

Special Section Europe and the Lost Generation

Lost at Sea

By Daniela Caruso*

A. Introduction

This essay aims to expand the definitional contours of the “lost generation” discussed in this special section of the German Law Journal. A reflection on the existential loss experienced by many young Europeans must also acknowledge, for the record and for reasons of relative salience, those who have literally drowned in the waters of southern Europe in their quest for a better future. Their youth has been lost in a true—not just metaphorical or metaphysical—sense. The per-day death toll reached its peak on 3 October 2013, when over three hundred bodies were retrieved off the coast of Lampedusa by Maltese and Italian rescue forces.¹ The just-concluded summer brought another tragic surge in Mediterranean migration, including more deadly shipwrecks.²

The law of the European Union (EU) colors only a part of the backdrop against which these deaths have occurred. Others share the responsibility. On one hand, member states’ immigration policies and nationality laws remain in large part un-harmonized. On the other hand, international law regulates, among other things, the threshold of rescue obligations. Nonetheless, the EU project itself is related to these deaths in many ways—both legal and political—and cannot disown them.

A second goal of this contribution is to rethink, for a moment, the relation between the increasing permeability of internal borders and the obstacles that third country nationals (TNCs) encounter at the EU’s external frontiers. Normally one thinks of the two as structurally opposed. Within its boundaries the EU dismantles checkpoints and fosters the bonding of its citizens. But precisely in order to enable the communal experience of the EU’s insiders, Europe reinforces its external borders, digging an ever deeper chasm

* Professor of Law, Boston University. Special thanks to Fernanda Nicola, Francesca Strumia, and the editors of the German Law Journal for comments on earlier drafts. Errors remain mine.

¹ See Frances Webber, *The Cradle or the Grave? EU Migration Policy and Human Rights*, 23 STATE WATCH J. 3, 4 (2014) (providing details of the tragedy).

² *Migrants Drown as Libya Boat to Italy Sinks*, BBC NEWS (May 12, 2014), <http://www.bbc.com/news/world-europe-27379493>; *Tidal Wave*, THE ECONOMIST (July 5, 2014), <http://www.economist.com/news/europe/21606301-more-horrific-deaths-mediterranean-tidal-wave>; *Nuova tragedia a Lampedusa. Affonda gommone, diciotto morti*, IL CORRIERE DELLA SERA (Aug. 24, 2014), http://www.corriere.it/cronache/14_agosto_24/nuova-tragedia-lampedusa-affonda-barcone-diciotto-morti-282e2882-2b5c-11e4-9f19-fba1b3d7cb6f.shtml.

between the European “self” and the TNC “other.” There are, indeed, plenty of EU activities that match exactly this dichotomous pattern.³

Yet, by way of a thought experiment, this essay sets aside the usual conceptual frame, and proposes to characterize the internal and external EU attitudes as aligned and even chronologically parallel. With Lampedusa as an illustration,⁴ these pages posit that a link exists between the lost at sea and the particular juridical discourse that has characterized the EU’s response to the Euro-zone crisis. This discourse, enshrined in primary and secondary legislation as well as judicial opinions, has managed to lock in, bless, and codify a principled resistance to sharing finite resources.

The dominant mantra of these years has been the non-renounceable independence of states’ budgets. No matter how deeply intertwined by the flow of people, things, and money, the economies of member states have remained distinct, in their own “silos.” The no-bailout clause of the Treaty on the Functioning of the European Union (TFEU) has been crucial to the unfolding of the Euro-zone crisis.⁵ Like a watershed, it has allowed the EU, as a supranational legal system, to detach itself both morally and materially from the collapse of local economies.

