMENTEDNESS IN SWEDEN (2012); MAJA SAGER, EVERYDAY CLANDESTINITY: EXPERIENCES ON THE MARGIN OF CITIZENSHIP AND MIGRATION POLICIES (2011); Dan Biswas et al., *Access to Health Care for Undocumented Migrants from a Human Rights Perspective: A Comparative Study of Denmark, Sweden and the Netherlands*, 14 HEALTH & HUM. RTS. 49 (2012); FRONESIS 27, *Migration* (2008), <http://www.eurozine.com/journals/fronesis/issue/2008-06-12.html>.

11. Piyasiri Wickramasekara, *Globalisation, International Labour Migration and the Rights of Migrant Workers*, 29 THIRD WORLD Q. 1247, 1252 (2008).

12. This was noted ten years ago. Berndt K. Keller, *The Employment Chapter of the Amsterdam Treaty: Towards a New European Employment Policy?*, in CHANGING INDUSTRIAL RELATIONS AND MODERNISATION OF LABOUR LAW 217, 233 (Roger Blanpain & Manfred Weiss eds., 2003).

13. Kommunal, Faktaunderlag till Kommunals kongress i Stockholm den 7-11 juni 2010 [Fact Sheet of the Kommunal Congress in Stockholm, June 7-11, 2010], Kommunals medlemmar och den globala utmaningen [Members of Kommunal and Challenges from Globalization] at 143 (2010) (Swed.).

14. Directive 2009/52/EC of the European Parliament and of The Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, 2009 O.J. (L 168).

workers and their organizations, labor and capital, and the state and organized labor and capital.<sup>15</sup> This Article describes the tensions and conflicts that arise within the “regular” labor market model and within and between labor market parties in Sweden when confronted with the presence of and demands from irregular migrant workers. How are these challenges met in terms of discourses and practices of inclusion, exclusion, and organizing?<sup>16</sup> The focus is on the actors’ understanding of the exceptional nature of undocumented migrants’ positions on the labor market and the work performed by this group. This charting of actors’ responses to changes is done against the backdrop of an analysis of the legal standing of undocumented migrant workers in Sweden and the European Union.<sup>17</sup> The purpose of the Article is also to discuss the reconciliation between migration regimes and the regulation of work, with special reference to the labor law position of undocumented migrants. This discussion is fueled with the interpretations and conclusions from the investigation of the labor market actors’ responses. Such a project cannot be undertaken without consideration of the international legal discourse and framework. The state jurisdiction and the setting that actually frame the work performed and the claims put forward are connected to the international legal developments.

The Article is structured as follows. First, the legal framework surrounding irregular migrants and their work is outlined, after which the evolving trade union policy in relation to this group is described. This is followed by a summary of the interplay between state law, trade unions, and migrants. Finally, the Article enters into a discussion on relations between labor law, migration law, and “undocumentedness” on the labor market.

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15. Quite a lot of research exists today on irregular migration. See Alice Bloch & Milena Chimenti, *Irregular Migration in a Globalizing World*, 34 ETHNIC & RACIAL STUD. 1271 (2011). Policy analysis does not often discuss how policies are played out in the Northern parts of the European Union. See Thomas Demmelhuber, *The European Union and Illegal Migration in the Southern Mediterranean: The Trap of Competing Policy Concepts*, 15 INT’L J. HUM. RTS. 813 (2011).

16. Cf. for the U.S. context RUTH MILKMAN, L.A. STORY: IMMIGRANT WORKERS AND THE FUTURE OF THE U.S. LABOR MOVEMENT (2006); WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY (Ruth Milkman, Joshua Bloom & Victor Narro eds., 2010); Martin Bak Jørgensen, *Legitimizing Policies: How Policy Approaches to Irregular Migrants are Formulated and Legitimized in Scandinavia*, 6 NORDIC J. APPLIED ETHICS 46 (2012).

17. Swedish legal academia has begun noticing undocumented migrants. Gregor Noll, *Asylsystemet, migrantnätverket och den informella arbetsmarknaden [The Asylum System, Migrant Network, and The Informal Labor Market]*, in EN GRÄNSLÖS EUROPEISK ARBETSMARKNAD? EUROPAPERSPEKTIV [A EUROPEAN LABOR MARKET WITHOUT BORDERS?] 125 (Sverker Gustavsson, Lars Oxelheim & Nils Wahl eds., 2006) (Swed.); Gregor Noll, *The Asylum System, Migrant Networks and the Informal Labour Market*, in SWEDISH STUDIES IN EUROPEAN LAW 1 (Per Cramér & Thomas Bull eds., 2008); Gregor Noll, *Introduction: The Laws of Undocumented Migration*, 12 EUR. J. MIGRATION & L. 143 (2010) [hereinafter Noll, *Introduction*]; Gregor Noll, *Why Human Rights Fail to Protect Undocumented Migrants*, 12 EUR. J. MIGRATION & L. 241 (2010) [hereinafter Noll, *Why Human Rights Fail to Protect Undocumented Migrants*].

## II. SWEDISH LABOR LAW AND WORK PERFORMED BY UNDOCUMENTED MIGRANTS: TENSIONS AND AMBIGUITIES

Being employed or employing someone in violation of the Swedish Aliens Act constitutes a criminal offence in Sweden.<sup>18</sup> The crime consists of working or hiring someone who should have a permit for working, but lacks such a permit. Both employer and employee are covered.<sup>19</sup> Violations are punished with fines, or in some cases regarding the employer, imprisonment. The crime of “illegal work” can be committed both by intent and by culpa.<sup>20</sup> Thus, the very legal point of entry into the labor market—the contract of employment—raises some legal issues particular to undocumented migrant workers.<sup>21</sup>

What are the private law implications of the fact that an employment contract concluded by an undocumented migrant is in breach of Swedish migration law (i.e., criminal law)? Asking whether this “illegal” contract is valid, and to what extent it is so, has been the traditional way of approaching the legal situation of undocumented migrants on the labor market. This approach utilizes unwritten general principles of contract law under the heading of *pactum turpe*. Such an “immoral” contract does not deserve the recognition and support from the legal system, and no claim can be made before a court of law on the basis of such a contract. Within legal academia the doctrine of *pactum turpe* has been applied to the employment contract of undocumented migrants, prompting the conclusion that “at least a hard core of rights derived from this somewhat peculiar employment contract nevertheless could be subject to recognition by the courts and the legal actors.”<sup>22</sup> Inghammar has argued that it is not “satisfactory” to preclude these contracts from all legal recognition, but claims that “It would, however, not be possible to consider these employment contracts equal to any other, legal, employments and a full ‘legalization’ or legal recognition of these contracts is therefore not at hand.”<sup>23</sup> I argue that it is

18. UTLÄNNINGSLAG (Svensk författningssamling [SFS] 2005:716) (Swed.).

19. *Id.* ch. 20, §§ 5 and 3 respectively.

20. Proposition [Prop.] 2003/04:35, 20 ch. 3 and 5 §§ Människosmuggling och tidsbegränsat uppehållstillstånd för målsägande och vittnen m.m. [government bill], at 48–51 (Swed.); CATARINA CALLEMAN, ETT RIKTIGT ARBETE? OM REGLERINGEN AV HUSHÅLLSTJÄNSTER [A PROPER JOB? ON THE REGULATION OF DOMESTIC WORK] 122 (2007) (Swed.); TORSTEN SETH, SVENSK INTERNATIONELL ARBETSRÄTT [SWEDISH INTERNATIONAL LABOR LAW] 109 (2009) (Swed.).

21. See Elaine Dewhurst, *Is the Irregularity of an Immigrant a Defense for Employers Charged with Employment Related Offences?*, 23 IRISH CRIM. L.J. 38 (2013).

22. Andreas Inghammar, *The Employment Contract Revisited: Undocumented Migrant Workers and the Intersection Between International Standards, Immigration Policy and Employment Law*, 12 EUR. J. MIGRATION & L. 193, 203 (2010).

23. *Id.* at 203–04; Andreas Inghammar, *Rörlighet på bakgården: E.U.-gemensam reglering av papperslösa arbetstagare och deras arbetsgivare [Movement in the Backyard: E.U. Harmonized Law on Undocumented Migrant Workers and Their Employers]*, in ARBETSLÖSHET, MIGRATIONSPOLITIK OCH NATIONALISM: HOT MOT E.U.:S SAMMANHÅLLNING? [UNEMPLOYMENT, MIGRATION POLICY,

not morally questionable for undocumented migrants to work, and would rather suggest that the doctrine of *pactum turpe* should not be invoked to evaluate the legal standing of the position of this group of workers.<sup>24</sup> A corresponding legal doctrine that could be deployed in this situation lacking the connection to notions of the contract being contrary to morale would be the general principles on contracting in breach of public policy or law.<sup>25</sup> Generally speaking these doctrines are quite unclear, both regarding conditions for applicability and the legal consequences.<sup>26</sup> Leaving these questions on legal doctrine unresolved, it has—according to the *travaux préparatoires*—always been possible for Swedish courts to try cases in which undocumented migrants demand back pay for work performed.<sup>27</sup> A more pressing issue is whether or not the recently adopted Sanctions Directive can contribute to a change in the legal understanding of the employment contract between the irregular migrant and his or her counterpart. Does the Directive—as Inghammar suggests—lend support to the position that these contracts of employment should not be deemed *pactum turpe*; that “worker’s rights under the employment contract . . . will be further strengthened under the Directive,” amounting to a “semi-legislation” of the “employment status” of undocumented migrant workers, and to “the acceptance of some rights derived from the employment contract without accepting the continuation of the employment.”<sup>28</sup> The fact that the Sanctions Directive was enacted on the basis of provisions on migration policy in the treaties of the European Union makes it difficult to argue that the Directive should have implications beyond the actual wordings of the particular provisions.<sup>29</sup> Competence given by member states to the European Union to shape a common migration law and policy is a somewhat inadequate basis for it to make changes in general principles of national contract law (e.g., *pactum turpe*),

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AND NATIONALISM: THREATS AGAINST E.U. COHESION?] (Antonina Bakardjieva Engelbrekt, Lars Oxelheim & Tomas Persson eds., 2012) (Swed.).

24. See also Joseph H. Carens, *The Rights of Irregular Migrants*, 22 ETHICS & INT’L AFF. 163, 174 (2008).

25. KURT GRÖNFORS & ROLF DOTEVALL, AVTALSLAGEN: EN KOMMENTAR [LAW ON CONTRACTS: A COMMENTARY] 196 (4th ed. 2010) (Swed.).

26. Gregor Noll & Niklas Selberg, *Remiss: Betänkandet E.U.: direktiv om sanktioner mot arbetsgivare (SOU 2010:63)*, Juridiska fakultetsstyrelsen, Juridiska fakulteten, Lunds universitet, dnr. J 2010/75 [Opinion: The Government Report Series on the E.U. Directive on Sanctions Toward Employers (SOU 2010:63)] (2011) (Swed.).

27. For example, before the harmonization by the Sanctions Directive. Statens Offentliga Utredningar [SOU] 2010:63 E.U.:s direktiv om sanktioner mot arbetsgivare. Betänkande av Sanktionsutredningen [government report series] (Swed.); Proposition [Prop.] 2012/13:125 Genomförande av direktivet om sanktioner mot arbetsgivare [government bill] (Swed.).

28. Inghammar, *supra* note 22, at 203, 211 & n.90; Inghammar, *supra* note 23, at 162.

29. Cf. the explicit regulation of private law implications (“automatically void”) of contracting in breach of E.U. competition law in art. 101.2 of the Treaty of the Functioning of the European Union.

or, for that matter, in human rights related aspects of employment contracts (e.g., freedom of association).<sup>30</sup>

The courts have not decided many cases regarding work performed by undocumented migrants. One case concerns the applicability of employment protection legislation in situations where the employment contract was in breach of migration law.<sup>31</sup> In this case, the Labor Court decided that the Employment Protection Act of 1982 is not applicable to persons not permitted by immigration law to be employed in Sweden.<sup>32</sup> The implication of this ruling is that the just cause standard for termination of employment found in this legislation does not hinder employers from instantly firing workers lacking work permits. In the words of the Labor Court, a work permit is a “primary requisite” for the employment of aliens in Sweden, and, furthermore, employment protection legislation does not affect the criminal responsibility of employers of workers without permits. The criminal law regulation is sufficient argument for applying (or rather not applying) labor law in a particular manner. To the judgment of the case, a highly unusual *obiter dictum* is attached, in which the court seemingly regret the position of the legislator in this matter, and articulate ambivalence to the decision just made:

[T]he protective provisions of the Employment Protection Act and the criminal law of the Immigration Act are in conflict. The court has emphasized that an employer must not observe regulations that will impose criminal responsibility on him. On the other hand, this decision implies that the social protection of an alien, in a situation such as the one at hand, is substantially weakened. The court therefore wishes to draw attention to, from the standpoint of the latter, the less than satisfactory situation that the mentioned conflict of laws may lead to.<sup>33</sup>

Thus, Swedish law entitles undocumented migrants remuneration for their work, but they can be fired, without the protection of the Employment Protection Act.<sup>34</sup> What other labor legislation applies to this group of workers? A Government Inquiry Chair assumes that “at least” laws on health and safety at the workplace, together with legislation on vacation and working time, are applicable to “illegal” workers.<sup>35</sup> This conclusion is

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30. See HUGH COLLINS, *THE EUROPEAN CIVIL CODE: THE WAY FORWARD* (2008); Michele LeVoy & Eve Geddie, *Irregular Migration: Challenges, Limits and Remedies*, 28 *REFUGEE SURV. Q.* 87 (2010).

31. See Elaine Dewhurst, *The Denial of Labour Rights to Irregular Migrants Under Irish Labour Law*, 3 *EUR. LAB. L.J.* 300 (2012).

