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Fortress Italy: Racial Politics and the New Immigration Amendment in Italy

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Michele Totah

Abstract

This Comment explores, using a framework of international human rights, how discrimination affected the passing of the Bossi Fini amendment to the Italian immigration law. Part I of this Comment discusses the international human rights norms established by several significant fundamental human rights treaties relevant to immigration issues. Part I also briefly discusses the history of Italian immigration legislation, and examines the radicalization of the immigration discourse in Italy. Part II surveys some important provisions of the new Bossi Fini amendment. Part III argues that the Bossi Fini amendment violates the asylum, expulsion, and non-discrimination human rights provisions discussed in Part I. Part III also posits that the underlying basis for the increase in restrictive immigration legislation lies in Italy's prevalent racist and xenophobic attitudes, and argues that though facially neutral, the Bossi Fini law has a disparate impact on immigrants of color.

COMMENT

FORTRESS ITALY: RACIAL POLITICS AND THE NEW IMMIGRATION AMENDMENT IN ITALY

*Michele Totah**

We need a law that can deal with these invasions, otherwise crime will continue to rise and Italian culture will be threatened . . . People who come to Italy must come to work. We will make illegal immigration a serious crime . . . Stop treating illegal immigrants like normal people. Only people who have got work contracts can come in. And we need more cops on the borders, helicopters. In America they shoot at illegal immigrants.¹

INTRODUCTION

On July 11, 2002, the Italian Parliament passed a controversial amendment to the Italian immigration law, entitled “Bossi Fini.”² Until recently, Italy was considered a country of emigration and was impervious to problems related to immigration.³

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1. *Intervista con Umberto Bossi*, LA STAMPA, June 6, 2002, at B3 (quoting Umberto Bossi, Italy’s Prime Minister for institutional reforms, at rally held in early summer of 2002); see Daniel Williams, *Italy, Too, Tries the Hard Line; Violent Crime, Immigration in the Political Spotlight*, WASH. POST, May 18, 2002 (comparing Bossi’s actions to “zero tolerance” model used in United States). Scholars note that Bossi’s statement foreshadowed changes to Italy’s immigration law under the Bossi Fini amendment, passed by the Italian Parliament on July 11, 2002. *Id.*

2. See *La legge Bossi Fini punto per punto*, CORRIERE DELLA SERA, July 12, 2002 (noting that Bossi Fini passed on July 11, 2002 sparking heated debates regarding constitutionality of law); see also *Profile: Berlusconi’s Allies – BBC News Online Profiles Silvio Berlusconi’s controversial right-wing coalition partners Umberto Bossi and Gianfranco Fini* (May 4, 2001) available at <http://news.bbc.co.uk/2/hi/europe/1313113.stm> (describing history of Italian politicians, Bossi and Fini) [hereinafter *Berlusconi’s Allies*]. The Amendment is named after Umberto Bossi, Leader of the Northern League and Minister for Institutional Reform and Devolution, and Deputy Prime Minister Gianfranco Fini, head of the National Alliance, and successor of Benito Mussolini’s Fascist movement. *Id.*

3. See JOANNA APAP, *THE RIGHTS OF IMMIGRANT WORKERS IN THE EUROPEAN UNION* 139 (2002) (noting that between 1871, when Italy became a Nation State, and 1971, twenty five million Italians left Italy). The author also notes that migratory history in

However, following the tightening of visa restrictions in Northern Europe and Italy's economic revitalization, immigration⁴ has increased dramatically.⁵ Scholars have offered numerous reasons to explain the surge of immigration in Italy, which include long coastlines that are difficult to patrol;⁶ proximity to Eastern Europe and Northern Africa;⁷ and an increase in refugees and asylum seekers fleeing to Italy to escape poverty, political repression, and instability.⁸ Additionally, Italy has many available jobs,

Italy is crucial to understanding and evaluating the emerging immigration legislation and policy. *Id.*; see also Maria Carella & R. Pace, *Some Migration Dynamics Specific to Southern Europe: South North and East West Axis*, 39(4) INT'L MIGRATION REV. at 66-67 (2001) (attributing Albanian crisis in Italy to lack of experience in dealing with immigration); David Christensen, *Leaving Back Door Open: Italy's Response to Illegal Immigration*, 11 GEO. IMMIGR. L.J. 461, 462 (1997) (describing Italy's policy problems relating to new rise in immigration); E. De Filippo & Enrico Pugliese, *Le Nuove Migrazioni Internazionali e i Modelli Migratori nei Paesi del Sud Europa*, in MEDITERRANEO 49-71 (July-Sept. 1996) (discussing Italian and Southern European models of migration as impervious to immigration-related problems); see generally MAURIZIO AMBROSINI, IMMIGRAZIONE STRANIERA IN ITALIA: DALLA CONOSCENZA ALL'INTERVENTO SOCIALE (1991) (describing social policies developed to address new issues arising from rise in immigration).

4. See THE LEGAL FRAMEWORK AND SOCIAL CONSEQUENCES OF FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION (Elspeth Guild ed., 1999) (providing definition of immigrant as one who moves to another country and resides there for more than three months). For the purposes of this paper, "immigrant" will be defined as one who moves to another country and resides there for more than three months. In the case of non-European Union ("EU") nationals, three months is the cut-off point whereby a visitor becomes an immigrant and a residence permit is required. *Id.* This does not mean that the immigrant will not return to his country of origin. *Id.* Many immigrants in Italy are seasonal workers or come to Italy for three to six months to work every year and return to their home countries. *Id.*

5. See THE LEGAL FRAMEWORK AND SOCIAL CONSEQUENCES OF FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION, *supra* n.4, at 110 (noting exponential increase in immigration to Italy in recent years); see also Thomas Straubhaar, *Allocation and Distributional Aspects of Future Immigration to Western Europe*, 26 INT'L MIGRATION REV. 462 (1992) (tracing increased migration to Western Europe in 1980s and 1990s to variety of factors including labor shortages in host Nation).

6. See Guido Bolaffi, *Redesigning Italy: The New Flow of Immigration*, 4 IND. INT'L & COMP. L. REV. 291, 291 (noting long coastlines are difficult to patrol and attract immigrants but other obstacles to controlling immigration are more serious).

7. See Christensen, *supra* n.3, at 463 (noting that Italy's proximity to immigration-sending Nations of North Africa makes policing borders difficult).

8. See BIMAL GHOSH, HUDDLED MASSES AND UNCERTAIN SHORES — INSIGHTS INTO IRREGULAR MIGRATION 37-42, 51-55 (1998) (describing push factors as poverty and political instability in home countries of immigrants and pull factors as labor demand in receiving countries); see also Mauro Fasti, *Italian Immigration and Refugee Law*, in IMMIGRATION, ASYLUM AND NATIONALITY LAW 15, at 18 (2001) (stating that extreme poverty and human rights violations are examples of push factors and expanding labor market is example of pull factor). Scholars also point to geographic proximity to North Africa and Eastern Europe, as well as willingness of immigrants to accept jobs that Italians are

particularly in the tertiary or service sector, due to its low birth rate.⁹ Despite the need for immigrants to fill jobs that Italians refuse to accept, scholars have characterized the attitudes towards immigrants as racist and reflective of the European-wide rise in anti-immigrant sentiment.¹⁰ In response to the influx of immigrants¹¹ on Italy's shores, the government enacted the controversial Bossi Fini amendment to the current immigration law to deal with the perceived "state of emergency."¹²

unwilling to take because they are precarious or poorly regarded as reasons for increased migration. *Id.* Additionally, scholars mention the employers' need for this type of work and their willingness to take advantage of immigrants who will accept lower salaries because of their social vulnerability, particularly if they are illegal. *Id.*

9. See Gavin Jones, *Survey Italy*, *FIN. TIMES* (London), July 22, 2002, at 6 (quoting Guidalberto Guidi, head of Confindustria, one of Italy's largest industries, saying Italian industry cannot survive without help of immigrant workers). The average is one child per woman in Italy, a number the Catholic Church and statisticians argue is not enough to maintain a labor force. *Id.* It must be added that immigration to Italy today is essentially economic migration. *Id.* Italy's market, as Livia Turco, ex Social Affairs Minister in the former Italian government and drafter of previous Turco-Napolitano immigration law, proclaims, needs this migration to survive. *Id.* Bossi Fini eliminates the idea of a sponsorship and many employers are unwilling to give a work contract to a person without "seeing their face." *Id.*; see also Confindustria, *L'immigrazione extra-comunitaria e Il Mercato del Lavoro Italiano* (1990) (explaining Italy's need for unskilled migrant workers to satisfy labor demand); Alessandra Venturini, *Il Mercato del Lavoro e il Lavoratori Extraeuropei: Una Lettura Economica*, in *ECONOMIA E DIRITTO* 6, 359, 362-71 (2001) (providing statistical and economic data on situation of immigrant workers in Italian labor market). Italy could not survive without the immigrant labor supply. *Id.* It has been calculated by ISTAT, a statistical agency in Italy, that Italy will lose twenty-eight percent of its population by 2050 and to maintain its working age population, Italy would need to allow 350,000 immigrants per year into the country or alternatively, keep its citizens working until they are seventy-five. *Id.* See generally *CARITAS DI ROMA, DOSSIER STATISTICO SULL'IMMIGRAZIONE: 2001* [hereinafter *DOSSIER CARITAS*] (reporting statistical information on numbers and status of immigrants in Italy).