By the same token, the most difficult aspect of migration—the flow of persons who have no access to preauthorized channels—has been handled in such a way as to leave states ultimately in charge and individually responsible. Of course, given the unity of external borders, there has been a great deal of EU-level coordination to prevent and combat illegal immigration, as well as significant harmonization of asylum laws.⁶ Nevertheless, no agile EU law mechanism exists to weave those who make it ashore into the socio-economic fabric of the Union as a whole. To the contrary, a complex set of rules and incentives often

³ See Daniel Thym, *EU Migration Policy and Its Constitutional Rationale: A Cosmopolitan Outlook*, 50 *COMMON MKT L. REV.* 709 (2013) (“Europe’s mission of promoting transnational freedom is not replicated in the Area of Freedom, Security and Justice. Instead of dismantling borders, EU activities re-confirm the relevance of borders towards third States.”).

⁴ By focusing on the subset of migrants that reach the coast of Lampedusa by means of make-shift boats, this essay excludes from its scope visa-based or otherwise pre-authorized immigration. It is meant to reflect on short and medium term reception policies, as opposed to the possibilities for inclusion that open up for some TCNs in the long term. See, e.g., Council Directive 2003/109, 2003 O.J. (L 16/44) (EC) (concerning the status of third-country nationals who are long-term residents); Council Directive 2003/86, 2003 O.J. (L 251/12) (EC) stating the right to family reunification).

⁵ See Consolidated Version of the Treaty on the Functioning of the European Union art. 125, Oct. 26 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

⁶ See TFEU art. 79, paras. 1, 2(c); Directive 2008/115/EC, of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, 2008 O.J. (L 348).

confines these persons to the state of first entry for a long time.⁷ The material costs of short and medium term reception are shared only minimally.⁸ Border states pay the consequences of poor policing measures on the EU perimeter.

Within this discourse, both the shipwrecks and the troubles of those who survive them can somehow be archived as unfortunate byproducts of an otherwise normal, and necessary, exercise in boundary drawing. The plight of Sicilian mayors, even when heard in Rome, finds no sympathetic ear in Brussels. The EU system has already exhausted all plausible avenues for redistribution within the constraints of the law. As a result, local problems are confined to their geography. In what counts as ordinary parlance in post-crisis Europe, the fate of those in transit to our shores can be downgraded from scandal to technical error, and from systemic problem to peripheral glitch. There is, perhaps, a more than tenuous nexus between the particular mode of the Euro-zone crisis management and the EU public's habituation to an inherently anti-redistributive discourse in matters of irregular migration across the Mediterranean.

To be sure, in many other corners of EU law the interdependence of states' finances is the norm. Since the days of *Gravier*, for instance, it has been clear that the benefit of state-funded vocational education must be extended, at no additional cost, to students from other member states.⁹ Furthermore, in cases like *Viking* and *Laval*, the Court of Justice has had no trouble imposing redistributive obligations on workers of some states to the alleged benefit of workers from other states, with immediate consequences for national welfare policies.¹⁰ The topic of migrants' reception, by contrast, has been grafted onto a pattern of ultimate fiscal independence—a pattern most obvious in the law of monetary union, and also visible in certain rules of EU citizenship.¹¹ The reasons for this choice, often self-evident, run deep into the fabric of both history and contemporary politics. Its wisdom, however, remains questionable, and must be questioned.

⁷ See FRANCESCA STRUMIA, SUPRANATIONAL CITIZENSHIP AND THE CHALLENGE OF DIVERSITY 105 (2013) (highlighting the fact that EU law promotes the internal mobility of citizens but at the same time “immobilizes” migrants). Notably, even if granted refugee status, immigrants must often remain in the state of first entry if they care to obtain long-term residence permits.

⁸ See *infra* Part C. Minimum standards of reception have recently been specified in greater detail. See Directive 2013/33/EU, of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection, 2013 O.J. (L 180) 96.

⁹ *Gravier v. City of Liege*, CJEU Case C-293/83, 1985 E.C.R. 593.

¹⁰ See Alexander Somek, *From Workers to Migrants: Exploring the Changing Social-Democratic Imagination*, 18 EUR. L. J. 711 (2012).

¹¹ *Alopa v. Ministre du Travail, de l'Emploi et de l'Immigration*, CJEU Case C-86/12, 2013 (not yet reported).