32. Arbetsdomstolen (AD) [labor court] 1979 no. 90 (Swed.).

33. *Id.*

34. LAGEN OM ANSTÄLLNINGSSKYDD (Svensk författningssamling [SFS] 1982:80) (Swed.).

35. Statens Offentliga Utredningar [SOU] 2010:63 E.U.:s direktiv om sanktioner mot arbetsgivare. Betänkande av Sanktionsutredningen [government report series], at 180–88 (Swed.). Inghammar, *supra* note 22; Inghammar, *supra* note 23. Proposition [Prop.] 2012/13:125 Genomförande av direktivet om sanktioner mot arbetsgivare [government bill] (Swed.) is not explicit on this last point, but because the government agrees that principal labor legislation is applicable, it can be assumed that the government is



deducted from the goals and aims of the laws in question, explicitly leaving the question of the “validity” of the employment contract unresolved. The above-mentioned legislation, and probably more than that, is applicable, without regard to the validity of the employment contract. It is explicitly stated that collective agreements bind undocumented migrant workers, and that these agreements are applicable to these workers.

Another case indicates that Swedish labor law to at least some extent recognizes “illegal” work.<sup>36</sup> Fundamentals of Swedish collective labor law stipulate that employers are, in relation to their counterparts in collective agreements, obliged to apply the standards in the collective agreement to workers not members of the trade union. The trade union is entitled to damages if the employer does not comply in this respect.<sup>37</sup> How is this doctrine to be applied when the work had been performed by workers lacking permits to work in Sweden? Is the trade union entitled to damages for incorrectly regulated work (i.e., not in line with the collective agreement), also when this work is deemed “illegal?” Labor Court replied in the affirmative, thus recognizing the work performed “illegally.”<sup>38</sup>

The regulation of undocumented migrant workers, and the ways in which this law has come into existence, carry some distinct features. The role of the legislator has been to regulate through passivity. No labor legislation applies to undocumented migrant workers according to its explicit language, leaving courts, legal scholars, and Government Inquiry Chairs alike with the task of extrapolating the relevant law from other sources, of which general principles of (contract) law has been put at the forefront. The absence of acts of parliament makes ground for particular venues for legal arguments, and set of sources of law, notably enhancing the relevance of otherwise seldom invoked legal material. The strong emphasis within legal discourse on the employment contract—its questioned “validity”—deviates somewhat from the importance Swedish law usually attaches to this contract.<sup>39</sup>

The question of the legal standing of undocumented migrant workers is not determined solely by contract validity. The question of what this

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of the view (*a fortiori* [*a maiori ad minus*]) that also *collective agreements* are applicable to undocumented migrants.

36. Arbetsdomstolen (AD) [labor court] 1991 no. 49 (Swed.).

37. FOLKE SCHMIDT, LÖNTAGARRÄTT [LABOR LAW] 115 (rev. ed. 1994 by Tore Sigeman with assistance of Ronnie Eklund, Håkan Göransson & Kent Källström) (Swed.).

38. Arbetsdomstolen (AD) (labor court), 1991 no. 49 (Swed.) (the court awarded only a fifth of the requested sum in damages). The Labor Court’s unreported case no A87/10 is another example of legal recognition of “illegal” work. The case started as a dispute over unpaid wages for an undocumented migrant but ended up being about punitive damages for the employer’s refusal to enter into a dialogue with the trade union. The proceedings ended by agreement of the parties, and not by judgment.

39. See Reinhold Fahlbeck, *Past, Present and Future Role of the Employment Contract in Labour Relations in Sweden*, in *THE EMPLOYMENT CONTRACT IN TRANSFORMING LABOUR RELATIONS* 77 (Lammy Betten ed., 1995).

validity implies in a certain situation remains unsolved. The future will tell if this contract can be the legal vessel that makes labor law relevant for undocumented migrants, and if it can form the most important legal basis for these claims. This kind of extensive use of unwritten sources (or, rather, sources outside of legislation) is quite uncommon in Swedish law. Perhaps Sweden's history of a dualist view on international law<sup>40</sup> together with traditions stemming from Scandinavian legal realism have contributed to the relative absence of impetus from international legal discourse to the discussion of the proper regulation of undocumented migrant workers.<sup>41</sup> References to international sources are lacking in this debate. It is nonetheless thought provoking that more aspiration is attached to references to the individual employment contract than to international law.

Academics created the general principles and doctrines of contract law for courts to use when handling individual cases where the law is contradictory. Regarding the issue of undocumented migrant workers the legislator invokes these principles and doctrines when reflecting on this regulatory dilemma. This course of action is both unusual and unnecessary. These doctrines do not aim at aiding the legislator in solving problems, because the legislator, of course, is sovereign to decide what the law is going to be without analyzing the finer points of contracting in breach of criminal law.<sup>42</sup> The legislator has not shouldered this responsibility to the fullest extent, leaving courts in the dark as to the intent of the legislator regarding the balancing of labor law and migration law. One example illustrating this is the Government Bill transposing the E.U. Sanctions Directive into national Swedish law, in which it is stated that "foreigners" (i.e., undocumented migrant workers) have the right of freedom of association and to organize.<sup>43</sup> This is the only input the legislator provides.<sup>44</sup> At the same time the Codetermination Act stipulates that

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40. See Hans-Heinrich Vogel, *Om införlivande av internationella överenskommelser och annan folkrätt med svensk rätt [On the Transposition of International Agreements and other Public International Law into Swedish Law]*, FÖRVALTNINGSRÄTTSLIG TIDSKRIFT [MGMT. LEGAL J.] 343 (1992) (Swed.).

41. See Petra Herzfeld Olsson, *Folkrätten i arbetsrätten [Public International Law in Labor Law]*, in *FOLKRÄTTEN I SVENSK RÄTT [PUBLIC INTERNATIONAL LAW IN SWEDISH LAW]* 193 (Rebecca Stern & Inger Österdahl eds., 2012) (Swed.); Stina Lagergren, *The Influence of ILO Standards on Swedish Law and Practice*, 125 INT'L LAB. REV. 305 (1986).

42. Proposition [Prop.] 2012/13:125 Genomförande av direktivet om sanktioner mot arbetsgivare [government bill] (Swed.); Statens Offentliga Utredningar [SOU] 2010:63 E.U.: direktiv om sanktioner mot arbetsgivare. Betänkande av Sanktionsutredningen [government report series] (Swed.); Inghammar, *supra* note 22; Inghammar, *supra* note 23; see, e.g., Håkan Nial, *Om förvärv i strid med legala förbud [On Acquisitions in Breach of Legal Prohibitions]*, in *TIDSSKRIFT FOR RETTSVIDENSKAP* 1 (1936) (Swed.) for these doctrines and principles.

43. Proposition [Prop.] 2012/13:125, at 24 ("Also a basic right such as freedom of association is valid regardless of the migration law status of the foreigner.").

44. The ILO Freedom of Association Committee interprets the term "worker" in ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organize (1948) as also covering undocumented migrant workers. See Complaint Against the Government of Spain Presented by General

“[w]here infringement of the right of association takes place through the termination of an agreement” the court of law should deem this (the termination) “invalid.”<sup>45</sup> How, then, should a court decide a case in which an employer fired<sup>46</sup> an undocumented migrant, because he or she joined a trade union?<sup>47</sup> If labor law takes precedent, the termination of employment is to be declared invalid and the employee reinstated, in which case, the court upholds the crime constituted by this employment. If criminal law takes precedent, the termination of employment is valid, but the right to association is done away with. The issue here is how the court can weigh, on the one hand, criminal responsibility of the employer (and the employee) and, on the other hand, the freedom of association for the employee. Basic assumptions regarding the coherence of the law are challenged by this hypothetical. Traditional doctrinal analysis and, for example, the search for the will of the legislator do not seem to render a clear answer. Moreover, legal rights must stand in a meaningful relation to enforcement.

The continual ambivalence surrounding the issue of undocumented migrant workers in Sweden is also visible in the implementation of the Sanctions Directive into Swedish legislation. Here, the legislator reflects on how the subject of the national law is to be constructed. At no point are concepts such as worker or employee considered, and the only options deemed available stem from migration law.<sup>48</sup> Ultimately, the legislator decided to follow migration law discourse and settled on the term “alien”/“foreigner.” Thus, today, Swedish *lex lata* stipulates that “an alien who has performed work” under certain conditions has the right to salaries from his or her employer.<sup>49</sup> Parties to such a case or dispute over salaries are, legally speaking, an alien and an employer. The traditional conceptual link between legal terms such as employer-employee and work-salary has thus been disrupted as migration law leaks into labor law discourse. The legal stipulation of the parties—employer versus alien—using half of labor law terminology in naming one party employer, while at the same time denying the other part to be defined as employee, displays the notion of “irregular” migrant workers as semi-workers in the eyes of the law.

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Union of Workers of Spain (UGT), Freedom of Association Case No. 2121, Report No. 327, Vol. LXXXV, 2002, Series B, No. 1.

45. 8 § LAGEN OM MEDBESTÄMMANDE I ARBETSLIVET (Svensk författningssamling [SFS] 1976:580) (Swed.).

46. See ILO Convention No. 158 on Termination of Employment (1982), which is ratified by Sweden. Proposition [Prop.] 1982/83:124 med anledning av beslut som har fattats av internationella arbetskonferensen vid dess sextioåttonde möte [government bill] (Swed.).

47. See ILO Convention No. 87; ILO Convention No. 98 on Right to Organise and Collective Bargaining (1949); ILO Declaration on Fundamental Principles and Rights at Work (1998).

48. Proposition [Prop.] 2012/13:125, at 24–26.

49. 4 § LAGEN OM RÄTT TILL LÖN OCH ANNAN ERSÄTTNING FÖR ARBETE UTFÖRT AV EN UTLÄNNING SOM INTE HAR RÄTT ATT VISTAS I SVERIGE (Svensk författningssamling [SFS] 2013:644) (Swed.).

### III. REGULATING UNDOCUMENTED MIGRANT WORKERS IN EUROPE: BACK PAYMENT E.U.-STYLE

Traditionally, few legislated rules have been applicable specifically to undocumented migrant workers. The enactment of the Sanctions Directive 2009/52/EC thus represents an important development, both regarding the harmonization of the set of actual rules, but also as a broader challenge to traditional assumptions regarding the role of labor law and policy.<sup>50</sup> The core provision of the Sanctions Directive is the prohibition of acquiring work from undocumented migrant workers,<sup>51</sup> and the administrative,<sup>52</sup> and penal sanctions.<sup>53</sup> In the words of Carrera and Guild, the Sanctions Directive “harmonise[s] at European level a nexus between employment, immigration and criminal law.”<sup>54</sup> Radical and novel in the Directive is the E.U.-harmonized legislated possibility of the migrant receiving back pay from his or her counterpart.<sup>55</sup> Even though the Directive’s terminology is that of labor law’s, e.g., employer and “illegal employment,” it has been contested that the subjective scope of the rules corresponds to that of labor law.<sup>56</sup> Should the Sanctions Directive—following its applicability in the world of work—be regarded as part of labor law? Some authors seem to implicitly place the Directive within the realms of labor law<sup>57</sup>; another claiming it has “a clear labour agenda,” and that it partly “stray[s] into the

50. Not much analysis of this legislation is to be found. Notable exceptions are Steve Peers, *Legislative Update: EC Immigration and Asylum Law Attracting and Deterring Labour Migration—The Blue Card and Employer Sanctions Directives*, 11 EUR. J. MIGRATION & L. 387 (2009); Florian Schierle, *Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 Providing for Minimum Standards on Sanctions and Measures Against Employers of Illegally Staying Third-Country Nationals*, in E.U. IMMIGRATION AND ASYLUM LAW: COMMENTARY ON E.U. REGULATIONS AND DIRECTIVES 533 (Kay Hailbronner ed., 2010); see also Niklas Selberg, *Åtgärder mot dem som tillgodogjort sig papperslösas arbete: nya principer i arbetsrättens sanktionssystem, eller ett principiellt nytt sanktionssystem? [Actions Against Those Who Benefit from the Work of Undocumented Migrants: New Principles Regarding Labor Law Sanctions, or a New System Altogether?]*, in NEDSLAG I DEN NYA ARBETSRÄTTEN [ASPECTS OF THE NEW LABOR LAW] 77 (Birgitta Nyström, Örjan Edström, & Jonas Malmberg eds., 2012) (Swed.).

51. Directive 2009/52/EC of the European Parliament and of The Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, 2009 O.J. art. 3 (L 168).

52. *Id.* arts. 5 & 7.

53. *Id.* arts. 9–10.

54. Sergio Carrera & Elspeth Guild, *An E.U. Framework on Sanctions Against Employers of Irregular Immigrants: Some Reflections on the Scope, Features and Added Value*, at 2 (CEPS Policy Brief No. 140, 2007).