10. See Giovanna Campani, *Immigration and Racism in Southern Europe: the Italian Case*, *ETHNIC AND RACIAL STUD.* 16(3) (1993) (tying increase in racism to increase in immigration to Italy); see also G. TORICELLO, *LA CONDIZIONE DELLO STRANIERO: PROFILI DI DIRITTO COMPARATIVO COMMUNITARIO* (1997) (explaining how Italian attitude towards immigrants affects social and political condition of immigrants in Italy).

11. See *DOSSIER CARITAS*, *supra* n.9, at 233 (stating that although immigration has increased dramatically, immigrants only make up 2.2% of population in Italy); see also 9(10) *MIGRATION NEWS* (2002) (calculating that there were 1.3 million legally registered foreigners in Italy, and 500,000-700,000 undocumented foreigners according to Italian Interior Ministry). Between January and August 2002, more than 16,000 immigrants arrived, compared to 12,000 in 2001).

12. See Eric Oleander, *Italy Declares a State of Emergency*, available at <http://www.cnn.com/2002/WORLD/europe/03/20/italy.immigrants/index.html> (March 20, 2002) (noting recent dramatic rise in immigration and unpreparedness of government or society to deal with such increase); see also *Immigrazione, Scajola — Stato di emergenza — tensione nella Casa della Liberta tra cattolici e la Lega*, *REPUBBLICCA*, available at www.repubblica.it

This Comment explores, using a framework of international human rights, how discrimination affected the passing of the Bossi Fini amendment to the Italian immigration law. Part I of this Comment discusses the international human rights norms established by several significant fundamental human rights treaties relevant to immigration issues. Part I also briefly discusses the history of Italian immigration legislation, and examines the racialization of the immigration discourse in Italy. Part II surveys some important provisions of the new Bossi Fini amendment. Part III argues that the Bossi Fini amendment violates the asylum, expulsion, and non-discrimination human rights provisions discussed in Part I. Part III also posits that the underlying basis for the increase in restrictive immigration legislation lies in Italy's prevalent racist and xenophobic attitudes, and argues that though facially neutral, the Bossi Fini law has a disparate impact on immigrants of color.

I. LAYING THE FOUNDATION: BUILD UP TO BOSSI FINI

There are a number of international, regional, and domestic standards under which Italy is judged.¹³ On the international and regional stage, Italy has signed and ratified several human rights treaties binding it to respect the fundamental rights and freedoms of people within its borders.¹⁴ On the domestic stage, Italy has passed legislation prohibiting all types of discrimination.¹⁵ Despite the domestic and international standards, commentators still note that pervasive racism is still embedded in

blica.ir/online/politica/immigratre/immigratre.html (labeling rise in immigration a "State of emergency" and discussing tension existing between Church and Northern League in regards to illegal immigration).

13. See GUY GOODWIN-GILL, BASIC DOCUMENTS ON HUMAN RIGHTS (Ian Brownlie & Guy Goodwin Gill eds., 1984) (describing applicable human rights treaties that Italy is bound by).

14. See *id.* (noting that Italy has signed and ratified numerous international human rights treaties).

15. See CONSTITUTION OF THE REPUBLIC OF ITALY, GAZZ. UFF., n.298, Dec. 27, 1947, entered into force January 1, 1948, arts. 3 and 10, reprinted in MARIO CAPPELLETTI, THE ITALIAN LEGAL SYSTEM 281 (1967) (providing anti-discrimination norms) [hereinafter ITALIAN CONST.]; see also Mancino Law, L. n.205, GAZZ. UFF., June 25, 1993 (providing emergency measure against racial, ethnic and religious discrimination and harsher prosecution for hate crimes); Reale Law, L. n.654, passed Oct. 5, 1975, published in GAZZ. UFF., Dec. 23, 1975 (defining racial discrimination and incorporating International Convention Against All Forms of Racial Discrimination into domestic law).

Italian immigration policies.¹⁶

A. *International Human Rights Framework*

Although international human rights law does not explicitly deal with the rights of immigrants, scholars have noted that a discussion of human rights as they relate to immigration, is integral in today's society.¹⁷ Since international and regional human rights norms use the words "all persons," or "everyone," the laws propose to embrace both citizens and extra-community nationals,¹⁸ including refugees, asylum seekers, and immigrants.¹⁹ Although the conventions and treaties legally bind signatory Nations, they pose enforcement problems, leading some European Union ("EU") Nations to deviate from these standards and ignore certain important human rights norms.²⁰ Nevertheless,

16. See TORICELLO, *supra* n.10, at 9 (explaining how Italian racist attitude towards immigrants affects social and political condition of immigrants in Italy); see also J. WRENCH, *RACISM AND MIGRATION IN WESTERN EUROPE* (1993) (discussing issues of racism and xenophobia in Italy).

17. See RICHARD LILLICH, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* 42 (Gillian White ed., 1984) (noting that although immigrants are not expressly mentioned, judging from plain meaning of words used, one would conclude that immigrants are indeed covered in U.N. and European human rights charters); see also D. ELLES, *Aliens and Activities of the United Nations in the Field of Human Rights*, 7 *REV. DES DROITS DE L'HOMME* 291, 307-08 (1974) (discussing role of immigrants in field of human rights and concluding that despite lack of express mention of immigrants, all U.N. Charters inevitably apply).

18. An "extra-community national" is a term used to describe immigrants and those who are not nationals of the country where they reside.

19. See Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter UDHR]. The preamble opens with: "All human beings are born free and equal in dignity and rights." *Id.*; U.N. CHARTER, PmbL. (proclaiming determination to "reaffirm faith in fundamental human rights in dignity and worth of human person"); see also LILLICH, *supra* n.17, at 42-44 (discussing the impact of UDHR on rights of immigrants and proposing that despite no express mention of immigrants, the UDHR, judging from plain meaning of words used must lead to conclusion that immigrants are covered); Ryszard Cholewinski, *Economic and Social Rights of Refugees and Asylum Seekers in Europe*, 16 *GEO. IMMIGR. L.J.* 709, 712 (surveying laxness in Europe's enforcement of economic and social rights of refugees and asylum seekers); Vienna Declaration and Program of Action, World Conference on Human Rights, 22d plen. mtg. (June 25, 1993), pmbL., at paras. 3, 8, U.N. Doc. A/ CONF.157/24 (Part 1), at para.1 (1993), *reprinted in* 32 *I.L.M.* 1661 (1993) [hereinafter Vienna Declaration] (stating that each State must promote, observe, and protect all forms of human rights and for and observance and protection of all human rights and fundamental freedoms).

20. See LOUIS HENKIN, *Politics of Law-Making*, in *INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS* 18-20 (Charlotte Ku & Paul F. Diehl eds., 1998) (asserting that lack of enforcement is major weakness in international human rights law); see also

many documents have been drafted to express the EU's desire to reinforce the ideal of fundamental human rights without regard to race, gender, language, religion, and political or other opinion.²¹

1. International Human Rights Treaties

a. Universal Declaration of Human Rights 1948

In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights ("UDHR"), which asserts a common standard of fundamental human rights, as they apply to all persons without distinction.²² The UDHR guarantees various civil and political rights, including the right to life, liberty, and security of person.²³ It also guarantees the prohibition of slavery, freedom from torture, the right to a fair trial, and

LOUIS HENKIN, *IDEALISM AND IDEOLOGY*, in *HOW NATIONS BEHAVE* 228, 232 (2d ed., 1979) (explaining that weak enforcement is more problematic in human rights law than any other type of law).

21. See Jonan Leman, *Europe's Consultative Commission on Racism and Xenophobia and the Slow Progress Towards a European Antiracism Observatory*, 18 *LOV. L.A. INT'L & COMP. L.J.* 603, 603-04 (1996) (proposing documents that express EU's desire to create union which entitles all peoples to rights and freedoms regardless of race, political opinion, etc.). Documents enforcing EU's non-discrimination principle include: Joint Declaration by the European Parliament, the Council, the representatives of the government of the Member States meeting within the Council, and the Commission of 1977, 1986, 1990 (Joint Declaration by the European Parliament, the Council and the Commission, 1977 O.J. (C 103) (1); Declaration Against Racism and Xenophobia, 1986 O.J. C 158, 1; Resolution of the Council and the Representatives of the Governments of the Member States, Meeting Within the Council of 29 May 1990 on the Fight Against Racism and Xenophobia, 1990 O.J. C 157.

22. See UDHR, *supra* n.19, art. 2 (asserting common standard of fundamental human rights for all persons). Article 2 of the UDHR provides:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Id.

See also HUMAN RIGHTS 286 (Louis Henkin et. al. eds., 1990) (noting that though not having force of binding rule of law, provisions of Declaration constitutes guiding principles of highest moral value).