B. The Commonality of Discourse in EMU and Immigration Law

EU asylum and immigration rules have developed in a way that bears interesting analogies to early monetary law and recent Euro-zone reforms. Just as in the case of monetary union, the creation of supranational institutions for the management of immigration began as a response to business's antipathy for internal borders. The Sarrebruck Accord of 1984 between France and Germany—a precursor to the larger agreement reached in Schengen in 1985—was a political response to a demonstration of truck drivers, angered by the length of checks at the Franco-German border.¹²

The genealogic parallel continues. The plan to communitarize monetary policy, building on the provisions on monetary capacity of the Single European Act, was launched into reality with a decision of the European Council in December 1991 and soon thereafter enshrined in the Maastricht Treaty. It was with Maastricht, as well, that immigration policy began to move past domestic confines.¹³ The reform had to work around a number of intergovernmental premises—most importantly states' exclusive grip on nationality laws, steeped in highly specific experiences of colonialism, imperialism, and migration. Under the aegis of a new pillar, the Schengen Agreement and Convention¹⁴ evolved into a Borders Code for the Union.¹⁵ The 1990 Dublin Convention¹⁶ morphed into the Dublin System.¹⁷ Thanks to a stronger foundation in the Treaty of Amsterdam, the EU finally equipped itself with Frontex, a supranational agency set up in Warsaw to manage and police external borders.¹⁸ Notably, the Treaty of Amsterdam also gave prominent status to the idea of

¹² BARBARA MARSHALL, *THE NEW GERMANY AND MIGRATION IN EUROPE* 119 (2000).

¹³ Bruno de Witte, *Institutional Variation across Policy Fields in the Evolution of European Union Law*, 20 *MAASTRICHT J. EUR. & COMP. L.* 465, 467–68 (2013).

¹⁴ Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, 2000 O.J. (L 239) 19.

¹⁵ Commission Regulation 562/2006, of the European Parliament and of the Council of 15 March 2006 Establishing a Community Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code), 2006 O.J. (L 105/1).

¹⁶ Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 1997 O.J. (C254/1).

¹⁷ The pillars of the Dublin System were, and still are (in revised form), Council Regulation 343/2003, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, 2003 O.J. (L 50/1) [Dublin Regulation]; Council Regulation 2725/2000, Concerning the Establishment of "Eurodac" for the Comparison of Fingerprints for the Effective Application of the Dublin Convention, 2000 O.J. (L 316) [Eurodac].

¹⁸ Council Regulation 2007/2004, Establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2004 O.J. (L 349/1) [Frontex].

variable geometry—a concept and set of instruments essential to the realization of both shared immigration policies and the EMU.

Analogies abound not only in the origins of current mechanisms, but also in the respective roles played by various member states in their onset and operation. In the 1980s, before reunification, Germany already experienced a high rate of inbound migration. It was in German political circles that the idea of Europeanizing immigration policies was born. An explicit reason for this shift to the supranational plane was the need to externalize a German problem. The goal was to redirect some migratory flows to other EU states.¹⁹

Today, accounts of German virtue, so central to the politics of the Euro-zone crisis, are also common in the literature on the Europeanization of mixed migration policy. Indeed, according to the UNHCR, in 2013 Germany was the recipient of the largest number of asylum applications in the region.²⁰ The villains of the story of reception are found, instead, among the PIIGS. In 2011, as the interest rates on Greek bonds took to the sky, the European Court of Human Rights famously held that Greece had subjected an Afghan migrant to inhuman and degrading treatment.²¹ Thus Greece, already the portrait of laziness and dishonesty in some quarters,²² became also the epitome of European xenophobia. Italy fared no better in 2012, when the Strasbourg court condemned its unceremonious *refoulement* of intercepted migrants back to Libya.²³

When the crisis hit, the EMU system notoriously burst at the seams. The straight jacket of the Treaty made urgent measures to save the Euro impossible. Any real strategy of survival had to be at least partly outsourced to non-EU institutions, such as the International Monetary Fund, or nested in the interstices of the system. Creatively, Euro-experts devised a number of ad hoc solutions, ranging from conditional loans, austerity pledges, and haircuts to new supervisory bodies and banking rules, but emphatically not including Eurobonds or direct forms of financial risk pooling. The Outright Monetary Transactions (OMT) decision of 2012, allowing the European Central Bank (ECB) to purchase sovereign bonds on the secondary market, was the closest the system got to shoring up the finances of one state with the strength of the whole Euro-zone. Notably, in reaction to the

¹⁹ See MARSHALL, *supra* note 12, at 119.