55. Directive 2009/52/EC, art. 6.

56. Selberg, *supra* note 50; see also Peers, *supra* note 50.

57. CATHERINE BARNARD, E.U. EMPLOYMENT LAW 187 (4th ed. 2012); ROGER BLANPAIN, EUROPEAN LABOUR LAW 360 (12th ed. 2010); MARK FREEDLAND & NICOLA KOUNTOURIS, THE LEGAL CONSTRUCTION OF PERSONAL WORK RELATIONS 428 (2011); Inghammar, *supra* note 22; Inghammar, *supra* note 23.

domain of labour and social policy.”<sup>58</sup> The view that the Sanctions Directive should be understood as part of labor law is to a certain extent contradicted by the stated goal of the rules: to “fight illegal immigration”—and its means; it therefore “prohibits the employment of illegally staying third country nationals.”<sup>59</sup> Furthermore, the legal basis for the enactment of the Directive was the treaty provision rendering E.U. rules on migration possible, and it was decided upon as part of on migration policy.<sup>60</sup> The *travaux préparatoires* claim that the legislation “is concerned with immigration policy, not with labour or social policy” and that “[i]t does not affect third-country nationals’ rights as workers, such as the rights to join a trade union, to participate in and benefit from collective bargaining and to enjoy working conditions that come up to health and safety standards.”<sup>61</sup> Leaving these statements aside, the Sanctions Directive might be conceptualized as an E.U.-level migration policy instrument, in the form of what must be understood as labor market regulation and labor law-like provisions. The means is borrowed from labor law—protection of workers, and the end is from migration law—fight of “illegal” migration. Back payments are regarded as a legal consequence of infringements of a prohibition.<sup>62</sup> Cost neutrality between hiring “legal” and undocumented migrant workers reduces the incentive to hire the “illegals” before the “legal” workers, ultimately achieving fewer undocumented migrants on Union territory. A new role for labor law (*mutatis mutandis*) and its inherent protective aspirations seems to be emerging, as the Sanctions Directive puts forward protective legislation that aims at counteracting the very group that can make use of the rules. Essentially, the Sanctions Directive is a protective regime—for the “legal” workers, not the “illegals.” Inasmuch as the Sanctions Directive analytically collapses the notions of “protection for” and “attack on,” internal border control—the delocalization of the border<sup>63</sup>—is provided with a new tool. The ambiguities regarding the underpinning logic and of impetus for the “labor law like” provisions of the

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58. Elaine Dewhurst, *The Right of Irregular Immigrants to Outstanding Remuneration Under the E.U. Sanctions Directive: Rethinking Domestic Labour Policy in a Globalised World*, 13 EUR. J. MIGRATION & L. 389, 390, 407 (2011).

59. Directive 2009/52/EC, art. 1.

60. Carrera & Guild, *supra* note 54, at 3 (asking “whether the current legal basis really is the most appropriate one”); *see also* CEPS, *ASSESSING EU POLICY ON IRREGULAR IMMIGRATION UNDER THE STOCKHOLM PROGRAMME* (Sergio Carrera & Massimo Merlino eds., 2010), *available at* <http://www.ceps.be/book/assessing-eu-policy-irregular-immigration-under-stockholm-programme>. Currently, Consolidated Version of the Treaty of the Functioning of the European Union, 2010 O.J. art. 79 (C 83/47).

61. *Proposal for a Directive of the European Parliament and of the Council Providing for Sanctions Against Employers of Illegally Staying Third-Country Nationals*, at 2–4 COM (2007) 249 final (May 16, 2007) [hereinafter *Sanctions Against Employers*].

62. Directive 2009/52/EC, arts. 3 & 6.

63. Bloch & Chimenti, *supra* note 15, at 1274 and accompanying references.

Sanctions Directive—the Directive can perhaps be characterized as doing the right thing, but for the wrong reasons—imply that these rules probably are an inappropriate foundation for the creation of a labor law for undocumented migrant workers. Such a legal project might instead be inspired by conclusions from realignment of labor law and migration law.<sup>64</sup>

The *travaux préparatoires* of the Sanctions Directive furthermore demonstrate the totality of E.U. law and policy regarding undocumented migrant workers; sanctions in accordance with the Sanctions Directive for the employer and a return decision in accordance with the Return Directive 2008/115/EC<sup>65</sup> for the migrant/worker.<sup>66</sup> In each instant, E.U. law aims at deporting the “irregular” migrant, making it conceptually inaccurate to claim that European Union has created a legal category of “illegal migrant worker,” that holds rights toward a correspondingly obliged employer.<sup>67</sup> The subject of the Directive is addressed in the capacity of migrant, not as worker. Enforcement of back payment regulation is a dilemma because it requires appearing before court and dealing with authorities. This may in turn lead to apprehension and deportation.

The Sanctions Directive presents Swedish legislation with a new principle: joint and several liability in subcontracting.<sup>68</sup> Up until now, the law has not allowed for a legal entity to be responsible for the actions of its business partners the way is envisaged in a subcontractor liability scheme. Trade unions in Sweden have long wanted such a scheme, and now the principle enters Swedish legislation not as part of traditional worker protection, but as a sanction within the migration law context. The distribution of liabilities within subcontracting chains and the obligations on employers to investigate the migration law status of persons looking for work amounts to a form of privatization of the control of foreigners on Swedish soil. Part of the responsibility to control migrants is placed on employers, who are assigned with the task of examining documents indicating whether employment would be legal.<sup>69</sup> The idea is that through this measure, no person lacking documents would be hired.

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64. This is the theme of the concluding remarks of this Article.

65. See, e.g., Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008 O.J. art. 6.1 (L 348) (return decisions *shall* be issued to illegally staying third-country nationals on the territory of a member state).

66. *Sanctions Against Employers*, *supra* note 61, at 2; see Markus Gunneflo & Niklas Selberg, *Discourse or Merely Noise? Regarding the Disagreement on Undocumented Migrants*, 12 EUR. J. MIGRATION & L. 173 (2010).

67. See Inghammar, *supra* note 22; Inghammar, *supra* note 23.

68. Directive 2009/52/EC of the European Parliament and of The Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, 2009 O.J. art. 8 (L 168).

69. *Id.* art. 4; see Tesseltje de Lange, *The Privatization of Control over Labour Migration in the Netherlands: In Whose Interest?*, 13 EUR. J. MIGRATION & L. 185 (2011).

The Sanctions Directive implies a new and hitherto unknown role for the state (i.e., courts) and for the collective agreement on the Swedish labor market. Back pay to the migrant worker is to be calculated on the basis of what a “comparable” “legal” worker would have been entitled to.<sup>70</sup> Within the Swedish context, this inevitably implies some type of comparison with a collective agreement, in effect creating a mechanism for extension of the collective agreement.<sup>71</sup> The “regular” labor law does not contain such a mechanism for extending collective agreements.<sup>72</sup> A key element of the Swedish labor relations’ model is not applicable to the undocumented workforce. Collective agreements have effect *erga omnes*, when it comes to irregular migrant workers. This implies, perhaps paradoxically, that, following the Sanctions Directive, the terms of employment of undocumented migrant workers in Sweden are, from a strictly legal point of view, more forcefully collectivized than those of “legal” workers.

The practical relevance of the Directive is disputed, as some commentators consider the key provisions both too narrowly drawn and too complex. They are likely to rarely be applied in praxis, according to this view.<sup>73</sup> In any event, one can argue that the Directive to some extent regulate the labor market standing of undocumented migrants. Moving from the analysis of the developing legal discourse, the Article next addresses the broader context of practices and responses in relation to the increasing and indeed increasingly noted presence of undocumented migrant workers on the Swedish labor market.

#### IV. UNDOCUMENTED MIGRANT WORKERS: EVOLVING CONCEPTUALIZATIONS AND LABOR MARKET ACTORS’ POLICIES

The presence of undocumented migrants on the Swedish labor market has brought tensions, conflicts, and changes to the pre-existing “model” for labor relations, affecting future developments and conditions of the neocorporatist tripartite cooperation and “mutual understanding” of the model and its main actors. The ways in which dominant trade unions understand and represent its position, its responsibilities, and its means are in a process of reformulation. The development of new forms for trade union activism is bringing change to the organizational landscape of the

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70. Directive 2009/52/EC, art. 2.j.

71. Proposition [Prop.] 2012/13:125 Genomförande av direktivet om sanktioner mot arbetsgivare [government bill], at 120–21 (Swed.); Selberg, *supra* note 56.

72. A similar result is obtained in other ways. REINHOLD FAHLBECK & JOHAN MULDER, LABOUR AND EMPLOYMENT LAW IN SWEDEN 34–35 (2009); SCHMIDT, *supra* note 37.

73. CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS 547 (3rd ed. 2010); *see also* Peers, *supra* note 56; Selberg, *supra* note 56.

Swedish model. Globalization and new patterns of migration challenge traditional roles of unions and union activists, who find themselves maneuvering complex spaces of interest representation, notions of belonging, inclusion, exclusion, and responsibilities. The presence of undocumented migrant workers have forced unions to take on new positions, to vary the range of union strategies, and to renegotiate some of the relationships within the labor movement, but also with the state and other national institutions. This part of the Article is based on trade union documents, e.g., from congresses representing processes within the movement.

A. *From the Policing of “Illegal Aliens” to Partial Inclusion*

Trade unions within the Swedish trade union confederation, LO, function in symbiosis with both the state and employers. The role of public authorities in the everyday world of labor relations is restricted by the Swedish model, in which labor market parties govern through collective agreements.<sup>74</sup> The interaction and dealings between employers and trade unions have been to a great extent carried out at the level of the locals, i.e., the plant level trade union organization. The formation of labor law strengthened the unions and their position in bargaining processes, so much so that the trade unions’ locals were said to “partake in virtually every aspect of workplace operations.”<sup>75</sup> This fundamental organizational aspect of the Swedish model, that has worked to structure the power relations of workplaces within private and public sector alike, is now beginning to change as union density declines.<sup>76</sup> The relatively small number of undocumented migrants in Sweden, compared to the rest of Europe, has been explained by the strong and active trade unions.

Considering the presence, control, and power of the unions, at the end of the twentieth century, employers recognized that if they knowingly hired an undocumented migrant, the trade union would notice.<sup>77</sup> Trade union involvement seems to lead to more “thorough” control of undocumented

74. NIKLAS BRUUN, *THE NORDIC LABOUR RELATIONS MODEL: LABOUR LAW AND TRADE UNIONS IN THE NORDIC COUNTRIES—TODAY AND TOMORROW* (1992).

75. REINHOLD FAHLBECK, *NOTHING SUCCEEDS LIKE SUCCESS: TRADE UNIONISM IN SWEDEN* 8, 56, 46 (1999).

76. Anders Kjellberg, *The Decline in Swedish Union Density Since 2007*, 1 *NORDIC J. WORKING LIFE STUD.* 67 (2011).

77. Denis Frank, *De oauktoriserade migranterna i svensk byggnadssektor—en studie i deportationspolitik 1990–2004 [Unauthorized Migrants in the Swedish Construction Sector - A Study in the Politics of Deportation 1990–2004]*, 46 *SOCIOLOGISK FORSKNING [SOC. RES.]* 26, 32 (2009). In states where unions do not play this particular role, (police) policy have favored targeting public places, squares, metro stations, etc., for immigration raids as a deterrent. Anna Triandafyllidou & Maurizio Ambrosini, *Irregular Migration Control in Italy and Greece: Strong Fencing and Weak Gate-Keeping Serving the Labour Market*, 13 *EUR. J. MIGRATION & L.* 251 (2011).



migrants and a less prominent shadow economy.<sup>78</sup> However, undocumented migrant workers have been present for a long time in the construction industry. From 1990 and onwards, the construction workers' union has been visiting work sites and reporting to the police suspected violations of the law regarding work permits, in effect taking part of the state's internal control of foreigners.<sup>79</sup> Research has traced the dealings between the police and the unions, and unveiled the methods employed to identify undocumented migrants at Swedish work sites during the last decades: the police encouraged the trade union to actively take part in the internal control of foreigners, and after being tipped off, the trade union officials visited work sites and communicated with the work force. If the officials still suspected violations of immigration law, they contacted the police, which would arrive and stay with the trade unionists at the site. On some occasions the trade union officials assisted the police in their work.<sup>80</sup> The police authorities would also include officials of the construction workers' union in the planning and execution of raids of work sites.<sup>81</sup>

An official from the LO union has described the alerting of authorities upon encountering undocumented migrant workers as a "side effect of the activities of the trade unions" and claimed that the reasons for this action were that the trade union "lacked tools to help the undocumented migrant workers."<sup>82</sup> At the same time, LO officials held the view that the workers were the ones being exploited.<sup>83</sup> While particular unions within LO employed police/authority strategies to control undocumented migrants, the rhetoric of the trade union confederation itself has been different. LO officials stated in 2005 that they favored action against the demand-side of unauthorized work, rather than against the workers themselves. Unions should "never take on the role of the police; it is not our task to hunt

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78. Trade union involvement in this respect has been understood as part of "the Scandinavian tradition." Bruno Caruso, *Immigration Policies in Southern Europe: More State, Less Market?*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* 299, 303, 312 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., 2004) [hereinafter *LABOUR LAW IN AN ERA OF GLOBALIZATION*]; Godfried Engbersen & Dennis Broeders, *The State Versus the Alien: Immigration Control and Strategies of Irregular Immigrants*, 32 *W. EUR. POL.* 867 (2009).

79. SOPHIE HYDÉN & ANNA LUNDBERG, *INRE UTLÄNNINGSKONTROLL I POLISARBETE – MELLAN RÄTTSTATSIDEAL OCH EFFEKTIVITET I SCHENGENS SVERIGE [INTERNAL CONTROL OF FOREIGNERS AS AN ASPECT OF POLICE WORK—BETWEEN RULE OF LAW AND EFFICIENCY IN SCHENGEN SWEDEN]* (2004) (Swed.); Frank, *supra* note 77, at 37.

80. Frank, *supra* note 77, at 43.

81. STINA BLOMGREN, *SVART NOTIS [BLACK NOTE]* 165 (2008) (Swed.); KRISTINA MATTSSON, *DE PAPPERSLÖSA OCH DE ANINGSLÖSA [THE UNDOCUMENTED AND THE UNSUSPECTING]* 125 (2008) (Swed.).

82. Thord Pettersson & Johan Lindholm quoted in K. Lindquist, *Praxis inom LO att ange papperslösa [Practice Within LO to Inform on Undocumented Migrants]* (Arbetaren, Oct. 1, 2008) (Swed.) [hereinafter Lindquist, *Practice Within LO*].

