



---

## European Journal of Legal Studies

Title: Illegality Regimes and the Ongoing Transformation of Contemporary Citizenship

Author(s): Juan M. Amaya-Castro

Source: European Journal of Legal Studies, Volume 4, Issue 2 (Autumn/Winter 2011), p. 137-161

---

### Abstract:

*This article introduces the notion of ‘illegality regimes’ and argues that the creation, enhancement, and strengthening of these regimes has a transformative, and perhaps even corrosive effect on the meaning and value of citizenship itself. The notion of illegality regimes refers to the complex normative and policy framework that is either intended to, or otherwise has the effect of marginalizing or otherwise excluding irregular migrants, and to assist the authorities in the process of localizing and deporting them. Much of the political and scholarly attention in the context of illegality is focused on how illegality regimes affect migrants and refugees, how these regimes weaken their human rights, and generally run contrary to liberal principles such as equality before the law and non-discrimination. However, the objective here is to explore how it is not just the undocumented migrant that is directly or indirectly affected by the illegality regimes, but also regular migrants, asylum seekers, and finally full citizens themselves. The ways in which this happens is by a progressive transformation of what it means to be a citizen, and by means of a re-accommodation of the relation between the citizen and the state. As globalization unleashes migratory processes, the state adapts. Citizenship adapts along.*

## ESSAY

### ILLEGALITY REGIMES AND THE ONGOING TRANSFORMATION OF CONTEMPORARY CITIZENSHIP

JUAN M. AMAYA-CASTRO\*

#### TABLE OF CONTENTS

|  |     |
|--|-----|
| 1. Introduction  | 139 |
| 2. Illegality Regimes, Weak and Strong                           | 140 |
| 2.1 Illegal and Potentially Illegal                              | 145 |
| 2.2 Fault Lines of Racialization and Class                       | 148 |
| 3. Citizenship Transformed                                       | 150 |
| 3.1 Theories of Citizenship                                      | 151 |
| 3.2 Under siege: citizenship as protection                       | 152 |
| 3.3 Belonging: citizenship as membership                         | 154 |
| 3.4 Vita activa: citizenship as engagement with the body politic | 155 |
| 3.5 Guarantees: citizenship as having rights                     | 157 |
| 3.6 The world: citizenship as universal equality                 | 160 |
| 4. Concluding: the checkpoint, citizenship and suspicion         | 161 |

---

\* Senior Research Fellow, Migration & Diversity Centre, Vrije Universiteit Amsterdam, the Netherlands, and Senior Visiting Professor at the United Nations mandated University for Peace in Costa Rica. I wish to thank Jessica Lawrence for her enormous and ongoing support in the development of these ideas. I am also indebted to the various members of the Inclusive Thinking Project, to Thomas Spijkerboer, Sarah van Walsum, Bas Schotel, Aafke Beukema toe Water, Iris van Domselaar, Yolande Jansen, Wouter Veraart, Wouter Werner, Karen Geertsema, Bahija Aarrass, Etienne Balibar, Joan Scott, Sébastien Chauvin, for their feedback, and to others who have contributed in multiple ways. I wish to dedicate this article to the memory of Dr. Mahmoud Hamid, friend and colleague at the United Nations mandated University for Peace, in Costa Rica, and a kind citizen of the world.

*[W]e can think of citizenship as a type of natural experiment for observing how a highly formalized institution can undergo significant transformations without going under.<sup>1</sup>*

## 1. Introduction

This article argues that the creation, enhancement, and strengthening of strong illegality regimes has a transformative, and perhaps even a corrosive effect on the meaning and value of citizenship itself. Much of the political and scholarly attention in the context of illegality is focused on how illegality regimes affect migrants and refugees,<sup>2</sup> how these regimes weaken their human rights,<sup>3</sup> and generally run contrary to liberal principles such as equality before the law and non-discrimination.<sup>4</sup> However, it is my objective to indicate how it is not just the undocumented migrant that is directly affected by the illegality regimes, but also regular migrants, asylum seekers, and finally full citizens themselves.<sup>5</sup> The ways in which this happens is by a progressive transformation of what it means

---

<sup>1</sup> Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2006) 319.

<sup>2</sup> See, e.g., Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press 2006); Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press 2008); W.R. Brubaker, *Immigration and the Politics of Citizenship in Europe and America* (University Press of America 1989); D. Jacobson, *Rights and Borders: Immigration and the Decline of Citizenship* (Johns Hopkins University Press 1996).

<sup>3</sup> See, e.g., Barbara Bogusz, Ryszard Cholewinski, Adam Cygan, and Erika Szyszczak (eds) *Irregular Migration And Human Rights: Theoretical, European And International Perspectives* (Brill: Martinus Nijhoff 2004); David Hollenbach (ed), *Driven from Home: Protecting the Rights of Forced Migrants* (Georgetown University Press 2010); Marie-Bénédicte Dembour and Tobias Kelley (eds), *Are Human Rights for Migrants?: Critical Reflections on the Status of Irregular Migrants in Europe and the United States* (Routledge 2011).

<sup>4</sup> See, e.g., Philip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh University Press 2000).

<sup>5</sup> By full citizens I mean people with formal nationality, recognized according to the rules and procedures of the law of the state that grants it. I am not referring to the complicated contested cases, but to the people who, at least in theory, need not worry about the legality of their presence on the territory of 'their' state.

to be a citizen, and by a re-accommodation of the relation between the citizen and the state. As globalization unleashes migratory processes, the state adapts, and citizenship adapts along.

This article starts by explaining the notion of an illegality regime, as a way of conceptualizing the overall logic and effect of a whole set of rules and policies aimed at marginalizing and excluding irregular migrants, or otherwise having that effect, and aimed too at localizing the undocumented, with a view to detaining and deporting them. The logic of illegality regimes is then further explored, as the article explains how these regimes are based on the assumption that everybody is potentially illegal. This involves the proliferation and intensification of moments of identity control. For illegality regimes to be effective in contemporary multi-ethnic societies that value non-discrimination, the control of identity control needs to be as pervasive and comprehensive as possible. However, this does not necessarily mean that there is no significant racial dimension, an aspect that is further articulated in this article. In the second part I continue to develop a first overview of an analysis that explores how illegality regimes affect citizenship. This is done in a systematic way, taking into account the enormous diversity there is in the long history of theorizing about the citizen and her relation to others, as well as to the state and the political community as a whole.

## 2. Illegality Regimes, Weak and Strong

Most countries nowadays practice some type of immigration control.<sup>6</sup> However, not all immigration control policies are created equal: they range between the very lax and the very strict. They may also employ a variety of different means of enforcement. Even the most lenient immigration regimes, however, include a category of people who are not allowed to be present in a country's territory and are therefore present 'illegally'.<sup>7</sup> This might be a relatively small group of

---

<sup>6</sup> See, e.g., Wayne A. Cornelius, Philip L. Martin and James Frank Hollifield (eds), *Controlling Immigration: a Global Perspective* (Stanford University Press 1994); Jeanette Money, *Fences and Neighbors: The Political Geography of Immigration Control* (Cornell University Press 1999); Jeroen Doomernik and Michael Jandl (eds), *Modes of Migration Regulation and Control in Europe* (University of Amsterdam Press: IMISCOE Reports 2008);

<sup>7</sup> This so called 'illegality' might be an actual crime or misdemeanor under domestic law, or it may not. The point is that the status of 'irregular' or 'undocumented' makes one the subject of the overall illegality regime. For sure, the term is controversial, for some the symbol of the moral fault of those who 'break' the law by trespassing into another state, while for others it is the symbol of how the state overreacts to what is essentially a systemic and social justice problem. This multiplicity in symbolic meaning wonderfully illustrates the underlying political

people or a relatively large group. How the state chooses to deal with this group is what I will refer to as its 'illegality regime'. However, I have chosen this term because it allows for an appreciation of the full extent of the states' preoccupation with and determination to mold society and its legal system to accommodate its drive to fight irregular immigration.