23. See LILlich, *supra* n.17, at 42 (noting that if all civil and political rights guaranteed by treaty were enforced, legal and political climate in most Nations would be drastically improved); see generally THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY (Asbjorne Eide et. al., eds., 1992) (providing history and commentary on evolution of UDHR and its relevance in today's political climate).

the presumption of innocence.²⁴ It provides for the right to privacy and the right to own property, as well as freedom of speech, religion, and movement.²⁵ Although it does not expressly mention the rights of immigrants, it uses all-inclusive language and its Preamble begins with the notion that the UDHR should be a common standard for all peoples and all Nations without distinctions.²⁶ The only rights in the UDHR that exclude immigrants

24. See UDHR, *supra* n.19, arts. 4, 5, 10, 11 (providing for right to be free from slavery and torture, and right to fair trial and to be presumed innocent). Article 4 states: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms." *Id.* Article 5 states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.* Article 10 states: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." *Id.* Article 11 states: "Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence." *Id.*

25. See UDHR, *supra* n.19, arts. 12, 17, 18 (providing for freedom of speech, religion, and movement and right to privacy and ownership of property). Article 12 of the UDHR provides: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks." *Id.* Article 17 of the UDHR provides: (1) "Everyone has the right to own property alone as well as in association with others." (2) "No one shall be arbitrarily deprived of his property." *Id.* Article 18 provides: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." *Id.* See also LILICH, *supra* n.17, at 41 (describing rights guaranteed by UDHR).

26. See UDHR, *supra* n.19, pmbl. (providing common standard of human rights for all people and all Nations). Preamble of the UDHR provides:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation

are those which expressly mention nationals.²⁷ Scholars have proposed that the Articles particularly relevant to immigrants are Articles 2, 9, 10, 13, 14, and 15.²⁸ The Articles, in combina-

with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms, Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge, Now, Therefore THE GENERAL ASSEMBLY Proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Id. See also LILLICH, *supra* n.17, at 42-43 (discussing Preamble of UDHR and noting it does not explicitly mention rights of immigrants but uses all-inclusive language, leading many scholars to use preamble in discussions related to immigration).

27. See UDHR, *supra* n.19, art. 21 (expressly mentioning nationals). Article 21 of the UDHR provides:

Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

Everyone has the right of equal access to public service in his country.

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Id. See also LILLICH, *supra* n.17, at 43 (mentioning Article 21 as example where nationality is relevant because it guarantees right to take part in government of "his" country and right to public access in "his" country).

28. See UDHR, *supra* n.19, arts. 2, 9, 10, 13, 14, 15 (providing for freedoms without distinctions of any kind). Article 2 of the UDHR provides:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Id. Article 9 of the UDHR provides: "No one shall be subjected to arbitrary arrest, detention or exile." *Id.* Article 10 of the UDHR provides: "Everyone is entitled to a full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charges against him."

Id. Article 13 of the UDHR provides: "Everyone has the right to freedom of movement and residence within the borders of each State.

Everyone has the right to leave any country, including his own, and to return to his country." *Id.* Article 14 of the UDHR provides: "Everyone has the right to seek and enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations." *Id.* Article 15 of the UDHR

tion, provide for freedoms without distinctions of any kind as well as the right to be free from arbitrary arrest, to be given a fair and public trial, and to move freely and have a right to a nationality.²⁹

Although signatory Nations are bound by the words of the UDHR in theory, this is not so in practice because the UDHR is not a treaty, but only a resolution of the United Nations (“U.N.”) Assembly and thus is not automatically binding in international law.³⁰ Nevertheless, scholars note that despite the fact that the UDHR is not a treaty, it provided guiding principles for many other international and human rights instruments.³¹ Additionally, scholars have proposed that the UDHR is a normative instrument, which does create legal obligations for the Member States of the U.N.³²

b. 1966 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (“ICCPR”) is one of the only international human rights documents, which specifically mentions the rights of immigrants and

provides: “Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.” *Id.*

29. See UDHR, *supra* n.19, arts. 2, 9, 10, 13, 14, 15 (relating indirectly to immigrant rights); see also LILLICH, *supra* n.17, at 43 (laying out Articles of UDHR relevant to immigrants).

30. See LILLICH, *supra* n.17, at 44 (stating that UDHR is not treaty but resolution and has no force in international law); see also Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects* 63 WASH. L. REV. 1,8 (1988) (stating that UDHR is resolution with no force of law); HUMAN RIGHTS, *supra* n.22, at 286 (noting that although some NGOs and smaller governments urged that UDHR be binding, it remained part of customary law without being binding).

31. See LAMMY BETTEN & NICHOLAS GRIEF, *EU LAW AND HUMAN RIGHTS* 15 (1998) (noting UDHR is not binding instrument but key source of inspiration for drafting other binding human rights doctrines); see also Buergenthal, *supra* n.30, at 8 (stating that most international lawyers would not deny that UDHR is normative instrument that creates at least some obligations for U.N. States); see also U.N. ESCOR, 34th Sess., Supp. No. 8, at 15, U.N. Doc. E/3616/Rev.1 (1962) (declaring expectation that UDHR be considered and enforced by international community); see also *Filartiga v. Pena Irala*, 630 F.2d 876, at 883 (2d. Cir. 1980) (defining U.N. Declaration, according to one authoritative definition, as formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated).

32. See LOUIS HENKIN, *THE AGE OF RIGHTS* 19 (1990) (discussing whether all UDHR rights are binding and under what circumstances and noting both sides of debate); see also Michael C. Small, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers*, 74 GEO. L.J. 163, 173 (1985) (citing *Filartiga*, 630 F.2d, at 883 noting some observers contend that UDHR carries significant legal weight).

the bases for expulsions, particularly in regards to national security concerns.³³ Scholars disagree on the provisions of the ICCPR and UDHR as they apply to immigrant rights: some have proposed that the ICCPR's terminology, like that of the UDHR, strives to encompass all peoples and thus extends to immigrants;³⁴ others note that one problem with the ICCPR is that, like the UDHR, it does not mention distinctions based on nationality, only national origin, thus expressly ignoring immigrants.³⁵ The ICCPR permits distinctions between citizens and non-citizens, including asylees and refugees; but not between different groups of non-citizens.³⁶

These provisions dealing with non-discrimination explicitly only mention "national origin" as a relevant ground for which discrimination must not occur.³⁷ Although different opinions

33. See International Covenant on Civil and Political Rights, U.N.G.A. Res. 2200 A (xxi), 999 U.N.T.S. (Dec. 16, 1966); 6 I.L.M. 1967 368, art. 13 [hereinafter ICCPR]. Article 13 states:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Id. See also LILLICH, *supra* n.17, at 47 (noting that Article 13 of ICCPR is crucial to immigrant rights because it concerns rights to which they are entitled during expulsion proceedings).

34. See LILLICH, *supra* n.17, at 45 (stating that ICCPR, similarly to UDHR has terminology that leads to inescapable conclusion that it extends to immigrants).

35. See *Id.* n.17, at 47 (noting that ICCPR does not mention nationality, only national origin causing significant enforcement problems); see also MARK BELL, *ANTI-DISCRIMINATION LAW AND THE EUROPEAN UNION* 52 (2002) (noting provision guaranteeing rights contained in Covenant without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status); ICCPR, *supra* n.33, art. 2(1) (mentioning all-inclusive and non-discriminatory nature of Covenant).

36. See Australian Human Rights and Equal Opportunity Commission, *The International Convention for the Elimination of All Forms of Racial Discrimination*, available at http://www.humanrights.gov.au/racial_discrimination/guide_law/icerd.html (noting that ICCPR permits distinctions between citizens and non-citizens but not between different groups of non-citizens); see also LILLICH, *supra* n.17, at 47 (noting problems with ICCPR and lack of mention of nationality).