83. *Id.* Similar in Landsorganisationen i Sverige, *Fackliga verktyg för migranter: En förbunds-gemensam rapport från LO [Trade Union Tools for Migrants: A Confederation Report from LO]*, at 5, 8, 20 (May 2008).

criminal employers engaged in serious white collar crime.”<sup>84</sup> The undocumented migrants were described as a part of the workforce: “[w]e support each other knowing that this will make us all stronger . . . it does not matter whether it is legal or illegal workforces being exploited.”<sup>85</sup>

In 2008, trade union officials stated that they would no longer alert the police upon encountering undocumented migrant workers.<sup>86</sup> However, around the same time, another official from an LO union said that “[w]hen we suspect a white collar crime being committed, we call the police and tax authorities” regardless of the status of the workers at the site.<sup>87</sup> Whether or not it has been the policy and practice of LO unions to search for and report undocumented migrants is in dispute.<sup>88</sup> The discourse on the presence of undocumented migrant workers was beginning to change at the very end of the century. Union activists called on notions of worker solidarity by pointing out the precarious and extremely tough conditions under which undocumented migrants were working.<sup>89</sup>

The confederation of white-collar trade unions, TCO, was one of the first labor organizations to decide on policy, and set its goal at “changing the power balance between the undocumented migrant workers and their employers.”<sup>90</sup> The focus was on labor market rights, not on migration policy, e.g., regularization. TCO highlighted the encounter between labor law and migration law and proposed a separation between the two systems; arguing that “migrant status” and “status of employee” needed to be distinguished:

Labor law status must be determined separately, without reference to whether a person has a work permit or not. The one lacking work permit shall be viewed as an employee and be covered by labor law . . . . There should be a clear distinction made between migration policy and efforts to enhance working conditions for workers without permits.<sup>91</sup>

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84. E. Olauson & L. Håkansson, *De som lockas jobba illegalt bör få rätt till skadestånd [Those who are lured to work illegal should be awarded damages]*, DAGENS NYHETER [LATEST NEWS], May 7, 1930 (Swed.).

85. *Id.*

86. BLOMGREN, *supra* note 81, at 174–175.

87. Thord Petterson quoted in Lindquist, *Practice Within LO*, *supra* note 82.

88. BLOMGREN, *supra* note 81, at 174. It is of course possible that local representatives of LO-unions continued a practice LO had decided to do away with.

89. ANNA HOLMGREN, PROJEKT RITA: RÄTTVIS INGÅNG TILL ARBETE—ETT PROJEKT I FASTIGHETSANSTÄLLDAS FÖRBUND MED STÖD FRÅN NÄRINGSDEPARTEMENTTET OCH EUROPEISKA FLYKTINGFONDEN [PROJECT RITA: FAIR ENTRY TO WORK—A PROJECT WITHIN FASTIGHETSANSTÄLLDAS FÖRBUND WITH SUPPORT FROM THE MINISTRY OF ENTERPRISE, ENERGY AND COMMUNICATIONS TOGETHER WITH THE EUROPEAN FUND FOR REFUGEES] (Swed.).

90. TCO, *Papperslösa arbetstagare ur ett arbetsrättsligt perspektiv. TCO:s policy angående papperslösa arbetstagare, antagen av TCO:s styrelse [TCO, Undocumented Migrant Workers From a Labor Law Perspective: TCO Policy on Undocumented Migrant Workers, Adopted by the Board of TCO] (2007)* (Swed.).

91. *Id.*

These statements reflect a principled approach to the task of labor unions, based on a notion of a “division of roles” between agents within the labor market and the welfare state: the task of the trade unions, TCO asserts, “is to protect the interests of workers, not to play the part of immigration authorities.”<sup>92</sup> TCO further claims that trade unions could, “in principle,” organize workers lacking permits. They attempted to counter the notion, prevalent among unionists, of “free riders” in claiming that because of their “special situation,” irregular migrant workers should be afforded help even though they were not members.<sup>93</sup>

In 2007, the European Trade Union Confederation (ETUC) presented—under the headline “All human Beings Have Human Rights”—its policy regarding undocumented migrant workers:

[A]ll individuals residing on the European Union territory, regardless of their legal status, are human beings and as such are the subjects of fundamental human rights. . . . The lack of recognition and implementation of these rights contributes to the level of exploitation of undocumented migrant workers.<sup>94</sup>

ETUC also brought attention to the interplay between migration law and labor law, and requested, as Swedish TCO had done, that they be separated, reaffirming “the uniqueness of labour law.”<sup>95</sup> Furthermore, ETUC stated that “[l]abour law exists to protect the worker in an unequal position of power, which is especially the case for undocumented workers.”<sup>96</sup> On the critical issue of allowing undocumented migrant workers union membership or not, ETUC stated that “relevant step on the path to combat exploitation” was the “[g]ranting of specific dedicated services based on membership of trade unions.”<sup>97</sup> In 2007, ETUC decided to organize undocumented migrants, promote their freedom of association, and to develop “policies and strategies to organize migrant workers, defend and promote their trade union rights and other human rights (whatever their legal status).”<sup>98</sup>

During the 2008 LO congress in Sweden, undocumented migrant workers were at the center of attention.<sup>99</sup> The Chairman demanded harsher

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92. *Id.*

93. *Id.*

94. ETUC, SOLIDAR, PLATFORM FOR INTERNATIONAL COOPERATION ON UNDOCUMENTED MIGRANTS (Apr. 26, 2007), available at [http://picum.org/picum.org/uploads/file\\_joint\\_comments\\_ETUC\\_PICUM\\_SOLIDAR\\_2604507\\_EN\\_final.pdf](http://picum.org/picum.org/uploads/file_joint_comments_ETUC_PICUM_SOLIDAR_2604507_EN_final.pdf).

95. *Id.* at 3.

96. *Id.*

97. *Id.* at 7.

98. ETUC, STRATEGY AND ACTION PLAN 2007–2011, at 40 (2000).

99. The issue was described by LO-officials as “perhaps the most difficult issue the congress has to decide upon.” Erland Olauson quoted in E. Larsson, *Papperslösa får plats i Fastighets [Undocumented Migrants Accepted as Members of Fastighets]*, LO-TIDNINGEN [LO NEWSPAPER], Dec. 17, 2008 (Swed.). In her address to the ETUC-congress in 2007, the chairperson of Swedish LO, stated that

punishments for employers and decriminalization of the work of undocumented migrants, stating that these people should be afforded the “same human rights in the working life as everybody else.” She also introduced the formation of a trade union center for undocumented migrant workers, claiming that these actions were all that was possible without more profound legal changes.<sup>100</sup> The congress decided to create the center, but dismissed a petition suggesting that LO should pursue amnesty for irregular migrants. The other petition regarding undocumented migrant workers suggested that profit-seeking employers was the core issue, and that making profits from work of undocumented migrants was “unworthy a civilized society.” The petition suggested that LO should take measures to organize these workers, claiming that no one but the trade union movement itself, together with undocumented migrants, can decide if and how to organize and represent these groups. LO should, according to the petitioners, develop “forms for organizing undocumented migrant workers and claim their labor market rights.”<sup>101</sup> In the debate, advocates claimed it was “absurd to have to fight for the basic idea of organizing people”; besides, delegates asserted, “it is a human right to become a member of a trade union regardless of citizenship.”<sup>102</sup> The congress responded by declaring that LO already was in the process of finding ways to organize undocumented migrant workers and to protect their rights. In the end, LO did not take a stance on the issue, and it was, in effect, left to each of the unions forming the LO to decide whether or not to organize undocumented migrants.<sup>103</sup> Delegates, nonetheless, argued that unions should refrain from taking on the role of the police and expressed sharp criticism of the LO board for its weak position in supporting undocumented migrant workers.<sup>104</sup> The activists behind the petition to organize congratulated the syndicalist union SAC, pointing to the fact that LO sent a signal that undocumented migrant workers should instead approach SAC to be able to enjoy union protection and membership.<sup>105</sup>

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“[w]e want to find forms for supporting and maybe organizing these people.” HOLMGREN, *supra* note 89, at 12.

100. Landsorganisationen i Sverige. LOs 26:e kongress 2008. Kongressprotokoll Del 1, at 11.

101. The board of LO opposed regularization as a matter of principle, because this would lead to more “irregular” migration and the institutionalization of this “problem.” Landsorganisationen i Sverige [The Swedish Trade Union Confederation], LOs 26:e kongress 2008 [The 26th Congress of LO 2008], Kongressprotokoll Del 2 [Minutes of the Congress, Part 1], at 535–36, 542–43, 539 (Swed.).

102. Sten-Erik Johansson quoted in K. Lindquist, *LO-nej till papperslösa [LO Says No to Undocumented Migrants]*, Arbetaren (June 4, 2008) (Swed.).

103. The petitions to act for harder punishment of employers and the decriminalization of the work performed by undocumented migrants were affirmed by the congress. In her closing address to the congress, the Chairman noted the divide on the issue of membership, but called the decisions made “important.” Landsorganisationen i Sverige, LOs 26:e kongress 2008, 537, 543, 646.

104. Johansson, *supra* note 102.

105. *Id.*

The arguments against organizing undocumented migrant workers stemmed from the notion that membership would be of little value to these workers. Undocumented workers could not, LO officials argued, receive the same support and benefits granted other members because the minute those benefits—e.g., insurance—were claimed, the migrant would likely be known to the authorities and risk deportation.<sup>106</sup> Union leadership has also argued that undocumented migrant workers are likely to accept work for wages below collective agreement levels. The proposal to decriminalize working without a permit has been supported with use of an explicit analogy to Swedish law on prostitution; it is the “client, not the one being exploited” that should be punished.<sup>107</sup>

LO is one of the world’s most successful union organizations, but its role in the corporatist Social democratic welfare state regime has complicated its position on the labor market and expanded its responsibilities beyond that of representing workers. In a model based on “mutual understandings” and corporatist agreements, the union can no longer rely on a simple conception of its responsibilities, aims, means, and projective. The ambivalence toward the presence of undocumented migrant workers is an outcome of this complex role reconfiguration: if the responsibility is not only to members and workers, but also to the Swedish model—and to the Social Democratic Party and its welfare state project—then legal frameworks and policies on other areas must also be protected.

Blurring between different legal fields, institutions and functions, occurs at all levels. Cooperation between the union and the police is, in this sense, an effect of choices on behalf of unionists to practice their sense of extended responsibility toward the state and the Swedish model. LO’s original position, that irregular migrant workers were an issue for police and migration authorities and not workers deserving protection by or membership in unions, was challenged internally by activists and by member unions. At the core of the conflict—which was partly dissolved by the creation of the *Trade Union Centre for Irregular Migrant Workers*—was the question of how to characterize irregular migrant workers: should they be given status as workers or as irregular—“illegal”—migrants?<sup>108</sup>

### B. Organizing and Suggesting Legalization

Two years after the 2008 LO congress, *The Swedish Building Maintenance Workers’ Union (Fastighets)* decided to start organizing

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106. Wanja Lundby-Wedin, *Problemet är inte de papperslösa! [The Problem Is Not the Undocumented Migrants!]* (Apr. 21, 2008), [www.lo.se](http://www.lo.se) (Swed.).

107. Landsorganisationen i Sverige. LOs 26:e kongress 2008. Kongressprotokoll Del 1.

108. See Gunneflo & Selberg, *supra* note 66.

undocumented migrants and represent them in negotiations regarding salaries and working conditions.<sup>109</sup> Before 2008, *Fastighets* took action on behalf of undocumented migrant workers, and expressed optimism about the possibilities of organizing and representing them: “we will act as if they were members.”<sup>110</sup> The 2009 congress of *Swedish Food Workers’ Union* decided to allow undocumented migrants into the ranks of the union. This decision was made in explicit contrast to the position of the board, which had stated that “[t]he union cannot accept illegal work, and work being performed for less than the salary laid down in collective agreements.” Nonetheless, the congress decided to offer membership to undocumented migrant workers.<sup>111</sup> The *Hotel and Restaurant Workers’ Union (HRF)*, decided against the will of its board on the 2011 congress, and allowed membership to undocumented migrants. The board opposed with reference to the Centre and added: “Membership presupposes employment . . . . Even though the undocumented migrants work, they are not, legally speaking, employees.”<sup>112</sup> One of the petitioners later claimed that it was important to her that the labor movement returned to its core values, and that it was not for the union to regulate who should be present on the Swedish labor market. Instead the union’s task is to protect the collective agreements.<sup>113</sup> *The Swedish Municipal Workers’ Union (Kommunal)* decided at its 2009 congress to delegate the decision to organize undocumented workers to the regional level.<sup>114</sup> At the 2013 congress of *Kommunal*, a petition suggested that the organization should grant undocumented migrants membership. The board stated that all persons employed within the union’s sphere of interest have right to membership, and that this applies to undocumented migrants as well. Thus there was no need to explicitly decide that these

109. Fastighetsanställdas förbund, Kongressprotokoll [The Swedish Building Workers’ Union, Minutes of the Congress] at 10, 24 (2010) (Swed.); Hans Öhlund quoted in E. Larsson, *Papperslösa får plats i Fastighets [Undocumented Migrants Accepted As Members of Fastighets]*, LO-tidningen [Press Release], Dec. 17, 2008 (Swed.).

110. Anders Bergsten quoted in J. Karlsson, *LO-förbund ger hjälp åt papperslösa [LO Union Aids Undocumented Migrants]* (Arbetaren, Feb. 20, 2008) (Swed.). *Fastighets* has worked extensively with the issue of undocumented migrant workers. HOLMGREN, *supra* note 89.

111. Livsmedelsarbetareförbundets kongress [The Swedish Food Workers’ Union, Minutes of the Congress], May 30–June 3, 2009, Protokoll, at 245–48 (Swed.).

112. Hotell och restaurangfackets kongress [The Hotel and Restaurant Workers’ Union Congress] (Nov. 18–21, 2011), Kongressprotokoll [Minutes] (Swed.).

113. A. Hellquist, *En minut med Katja Ojanne, styrelseledamot i Hotell—och restaurangfacket, som lade den antagna motionen om papperslösas medlemskap på HRF:s kongress [A Minute with Katja Ojanne, Member of the Board of the Hotel and Restaurant Workers’ Union Who Petitioned for Membership for Undocumented Migrant Workers]*, at 4 (Arbetaren no. 74/2011) (Swed.).