This notion intersects and interacts with the similar but distinct notion of the 'deportation regime', developed by Nicholas de Genova and others.<sup>8</sup> One can see an illegality regime as subsumed within a more general deportation regime. In this perspective the deportation regime, as developed by de Genova and others, has a more Agambean<sup>9</sup> signification than the notion of illegality regime that I want to develop here. One can also see it in the opposite direction: a deportation regime is subsumed within the more general illegality regime, of which it forms a part. Analytically, the distinctiveness allows for a different focus. If a deportation regime focuses on how "the whole totalizing regime of citizenship and alienage, belonging and deportability, entitlement and rightlessness, is deployed against particular persons in a manner that is, in the immediate practical application irreducibly if not irreversibly individualizing",<sup>10</sup> the notion of an illegality regime focuses on the accommodation of the entire sovereign and legal landscape to the figure of the illegal migrant. An essential purpose of the notion of an illegality regime is to argue that both illegality and deportation regimes do much more, and with much more systemic implications, than to perpetually threaten with deportation. Ultimately, I hope, both notions will be able to nourish each other.

Illegality regimes can be lax, or strong, in various ways. First, the group of people affected by the regime can be either significant or marginal. Second, the state involved may care a lot about enforcing this regime, about tracking down and deporting the illegal migrants, or it may not care very much. It is in this second sense that I refer to illegality regimes as being 'strong' or 'lax', although

---

tensions within the term and concomitantly, within illegality regimes themselves, and so I find it very useful for the purposes of this analysis. See generally, Dauvergne (n 2); Bill Ong Hing, 'The Immigrant as Criminal: Punishing Dreamers' (1998) 9:1 *Hastings Women's Law Journal* 79; David Bacon, *Illegal people: how globalization creates migration and criminalizes immigrants* (Beacon Press 2008); Nicholas de Genova, 'Migrant "Illegality" and Deportability in Everyday Life' (2002) 31 *Annual Review of Anthropology* 419.

<sup>8</sup> See the various contributions to Nicholas de Genova and Nathalie Peutz (eds), *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Duke University Press 2010).

<sup>9</sup> See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen tr, Stanford University Press 2008); Giorgio Agamben, *The State of Exception* (Kevin Attell tr, University of Chicago Press 2005).

<sup>10</sup> Nicholas de Genova, 'Theoretical Overview', in de Genova and Peutz (eds) (n 8) 33, 34-35.

the first dimension will usually influence the development and strengthening (or not) of such a regime.

States with weak illegality regimes devote very few resources to their enforcement. There are a number of possible reasons for this. It may be because the illegality regime is limited in scope, or the state does not draw many migrants, so the number of affected people is small or nonexistent. It may be that the number of affected people is large, but the state has different problems that it considers more important. It may be that the state accepts the presence of the irregular migrants because it believes that it benefits from them. Or it may be that the state would like to enforce its regime more strictly, but is generally weak, and therefore lacks the administrative resources for distinguishing between citizens and irregular aliens.<sup>11</sup>

States with strong illegality regimes, by contrast, devote substantial resources to their enforcement.<sup>12</sup> This can be because the state's illegality regime is broad in scope or because the state, for all types of reasons, attracts a large number of migrants, so the number of affected people is large. It may be that the state considers the problem of illegal migration very important. It may be that the state has very low tolerance for irregular migrants because it considers that they are a drain on its resources. Some combination of lax and strong policies may also occur, as a state may care more about some types of irregular aliens than others, or care about them in some contexts more than others, again for a variety of reasons.

Of course, a state's position along this axis is not static: as conditions and priorities shift, states may choose to strengthen or weaken their illegality regimes. There are a number of reasons why states may choose to enhance or strengthen their illegality regimes. It may be that the number of irregular

---

<sup>11</sup> Wendy Brown argues that much of the loud and visible energy and resources that go to the construction of walls and other barriers, and that do not have any significant impact on the numbers of irregular migrants entering the state serves a symbolic function, by which the state is trying to compensate for its diminished relevance in times of globalization. See Wendy Brown, *Walled States, Waning Sovereignty* (Zone Books 2010).

<sup>12</sup> It is difficult to disentangle how many resources go to immigration control, especially when the actual tasks of immigration control are spread out over a large number of agencies and departments. The United States Immigration and Customs Enforcement (ICE) alone had a 2011 budget of US\$ 5.8 billion, while the 2011 budget for the US Customs and Border Protection (CBP) is US\$ 11.1 billion. See U.S. Department of Homeland Security, *Budget-in-Brief Fiscal Year 2011* <[http://www.ice.gov/doclib/foia/secure\\_communities/fy2011budgetinbrief.pdf](http://www.ice.gov/doclib/foia/secure_communities/fy2011budgetinbrief.pdf)> accessed 10 October 2011. Meanwhile, Frontex, which only *coordinates* the migration control efforts of the national authorities of EU member states spent around 80 million Euro in 2010. Frontex, 'Budget and Finance' <[http://www.frontex.europa.eu/budget\\_and\\_finance/](http://www.frontex.europa.eu/budget_and_finance/)> accessed 10 October 2011.

immigrants is perceived to increase, or actually increases. It may be that the state gains additional resources with which it can enforce its migration preferences. Alternatively, the political atmosphere in a country may shift, leading it to focus more closely on irregular migration.

Conversely, a state may also choose to make its illegality regime more lax. It may be that the number of irregular migrants is perceived to decrease, or actually decreases. The state may lose resources, and be unable to enforce its regime. Or the political atmosphere in the country may shift, leading it to de-emphasize migration in comparison with other priorities.

These illegality regimes come in various forms and shapes and may be monitored and enforced by means of a number of mechanisms, with varying degrees of legality. They may focus on border control, such as in the building of walls or fences,<sup>13</sup> or they may involve more pervasive techniques of surveillance and monitoring. The stronger the illegality regime, the more it will focus on mechanisms of surveillance and control.<sup>14</sup> This will be the case even if it still allocates many resources to border control mechanisms. In most democratic states under the rule of law, however, illegality regimes are primarily *legal* regimes. They are created by law and implemented by law enforcement agencies, even when much of the authority or actual responsibility for enforcement is delegated to private actors.<sup>15</sup>

The fact that illegality regimes are legal regimes leads to something of a paradox: the 'illegality problem' is entirely the product of a state's decision to make irregular entry 'illegal'. As St. Paul understood, the law makes the sin.<sup>16</sup> When a state finds itself confronted with a situation in which the presence of irregular foreigners is, rightly or not, perceived as a problem of considerable priority, this presence becomes an *illegality problem* only once the state chooses to create and enforce an illegality regime. The scope of the state's illegality problem is thus directly related to the scope of its illegality regime.