37. See Dr. Silke von Lewinski, *Intellectual Property, Nationality, and Non-Discrimination*, available at <http://www.wipo.org/globalissues/activities/1998/humanrights/papers/word/lewinski.doc> (discussing national origin in human rights treaties); see also LILLICH, *supra* n.17, at 46 (noting that ICCPR only mentions national origin and fails to include nationality).

exist on the meaning of “national origin,” many commentators exclude “nationality” from the notion of “national origin,” stating that the non-discrimination treaties did not intend to oblige countries to automatically grant immigrants the same rights as to their own nationals; rather, “national origin” relates to ethnic or racial origin of an individual person.³⁸ Scholars propose that the most relevant Articles in terms of migrant rights and the Bossi Fini are Articles 9, 12, 13, and 26, which speak to freedom of movement, unlawful arrest and detention, expulsion, and equal protection.³⁹ The Human Rights Committee was established to

38. See LILICH, *supra* n.17, at 46 (noting that national origin refers to person’s descent or race, while nationality refers to person’s jurisdictional origin). Nationality is not mentioned in the ICCPR; however, Article 2(1) of ICCPR states that the rights set forth in the Covenant are to be granted to all persons within the territory, and subjected to the jurisdiction of the State party without distinction of any kind, such as race, color, sex, language, religion, political, or other opinion, national or social origin, property, birth, or other status. *Id.* at 46. Some scholars believe that nationality falls in the category of “distinction of any kind.” *Id.* (analyzing Article 2(2) of International Covenant on Economic, Social and Cultural Rights (“ICESCR”), noting that national origin relates to ethnic or racial origin of individual persons and that non-discrimination rule intends to differentiate between nationals and non-nationals); see also Amnesty International Report, *Nationality, Expulsion, Statelessness and the Right to Return*, available at http://www.geocities.com/bhutanese-refugees/ai_nationality.html (noting that while international human rights standards with regard to nationality are less concrete than in some other areas of human rights, past fifty years has seen development of some important principles derived from and reflected in practice of States, and set out in instruments such as 1951 Convention on the Reduction of Statelessness and, most recently, the 1997 European Convention on Nationality). These principles are also found in a number of other human rights instruments of broader application, such as the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) and the Convention on the Rights of the Child (“CRC”), and have been reiterated continually in declarations by U.N., regional and other bodies. Among the most concrete of these principles are those relating to the avoidance of statelessness and the right not to be arbitrarily deprived of nationality. *Id.*

39. See ICCPR, *supra* n.33, arts. 9, 12, 13, 25, and 26 (providing for freedom of movement, unlawful arrest and detention, expulsion and equal protection). Article 9 of ICCPR states:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any

ensure that the States Parties comply with the obligations of the treaty.⁴⁰

c. 1965 International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") obligates each State to prohibit any acts or practices of racial discrimination against

other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Id. Article 12 of ICCPR states:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Id. Article 13 of ICCPR states:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Id. Article 26 of ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Id. See also ICCPR, *supra* n.33, at General Comment 15, para. 9 (addressing expulsion of aliens in paragraph 9 and stating that alien who is expelled must be allowed to travel to any country that agrees to take him); *Id.* at para. 10 (stressing right to appeal and review by an impartial tribunal); see also LILLICH, *supra* n.17, at 46-47 (mentioning that Articles 9, 12, 13, 25, and 26 are of particular importance to immigrants).

40. See Buergental, *supra* n.30, at 10 (defining role of Human Rights Committee as institution which ensures compliance with obligations of treaties); BASIC DOCUMENTS ON INTERNATIONAL MIGRATION LAW 7 (Richard Plender ed., 1992) (noting that Italy signed and ratified treaty on September 15, 1978.)

persons, groups of persons, or institutions, and ensures that local and national public authorities undertake the responsibility to comply with these provisions.⁴¹ The provisions of the ICERD require States to take affirmative actions, using all appropriate means, to create a policy of eliminating racial discrimination in all forms as well as promoting understanding among races.⁴²

Despite the duties mandated by the ICERD, most western Nations have not adhered to these covenants in practice.⁴³ The Committee for the Elimination of all Forms of Racial Discrimination ("CERD"), whose duty is to enforce the ICERD, has assessed that one of the most important methods to combat discrimina-

41. See International Convention on the Elimination of all Forms of Racial Discrimination, U.N.G.A. Res. 2106 [XX] 1966, art. 1 (defining racial discrimination)[hereinafter ICERD]. Article 1 of ICERD states:

[R]acial discrimination [is] any distinction, exclusion, restriction, or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in political, economic, social, cultural or any other field of public life.

Id. See also BASIC DOCUMENTS ON INTERNATIONAL MIGRATION LAW, *supra* n.40, at 38 (providing that Italy signed treaty on January 5, 1976); see generally Christopher McRudden, *National Legal Remedies for Racial Inequality*, in *DISCRIMINATION AND HUMAN RIGHTS — THE CASE OF RACISM* (Sandra Fredman ed., 2000) (noting that ICERD obligates States to take action and proposing certain remedies that States could adopt to combat racial discrimination).

42. See ICERD, *supra* n.41, art. 2(1). Article 2(1) of ICERD states: "States are obliged to pursue by all appropriate means and without delay policy of eliminating racial discrimination in all its forms and promoting understanding among races." *Id.* The five objectives for the achievement of this goal require States under Article 2(1)(1) "not to engage directly or through their public institutions at all levels, in acts or practices of racial discrimination." *Id.*; under Article 2(1)(b) "not to sponsor, defend or support racial discrimination by any persons or organizations." *Id.*; under Article 2(1)(c) "to amend, rescind, or nullify legislation, which creates or perpetuated racial discrimination"; under Article 2(1)(d) "to prohibit, by all appropriate means, racial discrimination by any persons, group, or organization"; and under Article 2(1)(e) "to encourage elimination of barriers through internationalist multiracial organizations and movements and discourage anything which tends to strengthen racial division." *Id.* See also Helmut Partsch, *Elimination of Racial Discrimination in the Enjoyment of Civil and Political Rights*, 14 *TEX. INT'L L.J.* 191 (1979) (stating that ICERD requires States to actively create policy of eliminating racial discrimination and promote integration); BELL, *supra* n.35, at 59 (noting incorporation of ICERD in Italian domestic law).

43. See Kevin Boyle & Annaliese Baldaccini, *International Human Rights Approach to Racism* in *DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF RACISM* 135, 154-55 (Sandra Fredman, ed., 2000) (noting that most Western Nations have not adhered to international Covenants); see also Asbjorn Eide, *Study on the Achievements Made and Obstacles Encountered During Decades to Combat Racism and Racial Discrimination*, E/CN.4 Sub 2. 1989/8, para. 370 (discussing steps taken to combat racial discrimination in EU and noting much more needs to be done to ensure international covenants are respected).

tion against immigrants is to require States to guarantee non-citizens rights comparable to those afforded to citizens in order to promote the social inclusion of immigrants and prevent the rise of racism and xenophobia.⁴⁴ Nevertheless, CERD has no authority to require States to guarantee these rights, and countries are reluctant to tackle discrimination against immigrants; thus, immigrants continue to suffer from discrimination despite international protective legislation.⁴⁵

d. Convention Relating to the Status of Refugees

The 1951 Convention relating to the Status of Refugees (“Refugee Convention”) and the Protocol Relating to the Status of Refugees (“1967 Protocol”) govern refugee matters.⁴⁶ Article 1 of the Refugee Convention defines “refugee”, as any person who due to a “well-founded fear of persecution” for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his nationality and owing to such fear, is unwilling to avail himself of the protection of that country.⁴⁷ Commentators note that neither

44. See CERD General Recommendation XI on non-citizens, para. 3, 42nd Session (1993) (detailing CERD’s recommendation for social integration of immigrants to decrease xenophobia and racism); see generally U.N. CENTER FOR HUMAN RIGHTS, THE FIRST TWENTY YEARS: PROGRESS REPORT OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (1991) (detailing role of CERD in enforcing ICERD).

45. See Boyle & Baldaccini, *supra* n.43, at 155 (noting CERD’s enforcement problems in tackling discrimination); see also International ILO Convention No. 97 (revised) on Migration for Employment and ILO Convention No. 143 on Migrant Workers (Supplementary Provisions) (noting continued acts of discrimination in Italian labor market). *Id.*

46. See U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, art. 1 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan.31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol] (governing refugee matters).

47. See Refugee Convention, *supra* n.46, art.1. Article 1 states:

A. For the purposes of the present Convention, the term “refugee” shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization.

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality

the UDHR nor the ICCPR address the refugee problem and that States are reluctant to grant residency to immigrants, even those fleeing from persecution.⁴⁸ In response to the lack of attention to refugees, the U.N. adopted the Refugee Convention, which provides economic and social benefits as well as other protections to refugees.⁴⁹

However, commentators note that the problem with the U.N. Convention is that the term "refugee" has a narrow scope.⁵⁰ *Non-refoulement* was the primary protection for refugees, affording them the right not to be expelled or returned to a territory where their lives or freedom would be threatened.⁵¹ Although

and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Id. See also BASIC DOCUMENTS ON INTERNATIONAL MIGRATION LAW, *supra* n.40, at 7 (providing that Italy signed Convention on July 23, 1952 and ratified it on November 15, 1954).

48. See UDHR, *supra* n.19, art. 13(2). Article 13(2) provides: "Everyone has the right to leave any country, including his own, and to return to his country." *Id.* Article 14(1) provides: "Everyone has the right to seek and to enjoy in other countries asylum from persecution." *Id.* See also ICCPR *supra* n.33, art. 12(2). Article 12(2) states: "Everyone shall be free to leave any country, including his own." *Id.* See also HUMAN RIGHTS, *supra* n.22, at 405 (noting UDHR and ICCPR's neglect of plight of refugees and noting reluctance of States to grant residence status to aliens fleeing from persecution). The UDHR recognizes right of any individual to leave any country including his own as well as the right to seek and enjoy asylum from persecution. *Id.*

49. See Refugee Convention, *supra* n.46 (exemplifying U.N.'s mission to protect refugee rights); see also 1967 Protocol, *supra* n.46 (providing more detail in refugee rights since 1951 Convention related only to refugees after World War II). Many regional agreements spell out obligations of contracting States, notably the Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45 and the Recommendation on the Protection of Persons Satisfying the Criteria in the Geneva Convention who are not Formally Recognized as Refugees, Council of Eur. Comm. of Ministers, Doc. No. R(84)1(1984) (defining obligations of contracting States).

