Crim Law and Philos (2014) 8:635–657
DOI 10.1007/s11572-013-9229-6

ORIGINAL PAPER

Iniuria Migrandi: Criminalization of Immigrants and the Basic Principles of the Criminal Law

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Published online: 3 May 2013

Abstract In this paper I am specifically concerned with a normative assessment, from the perspective of a principled criminal law theory, of norms criminalizing illegal immigration. The overarching question I will dwell on is one specifically regarding the way of using criminal law which is implied in the enactment of such kinds of norms. My thesis will essentially be that it constitutes a veritable abuse of criminal law. In two senses at least: first, in the sense that by criminalizing illegal immigration criminal law puts a ban on (certain categories of) persons, rather than on their actions/omissions, in a way in which a principled criminal law should not do; and—second—in the sense that the criminalization of illegal immigrants represents a perversion of the criminal law, being a case in which criminal norms are (unjustifiably) used as means to attain extrapenal aims.

Keywords Illegal immigration · Criminalization · Tatstrafrecht versus Täterstrafrecht · Stereotypes · Expulsion · Subjection to state's administrative dominion

Introduction

When, in 2008, the former Italian Minister of the Interior, Roberto Maroni, publicly announced the Italian government's and parliament's intention to pass a statute criminalizing "illegal entrance into, or stay on, the state's territory", left-oriented public opinion, as well as the great majority of academic criminal lawyers, argued that such a political choice would have been merely populist and highly discriminatory. Minister Maroni candidly replied that many other countries, both inside and outside the European Union (henceforth: EU), were already criminalizing illegal immigration. Unfortunately (throughout this article I shall try to justify my using this adverb here), he was right. The

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criminalization of irregular immigrants is not at all an Italian speciality; it is rather a widespread trend all over the world.[1]

It was not always so. To be true, hostile social and political attitudes towards immigrants, strangers and foreigners have always existed;[2] in a way, they constitute an unavoidable step in the social and historical construction of communities and communities' identities (Calavita 2003; Melossi 2003; Krasmann 2007; Palidda 2009, 7. *Contra* Abizadeh 2005): something like a necessary chapter in the *Bildungsroman* of every social self. There are moments in history, however, in which these attitudes undergo a deterioration. And this is undeniably what has been happening in recent years in Europe—and not only in Europe—and has now led, as a result, to a 'a shift in the perception regarding the moral worthiness of [*illegal*] migrants, [*so that*] those who enter and remain without authorization are increasingly perceived as 'criminal' in a *mala in se* sense.' (Dauvergne 2008, 16. See also Bosworth 2008; Palidda 2009, 7 ff.; and, with some qualifications, Albrecht 2002.)

In this article I will be specifically concerned with a normative assessment, from the perspective of a principled criminal law theory, of the way in which this "shift in perception" has been translated into norms criminalizing illegal immigration. The overarching question I will dwell on is one specifically regarding the way of *using* criminal law, which is implied in the very fact of criminalizing illegal immigration. My thesis will essentially be that it constitutes a veritable *abuse of criminal law*. In two senses at least: first, in the sense that by criminalizing illegal immigration criminal law puts a ban on (certain categories of) persons, rather than on their actions/omissions, in a way in which a principled criminal law should not do (because in so doing it violates some basic liberal principles which should be thought of as compelling for any just criminalization—of course, insofar as we assume that a just criminalization should be inspired by such liberal principles); and—second—in the sense that the criminalization of illegal immigrants represents what in Antony Duff's terminology (Duff 2010, 92) might be called a *perversion of the criminal law*, being a case in which criminal norms are (unjustifiably) used as means to attain extra-penal aims.

I will carry out this critical task having as my test case the Italian regulation on (il)legal immigration: I will do this not only because Italian law is the one with which I am more familiar, but also because it presents some features that strike me as particularly revealing of a more general attitude towards irregular immigrants (and, in any event, of an attitude that needs to be pointed out and criticized). I will assume, however, as a telling circumstance the fact that many (if not all) of the relevant traits of the Italian migration law are in fact implementations of, or in accordance with, EU principles on the matter.

An Overview of the Relevant Legislation

The Italian Way of Banning Illegal Immigrants

The general rule governing foreigners' regular entrance into the Italian territory is a rule quite common among modern states: if we put aside some limited—even if relevant—

[1] E.g., among EU member states, illegal entry or sojourn is also criminalized in France (d'Ambrosio 2010), Germany (Ziegler in Guild and Minderhoud 2006), and the UK (Kostakopoulou in Guild and Minderhoud 2006). In Spain it is made into an administrative offense (Gortázar Rotaeche in Guild and Minderhoud 2006).

[2] On 'foreignness' as one of the 'stereotypes of persecution', Girard 1986[1982], Ch. 2. On the 'classical sociological theme of fear of the stranger', Aas 2007, Ch. 2.

exceptions,[3] no one should be admitted unless s/he has a regular visa and/or (it depends on the situations) a regular residence permit, that is unless s/he is explicitly and specifically *permitted*, *authorized*, to enter (or to stay) therein. Italian law, in particular,[4] makes obtaining such an authorization conditional upon the following presuppositions: (a) that the foreigner's entrance or stay be designed to pursue a legitimate end (a pretty obvious condition, indeed); (b) that his/her purported sojourn be of a limited duration (although the possible length varies according to the different aims of the foreigner's visit); (c) that s/he have money enough both to keep himself/herself during his/her stay and to return back home when the time of his/her stay has elapsed. Those who are not already provided with sufficient means of subsistence should at least be in a position to acquire such means "lawfully" (i.e., by regular job). Hence, no foreigner should enter Italy *in search of a job*: would-be guest-workers can only enter if at the time of their entrance they are already engaged in an official and authorized commitment with their future employers (art. 22 CLI). (In consequence, hiring an illegal immigrant is a crime, according to art. 22.12 CLI (Masera 2012).)

This whole system is highly artificial and hypocritical: as is well-known, the largest number of those who aspire to migrate in Europe are nationals from poor countries who seek to escape extremely needy living conditions; migration for them is precisely the way (to try) to gain some minimal means of support, so that they *cannot* be already provided with such means at the very moment of their migration. Furthermore, while these persons generally decide to migrate exactly *in search of a job*, it is highly unrealistic to think that—before entering Italy—they are already in touch with Italian employers eager to hire them regularly.

As a result, in many (indeed, in the great majority of) cases the only way would-be immigrants (who aren't wealthy enough to keep themselves during their stay) have to enter the Italian territory is by trying to do it *illegally*. This exposes them to *criminalization* and *liability to expulsion*.

First, those who succeed in their aspiration to enter the state's territory will thereby commit the crime of "illegal entrance into the state's territory", which is made punishable by art. 10-*bis* CLI with a minimum fine of 5,000 euro to a maximum of 10,000 euro. (The very same punishment is also attached to the crime of "illegal sojourn in the state's territory", committed by those persons who illegally stay on the state's territory once their visas or residence permits have expired, or once they have been denied a residence permit, or once their residence permit has been revoked.)

Moreover, illegal immigrants should undergo "administrative expulsion" directly decided on and executed by the police (arts. 10.2 and 13 CLI), irrespective of whether the expelled foreigner is or not on trial for their (alleged) illegal entrance or sojourn. No authorization (*nulla osta*) is required by the trial judge in this case; rather, if the judge receives official police information that the defendant has been administratively expelled

[3] EU citizens, nationals of visa exempt third-countries, and—but this is an exception tending today to be merely theoretical rather than practically relevant (Gibney 2004; Valluy 2009; Rastello 2010)—asylum seekers and refugees.

[4] The great bulk of the relevant regulation is to be found in *Decreto Legislativo* no. 286/1998, the Italian "Consolidated Law on Immigration" (henceforth: CLI). An act that, since its first enactment, has been strongly and repeatedly modified both by subsequent laws and by the Italian constitutional court's judgements. In what follows, however, I will essentially refer to its current shape.