114. Sofia Berglund, *Facket och de papperslösa [The Union and the Undocumented]*, Kommunalnytt [Press Release] no. 11/2008 at 7 (Swed.); Erik Hjärtberg, *Fritt fram för papperslösa medlemmar i avdelningarna [Undocumented Members Allowed in Union Section]*, Kommunalarbetaren [Press Release] (Feb. 2, 2009) (Swed.).

migrant workers were allowed to join; they already possessed that option in their capacity of workers.<sup>115</sup>

A shift in perspective is clear. A line of argument that not so long ago ended in the conclusion that the issue of undocumented migrant workers was a matter for police and immigration authorities, now ends in favor of organizing this group of workers. The decisions to organize and include were all based on reconfigured concepts of worker/employee, which was again based on equality; any person working could become member. Not all unions have followed this development: 2010 *The Swedish Construction Workers' Union* congress rejected a petition that stated that no person is “illegal” and that everyone working should benefit from the protection of the collective agreement, and if the law could not provide this, the law, and not the individual, is at fault.<sup>116</sup>

The penalization of working in breach of migration law—i.e., without a required permit—is gaining political opposition. The Green Party, the Left Party, and strands of the Social Democrats have suggested decriminalization, but so far the legislator has not done away with these provisions.<sup>117</sup> Trade unions have decided to oppose the criminalization of working while undocumented. Both LO and TCO argue that decriminalization is the only way to change the structure of economic incentives regarding employing undocumented migrants. The trade unions claim to be free to organize undocumented migrants, but representing them is difficult because of the absence of employment protection. Strengthening the standing of the migrant is important, according to this new stance, because “today, both the undocumented migrant worker and the employer are in breach of the law and commit a crime against the state,” and “[i]n a legal process it is very hard to claim that one criminal should pay damages to another criminal.”<sup>118</sup>

The employers, organized through the *Confederation of Swedish Enterprises*, argue that trade unions exaggerate the severity of the situation

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115. Kommunal, Förslag till Kommunals kongress i Stockholm [The Swedish Municipal Workers' Union, Suggestions from the Board to the Congress in Stockholm] (May 28–31, 2013), Motioner och utlåtanden [Petitions and Board Responses], at 24–25 (Swed.).

116. Byggnadsarbetareförbundet Kongress [The Swedish Construction Workers' Union, Congress] 2010, Motioner och utlåtanden [Minutes of the Trade Union Congress], at 122–23 (Swed.).

117. *E.g.*, Socialförsäkringsutskottets betänkande 2009/10:14 [parliamentary committee report] (Swed.); Motion 2010/11:Sf394 av Maria Ferm m.fl. (MP) (Swed.); Motion 2009/10:Sf319 av Kalle Larsson m.fl. (V) (Swed.); Motion 2009/10:Sf274 av Luciano Astudillo (S) (Swed.).

118. LO, Dnr 20100458, LOs remissvar SOU 2010:63, E.U.s direktiv om sanktioner mot arbetsgivare (Dec. 15, 2010) (Swed.); TCO, Dnr 10-0081, Yttrande E.U.s direktiv om sanktioner mot arbetsgivare—Betänkande av Sanktionsutredningen (SOU 2010:63) (Dec. 20, 2010) (Swed.). *The Swedish Association of Graduate Engineers* states that it will not be part of inspections and searches for undocumented migrants on the labor market, deeming it a government issue. Sveriges Ingenjörer, Dnr. Rnr 61.10, Yttrande E.U.s direktiv om sanktioner mot arbetsgivare (SOU 2010:63) (Dec. 14, 2010) (Swed.).

of undocumented migrants.<sup>119</sup> According to the employers, the basic problem for these migrants is their lack of permit of residence and work. The argument here is that the trade unions—once partly responsible for creating regulations for migration into Sweden—are themselves responsible for the sufferings of undocumented migrants. It is argued that the best course of action for trade unions is to expand the possibilities for legal migration.<sup>120</sup> *The Federation of Swedish Farmers* has suggested, without gaining much support, decriminalizing of unauthorized work and extending these workers the same rights held by other workers.<sup>121</sup> *The Swedish Federation of Business Owners* notes that tax evasion is a prerequisite for employing undocumented migrant workers, and views this crime as the bigger problem. If tax evasion and illegal competition were countered, there could be no hiring of irregular migrants, and furthermore, “disloyal competition and crime is really . . . worse than hiring third country nationals.”<sup>122</sup> *The Federation of Swedish Farmers* and the employer organization for agriculture and lumber state that they are opposed the governments’ attempts to referring the “problem” with “illegals” to the employer party.<sup>123</sup>

Within the trade union movement the decisions to oppose criminalization of unauthorized work and to support the Trade Union Center, seem to not have fully solved the question of how to approach undocumented migrants. The issue was again brought up at the 2012 LO congress, where the board received the delegates’ support in stating that exploitation of undocumented migrant workers should be seen as the effect of the “absence of access” to welfare and social services. The present legal situation, LO argued, does not only bring migrants pain and suffering, but also brings social costs to the “collective of workers.” The congress formulated that it would be “in the best interest of the collective of workers

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119. Muazzam Choudhury & Stefan Holm, *LO ger en falsk bild [LO Provides a False Face]* (Nov. 26, 2011), [http://www.svensktnaringsliv.se/kommentaren/lo-ger-en-falsk-bild\\_145523.html](http://www.svensktnaringsliv.se/kommentaren/lo-ger-en-falsk-bild_145523.html) (Swed.).

120. Karin Ekenger, *LO, de papperslösa och dubbelmoralen [LO, the Undocumented and the Double Standards]* (Aug. 19, 2008), [http://www.svensktnaringsliv.se/allmanna\\_nyheter/lo-de-papper-slosa-och-dubbelmoralen\\_57990.html](http://www.svensktnaringsliv.se/allmanna_nyheter/lo-de-papper-slosa-och-dubbelmoralen_57990.html) (Swed.).

121. *The Federation of Swedish Farmers* and the *Confederation of Swedish Enterprise* observe that sanctions against employers of unauthorized workers may lead to increased suspicion against certain groups of people and warn against discriminatory practices in the wake of such regulation. The employer organization for agriculture and lumber agrees. Lantbrukarnas Riksförbund, Remissyttrande Dnr 2010/5467, E.U.: direktiv om sanktioner mot arbetsgivare (SOU 2010:63) (Jan. 7, 2011) (Swed.). Skogs—och Lantarbetsgivareförbundet, Remissyttrande (SOU 2010:63) E.U.: direktiv om sanktioner mot arbetsgivare, betänkande av Sanktionsutredningen (Jan. 14, 2011) (Swed.).

122. Företagarna, Dnr (SOU 2010:63), Remissvar—E.U.: direktiv om sanktioner mot arbetsgivare (Jan. 14, 2011) (Swed.).

123. Lantbrukarnas Riksförbund, Remissyttrande Dnr 2010/5467, E.U.:s direktiv om sanktioner mot arbetsgivare (SOU 2010:63) (Jan 7, 2011) (Swed.). Skogs-och Lantarbetsgivareförbundet, Remissyttrande (SOU 2010:63) E.U.: direktiv om sanktioner mot arbetsgivare, betänkande av Sanktionsutredningen (Jan 14, 2011) (Swed.).



to strengthen the position of undocumented migrants, on the labor market as well as in society as a whole.”<sup>124</sup>

Trade union policy and discourse, it seems, have evolved to a point where a shared class interest at least in some respect is understood to exist between “regular” and “irregular” workers. The distinction is still being made, however, and undocumented workers still represent a special category to be approached in specific ways, separate from the traditional subjects and practices of union organizing. In Sweden, the popular notion and use of terms such as “illegal work” thus continue to exist, and has never been coupled with a corresponding notion of “illegal employers”—the label “illegal” continuously refers to the employee. The conceptualization of the “problem” as something alien to the Swedish model and its actors reproduces the notion of the “innocent” welfare state, a discourse with ties to processes identified and analyzed by postcolonial scholars of rendering racism and xenophobia invisible.<sup>125</sup>

#### V. INSTITUTIONAL DEVELOPMENT ON THE LABOR MARKET: THE SWEDISH TRADE UNION CENTER FOR UNDOCUMENTED MIGRANT WORKERS

Processes of trade union compromise on policy vis-à-vis undocumented migrants led to the creation of a new entity<sup>126</sup> within the organizational field of the labor market and the welfare state.<sup>127</sup> The new strategy is the organizational embodiment of the ambiguities trade unions appreciated regarding the (legal) possibilities of representing undocumented migrant workers. The Trade Union Center for Undocumented Migrant Workers represents a new form of trade union activism, bordering on interest representation, while offering a kind of legal service.<sup>128</sup> It is at the crossroads of exclusion and inclusion; it exists because some workers are excluded from the protection of (labor) law, but the aim is to perpetuate the principle of total inclusion in the trade union pattern of organizing all workers.

124. LO Kongressprotokoll—del 2, LOs 27 ordinarie congress [Minutes of Trade Union Confederation Congress], at 419–20 (2012) (Swed.).

125. Mulinari, *supra* note 4; see also Bastian A. Vollmer, *Policy Discourses on Irregular Migration in the E.U.—“Number Games” and “Political Games,”* 13 EUR. J. MIGRATION & L. 317, 326 (2011).

126. Outside the legal definition of a workers’ organization in the 6 § LAGEN OM MEDBESTÄMMANDE I ARBETSLIVET (Svensk författningssamling [SFS] 1976:580) (Swed.).

127. Suggestions about a new ombudsman for undocumented migrants have not been realized. Erik Larsson, *Ombudsman för papperslösa [An Ombudsman for Undocumented Migrants]*, LO-tidningen [Press Release] Oct. 8, 2010 (Swed.); see also Inghammar, *supra* note 23; Recital 16 of the Sanctions Directive.

128. Research focusing this new phenomenon has not yet been put forward, and little is known of its operations. This Section of the Article is based on material from the center and an interview with a key actor.

The Center resembles the kind of worker center that has for some time been part of North American, and to some extent also European, labor relations, thus representing a rare influence of the United States on the organizational structure of the Swedish labor market.<sup>129</sup> The governing principles of the organization are: “undocumented migrants are also entitled to rights at work,” and “rules on the labor market apply to everybody, including those lacking permits to reside and to work.” The Center engages in the struggle of undocumented migrants by helping them to “enforce their rights on the labor market” and by giving them “information regarding their rights and advice on wage levels, working conditions and health and safety regulations at work.” The Center is clearly aware that it operates on a labor market with a specific set of roles: “In Sweden it is primarily the trade unions, and not the authorities, that make sure that the laws and agreements of the labor market are respected. Therefore it is better to contact the trade union than the authorities, if problems occur at work.”<sup>130</sup>

Some of the activists within the movement of undocumented migrants disagree with focusing solely on rights on the labor market, and advocate that the movement must demand permits to reside and regularization: “we fight for papers, we don’t fight to remain illegal.”<sup>131</sup> This debate on strategy is indicative of the particular political dilemmas “undocumentedness” causes and that are visible in much organizing and mobilization among undocumented migrants. The notion is that it can be somewhat contradictory to critique the category of citizenship as such, while simultaneously putting forward demands on behalf of undocumented migrants currently present in the host state.<sup>132</sup>

The Center claims to be successful in about half of the cases they take on, success meaning that the worker gets at least some money owed her.<sup>133</sup> While no case has yet gone to court, the Center is prepared to sue, should this be deemed necessary and a successful outcome of the proceedings

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129. JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* (2006); JENNIFER GORDON, *SUBURBAN SWEATSHOPS. THE FIGHT FOR IMMIGRANT RIGHTS* (2005); Milena Chimenti, *Mobilization of Irregular Migrants in Europe: A Comparative Analysis*, 34 *ETHNIC & RACIAL STUD.* 1338, 1348 (2011); Janice Fine, *A Marriage Made in Heaven? Mismatches and Misunderstandings Between Worker Centres and Unions*, 45 *BRIT. J. INDUS. REL.* 335 (2007);

130. FACKLIGT CENTER FÖR PAPPERSLÖSA [TRADE UNION CENTER FOR UNDOCUMENTED MIGRANTS], [www.fcfp.se](http://www.fcfp.se) (last visited Nov. 25, 2013) (Swed.). The affiliated call center receives about seventy calls per year. E-mail from Ida Löwgren (Feb. 14, 2012) (on file with author).

131. Yacine Asmani quoted in B. Frank & K. Lindquist, *Arbetsrätt eller papper först? Papperslösa oeniga om hur kampen skall föras [Labor Law or Documents First? Undocumented Migrants Disagree on Strategy]*, *Arbetaren* [Press Release] (Nov. 28, 2007) (Swed.).

132. See Milena Chimenti & John Solomos, *Social Movements of Irregular Migrants, Recognition, and Citizenship*, 8 *GLOBALIZATIONS* 343 (2011).

133. If not otherwise stated, this section is based on Interview with Sten-Erik Johansson, Center Manager (Feb. 14, 2012) (on file with author).

plausible. The Center has experienced that employers of undocumented migrants often are involved in affairs that cannot be disseminated in public, making them likely to adhere to threats of alerting authorities, in effect creating a way to achieve back pay. The Center seldom receives counterarguments from employers based on notions of “irregularity” regarding the status of the worker. It is not the tasks performed, but the status of these tasks, i.e., what others think of the function of the Center, that constitutes the difference between working for a union and for the Center, according to one of its representatives: “In many parts of the trade union movement, this is still very controversial: many still argue that these are illegal aliens without a right to be here, and so these people should not be helped.” This statement reveals some of the deep-rooted conflicts linked to notions of belonging to the nation that is brought to the surface through the activity of the Center. There is a space in which the Center can take action, and it is also clear for the Center what would happen if it overstepped certain boundaries. One of these boundaries regards the “sacred” collective agreement. Says one of the Center’s representatives:

Our task is to see to it that no one, neither companies nor anyone else, dumps the price of the workers, the wages, and that some kind of order of things prevails. And most important—we won’t budge an inch on this—is that it is the collective agreements’ terms and levels that should come into effect. . . . This is really the issue where we don’t follow the wishes of the undocumented migrant worker. It’s a balance act. . . . [I]f we would accept what some of the undocumented migrants [would accept working for], we would break our own necks. Everything will go to hell if we don’t follow the collective agreement, since that is what we agreed on [the handshake we made] once upon a time. [Q: LO would abandon you then?] Yes, they would and they would be right to do so, and the unions would drop us too. This part is sacred.