50. See Refugee Convention, *supra* n.46, art.33. Article 33 states:

1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country. No reservations to Article 33 are allowed.

Id. See also *Chahal v. UK*, 23 Eur. H.R. Rep. 413 (1987) (stating that domestic interpretation of term "refugee" is narrow); HUMAN RIGHTS, *supra* n.22 at 405 (noting narrow scope of definition of refugee).

51. See Refugee Convention, *supra* n.46, art. 33. Article 33 states: "No Contracting

scholars have noted the importance of the *non-refoulement* principle, it is not a guarantee to permanent asylum and does not ensure the refugee all the rights recognized by the UDHR and the Covenants.⁵² While the Refugee Convention and the Protocol define the obligations of parties toward refugees, neither addresses nor mandates the adoption of particular procedures to determine who is a refugee entitled to protection, leaving each signatory State to establish its own enforcement procedures.⁵³

The right to asylum is expressed in Article 10 the Italian Constitution which allows immigrants to enter Italy if they are not allowed to exercise their democratic freedoms in their home country.⁵⁴ Additionally, Italy signed and ratified the Refugee Convention that obligates Nations to abide by the principle of

State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *Id.* See also HUMAN RIGHTS, *supra* n.22, at 405 (detailing protections under *non-refoulement* principle).

52. See HUMAN RIGHTS, *supra* n.22, at 405 (noting that *non-refoulement* does not guarantee permanent asylum); see also HUMAN RIGHTS AND FORCED DISPLACEMENT 214-216 (Anne F. Bayefsky & Joan Fitzpatrick, eds., 2000) (addressing problems associated with *non-refoulement* principle).

53. See RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS SEC. 111 cmt. h (1987) (noting some provisions in treaties are self-executing while others are not). "Self-executing" means that States shall determine the conditions under which this provision applies. *Id.*; Abigail King, *Interdiction: The United States Continuing Violation of International Law*, 68 B.U.L. REV. 773, 781 (arguing that 1967 Protocol should be considered self-executing after an examination of Congressional intent). A treaty is self-executing if its provisions neither explicitly call for legislation nor require positive legislative action, such as the appropriation of money or the imposition of sanctions. *Id.* Treaties that are not self-executing call for appropriations, creation or appointment of commissions, or disposition of government property. *Id.* This discussion is of deeper relevance in the United States because it never signed the 1951 Refugee Convention and only signed the 1967 Protocol, which is not self-executing. *Id.* However, Italy signed both documents.

54. See ITALIAN CONST., art. 10 (expressing right to asylum); see also Renato Franceschelli (Vice-President, Ministry of the Interior, Rome Department of Public Freedoms and Immigration), *Recent Developments in Italian Refugee Legislation: How do they fit in a European Migration and Refugee Policy* (Nov. 14, 2002), available at http://www.cicero.foundation.org/lectures/franceschelli_novoz.html (noting that despite Article 10 of Italian Constitution and Italy's ratification of Geneva Convention, Martelli was first law dealing with refugees and asylum). Article 10 states:

- (1) Italy's legal system shall conform with the generally recognized principles of international law.
- (2) The legal status of foreigners shall be regulated by law in conformity with international rules and treaties.
- (3) Foreigners to whom the actual exercise of the democratic freedoms guaranteed by the Italian Constitution is denied in their own country, shall be

non-refoulement.⁵⁵ Nevertheless, Bossi Fini has not adopted an asylum law to implement Article 10 of the Italian Constitution or the Refugee Convention.⁵⁶

entitled to the right of asylum within the territory of the Republic, under conditions laid down by law.

(4) The extradition of a foreigner for political offences shall not be permitted.

Id.

55. See HUMAN RIGHTS, *supra* n.22, at 405 (detailing protections under *non-refoulement* principle); see also Refugee Convention, *supra* n.46, art. 33. (enforcing non-refoulement provision).

56. See *Italy Asylum Bill Racist says MPs*, June 4, 2002 available at <http://Cnn.com/2002/World/europe.06/04/italy.immigration/index.html> (quoting Graziella Masci, member of opposition Refounded Communist Party, who told Italian Parliament that the Bill was "unjust, fascist, disgusting, enslaving and racist.") Organizations in Italy have stated that Italy has ignored its international obligations regarding asylum. *Id.* The Bossi Fini law, despite Article 14 of the UDHR, does not differentiate between asylum seeker and migrant. *Id.* See also AMNESTY INTERNATIONAL, ICS — CONSORZIO ITALIANO DI SOLIDARIETA, AND MEDICI SENZA FRONTIERE, RACCOMANDAZIONI PER LA MODIFICA DEL DISEGNO DI LEGGE DI INIZIATIVA GOVERNATIVA C.2454, NELLE DISPOSIZIONI IN MATERIA DI ASILO (Mar. 2002) (detailing recommendations put forth by various human rights organizations urging Italy to modify Bossi Fini law and take asylum-seekers into account). The General Director of Medici Senza Frontiere believes the text ignores the fact that refugees are fleeing from persecution or torture. *Id.* The President of Amnesty International, Italy, Marco Betotto, adds regarding Bossi Fini: "the norm provides for immediate expulsion of asylum seeker immediately after he has been denied status, thus impeding him from exercising his right to defend himself in an appeal." *Id.*; see also 9(5) MIGRATION NEWS (May 2002) (detailing Lubbers' concern with refugee agency asks Italy to ease proposed immigration law, Italy's lack of attention to asylum); U.N. refugee agency asks Italy to ease proposed immigration law, AGENCE FRANCE PRESSE, Apr. 16, 2002. (describing U.N.'s concern with Italy's immigration law). The U.N. believed that Bossi Fini was violating human rights. *Id.* A few months before Parliament passed Bossi Fini, Ruud Lubbers, the head of UNHCR, urged Italy not to push ahead with proposed immigration laws that would speed up the deportations of illegal immigrants. *Id.* See Campaign Against Racism and Fascism, *Institutionalized racism and human rights abuses, A special investigation into forty five deaths in Europe in 1998*, available at <http://www.carf.demon.co.uk/deaths98> (reporting that out of forty-five deaths, twenty-nine were asylum seekers or undocumented workers whose deaths arose as direct consequence of immigration and asylum policies which deny individual human rights). Institutionalized racism played a part in many of the remaining sixteen cases documented. *Id.* The U.N. and the Committee recommended that Italy adopt an asylum policy and that it treat torture as a specific offence, as defined by the Convention. *Id.* Amnesty International added that there is a noticeable increase in the number of allegations and that a high percentage were immigrants from Africa; thus reinforcing the idea of racism as a factor in the mistreatment of immigrants. *Id.* Lubbers was concerned with the lack of asylum provisions which has caused significant human rights abuses, particularly at the border. *Id.* See also Cinzia Gubbini, *Diritto d'Asilo Negato*, MANIFESTO, June 4, 2002 (noting Lubbers' concern with Italy's proposed Bossi Fini law). Lubbers advocated for a non-discriminatory provision that would allow appeals for rejected asylum applicants and asked the Italian government to present a separate bill to deal with asylum issues. *Id.*

2. Regional Human Rights Provisions

a. 1950 European Convention on Human Rights

The European Convention on Human Rights (“European Convention”) is a regional human rights treaty, which enforces human rights norms within signatory Nations.⁵⁷ The European Convention guarantees the right to life;⁵⁸ right not to be subjected to torture, inhuman or degrading treatment;⁵⁹ freedoms from slavery;⁶⁰ right to liberty, security of person, and due process of law;⁶¹ freedoms from *ex post facto* laws and punishment;⁶²

57. See European Convention For the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221 [hereinafter European Convention]; BASIC DOCUMENTS ON INTERNATIONAL MIGRATION LAW, *supra* n.40, at 153 (stating Italy signed treaty on Oct. 26, 1955).

58. See European Convention, *supra* n.57, art.2. Article 2 states:

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Id.

59. See European Convention, *supra* n.57, art. 3. Article 3 states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” *Id.*

60. See *id.*, art. 4. Article 4 states:

No one shall be held in slavery or servitude. No one shall be required to perform forced or compulsory labor. For the purpose of this article the term forced or compulsory labor’ shall not include: a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention; (b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; (d) any work or service which forms part of normal civic obligations.

Id.

61. See *id.*, art. 5. Article 5 states:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the

right to private and family life;⁶³ freedom of thought;⁶⁴ freedom of expression and of peaceful assembly;⁶⁵ and the right to marry

purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. Everyone who is arrested shall be informed promptly, in a language, which he understands, of the reasons for his arrest and the charge against him. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which a court shall decide the lawfulness of his detention speedily and his release ordered if the detention is not lawful. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Id.

62. *See id.* art. 7. Article 7 states:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. This article shall not prejudice the trial and punishment of any person for any act or omission, which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

Id.