---

<sup>13</sup> See generally Brown (n 11).

<sup>14</sup> See generally Dennis Broeders, *Breaking Down Anonymity: Digital Surveillance of Irregular Migrants in Germany and the Netherlands* (Amsterdam University Press 2009); Dennis Broeders and Godfried Engbersen, 'The Fight Against Illegal Migration: Identification Policies and Immigrants' Counterstrategies' (2007) 50 *American Behavioral Scientist* 1592; Huub Dijkstra and Albert Meijer (eds), *De Migratiemachine: De rol van technologie in het migratiebeleid* (Van Gennep/Rathenau Instituut 2009).

<sup>15</sup> Gallya Lahav, 'Immigration and the state: The devolution and privatisation of immigration control in the EU' (1998) 24:4 *Journal of Ethnic and Migration Studies* 675.

<sup>16</sup> St. Paul, 'St. Paul's letter to the Romans' ("sin is not imputed where there is no law.").

In some ways, therefore, there is nothing easier (even if politically difficult) than 'solving' the illegality problem: it is immediately eliminated when a state declares all migrants 'legal', or announces an amnesty. In this way, with one stroke of the pen, the problem of 'illegal' migrants disappears. This may be done incidentally or (very unlikely) permanently. Another option, however, is to allow an illegality regime to weaken, to phase itself out. The state can allocate fewer resources to its enforcement, use permitted discretion to make it more lax, or formally change the regime to diminish its reach. By the same token, if a state finds itself 'forced' for internal political reasons to address the migration issue and create, enhance or strengthen an illegality regime, it may also find that it is making the problem worse.<sup>17</sup>

Let's imagine a state that has a 'big' irregular migration problem, in the sense that it affects a large number of people. This state decides to confront the issue by, gradually and in jerks, making its illegality regime stronger. How will it go about doing so? What are the mechanisms that it has at its disposal? Whether it proceeds by means of the old-fashioned, brutal methods associated with a police state, such as razzias and checks, or by more gentle or sophisticated means, what becomes important--or more important, or essential--is that this state must enhance *its ability to distinguish between citizen and regular alien, on the one hand, and irregular alien on the other*. In other words, illegality regimes will be primarily focused on 'finding the illegal'.

This process of distinguishing legal from illegal has a number of important effects. In particular, as has been often pointed out and amply documented, strong illegality regimes push people into an increasingly difficult position, making irregular immigration more and more difficult, and increasing the cost for the potential migrant of being in an irregular status. As in other areas of illegalization, the purpose is not just to correct, but also to deter.<sup>18</sup> In other words, they make regular status more important.

For those who do not have access to 'legal' status, however, especially in cases where many people are affected, illegality regimes can lead to the creation of a

---

<sup>17</sup> In the absence of an illegality regime, and therefore of an illegality problem, a state may have a 'immigration problem'. It is a sign of the times that it is difficult *not* to translate an immigration problem into an illegality problem, and therefore to arrive at the almost inevitable 'solution' to the problem, which is to create and develop an illegality regime. However, one may resist such a move and consider alternative perspectives that will lead to different approaches, responses, and/or 'solutions'. For instance, the social theorist Ulrich Beck, who has endorsed a 'right to migrate', has proposed a legal regime that would regulate migration through varying tax-regimes. Ulrich Beck, 'Recht auf Migration' (*Zeit Online*, 12 May 2007) <<http://www.zeit.de/online/2007/18/migration-beck>> accessed 6 October 2011.

<sup>18</sup> Broeders & Engbersen (n 14).



society within a society.<sup>19</sup> Marginalized irregular immigrants rely on each other and on others for their social, economic, and political needs. An industry of smugglers, also known as 'human traffickers', may develop to provide entry into the territory, and sometimes employment, too.<sup>20</sup> A new economy in which irregular migrants can subsist will emerge and thrive, enhancing the already existing informal dimensions of the state's economy.<sup>21</sup> The more important IDs become, the more lucrative the market for their falsification.<sup>22</sup> The more difficult the access to social services, such as health, education, and housing becomes, the more lucrative (or morally compelling) it will be to provide them. In short, the more elaborate and forceful the illegality regime, the more autonomous and complex the 'gray' society and the illegal realm of the state will become.

As such, there is a compulsive dimension to the dynamics of illegality regimes: created by the state to enhance control, they work to create elaborate areas outside of the state's control. The challenge of having to 'find the illegal' is produced by the process of 'seeking' them in the first place. In doing so, governments justify ever greater efforts to control this society within society. The more pervasive the society and economy that serves irregular migrants and their employers, the more illegality itself will be perceived as a problem that needs tackling. Problem and solution feed on each other, each one making the other bigger in a positive feedback loop. In the meantime, the difference between regular and irregular, legal and illegal becomes more and more important.

## 2.1 Illegal and Potentially Illegal

---

<sup>19</sup> I do prefer this way of looking at things, rather than the perspective that sees irregular migrants as excluded from society.

<sup>20</sup> Raimo Väyrynen, for example, helpfully notes that 'illegal immigration and human smuggling, and even trafficking, are interrelated and result in a 'terrible paradox' ... the more strictly the laws of immigration against the illegal entrants are enforced, the more sinister forms of criminality are used in human trafficking to overcome barriers that are needed for making a profit.' Raimo Väyrynen, 'Illegal Immigration, Human Trafficking, and Organized Crime' (United Nations University Discussion Paper No. 2003/72 2003) 5.

<sup>21</sup> There is a great deal of work on the operation of the informal economy in migrant enclaves. *See, e.g.*, Saskia Sassen, 'The Informal Economy: Between New Developments and Old Regulations' (1994) 103 *Yale Law Journal* 2289.

<sup>22</sup> Not just fake resident status, but even fake citizenship. For example, the number of people in Malaysia with fake citizenship cards is estimated to be in the hundreds of thousands.

The logic of a growing illegality regime that is increasingly eager to 'find the illegal' is to enhance the number of checkpoints in society. The first place this will happen is at the border. A strong border control system, with barriers and a competent border control agency with the ability to screen legal from illegal,<sup>23</sup> will form the initial 'line of defense'. The effectiveness of this border control system will be enhanced by all those elements that suggest the imagery of a fortress, and thereby preempt attempts to enter through the side or back door. This means the designation of valid points of entry,<sup>24</sup> formal 'legal' entrances to a country, and the policing of the remainder of the boundaries, by land, sea, or air. Additionally, it may also entail the construction of physical barriers.<sup>25</sup> These sites and metaphors serve to filter people on their way in, acting as a porous membrane to allow in those who are legal and keep out those who are not.