²⁰ United Nations High Commissioner for Refugees, *2014 UNHCR regional operations profile—Northern, Western, Central and Southern Europe*, <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e48e5f6>.

²¹ *M.S.S. v. Belgium and Greece*, ECHR App. No. 30696/09 (Jan. 21, 2011), <http://hudoc.echr.coe.int/>.

²² See Philomila Tsoukala, *Narratives of the European Crisis and the Future of (Social) Europe*, 48 TEXAS INT'L L.J. 241–66 (2013) (analyzing and critiquing the common depiction of Greece as a profligate and immoral country in the context of the Euro-zone crisis).

²³ *Hirsi Jamaa and Others v. Italy*, ECHR App. No. 27765/09 (Feb. 23, 2012), <http://hudoc.echr.coe.int/> [hereinafter Hirsi].

redistributive flavor of the OMT decision, the German Federal Constitutional Court took pains to clarify the boundaries the ECB is not allowed to cross.²⁴

Over the same time span, a surge in migration to the southern and eastern flanks of Europe required similarly creative efforts.²⁵ Frontex was not adequately present in the Mediterranean. The national governments of the EU's south were proving particularly ill-equipped to police the influx of asylum seekers from Africa and the middle east—and in light of the sovereign debt crisis, things could only get worse. Moreover, with the unfolding of the Arab Spring, these governments found it ever more difficult to enforce repatriation treaties with non-EU countries.²⁶ The EU therefore again rethought its immigration policy. Building on the legacies of Tampere and the Hague,²⁷ in 2009 the European Council developed the Stockholm Programme, which emphasized enhanced cooperation in border management, the importance of an EU external security strategy, and strengthened cooperation with non-EU countries.²⁸ While the Stockholm Action Plan identified solidarity among member states as essential in the present migratory context, its implementation largely consisted of reinforcing existing mechanisms, all based on states' individual responsibility in border management and in handling mixed migration flows.²⁹

²⁴ Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2728/13, para. 41 (Jan. 14, 2014), https://www.bundesverfassungsgericht.de/en/decisions/rs20140114_2bvr272813en.html (“[F]iscal redistribution [is] not entailed in the integration programme of the European Treaties. On the contrary, independence of the national budgets, which opposes the direct or indirect common liability of the Member States for government debts, is constituent for the design of the monetary union.”). See Dagmar Schiek, *The German Federal Constitutional Court's Ruling on Outright Monetary Transactions (OMT) – Another Step towards National Closure?*, 15 GERMAN L.J. (2014).

²⁵ *Commission Communication Examining the Creation of a European Border Surveillance System (Eurosur)*, COM (2008) 68 final (Feb. 13, 2008).

²⁶ Italy, for instance, was no longer able to enforce its bilateral agreements with Libya, concerning prevention of clandestine immigration, following the Libyan revolution which broke out in of 2011. *Hirsi Jamaa*, ECHR App. No. 27765/09 at para. 19–21.

²⁷ PEO HANSEN & SANDY BRIAN HAGER, *THE POLITICS OF EUROPEAN CITIZENSHIP* 162–64 (2010) (comparing the Tampere Program of 1999 and the Hague Programme of 2004).

²⁸ *The Stockholm Programme—An open and secure Europe serving and protecting the citizens*, 2010 O.J. (C 115/1). See also *Communication on Delivering an Area of Freedom, Security and Justice for Europe's Citizens: Action Plan Implementing the Stockholm Programme*, COM (2010) 171 final (Apr. 20, 2010) [Stockholm Action Plan].