(art. 10.4 CLI), he must declare there are no grounds for proceeding ("*non luogo a procedere*"—art. 10.5 CLI).[5]

In those cases in which administrative expulsion cannot be immediately performed (which frequently happens), because, for instance, it is not clear which is their country of origin, illegal immigrants will be confined in so-called "Centres for Identification and Expulsion" (henceforth: CIE) (a veritable form of imprisonment), with the perspective of remaining therein for up to 18 months (art. 14.5 CLI), if it is necessary in order to identify them and to carry out their coercive expulsion.[6]

Lastly, a *judicial* order for immediate expulsion (which is exactly the same thing as administrative expulsion, except for the fact that the relevant decision is here in the hands of a judge, and not of the police) is expressly provided by the law as a substitute for the fine: in convicting a foreigner for the crime of illegal immigration, the judge may substitute the fine with foreigner's expulsion in those cases in which there are no obstacles to its immediate performance (art. 16.1 CLI; see also art. 62-*bis*, D.Lgs. 274/2000).

The European Way of Banning Illegal Immigrants

Importantly, this set of norms—as I have set it out here—is not at all in conflict with the EU principles on immigration;[7] on the contrary, the first one seems to be a rather accurate translation of the others.

To realize how true this is, it will suffice to consider a brief overview of the "Schengen Borders Code" (henceforth: SBC)[8] and of the "Repatriation-Directive" (henceforth: RD),[9] which are the two most important EU documents on the matter. According to them, not only does each EU member state have a wide-ranging right to exclude non-EU foreigners, but, in a way, it is obliged to do so, since '[*b*]order control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control' (6th Whereas, SBC).

Foreigners aspiring to legally enter the EU territory (and to stay therein for a maximum of 3 months-per 6 months) should present themselves at a border crossing point provided with valid travel documents and, if required, visas, but they should also either 'have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin […], or [*be*] in a position to acquire such means lawfully' (art. 5(c) SBC): a set of requirements we have already met. Most noteworthy, from my point of view, is the fact that the SBC seems to be particularly worried about the economic requirement, since it impliedly states—in a quite crude and clumsy, if sincere, way—that,

[5] In this case, the judge acquits the defendant without going into the merits of the charge: the defendant is absolved, not because s/he is found 'not guilty', but because some circumstances occur due to which the state loses interest in prosecuting and trying him/her.

[6] In cases in which immigrants cannot be confined in a CIE (for instance, because of a lack of beds), or, even though confined, could not have been identified or coercively expelled, they will be *ordered* by the local police chief (*questore*) to voluntarily and autonomously abandon the state's territory (art. 14.5-*bis* CLI). (If violated, this order will result in a crime, made punishable with a fine: art. 14.5-*ter* CLI).

[7] For a general overview of the EU law on migration, see Boeles et al. 2009 (part. 397 ff).

[8] *Regulation (EC) No 562/2006*, OJEU, 13.4.2006, L. 105.

[9] *Directive 2008/115/EC*, OJEU, 24.12.2008, L. 348 (on which see Viganò and Masera 2010).

in view of legal crossing of EU borders, some 'cash, travellers' cheques [*or*] credit cards [*should be found*] in the third-country national's possession' (art. 5.3, 2nd sub-paragraph).

Those foreigners who do not fulfil the established conditions 'shall be refused entry to the territories of the Member States' (art. 13.1 SBC). For those who nonetheless succeed in illegally entering (or staying in) EU territories, EU regulation provides but one major destiny, which is *expulsion* (or repatriation or return, according to the more politically correct language used in the RD): 'to return illegally staying third-country nationals' is not only 'legitimate for Member States' (8th Whereas, RD), it is a *duty*: 'Member States *shall* issue a return decision to any third-country national staying illegally on their territory' (art. 6.1 RD). This essentially means that member states are required by the RD to enact laws according to which illegally entering or staying persons will, in principle, be expelled. Moreover, 'Member States shall take all necessary measures to *enforce* the return decision if no period for voluntary departure has been granted' (art. 8.1). This basically means that they not only have an obligation to coercively execute illegal foreigners' expulsions, but, if necessary (i.e.: '[*u*]nless other sufficient but less coercive measures can be applied effectively in a specific case') 'in order to prepare the return and/or carry out the removal process', they are also permitted to keep would-be expelled foreigners in detention, up to a maximum of 18 months (art. 15.1 RD).

Finally, EU law does not require that illegal entry or sojourn be criminalized by the states. Neither, however, does it ban this possibility; which does much to lead to the substantially unquestioned conclusion that in principle criminalization of illegal immigration does not conflict with EU law, as was recently confirmed by some EU Court of Justice (ECJ) judgements.[10] *Achughbabian* is particularly interesting for my purposes here because in this judgement the court, while stating, on the one hand, that states are not precluded by RD (nor by EU law, more generally) from criminalizing illegal immigration, also argues, on the other hand, that they may not enact such national legislations which are 'capable of leading to an imprisonment in the course of the return procedure governed by the said directive' because this would be 'likely to thwart the application of the common standards and procedures established by Directive 2008/115 and delay the return, thereby[…] undermining the effectiveness of the said directive.' This does not mean that states are not legitimated to detain illegal immigrants: RD 'does not preclude a third-country national being placed in detention with a view to determining whether or not his stay is lawful.' It only precludes detention in those cases in which it is likely to negatively interfere with the achievement of the overriding RD's aim, which is that illegal immigrants' removal be carried out 'as soon as possible.'[11]

In other words, criminalization of illegal immigration is in principle legitimate from the perspective of EU law, insofar as it does not negatively affect illegal immigrants' prompt expulsion. As a result, whereas illegal immigrants' *detention* is certainly legitimate *as an administrative means* geared to carrying out their expulsion (as is, for instance, detention in CIEs according to Italian law), it is illegitimate instead *as a form of punishment* to be enforced during 'the course of the return procedure,' because this would be likely to impinge on the prompt expulsion of illegal immigrants.

[10] See ECJ (Grand Chamber), C-329/11, *Achughbabian*, 6.12.2011, at par. 28. See also C-61/11, *El Dridi*, 28.4.2011, and more recently C-430/11, *Sagor*, 6.12.2012.

[11] C-329/11, at par. 45.

A Criminal Ban on Persons, not on Deeds

Is the Criminalization of Illegal Immigration a Criminal Ban on Persons?

Relying on a dichotomy which was particularly in vogue in the German criminal law debate during the 1930s (e.g., Wolf 1936; Dahm 1935; Id. 1940; Freisler 1936, 517. See also Calvi 1967; Jescheck and Weigend 1996, § 7.III; Roxin 2006, Sec. 1, § 6.III; Frommel 1980, 560–2), in this section I am going to argue that criminalization of illegal immigration (at least, insofar as it shares the relevant features and rationale of Italian and European regulation of immigration) represents an instance of *Täterstrafrecht* (or "actor-centred" approach to criminal law), not of *Tatstrafrecht* (or "act-centred" approach to criminal law): a kind of criminal law concerned, not so much with actions and omissions, as with actors.[12]

This is not an unprecedented critique. Since its political gestation, for instance, art. 10-*bis* CLI has been taxed with being an instance of *Täterstrafrecht* (e.g., Donini 2009, 118 ff.; Associazione Antigone et al. 2009, 137); and, obviously enough, the very same complaint was frequently repeated after its introduction in 2009. In deciding about the constitutional legitimacy of this norm, however, the Italian constitutional court (Decision no. 250/2010) dismissed this critique by arguing that art. 10-*bis* CLI does not actually criminalize a quality of persons, but instead the *fact* that a certain type of conduct be performed: "clandestines", or "illegal immigrants",—this was the Court's main argument on the point—are made punishable, not because of *who* they are, but because of *what* they do, that is illegally entering (or remaining in) the state's jurisdiction. This is apparently true insofar as one limits oneself to reading the formal texture of the article: the word "clandestine" does not even appear in it, and the whole structure of the crime is expressly focused on the commission of a conduct and on its illegality ('the foreigner who *enters*, or *stays* on, the state's territory, *in violation of the norms of the present act*'). Hence, the court's conclusion that the 'personal and social plight' of being a 'clandestine' is nothing but a reflection of the performance of illegal conduct (as is, *mutatis mutandis*, 'the personal and social plight' of being a trespasser, a murderer, a thief, a rapist, and so on): one only becomes a clandestine because of what s/he does, that is violating the (Italian) regulation on migration.