This extensive infrastructure, this gigantic filter at the territorial edge of the state, is only the most visible physical manifestation of an illegality regime. In fact, it is but one expression of the logic of control that is at the heart of illegality. When a body enters a country, say at an international airport, there may be different lines or cues for nationals and visitors. Once one confronts a customs officer, however, every body is the same. This sameness is essential, because it means that *everybody is potentially illegal, until proven otherwise*. A valid passport or other ID is what gets you through the checkpoint at the airport, and legally into the country. The logic at the heart of an illegality regime is the logic of identity control.<sup>26</sup>

This logic extends itself beyond the physical border and the physical checkpoint. A truly strong illegality regime has to deal with the fact that no matter how much it invests in border control, its boundaries are permeable and imperfect in keeping irregular migrants out. This may be because the border is too long and too hard to police for geographical reasons. It may also be because there are too many ways to enter on a temporary basis, and then overstay. Tourists, workers, students, and others may all abuse their rights to temporary entry. It may also be that because a state is very strict in terms of how it deals with asylum seekers, some will escape into the realm of illegality rather than wait to see their claims processed and denied. Some may abscond after

---

<sup>23</sup> With legal I refer to both citizens and regular migrants, with valid visa or residence status. By illegal I mean the people on the other side of the formal legal divide.

<sup>24</sup> See the Annexes to Schengen agreement, for an example of a (very long) list of formal places of 'entry' into the Schengen area.

<sup>25</sup> Brown (n 11).

<sup>26</sup> John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State* (Cambridge University Press 2000).

rejection of their claims. In other words, there are many ways of entering a country, and staying there.

Once they have crossed the border, and entered the metaphorical fortress, all of these people will walk the streets, looking for jobs and housing, opening bank accounts, buying cell phones, attending schools and making use of health care facilities. They will become the subjects of the *internal* border control problem. At this point, a state may choose to shrug its shoulders and let things be. Or, it may choose to tighten its illegality regime, and focus on these internal legal anomalies. They do this by trying to 'find the illegal', by intensifying the logic of the illegality regime, by increasing the number of checkpoints.

Checkpoints are not necessarily posts manned by government officials. They are moments of identity control. They can be set up and operate in a variety of ways. Most commonly, they are translated into formal requirement to gain access to services and facilities, such as jobs and housing.<sup>27</sup> The more of these types of checkpoints there are, the 'stronger' or more developed and sophisticated an illegality regime can be said to be. They are also ways to keep the direct costs of such a regime relatively low, since they do not necessarily require direct expenses by the state to carry out these controls. Instead, they distribute the task of identity control among the network of individuals performing these checks. By linking identity checks to as many services and facilities as possible, the regime closes the net around irregular migrants, isolates them, and effectively changes what it means to be *inside* a territory, by assimilating a regime of exclusion, an *outside*, into the jurisdiction of the state.

The essential point here though is that once such an internal illegality regime is established, then just as at the airport, nobody is exempt from this control. Everybody is potentially illegal.

The expansion of identity control may be justified on the grounds that it protects consumers or citizens from being mistaken for other people. For example, the requirement that a customer identify herself when opening a bank account may be justified on the grounds that it protects others by preventing her from opening a bank account in their name. Such justifications may be absolutely valid. However, they do not diminish their effect on illegality. Identity controls can serve multiple functions: they are not all about enforcing illegality regimes.<sup>28</sup> But each set of controls does, whether intentionally or

---

<sup>27</sup> Broeders (n 14).

<sup>28</sup> David Lyon, *Identifying Citizens: ID Cards as Surveillance* (Polity Press 2009) 133 (describing the US Real ID system, which, though adopted in the context of enhancing national security and the 'war on terror', was also supported by the Heritage foundation and other anti-immigrant groups because of its restricted immigration through imposing harsher identification standards).

unintentionally, extend their reach. What is more, such controls are often explicitly focused on controlling illegality in addition to their other functions. Demanding the presentation of an ID as a requirement for basic transactions, such as opening bank accounts, has been an explicitly stated policy of legality control,<sup>29</sup> and part of a strategy of raising the price and discomfort of irregular status for those whose presence in a country has not been formally approved.<sup>30</sup>

## 2.2 Fault Lines of Racialization and Class

Identity control, as a manifestation of systemic exclusion or differentiation, can of course happen in many ways. Countries with formally racist historical regimes, such as the United States and South Africa, did not need very elaborate or sophisticated mechanisms to filter desirable from undesirable people--the evidence was (often) right in front of their eyes.<sup>31</sup> Similarly, in political regimes where ethnicity is an important category, such as that of Israel, screening processes can happen much more informally and loosely, or even voluntarily. However, in this genre of cases in which race and ethnicity are important categories there are usually other forms of segregation that operate in conjunction with the illegality regime. There might be designated territories to which the subordinated group is confined, as in the case of Israel and South Africa. Or, there might be a correlation between race/ethnicity and class, such as in the US or in most of Latin America, which comes with its own territorialized means of segregation. In these places the 'gray' society of the subordinated group functions openly and this is seen as part of the way things are, not as a problem in an of itself, since the 'real' problem, the presence of a particular group of people, is managed by means of territorialized segregation. It is not just that the segregation is embodied in the race or ethnicity of the excluded person, it is that the parallel society in which they live, with its schools and churches and dwellings, is not excluded from, but rather *part of the segregated regime*.

---

<sup>29</sup> However, some people argue that legality control is more of an excuse to expand the powers of the state. See, e.g., Johan van Someren, 'Mobiele vingerscan, verlengstuk van de identificatieplicht en de Paspoortwet' (*Vereniging Vrijbit*, 8 August 2011) <<https://www.vrijbit.nl/dossier/handhaving/politie-en-justitie/item/843-verlengstuk-van-de-identificatieplicht-en-de-paspoortwet.html>> accessed 10 October 2011.

<sup>30</sup> Broeders & Engbersen (n 14).

<sup>31</sup> Note, however, that apartheid laws needed more than a hundred pages to define the individual races.

Because of this, the paradoxical situation arises that those states that are the most multiracial and multiethnic, the most antiracist and egalitarian in terms of class, must also employ the most rigorous, sophisticated, and intrusive means of enforcing their illegality regimes. In other words, egalitarian and anti-racist societies with strong illegality regimes must be more *indiscriminate* in their enforcement, spreading the net as wide as possible and employing the most rigorous checks on the most different types of people.

A lot of the political debate about the development of illegality regimes and the specific measures thereof is about how this might lead to instances of racial or ethnic profiling in circumstances of identity control. Recent years have seen a number of US states allowing police to verify the illegality status of any person who is part of some other inquiry.<sup>32</sup> These regulations have been controversial, and elicited a great deal of protest.<sup>33</sup> However, most political protests against these regimes of control have focused on how they will play out with respect to the United States politics of race.<sup>34</sup> This nicely demonstrates the paradox described above: complaints that focus on the potential for 'racial profiling' are in some sense complaints that the illegality regime is not indiscriminate enough and should be applied *more broadly*. As such, and to put the finger on the irony: one of the hallmarks of a righteous egalitarian and *truly* anti-racist state to have a thoroughly indiscriminate and invasive illegality regime, in which everybody, independent of race, ethnicity, and class, can and in fact will be subjected to ID control. The best way of being indiscriminate is to make sure that everybody's identity is actually controlled, and the best way of being rigorous is to make sure that this control happens often.

However, it seems likely that identity controls will nevertheless be selectively applied and enforced, with more controls taking place in some neighborhoods than in others, with some areas of economic activity, such as construction and

---

<sup>32</sup> See, e.g., the laws of Arizona, Georgia, Alabama, and others. Alabama House Bill 56; 2010 Arizona Session Laws 113 (State Bill 1070) (the most significant and controversial parts of this bill were enjoined following a federal challenge on supremacy grounds); Georgia House Bill 87.