²⁹ The Stockholm Program yielded two revised regulations (Dublin III and Eurodac) and two revised directives (Conditions of Reception and Asylum Procedures, 2013 O.J. (L 180) and the revised Qualification Directive, 2011 O.J. (L 337)).

To be sure, two significant forms of EU resource pooling have stemmed from the Stockholm strategy. One is the recent establishment of Eurosur³⁰—a coordinated system of high-tech border surveillance that allows for real-time exchange of operational information among the member states as well as between them and Frontex. The point of this initiative is to “reduce the number of irregular migrants entering the EU undetected.”³¹ The other example of cooperation has been the attempt to deepen the member states’ common relations with the EU’s neighbors. This is known as the European Neighborhood Policy (ENP).³² It includes, among its recent yields, a couple of “mobility partnerships,” and aims to lighten migratory pressure at the southern flanks of Europe.³³ Yet, even these EU-level initiatives remain anchored to the paradigm of states’ individual responsibility.

Eurosur, like many instruments of economic policy, is mostly a tool for coordination of member states’ actions, not a wholesome assumption of the substantive task of policing irregular immigration. In a statement attached to the Eurosur Regulation, the Council of Ministers carefully dispels any belief to the contrary.³⁴ Italy, for instance, must shoulder its own policing operation, relying on spontaneous aid from other member states.³⁵ This operation—known as “Mare Nostrum” (*our sea!*)—has proven so taxing that it casts doubts on the value of maintaining barriers to immigration.³⁶ And, of course, the alphabet soup of reception centers in Italy (CIE, SPRAR, CARA) is put together with national and international funds, not with direct EU contributions.

The mobility partnership agreements, by the same token, only aim at the numerical reduction of undocumented migrants, and do so in ways that do not align with the

³⁰ Commission Regulation 1052/2013, of the European Parliament and of the Council of 22 October 2013 Establishing the European Border Surveillance System (Eurosur), 2013 O.J. (L 295/11) [hereinafter Eurosur].

³¹ COUNCIL EUR. UNION, COUNCIL ADOPTS REGULATION ESTABLISHING THE EUROSUR SYSTEM (2013), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/139099.pdf.

³² EUR. COMM’N, IMPLEMENTATION OF THE EUROPEAN NEIGHBOURHOOD POLICY IN 2013, REGIONAL REPORT: A PARTNERSHIP FOR DEMOCRACY AND SHARED PROSPERITY WITH THE SOUTHERN MEDITERRANEAN PARTNERS (2014), http://eeas.europa.eu/enp/pdf/2014/regional/pdsp_en.pdf.

³³ See the EU mobility partnership agreements signed with Morocco (June 2013) and Tunisia (March 2014).

³⁴ See Eurosur, *supra* note 30 (“Eurosur will contribute to improving the protection and the saving of lives of migrants. The Council recalls that search and rescue at sea is a competence of the Member States which they exercise in the framework of international conventions.”).

³⁵ Giovanni Caprara, *L’Operazione Mare Nostrum*, EURASIA (Nov. 4 2013), <http://www.eurasia-rivista.org/loperazione-mare-nostrum/20335/> (noting that assistance has come from Finland first, and then France and the Netherlands).

³⁶ Gianandrea Gaiani, *Mare Nostrum, una nave da guerra da mezzo miliardo per i soccorsi*, IL SOLE 24 ORE (June 7, 2014), <http://www.ilsole24ore.com/art/notizie/2014-06-07/mare-nostrum-nave-guerra-mezzo-miliardo-i-soccorsi-101032.shtml?uid=ABXMFoOB&fromSearch>.

international rights of asylum seekers.³⁷ The ENP, within which the mobility partnerships are framed, aims to strengthen democracy in the neighborhood so as to decrease the future flow of Europe-bound migration. By design, it contributes nothing to the fortunes of those TNCs who cannot be pushed back due to member states' international obligations. These persons remain where they first landed, waiting for their legal status to be determined by the relevant state authorities. Even if not detained, they are locked into a system that worsens their prospects if they leave the state of first arrival. They are "immobile migrants"³⁸—a local problem by definition.