[12] The debate on *Täterstrafrecht* seems to correspond, in the English speaking criminal law doctrines, to the debate on "act requirement" and on the (in)admissibility of so-called "status" or "situational offenses." (See, e.g., Silber 1967; Dan-Cohen 1972; Glazebrook 1978; Husak 1987, Ch. 4; Id. 2010a; Id. 2011.) *Täterstrafrecht*, however, is not the same thing as situation responsibility (at least, insofar as we refer to the way in which this last notion has been interpreted in the last decades). While this latter concept only focuses on a situation, or state of affairs, in which the defendant happens (more or less voluntarily) to find him- or herself, the former—as I shall try to show shortly—is specifically concerned, instead, with the stigmatization of certain persons in virtue of their (alleged) belonging to a given, stereo-typed, category. In a way, the problem of *Täterstrafrecht* begins where that of situation responsibility ends: this latter concept raises questions of voluntariness and blameworthiness, of fair attribution of responsibility for the occurrence of a given state of affairs; the former raises instead questions of social stigmatization and discrimination of persons. In sum: while status liability focuses on a person's *being in* a certain situation, *Täterstrafrecht* focuses instead on his/her (allegedly) *being* a certain type of person. This, obviously, does not mean that the two concepts cannot go hand in hand in specific cases: status offenses may be particularly useful from a *Täterstrafrecht* perspective, since the criminalization of "being in a certain situation" can be easily used as a way to infer the author's "being a certain type of person." Nonetheless, the two remain, at least in principle, different concepts raising different problems for criminal law theory. As a consequence, it cannot be excluded that in certain cases a "non status offense" (that is: an offense whose description revolves around the requirement of an act) can be examples of (spurious) *Täterstrafrecht* (see *infra*, Sect. 3.2.1).

Although seemingly sound, these arguments, in my view, miss some points, since they rely, first, on some lack of clarity (vagueness and ambiguity) underlying the very notion of *Täterstrafrecht*, and second, on a partial and incomplete vision of the whole system of relevant norms. Let's dwell on these two points separately.

Täterstrafrecht Versus Tatstrafrecht

Is the criminalization of illegal immigration an instance of *Täterstrafrecht*? Before answering this question, I must be clear on a crucial point. My evocation here of the *Tatstrafrecht*/*Täterstrafrecht* dichotomy is not a merely stylish, or studied, xenophilic choice. By resorting to it, I want to underscore some deeper political (and moral) implications it underlies. Even though there may be authors inclined to attribute a more polite and noble meaning to the notion of *Täterstrafrecht* (Bockelmann 1939, 1–8; Baumann 1972, Ch. 1, § II.2; Roxin 2006, Sec. 1, § 6; Whitman, J. The Failure of Retributivism in the American Common Law (on file with author)),[13] for the sake of my discussion here I will intentionally rely, instead, on the infamous version of the concept, the one paradigmatically represented by (but, as we will see, not certainly limited to) some samples of Nazi criminal legislation and thought. (E.g., Dahm 1935; Id. 1938; Id. 1940; Freisler 1936.) This entails that I will be using the *Täterstrafrecht* ideal-type as corresponding to an authoritarian and anti-liberal set of political values, amounting, in a way, to the translation of authoritarian and anti-liberal arguments into criminal law "principles"; and that, by contrast, I will be using the opposite *Tatstrafrecht* model as encompassing some of the most distinctively liberal ideas about criminal law, as they were advocated, for instance, by such pioneers of penal liberal thought as Cesare Beccaria and Jeremy Bentham, among others.[14] (Although liberal doctrines of criminal law are obviously themselves debatable and, to some extent and on certain points, criticisable, I will assume here that they are to be preferred to authoritarian and anti-liberal ones, at least insofar as the contrast between them is so shaped as I will be saying in what follows.)

This choice is not aimed at caricaturing the very notion of *Täterstrafrecht*, while extolling that of *Tatstrafrecht*. Rather it is aimed at showing that the criminalization of illegal immigrants (insofar as it is so shaped as we have seen so far) is exactly an example of this infamous version of the *Täterstrafrecht* idea, and as such should be criticised and rejected.

With this *caveat* in mind, I suggest defining *Täterstrafrecht*, as opposed to *Tatstrafrecht*, as a criminal law ideal-type according to which criminalization should have types of offenders (*Tätertypen*), rather than types of offences (*Tattypen*), as its intentional objects, so that punishment should be inflicted on persons, not so much because of something they might have done, as because of *who* they are—or, better still because of their fitting a *Tätertyp*, the ready-made (either criminological or legal) image of a certain type of person.

[13] A meaning connected to the idea of a better individualization of criminal responsibility. See also *infra*, notes 21 and 25.

[14] Even if in what follows I am contrasting *Tatstrafrecht* and *Täterstrafrecht* as two opposite ideal-types basically corresponding, respectively, to a liberal and an anti-liberal and authoritarian criminal law model, this does not mean that in fact these two models do not coexist. On the contrary, in the real life of legal and political systems, the achievement of liberal or authoritarian inspirations only comes in degrees, so that even the most liberal systems nurture illiberal norms; and when it comes to criminal law, this means that even systems generally inspired by the *Tatstrafrecht* model will more or less frequently host norms and practices inspired by the opposite *Täterstrafrecht* model. Which is exactly what happens, as I will try to show, with the way in which many Western, liberal, regimes actually deal with illegal immigration.

In brief an "actor-centred" criminal law focuses not on wrong*doings* (as *Tatstrafrecht* does instead) as on wrong*beings*: the fact of corresponding to a certain type of person is directly made into a wrong that triggers the infliction of a punishment. The "criminality" of a person is assumed to be *inherent in her being the wrong type of person*, and not dependent on the fact that s/he acts "criminally" (that is, that s/he commits crimes, or, more generally, behaves in deviant or anti-social ways).

Pure Versus Spurious Versions of Täterstrafrecht

The *Täterstrafrecht* ideal-type can theoretically assume either pure or spurious forms, depending on the role, if any, they attribute to the actual behaviour of the "criminal" in the assessment of his or her "criminality". (For a similar distinction, see Donini 2009, 119.)

The most obvious forms of an "actor-centred" approach to criminal law are clearly those according to which a person's "criminality" does not at all relate to anything "criminal" s/he might have done. According to these views, "criminality" is not only an inherent quality of a person, but it is a quality that can be identified by directly observing the person, independently of her actions. Cesare Lombroso's theory of "born criminals" (according to which in many cases persons' "criminality" can be plainly and fairly established on the basis of their anatomical and anthropometric characteristics) is a striking example of a pure "actor-centred" approach. (Lombroso 1896, xv: 'from [persons'] physiognomy and cranium is possible to predict their moral temper'.)

Täterstrafrecht, however, can also come in spurious forms assigning a (though limited) role to the actor's actual actions. These versions are, in a way, more insidious than pure ones in that they formally defer to the idea that criminal responsibility should be grounded on the criminals' actions or omissions: they do not deny that crimes' formal structure should revolve around the description of conducts, instead of, directly, types of persons. This, however, is only formal deference: indeed, the actions actually performed by a person are not deemed to be *constitutive* of his/her own "criminality"; they cannot make him/her into the "criminal" s/he already is; a "criminal" is inherently so, independently of the fact that s/he performs "criminal" actions. A person's actions/omissions only come into the assessment of her his/criminal responsibility as *symptoms* of his/her "wrongbeing"; they do not matter *per se*, as the intentional object of his/her criminal responsibility, but rather for what they (purportedly) reveal about their author: hence as proofs, or manifestations, of his/her inherent criminality, dangerousness, deviancy, disloyalty, etc. Which, in their turn, are properly revealed by the fact that the author is subsumable under a certain human typology. Actions, thus, are only nets to catch the relevant *Tätertypen*.