The self-understanding of the Center is that it is an instrument in the fight against social dumping, and this is also how it must represent itself in order not to be attacked from within the trade union movement. The other aspect of boundary work the Center identifies as crucial to its survival is related to the status of certain public policies. Migration policy is beyond debate, according to the same representative:

The trade unions are independent both vis-à-vis capital and state . . . . We are neither the tool of the police nor the tool of the capitalists. The terrible thing may happen, that after meeting us, the police are standing in the alley; [the migrants] are captured and deported. . . . [W]e cannot criticize this . . . . It would be a huge controversy . . . [Q: This pertains to the issue of managed migration . . .] Yes, exactly, it does. . . . If we were to think about this in another way, it in any case wouldn’t be anything we could act upon.

Perceived independence from state and capital, as well as refraining from critiquing some aspects of the current law, are what allow a specific organizational space to be occupied by the Center. Demanding another migration policy would be considered too provocative and would risk eroding its legitimacy. This means that while the Center exists and acts on the basis of a claim for undocumented migrants' rights on the labor market as workers, claims relating to citizenship are construed as outside of the agenda and even potentially harmful for its existence.

What then of the relationship between the Center and the employer party? While the Center's existence can be viewed as a compromise characteristic of the Swedish model of mutual understanding, the perception of the stance of the employers regarding the presence of undocumented migrant workers nonetheless reveals the inherent conflict between the labor market parties. Employers are said to be secretly happy about the increasing presence of undocumented migrant workers in Sweden and the subsequent undermining of the collective agreement's position as a regulatory instrument on the labor market: "they don't care about . . . the order and the discipline on the labor market, and they probably think it is good to undermine collective agreements." The dealings between employer and unions traditionally described in terms of "[s]trong elements of trust, cooperation and mutual understanding"<sup>134</sup> that is often claimed to be at the core of the Swedish model, seem to be fragile, and in a process of reorganizing, partly as a result of the presence of undocumented migrant workers.

The Center holds that the true interest and sympathies of employers are not with the Swedish model and its disciplined order; a chance to undermine unions and collective agreements, is, according to the Center, regarded by employers as a positive development. When asked how the class (in their capacity of workers) interests of undocumented migrants might be represented and furthered, the Center links the suggested concept to political processes on a global level and the fight for a more equal world order. Taking a stand for the class interest of undocumented migrants is about "general humanitarianism" coupled with the acknowledgment that the phenomenon of "undocumentedness" ultimately is created by states exploiting other states in an unequal world. The Center and other voices within the trade union movement suggest that the issue of undocumented migrant workers contributes to a vitalization of the movement, also in the respect of ideological debates on notions of class and class struggle.<sup>135</sup>

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134. Fahlbeck has used the term "marriage of reason," without the possibility of a divorce. FAHLBECK, *supra* note 72, at 8.

135. This is present in trade union discourse. OLLE SAHLSTRÖM, *I SKUGGAN AV EN STORHETSTID [IN THE SHADOW OF GREAT TIMES]* (2008) (Swed.); INGEMAR LINDBERG *SOLIDARITETENS LANDSKAP:*

The Center is the Swedish trade union movement's chief response to the demands from undocumented migrant workers, and represents both change and continuity compared to traditional trade unionism in Sweden. Trade unions have been successful in reshaping the Swedish (regular) labor market, and this project has been closely linked to the reshaping of the law, generating within the trade union movement a positive perception of law as a tool for change and protection. Trade unions have contributed to the juridification of the "regular" labor market, inasmuch as "conflicts of interests on the labor market are transformed into conflicts of legal character and considered legal questions."<sup>136</sup> The aggregated result of this process is the effect that, in the words of Bruun et al., "[s]hop stewards act as solicitors," and that trade unions have become equivalent to a lawyer's office in defense of the interest of members/workers, while at the same time being highly integrated in the state structure in a corporatist fashion:

In their original form, the main tasks of the trade unions on the labour market can be defined as articulation and furtherance of the employees' interests. In the Nordic countries, articulation of interests has traditionally taken the form of demand for legal regulation or rules laid down in agreements. After the advent of such regulation, furtherance of these interests has turned into protecting these rights, in other words, supervision of compliance with the regulations at places of work. The trade unions' role as a lawyer has become increasingly important; from this perspective, negotiations for an agreement and possible legal proceedings become important forms of activity.<sup>137</sup>

Unions are deploying the Center as a means to coordinate the existing labor market model, which in itself is the result of union battles with the new phenomenon of undocumented migrant workers. The traditional trade union "tool box," i.e., the law and legal procedures, are not available in the same way in this context, forcing the union to turn both to extra legal methods and class-based organizing. This latter process is complicated by the notion of "workers" as persons with a strong link to the nation, making it harder for unions to acknowledge migrants as workers. Perhaps the Center in Sweden will come to play a role similar to the ones in the United States, i.e., providing "social and legal services and pathways to mobilization in which the interests of citizens and irregular migrants

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ARBETARE UTAN GRÄNSER [THE LANDSCAPE OF SOLIDARY: WORKERS WITHOUT BORDERS] (2008) (Swed.); Ylva Thörn, *Papperslösa—vår tids statare? [Undocumented Migrants—The Unfree Laborers of Our Times?]*, in VEMS ORDNING OCH REDA? FRAMTIDENS KOLLEKTIVAVTAL OCH FACKLIGA SAMARBETE [WHOSE ORDER OF THINGS? COLLECTIVE AGREEMENTS AND TRADE UNION COOPERATIONS OF THE FUTURE] 166 (Anna Thoursie ed., 2008) (Swed.).

136. BRUUN, *supra* note 74, at 24.

137. *Id.* at 18, 24, 90.

(including regularization) are reframed as the common interests of workers?"<sup>138</sup> The future will tell.

VI. INSTITUTIONAL DEVELOPMENT ON THE LABOR MARKET:  
THE INDEPENDENT SYNDICALIST UNION AND THE REBIRTH OF  
JOB CONTROL

Independent unions without connections to LO (or TCO or SACO) are not common in Sweden, and they have played “a very marginal role on the labour market.” The small syndicalist union SAC is one of these rare independent unions. Considering that it “has been fought consistently and fiercely by LO, and [the employers’ organization] has never wanted anything to do with it”<sup>139</sup> one could describe their position in the Swedish labor market as marginalized.<sup>140</sup> SAC, never part of the corporatist project and oriented to the political (anarcho-left), claims to organize 5,000 to 6,000 workers and to have about a thousand members who are undocumented migrants.<sup>141</sup> SAC explicitly disregards demands for documents as a prerequisite for organizing, arguing that “regular” and “irregular” workers share the same interests.<sup>142</sup> This position is perceived as an internationalist stance and is directed against migration laws and borders. “Undocumentedness” is deemed a symptom, while organizing workers and attacking employers is understood as going for the root cause of problems in the labor market.<sup>143</sup> SAC claims that their work with organizing undocumented migrant workers “has turned out to be not only possible, but also successful,” but representatives of SAC also feel that the organization has been rendered invisible in the history of undocumented migrant workers in Sweden.<sup>144</sup> One aspect of SAC’s trade union strategy for better working conditions seems to be to threaten those employing undocumented migrants with publicity and public humiliation.<sup>145</sup>

But encounters with increasing numbers of undocumented migrant workers have induced a change of strategy for SAC as well. SAC has

138. Anne McNevin, *Contesting Citizenship: Irregular Migrants and Strategic Possibilities for Political Belonging*, 31 NEW POL. SCI. 163, 176 (2009).

139. FAHLBECK & MULDER, *supra* note 72, at 14, 18–20, 33.

140. Also regarding SAC and the Register there exists little or no research. If not otherwise stated, this Section is based on Interview with Amalia Alvarez, Union Activist (Mar. 21, 2012) (on file with author).

141. FAHLBECK & MULDER, *supra* note 72; LARS-OLOF PETTERSSON & WILLY SILBERSTEIN, SYNDIKALISTERNAS NYA ANSIKTE [THE NEW FACE OF SYNDICALISM] (2011) (Swed.).

142. Lotta Holmberg, *Organisera de papperslösa! [Organize the Undocumented!]*, Arbetaren no. 5/2002, at 18 (Swed.).

143. Lena Barrow, *Alla arbetare är välkomna [All Workers Are Welcome]*, Arbetaren no. 7/2002, at 18 (Swed.).

144. L. Holmberg, *Papperslösas kamp försvagas [Possible Trouble for the Struggle of Undocumented Migrants]*, Arbetaren (Sept. 30, 2008) (Swed.).

145. BLOMGREN, *supra* note 81, at 18.

partly returned to its tactical roots in reviving the strategy deployed circa 1910 of using a register as a means to regulate the labor market and achieving higher salaries. As part of the struggle for codetermination in decisions about hiring and firing of workers, the early trade union movement deployed different versions of so-called job control. This strategy should be understood as integral to the motif for forming unions, namely the overarching struggle to control labor exchange. In this way, the job control concept is related to phenomena such as trade union job-placement services. At this time, job control provisions existed in many union statutes. Trade unions provided employment services from about the year 1890, and became more important in the 1920s. As part of the strategy to prevent members' competing for jobs, trade unions sought to control who was employed, and what remuneration was offered. Job control aimed at limiting the employers' powers and to influence wages and working conditions as well as to achieve industrial democracy without the intervention of the legislator. The methodology was to achieve a fair distribution of the available jobs, increase wages, and safeguard agreed-upon terms. Wages could be increased by locking out employers that paid the least from the supply of labor. A prerequisite for this method is a high degree of loyalty to the organization and other members.<sup>146</sup> The syndicalist version of the Register method was formed in 1913, and consisted of a combination of wage statistics and employment services. LO and the social democrat-affiliated unions has once used the register method and job control, and viewed it as a complement to the collective agreement. The almost all-encompassing Saltsjöbaden agreement of 1938, however, entailed rules that limited the use of job control.<sup>147</sup>

On October 12, 2006, 250 workers gathered in Stockholm and formed a new register. All were from Spanish-speaking countries and were mostly employed at hotels, restaurants, and other service franchises, as well as in construction work. They decided to "fight for better salaries, and get some of the rights of ordinary workers; some, not all of them, because of the illegality." Their agreed-upon method of organizing changed the traditional role of the trade union into a form of employment service or job center.

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146. Trade unions relied on wage statistics and information on working conditions, and trade union bodies assigned jobs based on that information. Not following these rules, accepting work at lower wages etc., led to sanctions. BERIT BENGTTSSON, *KAMPEN MOT § 23. FACKLIG MAKT VID ANSTÄLLNING OCH AVSKED I SVERIGE FÖRE 1940* [THE STRUGGLE AGAINST ARTICLE 23: UNION POWER OVER HIRING AND DISMISSAL IN SWEDEN BEFORE 1940], at 67, 177–204, 214–27, 255–58 (2006) (Swed.).

147. *Id.*

There are no renegotiations and if the employer does not want to hire at the proposed price, strikes and picketing could be organized.<sup>148</sup>

The demarcation between industrial action and peace on the labor market is blurred.<sup>149</sup> The trade union also comes to deal with a number of tasks that are not perceived as union matters. The union office is used as postal address, a center for translation of documents, and a channel for information on available housing and information on employers who are violent and should be avoided.

The number of industrial actions on behalf of the register shifts according to season. Weather conditions in Sweden make restaurants more popular during the four summer months of May-August. Many undocumented migrants are employed in this sector during these months, and thus more conflicts arise in the summer. During the summer of 2011, SAC handled thirty cases where the employers refused to pay the agreed salary. In about half of these cases, the register method and blacking was deployed. The salaries demanded, according to SAC, are generally speaking similar to the levels laid down in collective agreements. The popularity of the register is explained with reference to the fact that oftentimes direct action is not needed, as the mere threat of bringing syndicalist activists to the work site renders payment of the owed salaries.

Representatives working with the SAC register perceive the Trade Union Center for Undocumented Migrants (LO) as “an aspirin to the people,” and refer to it as “propaganda,” as “it does not work, because the workers who go there will only get legal aid, after which they are encouraged to leave the country, because they are illegals.” The syndicalists claim that the LO affiliated center only gives workers information that is already available to everybody; “in that society.” But if the migrant contacts SAC, “there are people that could talk to the employer,” implying blacking and public shaming. The revival of the method of using a register in trade union activism thus represents a change in the forms of dialogue within the Swedish labor market. The self-understanding, politics, and actions of SAC correspond to the life and work of the “illegal” undocumented migrants. Research on undocumented migrant workers indicates that a “change from relative tolerance to repression sparks collective action, specifically when irregular migrants are barred from the labour market.”<sup>150</sup> The broadened trade union agenda visible in the register correlates to the experiences of undocumented

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148. SAC-SYNDIKALISTERNA [SWEDISH SYNDICALIST MOVEMENT], <https://www.sac.se/Aktuellt/Fokus/Registret/Kort-förklaring-av-Registermetoden> (last visited Nov. 20, 2013) (Swed.).

149. See Natasha Iskander, *Informal Work and Protest: Undocumented Migrant Activism in France, 1996-2000*, 45 BRIT. J. IND. REL. 309 (2007) on labor protests of undocumented migrant workers.