If a state does not manage to keep its borders clean, it becomes, in EU law, the polluter that must naturally pay or—in Euro-crisis parlance—the one to blame for Europe's loss of status in the eyes of the world. Thus it becomes normal for border states to pour whatever money is available into coastal policing, leaving as little as necessary for immigrants' reception and inclusion efforts. Gatekeeping, like austerity in the PIIGS zone, acquires an aura of necessity, crowding out the economic and political space for alternative social strategies.

C. Solidarity vs. Redistribution

Besides emphasizing states' responsibility to treat asylum seekers according to EU-approved standards, the EU Commission makes the case for "increased *solidarity* . . . among EU States, and between the EU and non-EU countries"³⁹ (emphasis added).

The notion of solidarity, as outlined in 19th century catholic social thought, is meant to bind the faithful, but only *in foro conscientiae*. Interestingly, in its early formulation, solidarity did not involve an enforceable legal duty to contribute one's resources to common causes, and was in fact at odds with any open redistributive command. In Pope Leo XIII's encyclical of 1891, solidarity was only one of the guiding principles.⁴⁰ The document also featured *subsidiarity*, which in the EU works as a bulwark against communitarization, and *private property*, which stands in tension with redistribution.

³⁷ EURO-MEDITERRANEAN HUMAN RIGHTS NETWORK, TUNISIA-EU MOBILITY PARTNERSHIP: A FORCED MARCH TOWARDS THE EXTERNALIZATION OF BORDERS (2014), http://www.euromedrights.org/eng/wp-content/uploads/2014/03/PR_Tunisia_17-03_EN.pdf.

³⁸ STRUMIA, *supra* note 7, at 105.

³⁹ EUR. COMM'N, *Common European Asylum System*, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm.

⁴⁰ Leo XIII, *Rerum Novarum* (1891): Leonis XIII P. M. Acta, XI, 97 (1892).

In the context of EU immigration law and policy—as well as the policies aimed at resolving the banking and sovereign debt crises—solidarity seems equally confined to the realm of voluntary sharing. The bulk of the EU's contribution to the handling of irregular migration inflows consists of facilitating spontaneous solidarity gestures among member states. It is in this frame that the EU has devised such programs as the European Resettlement Network,⁴¹ the Temporary Protection Directive (in the wake of the Kosovo crisis),⁴² and Eurema (a pilot project of intra-EU relocation intended to provide relief to Malta).⁴³ As the Council of Europe remarks, “[b]oth resettlement and relocation depend entirely on the good will and voluntary participation of the receiving States.”⁴⁴

When it comes to receiving and including irregular migrants into the EU society—an essential component of today's broader “social question”—redistribution is structurally difficult.⁴⁵ There are, of course, some truly redistributive inclusion programs, consisting not just of coordination mechanisms but of EU funds, duly earmarked in the budget and weighing on member states' finances in proportion to their fortunes.⁴⁶ But as in the case of the European Refugee Fund, such efforts remain materially and systemically marginal.

In a different political climate, one could aspire to transform the current system into one that embraces irregular migration as a natural, timeless phenomenon, to be owned fully at EU level so as to take seriously both the rights and the moral claims of the excluded. To begin with, one could conceive of not just minimum reception standards, but also fully coordinated—and binding—relocation schemes, as well as paths towards legal

⁴¹ See most recently the joint IOM, UNHCR and ICMC project entitled “Strengthening the response to emergency resettlement needs,” available at <http://www.resettlement.eu/page/emergency-resettlement-project>.

⁴² Council Directive 2001/55/EC, of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof, 2001 O.J. (L 212/12). Chapter VI of this directive, under the heading “Solidarity,” contemplated the possibility for member states to volunteer as receivers in the event of a mass influx of displaced persons. This would imply that immigrants would not be confined to the port of first entry. However, as the DG Home Affairs states on its website, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/temporary-protection/index_en.htm, the provisions within this Directive have not been triggered so far.