63. *See id.* art. 8. Article 8 states:

Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Id.

64. *See id.* art. 9. Article 9 states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

Id.

65. *See id.* arts. 10,11. Article 10 states:

and found a family.⁶⁶ The European Convention is based on a collective guarantee of individual rights; however, it does not extend further than formal equality and does not impose any affirmative duties on signatory Nations.⁶⁷

Scholars note that the European Convention extends to immigrant and refugee rights and that the provisions expressly relating to the rights of immigrants include Articles 3, 5 and 16, as well as Articles 2 and 4 of the Fourth Protocol of the European Convention.⁶⁸ These Articles, in combination, provide for the

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Id. Article 11 states:

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Id.

66. *See id.* art. 12. Article 12 states: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." *Id.*

67. *See* DISCRIMINATION AND HUMAN RIGHTS, *supra* n.41, at 42 (describing Convention as guarantee of individual rights); *see also* Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium, 6 Eur. Ct. H.R. 252 (ser. A) (1968), at para. 9 [hereinafter Belgian Linguistics Case] (stating that Article 14 of European Convention has "no independent existence," but when used in conjunction with another provision, it may lead to violation of Convention even where other provision alone has not been violated); *see also* BASIC DOCUMENTS ON INTERNATIONAL MIGRATION LAW, *supra* n.40, at 153 (stating that Italy acknowledges rights in treaty because it signed treaty on Oct. 26, 1955); *see generally* Anne F. Bayefsky, *The Principle of Equality or Non-Discrimination in International Law*, 11 HUM. RTS. L.J. 1-34(1990) (discussing weak enforcement against discrimination in international law).

68. *See* European Convention, *supra* n.57, arts. 5, 16, 2 of Fourth Protocol and 4 of Fourth Protocol (providing for right to liberty and security but exempting immigrants

right to liberty and security, but exempt immigrants from some of the freedoms afforded to residents and citizens.⁶⁹ The Convention also established the European Court of Human Rights (“ECHR”), to provide for the enforcement of the treaties.⁷⁰ The ECHR consists of a group of judges equal to that of the Members of the Council whose function is to interpret the European Convention and enforce the rights guaranteed by it.⁷¹ The rights in the European Convention are in many cases, enforced on both an international and domestic level.⁷² Many EU States have in-

from some freedoms afforded to residents and citizens). Article 5 guarantees the right to liberty and security of persons. It lists a number of instances where this right can be curtailed, including: “the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.” *Id.* art. 5; Article 16 restricts the political activities of immigrants. *Id.* art. 16; Article 2 of the Fourth Protocol concerns freedom of movement and residence but protects only those lawfully within the State Party, thus expressly excluding illegal immigrants. *Id.* art. 2 of Fourth Protocol. Article 4 of the Fourth Protocol prohibits mass expulsions of immigrants. *Id.* art. 4 of Fourth Protocol. See also LILLICH, *supra* n.17, at 95 (providing Articles specifically relating to immigrants include Article 5, 16, and 2 and 4 of Fourth Protocol); Kathleen Marie Whitney, *Does the ECHR Protect Refugees from “Safe” Countries?*, 26 GA. J. INT’L & COMP. L. 375, 376 (1997) (noting that European Convention extends to immigrant and refugee rights); *Soering v. UK*, 11 EUR. H.R. REP. 439 (1989) paras. 82, 88 and 91 (determining that Article 3 of European Convention applies to deportation and refugee rights).

69. See European Convention, *supra* n.57, arts. 5, 8. Article 5 states: “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the . . . lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.” *Id.* Article 8 states: “Everyone has the right to respect for his private and family life, his home and his correspondence; see also Whitney, *supra* n.68, at 376 (noting how ECHR provides for many rights like liberty and security but not all those afforded to citizens).

70. See European Convention, *supra* n.57, art. 19 (establishing ECHR). Article 19 provides:

To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up:

1. A European Commission of Human Rights hereinafter referred to as the Commission.
2. A European Court of Human Rights, hereinafter referred to as “the Court”.

Id. See also Buergenthal, *supra* n.30, at 15-16 (explaining structure of Convention Institutions including development of European Commission on Human Rights and European Court of Human Rights); see also LILLICH, *supra* n.17, at 94-98 (noting strength and weaknesses of ECHR in enforcing European Convention).

71. See European Convention, *supra* n.57, art. 32. Article 32 provides: “The jurisdiction of the Court shall extend to all matters concerning interpretation and application of the Convention and the protocols thereto, which are referred to is as provided in Articles 33, 34, and 47.” *Id.*; see also Buergenthal, *supra* n.30, at 15 (explaining significant influence of ECHR to interpret European Convention and enforce rights in it).

72. See Buergenthal, *supra* n.30, at 15-16 (stating that rights of European Conven-

corporated the rights of the Convention into domestic law, thus allowing individuals to invoke the rights of the European Convention in their respective national courts; while other States who have not incorporated the rights into domestic law may implement legislation to enforce the rights.⁷³ International enforcement of the European Convention is provided only after all domestic remedies are exhausted.⁷⁴ Despite significant measures to provide enforcement, the strength of the European Convention to enforce asylum provisions and prevent discrimination is weakened by the fact that plaintiffs must bring a cause of action against a State, rather than the actual perpetrator, which renders the European Convention less useful in enforcement.⁷⁵

b. Treaty of Amsterdam

Until the signing of the Treaty of Amsterdam,⁷⁶ no general provisions prohibited sex and race discrimination in the EU.⁷⁷ After the signing of the Amsterdam Treaty, guarantees against

tion are enforced both nationally and internationally and that most States have incorporated Convention into domestic law). *See generally* A. DREMCZEWSKI, *EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW: A COMPARATIVE STUDY* (1983) (describing European Convention's enforcement power in domestic law once States have domestically incorporated such document).

73. *See* Buergental, *supra* n.30, at 16 (stating that unless existing national law provides comparable rights, States Parties that have not adopted the Convention into domestic law may implement legislation to enforce rights); *see generally* ASPECTS OF INCORPORATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS INTO DOMESTIC LAW (J.P. Gardner ed., 1993) (describing mechanisms to enforce European Convention provisions in domestic law).

74. *See* European Convention, *supra* n.57, art. 26. Article 26 of European Convention provides: "The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken." *Id.*

75. *See* BETTEN & GRIEF, *supra* n.31, at 35-38 (describing enforcement mechanisms of European Convention and noting that strength to enforce certain provisions and prevent discrimination is weakened because plaintiffs are forced to sue State, not actual perpetrator); *see also* ASPECTS OF INCORPORATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS INTO DOMESTIC LAW, *supra* n.73, at 24 (detailing mechanisms for enforcing European Convention provisions in domestic law).

76. *See* Treaty of Amsterdam, Oct. 2, 1997, O.J. C 340/1 (1997) (amending Treaty on European Union, Treaties establishing European Communities and certain related acts) [hereinafter Treaty of Amsterdam].

77. *See* Treaty of Amsterdam, *supra* n.76, at Part 1, art. 13 (prohibiting sex discrimination); *see also* BARBARA MELIS, *NEGOTIATING EUROPE'S FRONTIERS 17-18* (1998) (noting no mention of sex or race discrimination in EU before Amsterdam Treaty).

discrimination on the basis of sex and race became firmly established.⁷⁸ Article 6 in the original version of the European Community Treaty ("EC Treaty") was limited in scope and applied only to non-discrimination against EC nationals on the grounds of nationality.⁷⁹ Although immigrants are included in the Amsterdam Treaty, there are no policies to ensure immigrant rights against discrimination because the applicable clause is vague and does not prohibit discrimination outright; rather, it makes provisions for appropriate action, which requires a unanimous vote in the European Council.⁸⁰

c. Italian Constitution

The principle of non-discrimination is not solely based on these international and regional norms, but is codified in several Italian legal doctrines.⁸¹ Legislation to forbid racism in the workplace has been in place since 1977,⁸² but commentators note that few cases are brought to the Labor Inspectorate because of the difficulty of proving discrimination under labor laws.⁸³ Commentators note that the principle of non-discrimination stems mostly from Italian immigration laws including

78. See Treaty of Amsterdam, *supra* n.76, art. 13 (prohibiting sex and race discrimination); see also MELIS, *supra* n.77, at 18 (noting signatory Nations subscribed to idea that Amsterdam Treaty firmly established guarantee against sex or race discrimination in EU).

79. See Treaty of Amsterdam, *supra* n.76, art. 12 (old art. 6). Article 12 states: "... within scope of application of this Treaty and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited"; see also European Convention, art.14 (noting no mention of nationality, only national and ethnic origin). Article 14 states: "... without discrimination on any ground, such as sex, race, color, language, religion, political, or other opinion, national or social origin, association with a national minority, property, birth, or status." *Id.*

80. See European Press ("EP"), *Report on the Treaty of Amsterdam*, A4-0347/97/ANNEX (discussing effect of Amsterdam Treaty in non-discrimination).