150. Chimenti, *supra* note 129.



migrants of being “illegal,” outside the law. The dilemmas of the “extra legal” upholding of some kind of law and order are also visible in the union’s work.

#### VII. UNDOCUMENTED MIGRANT WORKERS BETWEEN MIGRANT AND WORKER AND BETWEEN STATE AND TRADE UNION

In earlier periods of labor immigration to Sweden—notably during the great expansion of the 1960s and 1970s—labor immigration was regulated, and class interests of the unions were articulated in terms of ambitions toward “equality between Swedish and legal migrant workers.” An Immigration Board official during this time described “efforts to secure for the newcomers the same wages and other benefits enjoyed by Swedish workers” as “an expression of both traditional trade union solidarity and self-protection.”<sup>151</sup> Nonetheless, neither the concept<sup>152</sup> of nor the hardships<sup>153</sup> endured by undocumented migrant workers are new to unions and activists. Still, at the turn of the century, when changes in migratory patterns posed new questions, the Swedish trade unions seemed unprepared to handle the presence of a growing number of undocumented migrant workers in the labor market. Since the 1920s, LO is strongly connected to the Social Democratic Workers’ Party (SAP), which is the single biggest party in Sweden that affirms LO’s deeply rooted position within the Swedish welfare state.<sup>154</sup> LO and SAP are interrelated organizations; SAP is the political branch of the labor movement, LO the outcome of labor organization. SAP implements policy through politics and legislation, and LO works the bargaining table.

The fact that LO and its unions took the state’s migration law view on undocumented migrant workers—“illegal aliens”—for such a long time, can be understood as an exponent of the links between the union and the state apparatus and government agencies, including immigration authorities. The shift in the union’s views on undocumented migrant workers can be accordingly understood as a process of redefining the links between state and unions. The processes at play pressuring LO to include undocumented migrants have contributed to an increased distance between the trade union and the state, and the trade union and the SAP. In organizing undocumented migrants, unions have in effect also moved closer to the

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151. Kjell Öberg, *Treatment of Immigrant Workers in Sweden*, 110 INT’L LAB. REV. 1, 1, 8 (1974).

152. W. R. Böhring, *International Migration: A Suggested Typology*, 122 INT’L LAB. REV. 641 (1983); Chimenti & Solomos, *supra* note 132.

153. Raffaele de Grazia, *Clandestine Employment: A Problem of Our Times*, 119 INT’L LAB. REV. 549 (1980).

154. See GÖSTA ESPING-ANDERSEN, *POLITICS AGAINST THE MARKET: THE SOCIAL DEMOCRATIC ROAD TO POWER* (1988).

position of SAC. The Center represents a small but principally significant shift on the labor market, and the strategy it embodies—the “semi-organizing” of undocumented workers—also constitutes a new phenomenon on the Swedish labor market. SAC’s return to a method that has not been in use for seventy years is also a small, but principally significant shift on the labor market.

Government policy in relation to undocumented migrants is still an issue of hunting down and deporting.<sup>155</sup> Unauthorized work is still a crime in Sweden. A shift in focus has come about in the new sanctions against employers of undocumented migrants. The legislated possibility of back pay is a novelty in Sweden. It is not entirely clear whether an undocumented migrant worker that has encountered trouble in relation to the employer would, or perhaps should, dare to contact a trade union. Will the representative call the police, do nothing, call the Centre, or personally try to help? The standings of undocumented migrant workers in relation to state and employer are also changing: employer sanctions may lead to collusion between worker and employer, but on the other hand, the introduction of possibilities of back pay could lead to shared interests between the worker and the state/authorities. Employers of undocumented migrants are still better off avoiding both state and unions. Because of sanctions, a shared interest with undocumented migrant workers may be said to exist, while back pay rules counteract this. The continuity regarding the criminalization of unauthorized work still provides employers with an economic incentive to hire undocumented migrants.

In the Nordic countries, trade unionism has centered on the nation states. Because the members of trade unions have belonged to the nation, the “defense and articulation of interests has taken place within the framework of the national state” with the effect that the perspective for strategies of trade unions in the Nordic countries “has been almost exclusively a national one.”<sup>156</sup> The strong interrelation between union and state that has prevailed hitherto may soften in the wake of undocumented migrant workers’ entry into the labor market. Unions have to adapt. The “illegal migrant worker” would, at least to some extent, be understood also as a “worker.” In this capacity, the person should have his or her interests represented by a union, and other aspects than working (i.e., status as irregular migrant) would be disregarded.

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155. In 2010, in Sweden, 27,460 third-country nationals were apprehended, 20,205 were ordered to leave, and 27,413 left Sweden. In 2009, the number of irregularly staying third-country nationals apprehended in the E.U.-27 was about 570,000. Member States returned about 253,000 third country nationals. *Communication From the Commission to the European Parliament and the Council, Annual Report on Immigration and Asylum*, at 7, COM (2011) 291 final (May 24, 2011).

156. BRUUN, *supra* note 74, at 255.

This process would probably consist of a changing notion of worker (class) and a reconceptualization of the trade union “we.” The notion of worker might be affected by a “less is more” approach, which to a greater extent disregards the legal context, e.g., migration law, surrounding the human body performing work. The notion of membership and community in the trade union movement, together with the conceptually connected notion of “free-riding,” might also change, inasmuch as notions of who is a work-performer worthy of protection (instead of policing and expulsion) from law and trade unions change. These discursive changes—from “illegal” to “worker”—may in the future be given further legal expressions (e.g., the concept of employee). These processes would parallel earlier times when women were accepted as part of the workforce and trade unions started representing their (class) interests as workers.<sup>157</sup> The chasm between labor law, with its qualifications and concepts, and other areas of the law, criminal law and migration law, is widened as a result of this process. Perhaps notions of work are developing both beyond “regular” employment<sup>158</sup> and beyond formal right of belonging and citizenship? Instead of employer sanctions and criminalization of unauthorized work, the possibility of implementing standard employment protection and access to collective bargaining for undocumented migrants ought to be explored.<sup>159</sup>

#### VIII. CONCLUDING REFLECTIONS ON THE LAWS ON MIGRANTS AND THE LAWS ON WORKERS

The labor market processes provoked by the presence and work of “illegal aliens” illustrate the way contradictions within the law, present in both national jurisdictions and in international legal discourse, were managed in Sweden.<sup>160</sup> The issue of undocumented migrants’ rights on the

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157. See YVONNE HIRDMAN, *MED KLUVEN TUNGA: LO OCH GENUSORDNINGEN [SPEAKING WITH A FORKED TONGUE: LO AND THE GENDER SYSTEM]* (1998) (Swed.).

158. Cf. the discourses described in ALAIN SUPIOT, *BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE* (2001).

159. Bridget Anderson, *Migrants and Work Related Rights*, 22 *ETHICS & INT’L AFF.* 199, 202 (2008).

160. In Sweden, as in many other countries, there exists a general debate about what rights, entitlements, and duties undocumented migrants should have, and how these can be *de facto* realized, e.g., regarding health and medical services, school, preschool, childcare, and taxation. Statens Offentliga Utredningar [SOU] 2011:48 *Vård efter behov och på lika villkor—en mänsklig rättighet* [government report series]; Proposition [Prop.] 2012/13:109 *Hälsa- och sjukvård till personer som vistas i Sverige utan tillstånd* [government bill] (Swed.); Statens Offentliga Utredningar [SOU] 2007:34 *Skolgång för barn som skall avvisas eller utvisas*; Statens Offentliga Utredningar [SOU] 2010:5 *Skolgång för alla barn* (Swed.); Proposition [Prop.] 2012/13:58 *Utbildning för barn som vistas i landet utan tillstånd* [government bill] (Swed.); Shannon Alexander, *Humanitarian Bottom League? Sweden and the Right to Health for Undocumented Migrants*, 12 *EUR. J. MIGRATION & L.* 215 (2010); Carin Björngren Cuadra & Annika Staaf, *Public Social Services’ Encounters with Irregular Migrants in Sweden: Amid Values of Social Work and Control of Migration*, *EUR. J. SOC. WORK*, Dec. 2012, at 1; Mats Tjernberg, *Frågan om kongruens mellan rätten att erhålla vissa sociala förmåner och skyldigheten*

labor market turns our attention to the encounter between labor law and migration law.<sup>161</sup> Should undocumented migrant workers be afforded the protection of labor law, despite being in breach of migration law?<sup>162</sup> Is the application of labor law dependent on the migration law status of the person performing work?<sup>163</sup> It is important to investigate the ways in which the migration law approach might be reconciled with the fundamentals of labor and employment law, and how the confluence of the two legal fields might be handled in the future. Migration policy has many implications for society, as a regulator of the composition of the work force, and through its role in creating different positions on the labor market: “[i]mmigration controls work with and against migratory processes to produce workers with particular types of relations to employers and to labour markets.” Instead of, as pointed out by Anderson, theorizing illegality as “absence of status and therefore of access to state protection,” it should be acknowledged that immigration control produces illegality and status as well as types of legality, with effects on labor market positions of migrants.<sup>164</sup> Anderson thus argues for:

[T]he importance of paying close attention to the relation between labour markets and immigration controls which not only illegalise some groups, but legalise others in very particular ways. In practice, as well as a tap regulating the flows of workers to a state, immigration controls might be more usefully conceived as a mold *constructing* certain types of workers through selection of legal entrants, the requiring and enforcing of certain types of employment relations, and the creation of institutionalised uncertainty.<sup>165</sup>

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*att betala skatt [On the Question of Congruence between the Right to Certain Social Benefits and the Obligation to Pay Taxes]*, SKATTENYTT [TAX NEWS], no. 4, 2009, at 214 (Swed.); Mats Tjernberg, *The Economy of Undocumented Migration: Taxation and Access to Welfare*, 12 EUR. J. MIGRATION & L. 149 (2010).

161. Robert Guthrie & Rebecca Taseff, *The Rights of Illegal Workers Injured at Work: A Study of the Judicial Dilemma in the United States*, 23 INT’L J. COMP. LAB. L. & INDUS. REL. 61 (2007).

162. The emblematic example is the *Hoffman* case from the United States. Catherine L. Fisk & Michael J. Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights Without Remedies for Undocumented Migrants*, in LABOR LAW STORIES 399 (Laura J. Cooper & Catherine L. Fisk eds., 2005). Cf. Complaints against the government of the United States presented by the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM), ILO Freedom of Association Case, No. 2227, Report No. 332, Vol. 86, 2003, Series B, No. 3. Also the 2003 case (requested by Mexico) of the Inter-American Court of Human Rights raises these issues, Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. Hum. Rts. (Ser. A) No. 18 (2003).

163. In a few instances, the implications of irregular status of a migrant is explicitly stipulated in the legal text. *E.g.*, ILO Convention No. 143 on Migrant Workers (Supplementary Provisions) art. 9 (1975); Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, art. 3.2 (Nov. 27, 2000).

164. Bridget Anderson, *Migration, Immigration Controls and the Fashioning of Precarious Workers*, 24 WORK, EMP. & SOC. 300, 306 (2010); Bloch, *supra* note 3.

165. Anderson, *supra* note 164, at 312.

Institutionalized uncertainty is the conditions for undocumented migrant workers on the labor market amounting to vulnerability and exploitation: “Precarious work for those working illegally is not simply at the whim of individual employers, but structurally produced by the interaction of employment and immigration legislation.”<sup>166</sup> As migration law regulates the composition of the work force, labor law is currently understood as a regulator of migration.<sup>167</sup> These interconnections are visible in that, despite otherwise differing views and policies, corresponding views prevail on *work* as the root cause and driving force behind “illegal” migration. Some claim that it is the existence of dirty, dangerous, and demeaning work—i.e., the result of lack of radicalism and efficiency of labor and employment law—that creates opportunities for undocumented migrants’ employment. Others claim that it is the existence of good, over-protected, and expensive work that creates opportunities for undocumented migrants’ work. Were it not for the tough labor and employment regulations, and the succeeding high costs for labor, etc., there would not be any demand for cheaper labor performed by undocumented migrants.<sup>168</sup> The basic contradiction regarding undocumented migrant workers is, according to Carens, that:

[T]he rationale for denying normal workplace protections to irregular migrants is that this will reduce the incentive for them to come in the first place. Ironically, this sort of policy tends to create a comparative advantage for employers who hire irregular migrants, thereby making it even more attractive for employers to hire them.<sup>169</sup>

The performance of work resembling employment *prima facie* raises the question of whether labor law is applicable. But, could the exclusion defined by migration law also imply exclusion from labor law?<sup>170</sup> The denial of rights to undocumented migrant workers is legally explained by some version of the doctrine of illegality, which holds that a person should

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166. *Id.* at 311.

167. The strategy of differentiating labor law in order to achieve migration policy goals has been deployed by states and the European Union and been discussed as a trade union strategy. Caruso, *supra* note 78, at 307, 314, Directive 2009/52/EC of the European Parliament and of The Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, 2009 O.J. (L 168).

168. De Grazia, *supra* note 153. This driving force has been neutrally labeled “economic convenience.” The point is that employment is beneficial for both parties. Maurizio Ambrosini, *Irregular Immigration: Economic Convenience and Other Factors*, 14 TRANSFER 557 (2008).

169. Carens, *supra* note 24, at 176. Also, if migration law were to provide employers with too much power over migrant workers with permits, then these workers would be favored in comparison to Swedes. Anderson, *supra* note 164, at 202.