⁴³ UNCHR, EUREMA I AND II: PILOT PROJECT FOR INTRA-EU RE-ALLOCATION FROM MALTA, <http://unhcr.org/4ef338859.pdf>.

⁴⁴ Eur. Parl. Ass., *Resettlement of Refugees: Promoting Greater Solidarity*, Doc. 13460 (2014).

⁴⁵ Floris De Witte, *EU Law, Politics, and the Social Question*, 14 GERMAN L.J. 581, 588 (2013) (“Answers to the social question that presuppose different, or more stringent regulatory or redistributive commitments, are structurally less likely to be implemented successfully in Europe.”).

⁴⁶ Council Decision 2000/596/EC, of 28 September 2000 Establishing a European Refugee Fund, 2000 O.J. (L 252/12) (subsequently renewed). See also Council Decision 2007/435/EC, of 25 June 2007 Establishing the European Fund for the Integration of Third Country Nationals for the Period 2007 to 2013 as Part of the General Programme Solidarity and Management of Migration Flows, 2007 O.J. (L 168).

employment that direct recently documented immigrants towards those corners of Europe where unemployment rates are relatively less dire and the welfare system relatively less burdened. Even within the current legal architecture, the EU could make room for “mutual recognition of belonging,” i.e. for the idea that those who have duly obtained permits in one state be immediately allowed to move across internal borders with no loss of status or resident seniority.⁴⁷

But at present there is no sign of convergence on such goals. Urgent humanitarian measures, while legally possible and definitely not radical, are proving hard to trigger. The recast Dublin Regulation has indeed cast again, with only cosmetic alteration, the principle that asylum applications must be filed in the country of first entry—a feature of the system that creates undue pressure on southern member states, fills up their reception centers, and toughens the stance of coastal patrols.⁴⁸ Even with the leeway of the ordinary legislative procedure, upon which the recasting exercise was based, the EU legislature has kept the Dublin silos separate.⁴⁹ In a climate that is structurally hostile to the mutualization of reception burdens, it is difficult to summon political consensus towards gate lifting. Concerted efforts have therefore remained oriented towards Eurosur’s drones and Eurodac’s fingerprinting. The rest is left to good will.

Over time, the lines that separate areas of shared obligation from zones of local concern acquire an aura of eternal wisdom and inevitability. These lines are of course the arbitrary result of historical accidents and political bargains. They have been, however, written into law, and now determine with apparent objectivity the most entangled questions of our time.⁵⁰

D. A Way Forward

Pushing for EU-level redistribution in matters of irregular migration reception might very well be sheer folly in the current post-election climate. Things can always get worse, and often do. Redistribution often implies fuller integration. And if deeper federalism (as per Mr. Juncker’s program) were to combine with nationalist sentiment (as per Mme. Le Pen’s emboldened vision), one might soon look back with nostalgia at the days in which

⁴⁷ STRUMIA, *supra* note 7, at 291–300.

⁴⁸ Regulation 604/2013, of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast), 2013 O.J. (L 180/31).

⁴⁹ TFEU art. 78(2)(e).

⁵⁰ Duncan Kennedy, *A Semiotics of Legal Argument*, in 3 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW (YEARBOOK) 1992, VOL. III – BOOK 2: THE PROTECTION OF HUMAN RIGHTS IN EUROPE 309 (Academy of European Law ed., 1994).

spontaneous solidarity was at least an option. It is, in any case, beyond the ambition of this essay to chart the course of future immigration reforms or the path of budgetary and social welfare integration. What the foregoing sections have, more modestly, attempted to produce is a map of a pervasive discourse that normalizes tragedy and localizes problems, even when, for structural reasons, solutions at the local level are simply non-existent.