Nazi legal thought and legislation provide us with some telling examples. The Nazi-jurist Georg Dahm, one of the leaders of the so-called *Kieler Schulung*, for instance, shows how *Täterstrafrecht* paradigm can be used as an interpretive criterion, so as to re-interpret in an "actor-oriented" key even those crimes whose formal structure relies on the description of a conduct (Dahm 1935; Id. 1938, 256–7, 263–4; Id. 1940). Dahm argued that, according to an 'actor-centred' approach to criminal law, 'the quality of crime is to be determined according to the *essence* of its author'; which means, in Dahm's view, that 'in *Täterstrafrecht* perspective author and deed are to be seen as one and the same thing.' The qualities of the author—in the sense of his/her corresponding, or not, to a certain *Tätertypus*—change the very meaning of the act: to understand the criminal meaning of a deed, one has to inquire what type of person is the author who commits it: which means (in the Nazi jurists' account) that one has to inquire whether the author is subsumable under the *Tätertyp* of an anti-social, disloyal, deviant person.

The *Tätertyp* is a shadow lying behind the crime definition, according to which the meaning of the definition itself is to be determined. (Dahm 1940.) So, for instance, not anyone who steals (with no sufficient justification) other people's goods may be properly deemed to be a thief, but only *s/he who is a thief according to his/her own essence*—which means according to the fact that s/he is subsumable under the relevant *Täteryp*: the *Hitler-Jugend* comrade who, acting out of boldness, steals and burns the flag of a Catholic youth organization does not commit theft, because *Hitler-Jugend* comrades, being loyal to the regime, cannot be subsumed under the thief (and, more generally, under any criminal) *Tätertyp* (Dahm 1935, 35–6).

Nazi legislation, on the other hand, provides us with certain criminal norms directly forged according to the (spurious version of the) *Täterstrafrecht* paradigm, and thus directly concerned with the criminalization of *Tätertypen*. Think, most notably, of so-called *Polenstrafrechtsverordnung* (*VO über die Strafrechtspflege gegen die Polen und Juden in den eingegliederten Ostgebieten*), enacted on Dec. 4, 1941, according to which the Poles and Jews residing in the annexed Eastern territories were to be subjected to a far harsher version of German criminal law than the one applicable to other persons, so that, for instance, they were to be sentenced to death in many cases in which other persons would have been sentenced to detention.[15]

But Nazi Germany during the 1930s and in the early 1940s is only the most renowned, and easy-to-point-out, example. Pieces of legislation inspired by the (spurious version of the) *Täterstrafrecht* ideal-type, in reality, can also be found in many other times and places, including modern liberal states as well as contemporary constitutional democracies. The story (which is a long one, and I have no space to recount it here in its entirety) might begin, for instance, with norms against vagrancy and idleness (so widespread in the nineteenth century liberal legislation),[16] to continue with norms against so-called "crimes of possession" (so widespread in the US's criminal law, at least since the second half of the twentieth century),[17] to arrive to norms such as art. 61, no. 11-*bis* of Italian penal code[18] (according to which punishment should have been aggravated for crimes committed by illegal immigrants, no matter how the fact of being an illegal immigrant could have affected, or facilitated, the very commission of the crime).[19]

[15] See also Werle 1988, 2866, for a review of the criminal law conceptions (including, of course, *Täterstrafrecht* orientation) underlying the Nazi draft of a German criminal code in 1936, and Freisler 1936, 516–7, suggesting the 'techniques' according to which—in Freisler's own view—the special part of a Nazi criminal code should have been drafted (criminal norms should have been revolving, 'as frequently as possible,' directly on the 'description of *Tätertypen* instead of types of actions').

[16] Such norms were basically founded on the *presumption* that, since idles and vagrants were lacking "legal", "official", "regular" means of support, they *had to* be committing crimes (notably, against other persons' goods and property) in order to support themselves. See, e.g., Lacey 1953, 1206, 1217 ff.; Perkins 1958, 250f.; Sherry 1960, 564; Corso 1979, 263 ff., 278; Dubber 2005, 130 ff.

[17] See, e.g., Dubber 2001: possession offenses have 'replaced vagrancy as the sweep offense of choice. […] Backed by a wide range of penalties, they can remove undesirables for extended periods of time, even for life' (836).

[18] First introduced with *Decreto-legge* no. 92/2008, but then nullified by the Italian constitutional court (Decision no. 249/2010).

[19] But many other examples might be easily gleaned here and there in our legal systems—from nineteenth century norms against "habitual offenders" to contemporary norms dealing with "dangerous offenders" (I owe this suggestion to Lucia Zedner).

Dealing with Stereotypes

Whatever form it may concretely assume (either pure or spurious), a first major characteristic of the *Täterstrafrecht* ideal-type is that it is not really concerned with actors *as individuals*, but *as stereotypes*:[20] its specific focus is the *Tätertyp*, not human beings with their personal and possibly unique traits.[21] The *Täterstrafrecht*'s *Täter*, in other words, is not considered *qua* person, but simply in virtue of his/her possessing some traits that link him/her to a certain stereotyped image.

The mechanism works approximately as follows. First, a stereotype (*Tätertyp*) is constructed, at a social and political level,[22] by singling out certain (allegedly) descriptive traits (country of origin, racial characteristics, the bare fact of being regularly unoccupied and lacking in means of support, and so on) to which—based on social and political prejudices (largely unwarranted and hardly backed up by empirical data)—a corresponding expectation, and thus normative judgement, or qualification, is tied (dangerousness, deviancy, disloyalty, enmity, etc.).[23] A stereotype thus constructed is a formidable instrument for "descriptively" identifying types of persons to whom a (negative) moral qualification is assumed to be necessarily and appropriately corresponding (Poles and Jews are disloyal persons, enemies of the German people; vagrants and idles are dangerous persons, enemies of the bourgeois; and so on).

The stereotype is then formally "poured into" the definition of a crime, as its "descriptive traits" are made (directly or indirectly) into elements of the crime definition.

Finally, the stereotype (and the crime with it) is applied in its entirety by merely subsuming under it those persons who simply happen to possess those "descriptive traits" on the basis of which the stereotype (and thus the crime) had been previously constructed. When an individual's traits match the "descriptive" part of the stereotype, then the perverse syllogism is at hand: that person will be picked out as a concretization—as an instance—of the relevant *Tätertyp*; and, as a consequence, s/he will be automatically deemed to be the appropriate target of the normative judgement that is assumed to be necessarily connected to the stereotype (dangerousness, deviancy, and so on).

Paradoxical as it may seem, therefore, in the *Täterstrafrecht* model it is the actor—as individual, as human being—that is missing, submerged by the intrusive and cumbersome caricature of the *Tätertyp*, the stereotype. The presumptive and unwarranted reasoning on which the *Tätertyp* is built conceals the actor's individual qualities. It substitutes stereotypes for actors, and thus transforms *real* actors into *men and women without qualities*. The logic of the "actor-centred" model turns out to be exactly the opposite of what one would have imagined at first: it is not really focused on actors, it is not really interested in emphasizing *this* actor's character or moral personality; it is not designed to attain better individualization of both criminal responsibility and penal responses; on the contrary it is

[20] "Stereotypes" are schemas through which people organize their knowledge, beliefs and expectations about social groups (Hamilton and Troiler 1986, 133): they are 'abstract knowledge structures linking a social group to a set of traits or behavioral characteristics' (Hamilton and Sherman 1994, 3).

[21] It is not by accident, therefore, that Nazi criminal theorists were strongly critical of Franz von Liszt's account and of the "individualizing turn" he advocated for criminal law—a turn which, in their view, would have meant a weakening and an excessive humanization of criminal law itself. See, e.g., Dahm and Schaffstein 1933, 14 ff; Wolf 1935, 550–1 ('The *Tätertypus* is totally anti-individualistic, completely contrary to Franz von Liszt's […] naturalistic theory of crime.').

[22] And with media playing a crucial role (e.g., Gorham 2009).