<sup>33</sup> Indeed, Nobel Peace Prize Laureate and activist Desmond Tutu even cautioned that the Arizona law was the first step down the road to apartheid. Desmond Tutu, 'Arizona: The Wrong Answer' (*Huffington Post*, 29 April 2010) <[http://www.huffingtonpost.com/desmond-tutu/arizona---the-wrong-anw\\_b\\_557955.html](http://www.huffingtonpost.com/desmond-tutu/arizona---the-wrong-anw_b_557955.html)> accessed 10 October 2011.

<sup>34</sup> See, e.g., Kieth Aoki & John Shuford, 'Welcome to Amerizona--Immigrants Out: Assessing Dystopian Dreams and Usable Futures of Immigration Reform, and Considering Whether Immigration Regionalism is an Idea Whose Time has Come' (2010) 38 *Fordham Urban Law Journal* 1; Andrea Christina Nill, 'Latinos and S.B. 1070: Demonization, Dehumanization, and Disenfranchisement' (2011) 14 *Harvard Latino Law Review* 35; Mary Romero, 'Are Your Papers in Order?: Racial Profiling, Vigilantes, and "America's Toughest Sheriff"' (2011) 14 *Harvard Latino Law Review* 337.

catering, more often investigated, with more emphasis on urban areas than on rural areas, and so on. In this way, existing class structures based on income, ethnicity, etc. will be reinforced as some groups bear the brunt of the illegality regime.<sup>35</sup>

Even so, *everybody* will be affected by strong illegality regimes, as its main manifestation is not that of officers in the street, but of building check points into an increasing number of moments in the daily life of citizens. These check points will be manned by a growing number of private individuals.

### 3. Citizenship Transformed

As explained above, a strong illegality regime makes formal citizenship, or at least some degree of legal status, more important. However, this importance is not necessarily a blessing. It means that formal citizenship becomes more necessary, and that its absence becomes more consequential.<sup>36</sup> It means that citizenship is haunted by a Sword of Damocles, for being a citizen no longer provides certainty, as an intrinsic part of one's political identity in the world at large, but becomes instead a status that entails a degree of constant anxiety. It also means that any confusion about one's citizenship, such as mistaken identity, or loss of ID through carelessness or theft, is even less of a laughing matter and becomes an urgent problem, for without proof of legal status ordinary life loses many of its comforts. Where illegality regimes are rigorously enforced, citizenship becomes something that you can never leave home without. Instead of being a formal status, which brings with it important but mostly symbolic rights such as the right to vote or to hold public office, it becomes the key to your most basic needs, such as the ability to buy a house, to have a job, to set up internet access, and so on. From a badge of honor, shown during the festive moments of the life of the body politic, citizenship becomes

---

<sup>35</sup> Michael Wishnie, 'State and Local Police Enforcement of Immigration Laws' (2004) 6:5 University of Pennsylvania Journal of Constitutional Law 1084, 1113 (describing the US Immigration and Naturalization Service's selective enforcement of immigration rules on those who were speaking Spanish, listening to Spanish music, or had a Hispanic appearance).

<sup>36</sup> As Hannah Arendt argued, because rights are not 'natural' but a construction of society, they are fundamentally attached to an individual's membership in the political realm. To the extent that this membership is marked by citizenship status, citizenship becomes a matter of crucial importance. '[N]ot the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever, has been the calamity which has befallen ever-increasing numbers of people. Man it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity. Only the loss of a polity itself expels him from humanity'. Hannah Arendt, *The Origins of Totalitarianism* (Harcourt 1968) 297.

the object of constant scrutiny and mistrust. In a weak illegality regime, you may never need of a passport, or other ID, if you never travel abroad. Under a strong illegality regime, however, your ID is the thing that gives you access to a 'normal' (legal) life. Moreover, the more pervasive the identity controls imposed by an illegality regime, the more you will be held hostage not just to your citizenship, but also to the formal and tangible evidence thereof, the ID. As one's citizenship becomes more and more important, the person underneath that citizenship will start to melt away; from a person with citizenship, you become close to nothing without it.

### 3.1 Theories of Citizenship

This dynamic engages most of the traditional theories of citizenship. Theories about citizenship abound and are as old as political philosophy and/or law.<sup>37</sup> They range from the so-called republican approaches that emphasize the connection between citizenship and participation in the realm of politics, and which focus on the arena of political engagement<sup>38</sup>; through Liberal approaches that are built around law and rights, and have a cosmopolitan or universalist vocation<sup>39</sup>; through communitarian approaches that emphasize cultural belonging and community<sup>40</sup>; to radical pluralistic approaches that offer the

---

<sup>37</sup> For one famous historical overview, see J.G.A. Pocock, 'The Ideal of Citizenship since Classical Times' (1992) 99 *Queen's Quarterly* 35. See also Derek Benjamin Heater, *Citizenship: the civic ideal in world history, politics and education* (first published 1990, 3rd edn, Manchester U. Press 2004); Gershon Shafir (ed), *The Citizenship Debates: A Reader* (University of Minnesota Press 1998).

<sup>38</sup> See e.g., Aristotle, *The Politics* (T.A. Sinclair tr, Penguin 1962); Arendt (n 36). For neo-republican theories that seek to update republicanism for the modern era, see Adrian Oldfield, *Citizenship and Community: Civic Republicanism and the Modern World* (Routledge 1990); Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Harvard 1996); Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster 2000).

<sup>39</sup> See, e.g., John Rawls, 'Justice as Fairness, Political not metaphysical' (1985) 14 *Philosophy and Public Affairs* 223; Jürgen Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' (1992) 12 *Praxis International* 1.

<sup>40</sup> See, e.g., Michael Walzer, *Spheres of Justice* (Basic Books 1983); Charles Taylor, 'The Politics of Recognition' in Amy Gutman (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994); Will Kymlicka, *Multicultural Citizenship* (OUP 1996).

image of a differentiated citizenship, one in which any identity can find its place.<sup>41</sup>

These theories of citizenship are the products of enveloping narratives of political and legal ideas of community and state. These narratives offer both a normative background as well as a factual account of the life of the state, its sovereignty, its subjects, and their legal and political status. As such, when we speak of citizenship, we are not talking about a fixed or uncontested institution, let alone a too formally defined one.<sup>42</sup>

Theories about citizenship are seen here as interventions into debates about what the best and most accurate account is about what is going on in the life of the contemporary state of affairs. For the purpose of this project this article will offer such an account, but one that is centered around a phenomenological exploration of the social practices that constitute citizenship, and how it is embedded in legal rules about rights as well as about duties, and about competences and jurisdiction. This account has normative dimensions, but these are backgrounded, sacrificed in the attempt of figuring out how the chimera of citizenship is affected by illegality regimes.

### 3.2 Under siege: citizenship as protection

Citizenship, then, can be many things. And in each of its guises, it is both produced and affected by the presence of illegality regimes.

To begin with, citizenship can be understood as a form of protection.<sup>43</sup> Illegality regimes are justified in a number of ways: by reference to economic stability

---

<sup>41</sup> See, e.g., Iris Marion Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99 *Ethics* 250.