81. See Mancino Law, *supra* n.15 (providing emergency measure against racial, ethnic and religious discrimination and harsher prosecution for hate crimes); see also Reale Law, *supra* n.15 (defining racial discrimination and incorporating International Convention Against All Forms of Racial Discrimination into domestic law); ITALIAN CONST., arts. 3,10 (providing basis for antidiscrimination law in Italy).

82. See Law guaranteeing equal treatment between men and women in employment, L. n.903, passed December 9, 1977, reproduced in R. SCOGNAMIGLIO, CODICE DI DIRITTO DEL LAVORO - ANNOTATO CON LA GIURISPRUDENZA - PRIMA PARTE GENERALE, TOMO I. DISCIPLINA LEGISLATIVA 243 (1980).

83. See Law on the liberties of union workers, L. n.300, passed May 20, 1970, published in GAZZ. UFF., May 20, 1970; See BELL, *supra* n.35, at 165 (noting very few cases brought pursuant to law because of excessive proof requirements).

Turco-Napolitano, Martelli, and L 943/86.⁸⁴

As a general principle, Article 3 of the Italian Constitution states that all citizens have equal social rights and are equal before the law, regardless of race, sex, language, religion, political opinion, or social conditions.⁸⁵ This Article refers only to citizens; Article 2,⁸⁶ however, guarantees fundamental rights regardless of nationality, and Article 10(2) addresses Italy's duty to conform to international human rights standards.⁸⁷ Another important Italian antidiscrimination law is the Mancino Law, which modified the previous Reale Law.⁸⁸ Mancino incorporates CERD into Italian domestic law, providing for urgent measures in all matters relating to racial, ethnic, or religious discrimination.⁸⁹

84. See BELL, *supra* n.35, at 164 (noting that Law 943/1986 established principle of equality for national and non-national workers); see also G. Campani, F. Carchedi, G. Mottura & E. Pugliese, *La Prevention des formes de discrimination et de racisme dans le lieux de travail en Italie*, at 20 (Working Paper No. WP/95/47/FR European Foundation for the Improvement of Living and Working Conditions 1995) (focusing on forms of discrimination in Italy and effect of non-discrimination principles found in immigration laws).

85. See ITALIAN CONST., art. 3, labeled "Equality," providing:

(1) All citizens possess an equal social status and are equal before the law, without distinction as to sex, race, language, religion, political opinions, and personal or social conditions.

(2) It is the duty of the Republic to remove all economic and social obstacles which, by limiting freedom and equality of citizens, prevent the full development of the individual and the participation of all workers in the political, economic, and social organization of the country.

Id.

86. See ITALIAN CONST., art. 2 labeled "Human Rights." Article 2 states: "The Republic recognizes and guarantees the inviolable rights of man, both as an individual and as a member of the social groups in which one's personality finds expression, and it requires the performance of imperative political, economic, and social duties." *Id.*

87. See ITALIAN CONST., art. 10. Article 10 is labeled "International Law" and provides:

(1) Italy's legal system shall conform with the generally recognized principles of international law.

(2) The legal status of foreigners shall be regulated by law in conformity with international rules and treaties.

(3) Foreigners to whom the actual exercise of the democratic freedoms guaranteed by the Italian Constitution is denied in their own country, shall be entitled to the right of asylum within the territory of the Republic, under conditions laid down by law.

(4) The extradition of a foreigner for political offences shall not be permitted.

Id.

88. See Mancino Law, *supra* n.15 (incorporating CERD into domestic law); see also Reale Law, *supra* n.15 (preceding Mancino Law).

89. See Mancino Law, *supra* n.15 (incorporating CERD into domestic law).

3. The Principles of Direct and Indirect Discrimination

The principle of non-discrimination revolves around the practices of exclusion, restriction, privilege, or preference.⁹⁰ Antidiscrimination law, as established by international human rights and Italian constitutional law, forces those who wish to use differential treatment to provide a valid reason for doing so.⁹¹ Despite the adoption of non-discriminatory immigration policies and the emphasis that the treaties have on fundamental human

90. See ICCPR, *supra* n.33, art. 26. Article 26 states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion national or social origin, property, birth or other status.

Id. See also ICCPR, *supra* n.33, art. 36 (concerning non-discrimination); UNHCR Art. 2 and Art. 7 (dealing with principle of non-discrimination); UDHR, arts. 1, 2.1 and 7. Article 1 of UDHR ordains: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." *Id.* Article 2(1) of UDHR ordains: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *Id.* Article 7 of UDHR ordains: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of his Declaration and against any incitement to such discrimination." *Id.*; see also European Convention, *supra* n.57, art. 14 (stating that fundamental human rights and liberties should be enjoyed without discrimination); International Covenant for the Elimination of All Forms of Racial Discrimination ("ICERD"), 1965, ratified in 1969, arts. 1(3) and 5. Article 1(3) of ICERD states:

Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship, or naturalization, provided that such provisions do not discriminate against any particular nationality

Article 5 of ICERD states:

In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone without discrimination as to race, color, or national or ethnic origin, to equality before the law.

Id.

91. See GOODWIN GILL, *supra* n.13, at 167 (noting need for valid reason to prove differential treatment and discrimination); see also *Moustaquim v. Belgium*, 13 Eur. Ct. H.R. (ser. A) at para. 43 (1991) (providing that restrictive measures must be in accordance with law, adopted in pursuit of legitimate aim and necessary in democratic society "justified by a pressing social need and . . . proportionate to the legitimate aim pursued"); *Beldjoudi v. France*, 234 Eur. Ct. H.R. (Ser. A) at 234 (1992) (holding restrictive measures must be in accordance with the law and have legitimate aim).

rights, often these rights are not seen as mandatory, but secondary to the interests and entitlements of the receiving communities.⁹² Nevertheless, commentators note that attempts to control migration in a purely domestic context through State sovereignty are misplaced in the current integrated EU system.⁹³ Social, economic and, more recently, security grounds have overshadowed fundamental rights of immigrants, particularly for those who do not reflect the ethnic origin of the majority of the populace.⁹⁴

Restrictive immigration measures often adversely impact immigrants of color, particularly those from African Nations; however, indirect discrimination is more difficult to detect because it can result even in situations where facially neutral anti-discrimination laws apply.⁹⁵ The development of indirect discrimination

92. See GOODWIN-GILL, *supra* n.13, at 166 (describing role of State sovereignty in limiting human rights and noting it should be secondary to interests of receiving communities); see generally CONTROLLING MIGRATION – A GLOBAL PERSPECTIVE 30-32 (Cornelius, Markus and Hollifield, eds., 1994) (discussing principle of State sovereignty in international migration). The basis for much of the human rights discourses are major declarations and international agreements including 1948 Universal Declaration of Human Rights, the 1965 Convention on Civil and Political Rights, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, the 1950 European Convention on Human Rights and many others. *Id.*; see also Saskia Sassen *Regulating Immigration in a Global Age: A New Policy Landscape*, 57 ANNALS 65, 66 (1999) (stating that immigration policy is deeply embedded in question of State sovereignty).

93. See John D. Snethen, *Immigration Project: The Evolution of Sovereignty and Citizenship in Western Europe: Implications for Migration and Globalization*, 8 IND. J. GLOBAL LEG. STUD. 223, 230 (2000) (pointing out problems arising from *Nishimura Eiku v. United States*, 12 S.Ct. 336, 338 (1892) where U.S. Supreme Court erroneously interpreted concept of sovereignty stating that whim of sovereign justifies immigration policies of State and that international law accords all sovereign states power to forbid the entrance of immigrants or to admit them only where State sees fit); see generally Tomas Hamme, *Laws and Policies Regulating Population Movements: A European Perspective*, in INTERNATIONAL MIGRATION SYSTEMS, A GLOBAL APPROACH (Mary M. Kritz et al. eds., 1992) (analyzing domestic and EU policies in response to migration).

94. See THE LEGAL FRAMEWORK AND SOCIAL CONSEQUENCES OF FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION, *supra* n.4, at 45-47 (noting how racial and ethnic antecedents have affected implementation of human rights law especially in recent troubling economy and in light of terrorist attacks of September 11, 2001); see also I. Ward, *Law and Other Europeans*, 35 J. COMMON MARKET STUD., 79, 82-85 (1997) (discussing role of ethnicity and race in integration of immigrants into society noting how principle of State sovereignty often trumps fundamental human rights and that no restrictions should be placed on exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in interests of national security on public safety, public order).

95. See Titia Loenen, *Indirect Discrimination: Oscillating Between Containment and Revolution* in NON DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES 195 (Titia Loenen

in Europe is similar to the notion of disparate impact analysis in the United States, but in Europe, the idea has a more narrow scope.⁹⁶ The United States Supreme Court, in its case law on Title VII of the Civil Rights Act, which addresses employment discrimination, first introduced the disparate impact analysis.⁹⁷ Under this analysis, an employer's practices, seemingly neutral on their face, like hiring or promoting, which are not based on race, color, nationality, religion or sex, but have a significantly adverse impact on a protected group, are considered discriminatory unless the employer can show that the practice was a "business necessity."⁹⁸

To prove indirect discrimination, some European lawyers use U.S. Civil Rights Law and posit a test that involves a two-step process.⁹⁹ First, the proponent must show an adverse effect upon a specific group, such as women or a racial minority, and

and Peter Rodriguez eds., 1999) (discussing how immigration laws adversely affect immigrants of African descent); *see also* DISCRIMINATION AND HUMAN RIGHTS LAW: THE CASE OF RACISM, *supra* n.41, at 107 (describing concept of indirect discrimination in Europe and how it is necessary because laws are facially neutral).