[23] On the social construction of stereotyped and 'spoiled identities' see Goffman 1986[1963].

geared to *dehumanizing* actors (and thus to denying them as persons)[24] by resolving their whole personality into the mere fact of their being subsumable under a ready-made stereotype.[25]

Prevention Through Practical Reason Versus Prevention as De-Humanized Pre-emption

To such a dehumanized concept of actors/criminals there corresponds, almost inescapably, an equally dehumanizing view of criminal law's aims.

To be true, both the *Tatstrafrecht* (i.e., liberal, Enlightened) and the *Täterstrafrecht* (i.e., non-liberal, authoritarian) ideal-types are expressly concerned with the aim of preventing the occurrence of socially harmful or dangerous or undesirable deeds or states of affairs. *Täterstrafrecht* will hardly present itself as merely discriminating among persons; it will always claim, instead, to be a means to secure social order and protect society.

Where the two ideal-types strongly diverge is in the *kind of prevention* they purport to pursue, and in the *costs* they are ready to impose *on individual liberties* in order to pursue their purported preventive aims.

Tatstrafrecht's prevention of social harms comes through practical reasoning. One of the distinctive claims of the eighteenth century Enlightenment penal reformers (such as the Italian Pietro Verri and Cesare Beccaria, or the English philosopher Jeremy Bentham) and the nineteenth century post-Enlightenment liberal reformers (such as the German criminal law theorist Anselm von Feuerbach or the English philosopher John Stuart Mill) was indeed the attribution of a general capacity of reason to everybody (including—potential or actual—criminals). This very assumption informs the *Tatstrafrecht* ideal-type. The main idea at work here, indeed, is that criminal law's addressees should be treated as rational—hence moral—beings, and that prevention should be attained by seeking to elicit a practical—thus moral—reasoning from them, so as to influence their orders of preferences and make them prefer refraining from punishable conduct (for the sake of escaping the correlative punishment) rather than performing it at the risk of being punished.

Insofar as *Tatstrafrecht*'s prevention is *rational* prevention (prevention by means of practical and moral reasoning), it clearly shows *respect* for the criminal law's addressees as rational/moral beings.

The rationality—and thus the moral capacity and worth—of the criminal law's addressees, by contrast, are not amongst the *Täterstrafrecht* ideal-type's underlying assumptions. Criminals—and more generally, criminal law's addressees—, are seen instead as mere (potential) sources of social harms or disorders, not really different—at least, in this respect—from (dangerous) natural events.[26] This substantial *dehumanization* of persons as

[24] On '*dehumanization*' as a form of 'denial' of persons, see Cohen 1995, 79 (cited in Young 1999, 112).

[25] This helps draw a neat distinction between *Täterstrafrecht* approaches and so-called "character theories" of criminal responsibility. (See, e.g., for different versions of the "character approach" to criminal responsibility: von Liszt 1905[1902]; Engisch 1942; Bayles 1982; Lacey 1988, Ch. 2; Huigens 1995; Tadros 2005.) Also character theories—it is true—can be concerned with authors much more than with acts (so that acts are considered relevant only as symptoms of the relevant personality or character). (Lacey 2007, 29.) However, while *Täterstrafrecht* accounts (in the version I am referring to in this article) are basically uninterested in *individuals*' character and personality, character theories, instead, are driven by the—exactly opposite—aim of individualizing criminal responsibility so as to obtain that every person's criminal responsibility be assessed according to his or her own *individual* character (and thus that criminal punishment be attuned to individuals' personality).

[26] From this point of view, *Täterstrafrecht*'s prevention turns out to be strictly intertwined with (if not, directly, a form of) police prevention, insofar as police power 'treats offenders as mere sources of danger, to be policed along with other threats, animate and inanimate alike, from rabid dogs to noxious fumes.'

targets of criminal law's prevention descends—partly—(sometimes explicitly, often implicitly) from a deterministic account of (criminals') human action, or at least from a pessimistic view of individuals' capacity to resist their (allegedly) inner/born, or socially induced, criminal urge or inclination. "Criminals" being inherently so (because of "nature" or social compulsion), state and society could/should not expect them to refrain from committing "crimes": criminals can't help being who they are; it thus makes no sense providing them with good reasons to refrain from acting "criminally." This clearly rules out any reliability of general preventive mechanisms: being criminal law's addressees' rationality and morality irrelevant and beside the point, the state should not try to engage in a practical and moral dialogue with them—the kind of practical and moral dialogue entailed by (liberal) general prevention.

Insofar as *Täterstrafrecht* aims at preventing socially harmful or undesirable states of affairs, this can only come in the form of specific prevention, or better of an incapacitating and neutralizing *pre-emption*,[27] according to which crimes should be averted by directly selecting and picking out those persons who, because of their matching a given actor stereotype (*Tätertyp*), can be assumed/presumed to be dangerous, deviant, disloyal, and so on, and thus inclined to act so as to cause socially harmful or undesirable states of affairs: persons should thus be punished in order to prevent them from manifesting, actualizing, their inherent criminality, in order to avoid their potential criminality taking effect.[28]

Prevention at the Cost of Individual Liberty

But *Tatstrafrecht*'s and *Täterstrafrecht*'s prevention also differ from one another as to the costs they are willing to accept in terms of restrictions on individual liberties.

Tatstrafrecht, as a liberal criminal law ideal-type, is based on the presupposition that persons are in principle free both to choose how to act and to act how they choose to, and that this freedom—*per se* and insofar as it is compatible with other persons' freedom—represents a value that should be respected (i.e., not arbitrarily violated) and secured by the state. Furthermore, persons are also provided with an inviolable sphere of privacy, within which an individual's exercise of his/her freedoms should count as nothing but that very same individual's exclusive business. Even though the very existence of the criminal law necessarily entails some "trade-offs" between individual liberty and privacy, on the one

Footnote 26 continued
(Dubber 2001, 849, and *passim*. See also Dubber 2004, 1318 ('*insofar as he* [the policed] *is an object of police*, he is not a person); Dubber 2005, 2013).

[27] 'Pre-emption stands temporally prior to prevention of proximate harms: it seeks to intervene when the risk of harm is no more than an unspecified threat or propensity as yet uncertain and beyond view. Whereas the preventive turn of the criminal law is triggered in the main by acts "more than merely preparatory" to a specified offence, pre-emption legitimates substantial curtailments of individual liberty at an earlier point in time and, often, without the requirement of mens rea, still less actus reus' (Zedner 2007b, 1120).

[28] *Täterstrafrecht*'s prevention is thus, in fact, 'pre-crime prevention' (on which concept, see Zedner 2007a. See also Krasmann 2012, 380).

This very same logic is partly but neatly echoed in some of the most relevant features of so-called "actuarial justice" (characterized by 'the replacement of a moral and clinical description of the individual with an actuarial language of probabilistic calculations and statistical distributions applied to populations' and by 'the recent and rising trend of the penal system to target categories and subpopulations rather than individuals': Feeley, Simon 1992; Eid. 1994), as well as in the now widely debated category of *Feindstrafrecht* (or "enemy criminal law") notoriously elaborated, and to some extent defended, by German criminal law theorist Günther Jakobs (e.g., Jakobs 2004. See also Zedner 2013, for a discussion of *Feindstrafrecht* in relation to penal law trends on illegal immigration).

hand, and the protection of society, on the other, the stress is here explicitly laid on the first horn of the dilemma: society being a means of securing the coexistence of individuals' liberties, its protection is thus conceived of as a sort of indirect protection of individuals. Consequently, a prevention of socially harmful or dangerous conducts/events by means of criminal law will only be seen as legitimate insofar as it does not degenerate into a substantial erosion of individuals' freedoms and rights.

As a result, prevention by means of criminal law may only be concerned with those cases in which persons make substantial steps towards the commission of a crime: that is, with those cases in which individuals exceed the privacy of their exclusive business sphere by moving unequivocally towards socially dangerous or harmful conduct, thereby abusing of their own liberties. Insofar as a reasonable doubt remains as to whether an individual is going to use her liberty in lawful or unlawful ways, the importance attached to the values of individuals' liberty and privacy will always represent, from a liberal perspective, a compelling reason for limiting criminal law's intervention. Hereby the *Tatstrafrecht* ideal-type originates.