<sup>42</sup> As Judith Shklar has written, 'There is no notion more central in politics than citizenship, [yet] none more variable in history, or contested in theory'. Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Harvard U. Press 1991) 1. Kivisto and Faist give a sense of this when they list the "proliferation of adjectives" that characterize citizenship literature. Peter Kivisto & Thomas Faist, *Citizenship: discourse, theory, and transnational prospects* (Blackwell 2007) 2-3. Contestation over this term goes back a long way: 'The nature of citizenship ... is a question which is often disputed; there is no general agreement on a single definition'. Aristotle (n 38) 93.

<sup>43</sup> As the geographer Yi-Fu Tuan once asserted, 'every human-made boundary on the earth's surface--garden hedge, city wall, or radar 'fence'--is an attempt to keep inimical forces at bay. Boundaries are everywhere because threats are ubiquitous.' Yi-Fu Tuan, *Landscapes of Fear* (University of Minnesota Press 1979) 6.



and/or welfare,<sup>44</sup> by reference to cultural homogeneity or social cohesion,<sup>45</sup> or by reference to a combination of security and criminality concerns. In each of these stories, illegal migration is constructed as an invasion, as hordes of people 'breaking the law'.<sup>46</sup> Though the language of formal illegality rules and the rhetoric surrounding the rise of illegality regimes on the political agenda may differ,<sup>47</sup> the instruments used to enforce them are generally fixed. These involve very visible measures of police or administrative measures, the construction of physical barriers,<sup>48</sup> and the deployment of a variation of stealth controls by labor inspectors and other administrative inspections.<sup>49</sup> The detention of irregular migrants equates them with criminals, holding them in detention centers that are, like prisons, designed to keep people in and prevent them from disappearing into the population.<sup>50</sup>

Whether draconian or lenient, however, illegality regimes are ultimately justified and implemented as a response to a threat or even a danger. Physical manifestations of citizenship, such as an ID card or passport, are now required not only to give access to territory or consular assistance abroad, or for the

---

<sup>44</sup> See, e.g., Peter Brimelow, *Alien Nation: Common Sense About America's Immigration Disaster* (Random House 1995) 137-177.

<sup>45</sup> David Miller, for example, worries that the presence of foreigners might put social democracy at risk because social democracy requires a unity of community and purpose. David Miller, *On Nationality* (OUP 1995).

<sup>46</sup> A number of scholars have commented on the military language used to describe immigration. In one interesting study, Leo Chavez describes the militaristic costumes and props used by the Minutemen vigilante border patrol groups in the United States, and examines the way that these performative strategies reinforce the narrative of invasion. Leo R. Chavez, 'Spectacle in the Desert: The Minuteman Project on the US-Mexico Border' in David Pratten and Atreyee Sen (eds) *Global Vigilantes* (Hurst Publishers 2007).

<sup>47</sup> For example, though seldom actually so implemented, political debates sometimes make reference to the use of the military in pursuing irregular migrants. Physical walls can, in this sense, be seen as deploying military means (walls) without deploying the actual military. The big exception though is the patrolling of waterways and maritime borders, which is done by actual military components of the state: navies.

<sup>48</sup> P. Andreas, 'Redrawing the line: Borders and security in the twenty-first century' (2003) 28 *International Security* 78; Phillip Cole, 'The American Fence: Liberal Political Theory and the Immorality of Membership' in Gideon Calder, Phillip Cole & Jonathan Seglow (eds), *Citizenship Acquisition and National Belonging: Migration, Membership and the Liberal Democratic State* (Palgrave Macmillan 2010); Wendy Brown, *Walled States, Waning Sovereignty* (MIT Press 2010).

<sup>49</sup> What Broeders and Engbersen call 'weapons of mass detection'. Broeders and Engbersen (n 14) 1593.

<sup>50</sup> See generally M. Welch, *Detained: Immigration Law and the Expanding INS Jail Complex* (Temple University Press 2002); Mary Bosworth, 'Border Control and the Limits of the Sovereign State' (2008) 17 *Social and Legal Studies*.

exercise of voting rights. They also serve as a symbol of the efforts of the state to protect the integrity of its territory, and the economic and social welfare enjoyed by its citizens. In the weak version, citizenship serves to protect citizens' access to their 'birthright', to the spoils collected by previous generations.<sup>51</sup> In the stronger version, citizenship serves to protect the privileges themselves, by ensuring, through the operation of illegality regimes and restrictive immigration policies, that economic welfare and social cohesion are maintained.

However, there is a more concrete dimension to this protection. Citizenship, in its material expression, serves to protect subjects from suspicion and prevents their exclusion from everyday activities such as getting a job or health insurance. This protection, however, is only necessary because of the illegality regime itself, which cordons off large proportions of public life. The logic is therefore circular: citizenship protects the public from the dangers of illegality, which are themselves the product of the citizenship regime.

### 3.3 Belonging: citizenship as membership

Citizenship can also be about membership and belonging, and illegality about strengthening this community.<sup>52</sup> Citizenship here is about what connects subjects to the body politic, what connects them to one another. To be a citizen means to share in the sovereignty over the state of affairs.<sup>53</sup> Illegality regimes can be seen as aiming to increase the value of these connections, to close them off from cultural contamination, to root the political community in the territory, and to make sure that only those selected to enter into the political community

---

<sup>51</sup> See Ayelet Shachar and Ran Hirschi, 'Citizenship as Inherited Property' (2007) 35 *Political Theory* 253.

<sup>52</sup> Michael Walzer, for example, sees citizenship as about protecting communities: 'The theory of distributive justice begins, then, with an account of membership rights. It must vindicate at one and the same time the (limited) right of closure, without which there could be no communities at all, and the political inclusiveness of the existing communities'. Walzer (n 40) 63.

<sup>53</sup> As Walzer writes, 'we who are already members do the choosing, in accordance with our own understanding of what membership means in our community and of what sort of a community we want to have. Membership is a social good is constituted by our understanding; its value is fixed by our work and conversation; and then we are in charge (who else could be in charge?) of its distribution'. Walzer (n 40) 32. 'Citizenship, conventionally understood, marks full and permanent membership in a political community; ... it defines the circle of our greatest trust and of our most extensive common endeavors'. Peter H. Schuck, 'Citizenship in a Post-9/11 World: An Exchange Between Peter H. Schuck and David Cole' (2007) 75 *Fordham Law Review* 2531, 2534.

by the appropriate procedures can actually do so.<sup>54</sup> Thus, illegality regimes are meant to strengthen the connection of citizens to the body politic; to extend the reach of the political community to more areas of life, such as renting an apartment or even getting a bank account. Citizenship becomes important in all sorts of places where it never was before.<sup>55</sup> As the external lines of the public realm are made stronger, the connection among those who have access and are part of the community may increase as well.

At the same time as they strengthen some community ties, however, these lines cut straight through others. This happens as individuals are separated by ethnicity and national origin, dividing up those immigrants with legal status from those without.<sup>56</sup> And it happens geographically too, with effects that are accommodated territorially. As described above, illegality regimes create localities and sites where underground markets and service providers are more densely concentrated. This process, too, is circular: illegality regime creates sites with increased illegality. These sites are not the exclusive domain of irregular migrants, but are shared by other groups, often groups that are themselves at the margins of the public realm and the body politic. Illegality regimes increase the distance between center and periphery within a community, and, as such, change the economy between cohesion and division, not necessarily in desirable ways.