170. A parallel discussion exists regarding undocumented migrants and political (i.e., participatory) rights. See Ludvig Beckman, *Irregular Migration and Democracy: The Case for Inclusion*, 17 CITIZENSHIP STUD. 48 (2013).

not benefit from their own wrongdoing.<sup>171</sup> What is at stake in handling the encounter and conflation between labor law and migration law is the relevance of assumptions regarding coherence and rationality within the legal system.<sup>172</sup>

The normative interaction between labor law and migration law is an acute matter for legislators and courts when faced with questions of labor law protection for undocumented migrants. The introduction of sanctions against both employer and “illegal” employee might bring the interests of these groups closer together, hindering detection, and, in Caruso’s words, “becoming, perhaps counter-intuitively, an important factor in inducing the submersion of immigrant labour.”<sup>173</sup> Employers of undocumented migrants are also reported to explain and justify the meager terms of work and the low salaries with the risk of being subject to employer sanctions.<sup>174</sup> In sum, what is needed is the handling of the connections mentioned concisely by Hanau: “Illegal work is cheap and it’s cheap because it’s illegal.”<sup>175</sup>

Furthermore, there is a need to conceptualize a foundation for labor rights for undocumented migrants that does not, as for example is the case in the E.U. Sanctions Directive, base labor rights in migration policy’s desire to fight “illegal” immigration, in effect visualizing worker protection enshrined in labor law as instrumental to migration law’s war on illegal migrants.<sup>176</sup> The implicit assumptions underlying the regulation of work of undocumented migrants should as such not threaten the integrity of labor law and contradict the ideas underpinning this legal regime, as would be the effect, if labor law is construed solely as a factor in the cost-benefit analysis of employers (and migrants).<sup>177</sup> Instead of founding labor rights of undocumented migrants in the aspiration for them to leave, it is possible to

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171. Robert Guthrie & Rebecca Taseff, *Dismissal and Discrimination: Illegal Workers in England and Australia*, 24 INT’L J. COMP. LAB. L. & INDUS. REL. 31 (2008).

172. Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL. J. 125, 128, 159 (2009).

173. Caruso, *supra* note 78, at 303, 313.

174. Bloch, *supra* note 3, at 284.

175. Peter Hanau, *Immigration to the Workplace: The German Experience*, 28 COMP. LAB. L. & POL. J. 213, 216 (2007).

176. *Cf.* Bell’s claim that the Sanctions Directive “continues to intertwine labour law issues with immigration law issues, with the result that the latter overwhelms the further.” Mark Bell, *Irregular Migrants: Beyond the Limits of Solidarity?*, in PROMOTING SOLIDARITY IN THE EUROPEAN UNION 150, 164 (Malcolm Ross & Yuri Borgmann-Prebil eds., 2010); *see also* Carrera & Guild, *supra* note 54, at 1 (“There is a very strong employment dimension embracing the content and aim of [the Sanctions Directive], which may call for the need to reconsider the treatment of this issue from an exclusive immigration control perspective. Are immigration rules an effective way to tackle the problem of exploitation in the workplace?”).

177. *See* Elaine Dewhurst, *The Gap Between Immigration and Employment Law in Ireland: Irregular Migrants Fall through the Cracks*, 10 IRISH EMP. L.J. 11, 16 (2013) (“[A]n increase in cost can be achieved by making irregular migrants as expensive as regular employees. Allowing irregular immigrants, like Mr. Younis, to assert their rights and claim back pay would discourage many unscrupulous employers from hiring irregular migrants in the first place.”).

ground these rights in a reconsidered notion of the worker and the realignment of labor law in the migration law context.<sup>178</sup>

The tensions inherent in the regimes surrounding work and migration are reflected in international legal discourse. While the Migrant Workers' Convention stipulates that it does not imply the regularization of undocumented migrant workers, the preamble at the same time acknowledges that "recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized." The position of the Convention appears to be unclear. The idea underpinning article 35 seems to be that granting rights to irregular migrants would attract more of them, while the preamble states that the lack of rights causes the demand for irregular migrants' labor. Consequently, more rights granted to this group would counter irregular migration. Generally speaking, the Migrant Workers' Convention puts migration law before labor law: "Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers."<sup>179</sup> There are also tensions between the European Union and ILO. At the regional level E.U. assumes that:

If Member States act alone there is a risk of significantly different levels of sanctions and enforcement in different Member States. This could lead to distortions of competition within the single market and to secondary movements of illegally staying third-country nationals to Member States with lower levels of sanction and enforcement.<sup>180</sup>

The notion expressed by European Union is that lack of repression against irregular migrant workers and their employers lead to increased migration, parallel in a cynical way not only the Declaration of Philadelphia—"poverty anywhere constitutes a danger to prosperity everywhere"—but also the preamble of the ILO Constitution: "the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries."

There is a need to reflect on the foundations of a labor law for undocumented migrants, and a framework that is suitable for discussing cases in which migration and labor laws collide. A normative challenge is visualizing a system in which the two legal fields coexist. Furthermore, a

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178. Legal relevance of the discussion currently depends on a certain framing and postulates, e.g., that the world is divided into nation states, that both migration and labor law are to be part of the legal system, and that complete effectuation of migrations law's goals is not possible (or the price is too high). See Ambrosini, *supra* note 168 ("embedded liberalism" or the "liberal constraint"); Carens, *supra* note 24.

179. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, art. 79 (Dec. 18, 1990).

180. Sanctions Against Employers, *supra* note 61, at 6.

normative starting point should be that labor law (protection) is to be conceptualized as a legal field in its own right. In the words of Langille, labor law might be understood in terms of a “package deal” regarding scope and content. A “particular account of labour law’s normativity” relates to “a particular account not only of its content but its scope, that is, its ‘jurisdiction’ or ‘domain.’”<sup>181</sup>

The normative project of extrapolating from present law the regulation of undocumented migrant workers might start with a broad-brush investigation—and juxtaposing of—the inherent rationalities of labor law and migration law. The goal of labor law is usually described in relation to compensating for an unequal bargaining position, while that of migration law is to regulate the flow of persons across borders. The crucial point here is that the ways of operating—the means of the law—differ accordingly. Labor and employment law are, and must be, founded on equality and collectivity.<sup>182</sup> This is expressed, for example, in the concept of the employee, or the understanding of trade unions as labor market cartels. The objectives of labor law cannot be achieved without equality, collectivity, and the limiting of competition,<sup>183</sup> and this is therefore what defines the relevant subject in terms of employee (the human body performing work) without distinctions. The employee is at the center of attention and her interests are safeguarded through collective actions furthering policies founded upon unity, thus creating limits to competition. No worker has an interest in being excluded from the group of workers, and no worker has an interest in seeing that any other worker is excluded from the group of workers; this would threaten the effectuation of labor law’s objectives.<sup>184</sup> On the other hand, the regulation of migration is based on the personal sovereignty of states.

From one day to another, states are free to allow or prohibit the immigration of labor, or to choose to allow entry, e.g., only to well-

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181. Brian Langille, *Labour Law’s Theory of Justice*, in I THE IDEA OF LABOUR LAW 101, 107 (Guy Davidov & Brian Langille eds., 2011).

182. See REINHOLD FAHLBECK, STRIDSÅTGÄRDER, SÄRSKILT SYMPATIÅTGÄRDER, PÅ ARBETSMARKNADEN OCH KOLLEKTIV REGLERING AV ANSTÄLLNINGSVILLKOR: EN INTERNATIONELL JÄMFÖRELSE [INDUSTRIAL ACTION, PARTICULARLY SYMPATHY ACTION, ON THE LABOR MARKET AND COLLECTIVE REGULATION OF EMPLOYMENT CONDITIONS: AN INTERNATIONAL COMPARISON] 59–61 (2007) (Swed.); Jonas Malmberg, *Collective Agreements and Competition Law in Sweden*, in COLLECTIVE AGREEMENT AND COMPETITION IN THE EU: THE REPORT OF THE COLCOM-PROJECT 187 (Niklas Bruun & Jari Hellsten eds., 2001).

183. Cf. the apocryfic maxims “to take labour out of competition” and “the labor of a human being is not a commodity or article of commerce.”

184. See Caruso, *supra* note 78, at 315 (“The growth of the informal, shadow economy, copiously fed by immigration, is a challenge not only to equality in labour law but to the very effectiveness of labour law and its regulatory apparatus, effectiveness being one of its main aims.”).



educated workers, while denying entry to others.<sup>185</sup> This drawing of borders and defining criteria for admission to the state is in this sense ultimately arbitrary, in contrast to the principle of collectivity of labor law. The qualification process for labor law is objective in the sense that inclusion into labor law is based upon what the person actually performs—i.e., work.<sup>186</sup> Working human bodies' equality in relation to status as worker must be at hand, if labor law is not to be threatened, while at the same time, this state of affairs does not do away with the field of migration law. The effectuation of labor law does not threaten migration law—while the opposite is true; the effectuation of migration law threatens labor law. Inclusion in labor law is not in opposition to exclusion by migration law, and vice versa. The systems are autonomous, if they are put in this order; otherwise the one (in principle) threatens the other. Labor law should be given primacy over migration law. Labor law should include everybody that is excluded by migration law. Work-performing bodies are not identified by the study of documents. The labor law notion of worker should therefore not be partially defined by the study of documents.

Finally, labor law might also be understood in terms of the rules governing a market within the state's jurisdiction. The limits for market behavior "reflect a particular democracy's conception of the minimum standards under which economic activity should be conducted within its borders." The implication is that labor law should apply to all workers.<sup>187</sup> The creation<sup>188</sup> of a labor force membership that does not consider documents and only with regard to whether a person works or not, would be beneficial, and amount to an attempt to, in a labor law context, "displace citizenship from its privileged place in our political imaginations." This could be the labor market parallel to a "decoupling" of the idea of citizenship from rights and recognition, which instead "should be based on an individual's personhood or her social participation, rather than on citizenship."<sup>189</sup> Scholarship, as well as policy, should look beyond the

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185. Noll, *Asylum, Migrants and the Informal Labour Market*, *supra* note 17, at 3; *see also* LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 32 (2006) (regarding citizenship).

186. See, e.g., the discussions in Guy Davidov, *The Reports of My Death are Greatly Exaggerated: "Employee" As a Viable (Though OverUsed) Legal Concept*, in *BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK* 133 (Guy Davidov & Brian Langille eds., 2006); Taco van Peijpe, *E.U. Limits for the Personal Scope of Employment Law*, 3 *EUR. LAB. L.J.* 35 (2012).

187. Carens, *supra* note 24, at 175; *see also* Jonas Malmberg, *Vad Handlar Arbetsrättslig Reglering Om? En Essä Om Arbetsrättens Uppgifter [What Is Labor Law Regulation About? An Essay on the Tasks of Labor Law]* (2010) (Swed.) (on the notion of labor law as market regulation).

188. Cf. reflections on regulating working life as if it were to be regulated presently from a legal void in Reinhold Fahlbeck, *Towards a Revolutionised Working Life: The Information Society and the Transformation of the Workplace*, 14 *INT'L J. COMP. LAB. L. & INDUS. REL.* 247 (1998).

189. Linda Bosniak, *Critical Reflections on "Citizenship" As a Progressive Aspiration*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION*, *supra* note 78, at 339, 343.

traditional notion of “undocumentedness” as a derived category defined by what it is lacking, because this view is based on the primacy of migration law. The question instead ought to be how to construct inclusion in labor law for undocumented migrants.<sup>190</sup> No intervention is an intervention.<sup>191</sup> Undocumented migrant workers should be covered by labor law, and have the practical means of using it.<sup>192</sup> Labor law should be autonomous in relation to migration law, but not the other way around.<sup>193</sup> There is a need to redevelop and redefine an industrial citizenship, or a global labor market membership,<sup>194</sup> without regard to citizenship in the migration law sense. Developing a labor law version of ethical territorialism, “treating membership as a matter of social fact rather than as a legal formality,” seems as an agenda for legal scholarship suitable for the challenges posed by today’s working life<sup>195</sup> and in line with a universalistic project that, in the words of Kountouris, “increasingly seek[s] to guarantee legal rights and entitlements that cut across traditional distinctions between different types of work, and traditional divides.”<sup>196</sup>

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190. See Niklas Bruun, *The Future of Nordic Labour Law*, in STABILITY AND CHANGE IN NORDIC LABOUR LAW 375, 378 (Peter Wahlgren, ed., 2002) (“[L]abour law today, including the Nordic countries, is a complicated system built on multiple sources and layers of rules. We can actually describe the situation in terms of several labour law systems existing side by side within one national jurisdiction.”).

191. See Reinhold Fahlbeck, *Employment Protection Legislation and Labour Union Interests: A Union Battle For Survival?*, 20 STAN. J. INT’L L. 295 (1984).

192. It is a normative problem for states if only “purely formal legal rights” exist, without the possibility to exercise them. Carens, *supra* note 24, at 167; see also Niklas Selberg & Gregor Noll, *Det måste vara lika för alla [Equality for Everybody]*, 3 LAG & AVTAL [L. & CONTRACTS] 38 (2011) (Swed.).

193. Davidov discusses irregular migrant workers within the context of enforcement of labor law. Guy Davidov, *The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions*, 26 INT’L J. COMP. LAB. L. & INDUS. REL. 61 (2010). Many legal-technical issues specific for “undocumentedness” arise here. See Carens, *supra* note 24, at 167.

194. See Judy Fudge, *After Industrial Citizenship: Market Citizenship or Citizenship at Work*, 60 INDUS. REL. 631 (2005); Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007); Leah F. Vosko, *Out of the Shadows? The Non-Binding Multilateral Framework on Migration (2006)*, in THE IDEA OF LABOUR LAW 365, 380–84 (Guy Davidov & Brian Langille eds., 2011); Leah F. Vosko, *Prospects for Using International Labour Regulation to Forge Global Labour Market Membership*, in THE IDEA OF LABOUR LAW, *supra*, at 365, 380–84.

195. Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389, 392 (2007); see also Guy Mundlak, *De-Territorializing Labor Law*, 3 LAW & ETHICS HUM. RTS. 188 (2009).

196. Kountouris identifies immigration status as a legal factor rendering work relations precarious. Nicola Kountouris, *The Legal Determinants of Precariousness in Personal Work Relations: A European Perspective*, 34 COMP. LAB. LAW & POL. J. 21, 25 (2012).