From a *Täterstrafrecht* perspective, by contrast, individuals are not really free to choose how to act, nor are they free to act how they choose; or, even if they are, their freedom is not a sufficiently important good to override society's general and pervasive interests. The stress is here clearly laid on society's stance, rather than on individuals': the whole comes first, the single later; it is their being part of a community, of a whole overarching social project, that gives individuals their specifically human standing and sense. As a result, the prevention of social harms and disorder is deemed a far more important end than protection of, and respect for, individual liberties and privacy. The relevance of individuals' interests is only derivative, a reflection of society's interests, so that the protection of society encounters no real obstacle in the individual's liberty and privacy. (Dahm and Schaffstein 1933; Schaffstein 1934, 605.) Consequently, there is no need to make criminal law's intervention dependent on the fact that the individual actually undertakes prohibited conduct: the dangerous subject can, and must, be neutralized quite independently of the fact that his/her dangerousness actually manifests itself in socially dangerous conduct.

The Criminal Ban on Illegal Immigration as a Case of (Spurious) Täterstrafrecht

I think we have gathered by now a sufficient number of reasons for being hostile to the *Täterstrafrecht* ideal-type, as well as to its possible concrete manifestations—at least insofar as we assume, as I am doing here, that the values encompassed in the opposite ideal-type (*Tatstrafrecht*) deserve a general (though qualified and not unconditioned) appreciation and approval. But is the criminalization of illegal immigration one of these concrete manifestations? As we have seen, one way (probably the *only* one) to try to reject this conclusion is by arguing (as the Italian constitutional court did) that criminal norms on illegal immigration expressly focus on the commission of a certain type of conduct and on its illegality (in the case of art. 10-*bis* CLI: "the foreigner who *enters*, or *stays* on, the state's territory, *in violation of the norms of the present act*"), rather than merely criminalizing certain types of actors: if clandestines are made punishable—this was the argument—it is not just because of *who* they are, but because of what they do: violating the state regulation on (legal) migration.

We are now in a position to see how this argument misses the point. That the definition of a crime be formally focused on the commission, or omission, of an act does not *per se* immunize the corresponding norm against the fact of being an example of *Täterstrafrecht*. The possibility still remains that it is a case of spurious *Täterstrafrecht*, if, in the logic of

that norm, the conduct only enters the picture, not really as the intentional object of criminal responsibility, but as a way to point out the (allegedly) inherent criminality of those persons fitting a certain *Tätertyp*.

This, in my view, is exactly what happens with norms criminalizing illegal immigration, at least in those systems sharing the relevant features I described in Sect. 2.

To clarify this, we need to go beyond the mere structure of the norms criminalizing illegal immigration, and expand our view so as to encompass the more general traits of states' regulations on legal and illegal migration. From this more comprehensive perspective, it should become quite clear that those regulations are usually set up in such a way as to make only certain categories of migrants qualify as "illegal." Indeed, putting aside the (more and more exceptional) possibility of obtaining asylum seeker or refugee status (see *supra*, note 3), regular entry in many (not only European) states' territories depends, as we have seen, either on being a national of a visa-exempt country (which, from the point of view of many rich Western societies, basically means being a national of another rich Western society), or on being provided with sufficient means of subsistence (or, at least, being in a position to acquire such means lawfully).

As a result, only certain categories of persons qualify as the possible targets of an illegal immigration crime: basically, the poor coming from non-visa-exempt countries. Their shadow clearly lies behind the crime definition.

Importantly, such a selection of the possible authors of the crime is the result of a system of norms knowingly geared to: (a) discriminating among different categories of potential migrants (on the basis of their countries of origin and their wealth);[29] (b) excluding—as non-admitted migrants—those who possess certain characteristics that—in the social and legal construction of the illegal migrant stereotype—qualify them as undesirable (see *infra*); (c) imposing a criminal ban on those migrants who, although being undesired, all the same seek to enter the state's territory.

A crime of illegal immigration, in fact,—at least in the European legal systems—refers to poor migrants coming from Africa, near East, some Asian regions (e.g., Sri Lanka, Philippines), and, in part, eastern Europe as its specific type of author (*Tätertyp*). The fact that it is formally built upon the commission, or omission, of a certain type of action does not save it from ending up being a criminal ban on (certain) types of persons because of their poverty and geographical provenance. While, on the one hand, the crime's formal structure revolves around a specific type of conduct (illegally entering, or staying on, the state's territory), the state's regulation on legal/illegal migration, on the other hand, is constructed in such a way as to make the illegality of such conduct—and thus its being a crime—a function of the personal and social conditions of those who commit it, of their being nationals of certain countries and of their lacking sufficient means of support.

Furthermore, in adherence with the *Täterstrafrecht* ideal-type, the illegal immigrant *Tätertyp* encompasses both a "descriptive" and a normative side. Given the descriptive traits of the stereotype (the immigrant's poverty, but also his/her arriving from non-Western—i.e., more or less "non-civilized"—areas of the world), the normative assessment—or better, the stigmatization—of illegal immigrants as dangerous and deviant persons is at hand and ready-made. That migrants coming from poor countries and lacking

[29] Calavita 2005, 155: 'Immigrants' stigmata of poverty is every bit as conspicuous and consequential—as racialized—as somatic signs inscribed in bodies, and are at the heart of the social interpretation of those signs. […] It should be pointed out, however, that while somatic distinctions may be neither necessary nor sufficient for racialization to occur […] the *sine qua non* of immigrant racialization may be their status as members of the third world, their poverty, and their need.'

sufficient means of subsistence, once they have entered the state's territory, will either "steal work from nationals" (and reduce the portion of state and social assistance that will fall to their lot) or be compelled by their very poverty (and driven by their allegedly being "non-civilized") to commit crimes in order to support themselves, is a pretty easy (though unwarranted)[30] conclusion to draw.

Hence, the qualities of being undesirable, dangerous, criminal, are inescapably tied to the illegal immigrant stereotype.[31] This is an authentic *topos*, a cliché, in the way in which common people and politicians (Calavita 2005, 129 ff.), but also, to some extent, magistrates prosecutors lawyers (Camporesi 2003, 173 ff., 177) and policemen (Palidda 2009, 13), talk of illegal immigrants. And the law does nothing but confirm these *topoi*, by criminalizing illegal immigration and making the immigration's illegality conditional upon people's geographical provenance and poverty.

More precisely, the stigmatizing force of the illegal immigrants' *Tätertyp* takes effect in two different stages, each reinforcing the other, so that the final effect is a vicious circle in which the very fact of stigmatizing a certain category of persons ends up confirming the reliability of the reasons why it was stigmatized in the first place. In a first stage, the stigmatization of certain categories of immigrants works as the (social and political) basis of the very construction of the *Tätertyp*, and, therefore, as the purported justification for criminalizing illegal immigration: "we punish illegal immigrants because, being poor and non-civilized, they are dangerous to our societies." In a second stage, however, the very existence of the crime of illegal immigration, and the fact that only certain categories of migrants (can) commit it, serves to confirm and reinforce the *Tätertyp*'s normative side (and thus the reliability of the sociological and anthropological hypothesis purportedly justifying the very decision to criminalize illegal immigration): that is, the idea (*recte*: the prejudice) that illegal immigrants are inherently criminal and cannot help committing crimes.

The impression of a criminal stigma on illegal immigrants (Melossi 2003; Aas 2007, Ch. 4) works, then, both as a presupposition (a grounding reason) and as an effect of the criminalization of illegal immigration. By criminalizing the very fact of irregularly entering the state's territory, the social stigma of being "criminals" is attached to certain categories of persons. And this, transitively, invests these persons with the very same invidious meanings, labels, qualifications that are socially attached to the concept of "criminality": criminals are deviants, dangerous persons, a threat to society and individuals; clandestines are, *per definitionem*, criminals (being authors of the crime of illegal entrance or stay); hence, clandestines are deviants, dangerous persons, a threat to society and individuals.[32]

[30] The widespread idea that (legal and illegal) immigrants commit far more crimes than natives (see already Lombroso 1918, § 31) is hardly backed up by reliable empirical data and their reasonable interpretation (Calavita 2005, 139 ff.; Melossi 2012. *Contra*, however, Barbagli 2008).