In opposition to this discourse, which the experience of the Euro-zone crisis has somehow fortified, it is today particularly important to rethink the lines we have drawn between matters of common budgetary concern and states' exclusive worries. When these lines are revisited, the arbitrariness of current resource silos—both within the EU and in Europe's dealings with its neighbors—may become easier to detect. An essential part of this reflection depends on building narratives of openness and continuity between Europe and the lands whence desperate migration journeys originate. This much can certainly be done in the forum of public opinion, as well as in the realm of academic work.

History, as always, lends much needed perspective, and may help us situate the burning question of migrants' inclusion in a larger and deeper context. As recently pointed out, the coming to life of the European Communities (EC) was no virgin birth,⁵¹ and the past sins of member states in what we now call the global south would cast long shadows on the novel supranational enterprise.⁵² Archival research has recently unearthed important details on the EC's role in (post)colonial affairs. This work duly revisits the traditional understanding of the early Community ethos, and even posits that the goal of managing colonial affairs was as central to post-WWII federalism as the Iron Curtain problem.⁵³ It has also been documented that during the interwar period, Europe looked at Africa as a place that could and should welcome as many migrants as necessary to cure Europe's own demographic problems.⁵⁴ Against this background, the fact that "today's EU does as it pleases to prevent African migrants from entering Europe" acquires a darker tone.⁵⁵

Even something as contemporary as the ENP has much to gain from historical inquiry. For instance, the EU's agreements with neighboring countries are often advertised as rescue measures offered to ever-struggling economies around the Mediterranean. But with closer

⁵¹ Kalypto Nicolaïdis, 'Southern Barbarians'? A Postcolonial Critique of EU Universalism, in *ECHOES OF EMPIRE: MEMORY, IDENTITY, AND COLONIAL LEGACIES* 247, 249 (Kalypto Nicolaïdis, Berny Sèbe & Gabi Maas eds., 2014).

⁵² *Id.* at 249–53.

⁵³ Peo Hansen & Stefan Jonsson, *Building Eurafrika: Reviving Colonialism through European Integration, 1920-1960*, in *ECHOES OF EMPIRE: MEMORY, IDENTITY, AND COLONIAL LEGACIES* 184, 185 (Kalypto Nicolaïdis, Berny Sèbe & Gabi Maas eds., 2014).

⁵⁴ *Id.* at 185 ("[I]t was widely agreed that Europe was overpopulated, an imbalance that could be resolved by the emigration and resettlement of surplus population in the 'empty' territory south of the Mediterranean.").

⁵⁵ *Id.* at 195.

analysis, one retrieves stories of once flourishing industries in the north of Africa, crushed by the very market forces that the Common Market unleashed and nurtured.⁵⁶ It is also essential to carry such insights to the present world trade context, and pay special attention to the negative externalities of both internal commerce and external EU deals. The plight of irregular migrants at Europe's gate may then acquire higher salience.

As Europe reflects inwardly on its own struggles and its inner inequities, a redistributive concern—the raw idea that past and present wrongs call for redressing—must remain firmly at the center of the debate. Historicized and contextualized redistributive arguments may prove more useful than identity politics,⁵⁷ more convincing than liberal egalitarianism,⁵⁸ more prescriptive than cosmopolitan outlooks,⁵⁹ and perhaps more apt to question, in the long term, the stonewalling practice that insulates Brussels from Lampedusa's mourning.

⁵⁶ The case of the rise and fall of the wine industry in pre- and post-independence Algeria is very much on point. See Daniela Caruso & Joanna Geneve, *Trade and History: Commerce between the EU and Algeria in the Wake of Camus's Centennial* (Boston Univ. School of Law, Public Law Research Paper No. 14-49; Boston Univ. School of Law, Law and Econ. Research Paper No. 14-49, 2014).

⁵⁷ See NANCY FRASER & ALEX HONNETH, *REDISTRIBUTION OR RECOGNITION?: A POLITICAL-PHILOSOPHICAL EXCHANGE* (2013).

⁵⁸ See, e.g., THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* (2002) (arguing that affluent societies are at least partly responsible for others' poverty). Cf. JOHN RAWLS, *THE LAW OF PEOPLES* (1999).

⁵⁹ Thym, *supra* note 3.