Just as with 'citizenship as protection', then, the notion of 'citizenship as cohesion' sets up an illegality regime that ends up undermining its goals in the name of promoting them. The way in which this happens is via the slow but relentless development of an illegality regime that feels that it needs to reach further and intrude deeper into the fabric of social life. The more citizenship operates as an anxious overcoming of a constant distrust about ones membership and overall legality, the less it can comfortably function as a symbol of belonging to a political community. In short, by becoming more, citizenship becomes less.

### 3.4 *Vita activa*: citizenship as engagement with the body politic

---

<sup>54</sup> The rise of language and 'shared values' tests for newcomers is evidence of this conception of citizenship. See Sue Wright, 'Citizenship Tests in Europe' (2008) 10 *International Journal of Multicultural Studies* 1.

<sup>55</sup> For example, a few supermarkets in Amsterdam only accept electronic payment, using debit accounts, for which you need a bank account, for which you need some type of regular status

<sup>56</sup> It inevitably will divide couples, lovers, and families too.

A third way of seeing citizenship is as a sign of political engagement. Illegality, understood through this paradigm, is intended to protect the exclusive nature of the political realm.

Especially in the republican tradition, citizenship is concerned with the capacity and desirability of engaging in the realm of politics. In contemporary societies, there are a number of formal and less formal institutions that aim to facilitate this engagement, including the different elements and levels of the state (local, regional, national), non-state organizations, and civil society in general. Each national culture has informal dimensions too, which might include disruptive public demonstrations, or mobilization through radical or fringe political parties. All this and much more is part of the social organizing of political engagement that is part of the institution of citizenship.<sup>57</sup>

In order to be meaningful, however, this citizenship must be limited to those who are both prepared and capable of participating in the public sphere. Illegality regimes are thus put in place to cordon off the realm of political life, and to ensure that the arena of public engagement is only accessible to formal citizens. That is, that only those with the right and capacity to do so can engage as equals in political life.<sup>58</sup>

At the same time, though, the means and techniques used to enforce an illegality regime in this paradigm work to undermine political engagement. The degree to which this happens depends very much on local circumstances, formal and informal political cultures, and the nature of the illegality regime itself, as well as on the 'size' of the perceived illegality problem. One can imagine situations in which a relatively weak illegality regime would continue to allow engagement and participation in all types of formal and informal political and judicial procedures. But, one can also imagine situations in which a very

---

<sup>57</sup> As Michael Sandel describes it, 'the republican tradition emphasizes the need to cultivate citizenship through particular ties and attachments. More than a legal condition, citizenship requires certain habits and dispositions, a concern for the whole, an orientation to the common good. But these qualities cannot be taken as given. They require constant cultivation. Family, neighborhood, religion, trade unions, reform movements, and local government all offer examples of practices that have at times served to educate people in the exercise of citizenship by cultivating the habits of membership and orienting people to common goods beyond their private ends.' Sandel (n 38) 117.

<sup>58</sup> This type of cordoning off will also exclude non-citizens with legal status. Michael Sandel justifies this exclusivity as flowing from the 'special demands of republican citizenship'. As he puts it: 'If sharing in self-rule requires the capacity to deliberate well about the common good, then citizens must possess certain excellences of character, judgment, and concern for the whole. But this implies that citizenship cannot be indiscriminately bestowed. It must be restricted to those who either possess the relevant virtues or can come to acquire them'. Sandel (n 38) 318.

strong or repressive illegality regime leads to situations in which a large number of people are denied access to formal and informal legal and political channels. If this is the case, such an illegality regime will basically create new forms of politics, primarily in the informal realm,<sup>59</sup> but perhaps in ways that openly defy existing political and legal structures of citizenship in the sense of the dynamics of political engagement. This may be a good thing in and of itself, but it may also be potentially destabilizing. In its quest to delimit and thereby protect public life, therefore, illegality regimes can end up eliminating pathways for political engagement and creating separate, privatized spheres of social action that are disengaged from the broader public world.

### 3.5 Guarantees: citizenship as having rights

Citizenship has acquired, in the last fifty or so years, perhaps the most sophisticated legal and institutional environment it has ever had. This has happened primarily through the framework of human rights and through the ways in which rights discourse is part and parcel of the entire legal institutional edifice. Since their introduction as political rights, human rights have enshrined the most important aspects of what citizenship means:<sup>60</sup> equality, individual autonomy, access to legal and political institutions, etc. They have not only been the objectives in various emancipatory struggles, such as voting rights for women, basic social rights for the poor; they also have created institutional mechanisms to achieve these results.<sup>61</sup> Moreover, notions of what citizenship means have followed a trajectory that has been closely connected to theoretical, doctrinal, and legislative developments in human rights. For example, social rights and cultural rights have been developed in periods when the issues of social solidarity and cultural identity were polemical points of

---

<sup>59</sup> See, e.g., Anne McNevin, *Contesting Citizenship: Irregular Migrants and the New Frontiers of the Political* (Columbia UP 2011); E.C. Hughes, 'Bastard Institutions' in L. Coser (ed), *Everett C. Hughes on Work, Race, and the Sociological Imagination* (first published 1951, Chicago U. Press 1994); S.J. Mahler, *American Dreaming: Immigrant Life on the Margins* (Princeton 1995); Broeders & Engbersen (n 14).

<sup>60</sup> T.H. Marshall provided one influential statement of this conception of citizenship as rights just after World War II. T.H. Marshall, 'Citizenship and Social Class' (1950) in T.H. Marshall, *Class, Citizenship and Social Development* (Anchor 1965). And Hannah Arendt, famously, defined citizenship as the 'right to have rights'. Arendt (n 36). See also Simon Szreter, 'The right of registration: Development, identity registration, and social security--a historical perspective' (2007) 35 *World Development* 67 (arguing for a human right to identity registration, which would help ensure that all individuals have access to civil and political rights).

<sup>61</sup> For Marshall, for example, full citizenship requires a liberal-democratic welfare state that can guarantee civil, political and social rights to every member of society. Marshall (n 60).

articulation in the broader discussions about citizenship and about the relation between the state and its citizens.<sup>62</sup>

As human rights institutions grew in strength and authority, they came to be perceived as guarantors of the basic rights of citizens, to the point of offering a check on the power and authority of the (democratically elected) legislature. In this way, they have contributed to the construction of citizenship as a set of guarantees, enshrined in rights that are legally enforceable, if necessary against the grain of democratically articulated will.<sup>63</sup>

A paradox ensues. An illegality regime puts significant pressure on this reliance and on the function of a human rights framework in general, even if at the same time it seems to continue its job unscathed. For one, recent decades have seen a fairly meek response by human rights institutions to the claims of migrants in general, and to the claims of irregular migrants in particular. The general argument goes like this: "As a general principle of international law, it is at the discretion of the State to grant entry to its territory to non-nationals. However in exercising control of their borders, States must act in conformity with their international human rights obligations. In certain specific categories of cases, States may be required by international law to permit a migrant to enter or remain: where a migrant meets the criteria for refugee status, or complementary protection; or where entry to the territory is necessary for purposes of family reunification."<sup>64</sup> In fact, human rights institutions have supported the general idea, explained above, of a state under siege, of a state that needs protection against the phenomenon of migration in general, and irregular migration in particular.<sup>65</sup> The reasons mentioned above have in fact been the justification of

---

<sup>62</sup> Marshall (n 60).