[31] To say it in Girardian terms (Girard 1986[1982], Ch. 3), what is at work here is the social construction of a *mythology* in which to foreigners' "physical monstrosity" (i.e., "racialization"; see *supra*, note 29) the idea of a corresponding "moral monstrosity" is attached.

Jock Young expresses roughly the same idea by referring to the social process of 'essentialising' and 'demonizing' illegal immigrants, see Young 1999, 111–2.

[32] '[*T*]he very fact of their illegal nature is seen as a criminal 'master status' which quite falsely indicates their guilt of all other types of crime as obvious and tautologous' (Young 1999, 112).

Words have their importance here: to refer to irregular immigrants as "clandestines" (*clandestini*)—as we usually do in Italian public discourse—subtly but heavily contributes to the idea that these persons are inherently "criminal," "deviant": "clandestine" is s/he who conceals her- or himself to authority's approval and laws (Maneri 2009, 79–80), thus being "ontologically illegal." See also Dauvergne 2008, 15: 'The

Illegal Immigration as Trespass?

An analogy between illegal immigration and trespass is frequently alleged as an objection to the idea that criminalization of illegal immigration (at least in those cases that share the same features as Italian and EU law) is an instance of the (spurious version of the) *Täterstrafrecht* paradigm (see, e.g., Italian constitutional court, Decision no. 250/2010).

The argument runs approximately as follows. Illegally entering, or staying on, a state's territory is analogous to illegally entering, or staying on, the land or premises of another: the two crimes share the very same structure (revolving around the *act* of violating a "domestic border"), and only differ as to the nature of the violated border (respectively, public or private). Criminalization of trespass however clearly does not amount to an instance of *Täterstrafrecht*, since it is undoubtedly focused on the commission (entering) or omission (staying) of an act. The same conclusion should thus be drawn as to the crime of illegal immigration.

In my view, the argument is only conducive insofar as we limit ourselves to looking at the formal structure of the two crimes—both revolving around the *act* of illegally entering, or staying on, a definite space. As I have tried to show so far, however, what makes the crime of illegal immigration—in the Italian and European context—an example of *Täterstrafrecht* is not its formal structure, but the broader philosophy of migration regulation it presupposes. And (putting aside the dubious idea that states be something like macro-houses) this is exactly where illegal immigration and trespass differ from one another. While criminal trespass does not normally presuppose a discriminating and stereotyped concept of those who can commit it (since the illegality of the act is not function of the stereo-typed definition of the identity of potential "enterers or overstayers"), the crime of illegal immigration relies instead on a migration regulation based on the principle that only certain categories of persons are undesired—because of their poverty and geographical provenance. (Just to be clear, criminal trespass would itself amount to an example of (spurious) *Täterstrafrecht* if it was constructed as the criminalization of a stereotyped category of "enterers or overstayers".)

Criminal Law as a Camouflage

I want now to go a step further and argue that, paradoxical as it may appear, the most relevant reason to be worried about here is not just that illegal immigrants are subjected to criminal law, but, on the contrary, that they are *not really* subjected to it: that their criminalization is functional precisely to taking them away from criminal law (from its rules and principles) and subjecting them to non-penal, administrative, "purely preventive" power.

In a way, there is too little criminal law at work here. To be sure, I am not advocating the introduction of more criminal norms dealing with illegal immigration; I am rather complaining that those criminal norms that exist are nothing but façades, merely functional to covering and legitimating other kinds of practices and mechanisms that have nothing to do with criminal law. In normative systems of the sort I have been describing here, criminal law is a *corpus extraneus*, an "intruder", which *per se* has nothing to do with the

Footnote 32 continued
'illegality' of peoples is a new discursive turn in contemporary migration talk. […] People themselves are now 'illegal'; states are concerned about 'illegals.'

very logic underlying the whole system itself. It simply appears for symbolic reasons. The job which these criminal norms are designed to do is not criminal law's proper job—that is punishing wrongdoers, calling them to answer to society for their wrongdoings, and so on—but merely that of covering with its legitimating mantle a completely different—and, in a sense, anti-penal—set of practices and mechanisms going on below deck.

Criminalization of Illegal Immigration and the Aims of the Criminal Law

The previous conclusions can be easily drawn if one considers that norms such as art. 10-*bis* CLI are so structured as to be completely unable to attain "canonical" criminal law's aims. If one looks at them from criminal law's own perspective, they appear to be completely useless. My point is that this does not happen by accident: the uselessness of these norms is functional to the whole system's logic, which is not really designed to subject illegal immigrants to criminal law, but to criminalize them as *Tätertypen* so as to legitimate the non-penal, merely repulsive and expulsive, treatment that the very system provides for them.

Consider art. 10-*bis* CLI. How could such a norm ever claim to have, for instance, any (either general or specific) preventive effects? Punishing illegal immigration with a fine ranging from 5,000 to 10,000 euro is a very curious way of attempting to prevent illegal entrance by persons (such as illegal immigrants) who are, *by* (legal) *definition*, lacking sufficient means of support. Since poverty is a pre-requisite of the illegal immigrant status, the punishment officially tied to illegal immigration is practically impossible to enforce. The norm amounts therefore to the announcement of a non-punishment. And, being practically non-enforceable, and thus non-punitive, the provision of a fine as a "punishment" for illegal immigration cannot even have any preventive effects. (See also Donini 2009; Associazione Antigone et al. 2009) No one will obviously be deterred (either generally or specifically) by it, since—according to the very logic of deterrence—no one could be deterred by the prospective non-infliction of, or by the fact of not being subjected to, a sanction.[33]

But there is more to this point that deserves to be highlighted. Not only does the punishment for illegal immigration seem unlikely to attain any kind of preventive effects. Everything in this micro-system's texture seems to conjure against its judicial application, favouring instead the application of expulsive mechanisms. In the law's general design, indeed, the expulsion of immigrants is clearly preferred to their actual punishment, as can be easily inferred from some simple circumstances. First, as we have seen, as soon as they enter (or irregularly stay on) the state's territory, illegal immigrants are liable to administrative expulsion directly decided on, and inflicted by, the police, which is immediately executive *irrespective of whether the foreigner has or not been already charged for the crime of illegal immigration*. Importantly, if the foreigner is already on trial for the crime of illegal immigration, the judge must declare "*non luogo a procedere*" (i.e., that there are no bases for proceeding: see *supra*, Sect. 2.1) as soon as he is officially informed by the police that the defendant has been administratively expelled. Administrative expulsion, in other words, pre-empts illegal immigrants' punishment: as soon as the (allegedly illegal) immigrant is expelled, the state is no longer interested in prosecuting and trying him/her; his/her (alleged) crime vanishes with his/her expulsion.

[33] This is why, for instance, the classic liberal advocates of deterrence (starting, at least, from Cesare Beccaria) claimed that punishment should be, among other things, *certain*.

Secondly, a stratagem is also provided by the law in order to *avoid* illegal immigrants being actually subjected to the threatened fine even in those cases in which they are convicted for their crime: the judge may *substitute* the fine with (judicial) expulsion;[34] which in practice means that the fine, abstractly announced as the official (but *de facto* unenforceable) penal sanction for the crime of "clandestinity", ends up being only a sort of a *prima facie* punishment, one that is clearly destined to remain merely theoretical and "in the books."