<sup>63</sup> As Seyla Benhabib notes, 'cosmopolitan norms enhance the project of popular sovereignty while prying open the black box of state sovereignty. They challenge the prerogative of the state to be the highest authority dispensing justice over all that is living and dead within certain territorial boundaries. In becoming party to many human rights treaties, states themselves 'bind' their own decisions.' Seyla Benhabib, 'Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times' in Heather Gautney et al. (eds) *Democracy, States, and the Struggle for Social Justice* (Routledge 2009) 82.

<sup>64</sup> International Commission of Jurists, *Migration and International Human Rights Law* (International Commission of Jurists 2011) 43.

<sup>65</sup> Since the *Abdulaziz* case, the European Court of Human Rights has always started its analysis of cases related to migration with a reiteration of a state's sovereign right to control entry to its territory; protecting the domestic labor market was cited as one possible legitimate justification. Par. 78 of *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, European Court of Human Rights, Appl. 9214/80, 9473/81, 9474/81; Judgment of 28-05-1985; published in Series A-94. In this, and to deal with irregular migration, the European Court has also allowed states to use coercive measures, such as detention. See generally: Galina Cornelisse, *Immigration Detention and*

the human rights institutions: social cohesion and economic welfare. As such, illegality regimes carry *the general seal of human rights approval*.

However, the construction of an illegality regime also means that a state has to limit some of the rights of its citizens, such as the right to privacy, in its quest to verify everybody's legal status.<sup>66</sup> The rights of citizens are vulnerable to this in the same way that they are vulnerable to an anti-terrorism regime. This limitation of some rights in the context of counter-terrorism however, is nothing compared to the limitations endured by aliens and by irregular migrants. This fissure in the general framework of equality generally guaranteed by human rights frameworks can, however, mean that the standard of normality changes. The degree of protection and guarantee is now measured by reference to the inferior level of protection enjoyed by irregular migrants.<sup>67</sup> This shift in turn raises the stakes of being confused with irregular migrants, either by error or by bad intentions.<sup>68</sup>

Finally, illegality regimes tend to increase the amount of power, authority and competences in the hands of the public administration: that is, increasing the power in the hands of the executive, and decreasing the power of the judiciary.<sup>69</sup> Whereas the criminal law system has a long tradition of checks and guarantees, the administrative law system in many countries is not really designed to deal with the tracking down, rounding up, and deporting of

---

*Human Rights* (Martinus Nijhoff 2010). In the words of Catherine Dauvergne, *supra* note 3 at 21: "human rights norms have done little to assist illegal migrants."

<sup>66</sup> See Conor Friedersdorf, 'Why Alabama's Immigration Bill is Bad for Citizens' *The Atlantic* (13 June 2011).

<sup>67</sup> Beyond civil and political rights, one can see the downward effect or pressure that illegality produces on labor standards and on wages.

<sup>68</sup> There is the famous case of Vivian Solon, an Australian citizen who was deported to Manila, where she had been born, after being unable, due to mental health problems, to adequately explain her situation to the immigration authorities. See [http://en.wikipedia.org/wiki/Vivian\\_Solon](http://en.wikipedia.org/wiki/Vivian_Solon) (last accessed 10 October 2011). Then there is also the growing practice of Dutch authorities to put under immigrant detention demonstrators who refuse to identify themselves. This administrative detention does not require a formal criminal law charge and can last up to eighteen months. See Juan M. Amaya-Castro, 'Tegenwoordig ben je hier illegaal tot het tegendeel is bewezen', *De Volkskrant* (6 August 2011) 36.

<sup>69</sup> See, e.g., Donald S. Dobkin, 'The Rise of the Administrative State: A Prescription for Lawlessness' (2008) 17:3 *Kansas Journal of Law and Public Policy* 362 (describing the increase in administrative power that came along with the Bush administration's increased focus on immigration as a security threat).

thousands of people. In short, an illegality regime affects the very realm of law designed to regulate relations between citizens and the state.<sup>70</sup>

### 3.6 The world: citizenship as universal equality

Increasingly, the idea of democratic states fulfilling the promise of making the way for a humanity in which all are equal is coming under pressure.<sup>71</sup> In this promise, citizenship based on democratic institutions and equality was not just a birthright for the happy few, but the promise that the rule of law and democratic rule held out to humanity.<sup>72</sup> Egalitarian and democratic citizenship has been constructed as the West's claim to universal moral, legal, and political authority. Even recently, when we have seen a surge in illegality regimes, democracy and egalitarianism are held out as evidence of Western superiority, for other countries to emulate. However, this idea is coming under pressure as these same states start treating citizenship as a birthright and as a privilege, and not as the West's gift to mankind. Having growing numbers of people being excluded from the regular political, social and cultural life of a body politic can of course be ignored, but only for so long as politics of defiance and visibility are suppressed. In short, it is very difficult not to see states with strong illegality regimes as not being discriminatory and repressive states, even if their illegality regimes as such are designed to be indiscriminate. As birthright and privilege become stronger elements in the conception of citizenship, equality and non-discrimination give way.<sup>73</sup> In this way, the idea of citizenship as a manifestation of universality is undermined, while the idea of citizenship as the exclusionary politics of privilege is enhanced.

---

<sup>70</sup> An interesting general case is made in favor of the notion of citizenship over the institutionalized one of human rights by Paulina Tambakaki, *Human Rights, or Citizenship?* (Birkbeck 2011).

<sup>71</sup> In this sense, scholars such as Yasemin Nohoglu Soysal have written of the development of a 'postnational' citizenship that 'challenges the predominant assumption, both scholarly and popular, that national citizenship is imperative to membership in a polity'. Yasemin Nohoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (U. of Chicago Press 1994) 3.

<sup>72</sup> Martha Nussbaum, for example, recently declared herself a 'citizen of the world', arguing that 'If we really do believe that all human beings are created equal and endowed with certain inalienable rights, we are morally required to think about what that conception requires us to do with and for the rest of the world'. Martha Nussbaum, 'Patriotism and Cosmopolitanism' (1994) Oct.-Nov. Boston Review.

<sup>73</sup> Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard UP 2009).



#### 4. Concluding: the checkpoint, citizenship and suspicion

It is important to keep in mind that we are not merely talking about a symbolic dimension in which citizenship means one thing or another, even if this dimension is highly relevant in the context of developments in law and legal doctrine. Moreover, it is also not about merely referring to these legal and doctrinal accommodations of illegality regimes, even if this legal formalization of surveillance and checkpoint practices is a fundamental piece of the puzzle. What is at the core of this argument is the sweeping transformation of our political and therefore our physical environment by technologies that allow for mass surveillance and continuous control,<sup>74</sup> as well as for the linking together of the growing flows of information collected by the state.<sup>75</sup> It is these technologies, as much as the various developments that trigger migratory flows themselves, that imposes itself as the new material environment in which citizenship acquires concrete significance in the experience of its subjects.

---

<sup>74</sup> Lyon (n 28).

<sup>75</sup> See generally, Benjamin Muller, *Security, Risk and the Biometric State: Governing Borders and Bodies* (Routledge 2010).