Resentment Versus *Annoyance*

At this point, one might be tempted to think that the judicial expulsion, and not the fine, is the *real* punishment for the crime of illegal immigration, and that the former does not involve the same observations made in relation to the latter. However, whereas it is true that, when it comes to illegal immigrants, the law's real aim is expulsion (or, at any rate, illegal immigrants' *liability to expulsion*),[35] under closer scrutiny, it emerges that *administrative* expulsion, and not *judicial* expulsion, is the law's crucial point, as should be made clear by the fact that judicial expulsion too (as well as a fine) is pre-empted by the execution of administrative expulsion. The system seems to be geared to putting illegal immigrants under the state's administrative domination (which includes their liability to administrative expulsion and, if this is not immediately possible, to confinement in CIEs) and not really to expelling them as a—substitutive—*punishment* to be inflicted by a judge instead of a fine.

More generally, it seems that punishing illegal immigrants (either by a fine or by judicial expulsion), and thus putting them on (criminal) trial, is not among the crucial points of the regulation of illegal immigration. The system seems to be uninterested in subjecting these persons to criminal justice and criminal law *for the crime of illegal immigration*.[36]

This is, I argue, a particularly telling circumstance, overtly indicative of the way in which our legal systems (or, at least, Italian and EU legal systems) conceive of illegal immigrants and of their personal and moral standing. However paradoxical it may appear at first glance, it confirms and reinforces that very same dehumanized approach to illegal immigrants that I outlined earlier, when, in Sect. 3, I argued that criminalization of illegal immigration is a (spurious) version of the *Täterstrafrecht* ideal-type. Both criminalization of illegal immigration and its intended judicial unenforceability (or, at least, "residual" enforceability) manifest the very same dehumanized conception of illegal immigrants as *non-persons* (Dal Lago 1999). Criminalizing them as *Tätertypen* and avoiding a criminal trial ascertaining their "crime" are both circumstances that, although seemingly contradictory, work towards the very same end of denying illegal immigrants any human and moral worth.

Let me dwell on this point. Criminal law is in a way based on (social) resentment, insofar as it revolves around the commission of public wrongs and thus entails a public

[34] The use of expulsion as a substitute for ordinary criminal penalties is not at all a singularity of Italian migration law. See Albrecht 2002, 181–3; Guild Minderhoud 2006; Aas 2007, 87.

[35] Which is true both of Italian and EU law: see *supra*, Sects. 2.1 and 2.2.

[36] This last *caveat* is particularly important, because, when it comes to other crimes (such as, most notably, drug crimes), the law seems instead to be particularly eager to put immigrants in the penal systems' ward. See, e.g., Barbagli 2008; Melossi 2012.

condemnation of those who are deemed responsible for committing them.[37] The act of punishing wrongdoers is an expression of such public resentment, and the criminal trial is a way of "coming to terms" with it—a "grieving process" for social resentment. This makes criminal law into a kind of law strictly intertwined with morality, resentment being a moral emotion that triggers moral reactions (Strawson 1993[1962]), and helps explain why, at least in many contemporary Western societies, criminal law is so constructed as to trace morality (not necessarily in the definition of the wrongs,[38] but) in the attribution of responsibility.

Because it is a moral emotion, resentment also expresses *concern* for the person against which it is directed. Feeling resentment against a person entails attributing to him/her a *moral standing*, treating him/her as a *moral subject*. We are *interested* in his/her moral world, and this is why we call him/her to *answer* for what s/he did. We expect—or even require—him/her to explain his/her behaviour, justify himself/herself, plea for an excuse, and so on: in brief, to engage in a moral dialogue with us, the "public", society. Therefore we put him/her on (criminal) trial, which is in fact a manifestation of our *interest* in what s/he did and in what s/he has to say about it. Criminal law and the criminal process are, thus, for persons: putting someone on (criminal) trial means crediting him/her with a *personal* standing, acknowledging *his/her being a person*. Thereby all the basic principles of (i.e., all the principled limitations and constraints on) the criminal law derive: from the assumption that the criminal law's addressees are in fact *persons*.

When it comes to the crime of illegal immigration, however, resentment seems to be supplanted by annoyance, or indifference at most. The legal system, as we have seen, shows no real interest in prosecuting the (alleged) authors of the crime, nor in punishing them, the real aim being that of expelling these people as soon as possible,[39] or at any rate making them *liable to expulsion* so as to put them under the *administrative dominion of the state*: a dominion far more extensive and intrusive, and far less principled than that to which a criminal conviction may give rise. From this point of view, criminal process and criminal punishment cannot be but a *last resort* in the "states' struggle against illegal immigration." After all, trying and punishing illegal immigrants would mean, in a sense, including them, although temporarily, in the public and social space represented by a criminal process, making them part of the 'community' and freeing them from mere subjection to administrative domination.

The norms criminalizing illegal immigration thus seem to be designed to be enforced, not so much through criminal process and punishment, as through administrative force and measures.[40] This matches very well the fact that they are examples of the *Täterstrafrecht* ideal-type. By criminalizing illegal immigrants for their irregular entrance or stay, while at

[37] That criminal law, criminal punishment, and criminal process, revolve around 'public wrongs' and entail 'public condemnation' is a fairly accepted idea among criminal law theorists. Among many others (and on the basis of different general accounts), see, e.g., Hart 1958, sec. II.A.4; Feinberg 1965, 401 ff.; von Hirsch 1993; Duff and Marshall 1998; Duff et al. 2007; Ashworth and Zedner 2008.

For some useful qualifications, see however Husak 2010b.

[38] The highly controversial claim of legal moralism.

[39] Recall *Achughbabian* (*supra* Sect. 2.2), where this point is explicitly made.

[40] See also Albrecht 2002, 181: 'a combination of administrative and criminal controls on immigration is being established that allows greater flexibility in responding to criminal offences committed by immigrants than does the criminal law alone. Expulsion and deportation are repressive or punitive measures that may be added to (or exchanged for) ordinary criminal penalties. Administrative procedures may replace criminal procedures which makes for administrative convenience but does away with the safeguards emanating from the rule of law.'

the same time taking them away from the judicial ascertainment of their "crime" and responsibility, the law shows it is merely interested in constructing these people as *Tätertypen*, as "illegals", as instances of a dehumanized stereotype, and not in calling them to answer, as moral agents, for the crimes they are charged for. The legislator is content with the *mere* impression of a criminal stigma on illegal immigrants,[41] for this enables him, politically and socially, to keep these people under legal and administrative domination, in a purgatory where they can be easily managed for the state's own purposes: a largely populated limbo where they will remain until they either "see the light" (by emerging to a civil condition in virtue of one of the ever-recurring regularizations)[42] or are—more or less causally—picked out to be expelled (which means that they will sooner or later return).

Criminal law is thereby abused, perverted and used as a mere camouflage geared to pursuing, or to legitimating the pursuit of, non-penal aims radically conflicting with those that a principled criminal law should properly pursue: a mere façade designed to cover with the criminal law's legitimating mantle a system of administrative measures aimed at reducing illegal immigrants to the dehumanized condition of non-persons at the mercy of the state.

Acknowledgments I have written this article while I was a Senior Visiting Fellow at the "Nathanson Centre on Transnational Human Rights, Crime, and Security", Osgoode Hall Law School, York University, Toronto. Thanks to Nathanson Centre for financial support. I would also like to thank for comments and encouragement Markus D. Dubber and other participants to the "Criminal Law Science Club" seminar, on Dec. 4, 2012, at the University of Toronto (and in particular Sarah Armstrong, Alan Brudner, and Lindsay Farmer), as well as the participants to the "Nathanson Visiting Fellows Seminar", on Dec. 10, 2012 (and in particular Angus Grant, William Payne, James Roundell, James Stribopoulos, Francois Tanguay-Renaud). Last but not least, many thanks to Doug Husak, Carlo Ruga Riva, and Lucia Zedner for written comments on a previous version of the article.

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[41] It should be noted, by the way, that for criminal stigma to be imposed on persons there is no need to wait that they be actually convicted in criminal trial: the stigmatizing force of criminalization takes effect far before that moment, and frequently continues to operate even when defendants have been acquitted of their charge (Schwartz and Skolnick 1962). In a way, it is intrinsically connected to the very enactment of the relevant criminal norms.

[42] See, e.g., Dauvergne 2008, 139–41; Maas 2010. In Italy, the most recent regularization dates back to July 2012 (Masera 2012).

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