96. *See* Loenen, *supra* n.95, at 54 (noting that indirect discrimination in Europe grew out of European sex discrimination law and although originally based on U.S. model, does not apply to race, sexual orientation or religion); *see e.g.* on disparate impact in the United States: Adarand v. Peña, 515 U.S. 200 (1995), Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979); *see also* DISCRIMINATION AND HUMAN RIGHTS — THE CASE OF RACISM, *supra* n.41, at 115 (stating that disparate impact is not in itself discriminatory if unequal results are legitimate and no exclusionary barrier can be identified, or if the inequality can be justified under business necessities or social policy).

97. *See* Title VII of the Civil Rights Act (prohibiting discrimination based on race, color, religion, sex and national origin in employment); *see also* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (providing basic ideas of disparate impact later used in a case before the ECJ *Jenkins v. Kingsgate*, Case C-96/80, *Jenkins v. Kingsgate*, 1981 E.C.R. 911).

98. *See* *Washington v. Davis*, 426, at 248 U.S. 229 (1976) (holding that rule requiring statute designed to serve neutral ends is invalid, unless there is compelling justification, but if in practice it benefits or burdens one race more than another it would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be burdensome to poor and to average Black than to more affluent white). In *Washington v. Davis*, however, the U.S. Supreme Court decided that intent was necessary and that "the invidious quality of the law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Id.*; *see also* T. Rakoff, *Washington v. Davis and the Objective Theory of Contracts*, 29 HARVARD C.R. — C.L.L. REV. 63, 63-99 (1994) (analyzing disparate impact in *Washington v. Davis*, and concluding that business necessity is arbitrary and used to liberally to lessen effect of disparate impact).

99. *See* Loenen, *supra* n.95, at 206 (describing scholars' use of indirect discrimination test).

then he must prove that there is no objective justification available for the adverse effect.¹⁰⁰ In *Belgian Linguistics*, the ECHR noted that the principle of equal treatment is violated if there is no reasonable or objective justification for the differential treatment.¹⁰¹ Furthermore, there must be a reasonable relationship of proportionality between the means employed and the ends sought to be realized.¹⁰²

Legal commentators note that the ECHR's practice under the "legitimate aim" test has undermined the equality principles under Article 14 of the European Convention.¹⁰³ The applicant must demonstrate invidious discrimination because the ECHR grants wide discretion in justifying objective and reasonable criteria for disparate impact.¹⁰⁴ If the ECHR does not consider the discrimination to be especially harsh, and if it finds no common ground among national jurisdictions on the issue, it will be easier for a State to show that a difference of treatment pursues a legitimate aim.¹⁰⁵

100. See Loenen, *supra* n.95, at 206 (describing indirect discrimination test); see also *Lithgow and Others v. United Kingdom*, 102 Eur. Ct. H.R. (ser. A), at para. 177 (1986) (noting ECHR must consider Article 14 and decide whether dissimilar treatment on persons in analogous situations occurred and whether it is justifiable).

101. See Endre Sebok, *The Hunt for Race Discrimination in the European Court* (May 7, 2002), available at <http://www.eumap.org/Articles/content/70/7029> (noting principle of equality is violated if no objective justification for differential treatment); see also *Belgian Linguistics*, *supra* n.67, at para. 10 (noting equality of treatment violated if distinction has no reasonable and objective justification).

102. See *Belgian Linguistics*, *supra* n.67, at para. 10 (noting that there must be reasonable relationship of proportionality between means employed and aim sought); Sebok, *supra* n.101, at 1 (describing *Belgian Linguistics* case as it relates to indirect discrimination).

103. See Sebok, *supra* n.101, at 1 (stating legitimate aim test undermines Article 14). See also *European Convention*, *supra* n.57. Article 14 states: "... enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"); *Moustaquim v. Belgium*, *supra* n.91 (providing that restrictive measures must be in accordance with law, adopted in pursuit of legitimate aim and necessary in democratic society "justified by a pressing social need and . . . proportionate to the legitimate aim pursued")

104. See H.C. YOUROW, *THE MARGINS OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* 160 (1996) (describing margin of appreciation and wide discretion afforded to states in justifying objective and reasonable criteria for differential treatment); see also Sebok, *supra* n.101, at 2 (noting applicants need to prove invidious discrimination).

105. See Sebok, *supra* n.101, at 2 (noting that ECHR will more easily hold legitimate aim exists if states have not found common ground on issue); see also F.G. JACOBS & R.C.A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 291 (1996) (noting

The ECHR, which has an impact on Italian law, has consistently held that not all differential treatment is unequal or discriminatory.¹⁰⁶ The ECHR was faced with an immigration case relating to indirect discrimination in *Abdulaziz, Cabales and Balkandali v. United Kingdom Series*, whereby the ECHR took a narrow view of discrimination and held that Article 14 of the European Convention only prohibits regulations that explicitly differentiate on grounds of race or ethnic origin.¹⁰⁷ The ECHR rejected the idea of indirect discrimination applied by ECJ and held that the UK's immigration laws were not in violation of the European Convention simply because would-be immigrants from the New Commonwealth and Pakistan usually consisted of non-whites.¹⁰⁸

how European Convention searches for common ground among states to show that difference of treatment does not pursue legitimate aim).

106. See DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF RACISM, *supra* n.41, at 116 (discussing differential treatment relating to indirect discrimination and concluding that not all differential treatment is unequal or discriminatory); see also Belgium Linguistics Case, *supra* n.67 (differential treatment is only discriminatory if it has no objective and reasonable justification or if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realized").

107. See European Convention, *supra* n.57, art.14. Article 14 states: "... enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"); see also *Abdulaziz, Cabales and Balkandali v. United Kingdom Series A No. 42 (1985) 7 EHCR 471* (using proportionality test and holding United Kingdom's 1980 Immigration Rules were discriminatory on grounds of sex, but not of race because exclusion of particular group on grounds of nationality was held to be a "legitimate means of achieving legitimate aims of immigration policy, even though such exclusion had disparate impact on Black and Asian people"). The ECHR rejected applicants' race discrimination claim, noting that even when immigration rules affect non-whites more than whites in practice, does not lead to the conclusion that the rule is discriminatory. *Id.*

108. See *Abdulaziz, Cabales, and Balkandali*, *supra* n.107, at para. 85 (using proportionality test and holding no indirect discrimination); see also DISCRIMINATION AND HUMAN RIGHTS – THE CASE OF RACISM, *supra* n.41, at 108 (describing indirect discrimination in regards to *Abdulaziz* case). It is interesting to note that in Europe sex discrimination is classified as strict scrutiny while in the United States only race is strictly scrutinized and sex must pass the intermediary test. Compare the Equal Protection Clause in the United States, which uses a proportionality test to classify suspect classes such as race, which deserves "strict scrutiny," or the strictest proportionality test. *Id.* According to the strict scrutiny test, a State must not merely assert a legitimate objective, but advance a compelling governmental interest and thus is almost always struck down. *Id.* See e.g. on Equal Protection Clause, *United States v. Carolene Products Co.* 304 U.S. 144, n.4 (1928); *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that the differentiation must be reasonable and appropriate to achieve particular end and narrowly tailored to achieve its purpose).

B. *Legal History of Italian Immigration*

Until 1986, the only applicable law relating to immigration was a collection of Public Safety Laws enacted in 1931 under Benito Mussolini's Fascist regime.¹⁰⁹ Foreign citizens were seen as a potential threat and, consequently, had no individual or collective rights.¹¹⁰ Significantly, the provision for the legitimization of foreigners was placed just before the Article in the law dealing with mentally disturbed patients, drug addicts, and beggars.¹¹¹ The Italian Supreme Court of Appeals, *Corte di Cassazione*, criticized the legislation in 1977, but no new legislation was enacted until 1986 when the government passed Law n. 943/1986.¹¹² Law n.943/86 provided for equality of treatment between citizens and foreign workers in areas such as social and health services, education, housing, and family reunification.¹¹³ Despite these provisions, its stated main goal was to prohibit clandestine immigration, but it only took into account those immigrants already in the country and lacked provisions regarding entry, regularization, refugees, or asylum seekers.¹¹⁴

109. See Law on Regulations on the Hiring and Treatment of Foreign Workers and Against Illegal Immigration, L. n. 943, passed December 30, 1986, *published in Gazz. UFF.*, January 12, 1987; see also Christensen, *supra* n.3, at 468 (providing brief description of the history and of Italian immigration policy and noting lack of concern with immigration until 1990s).

110. See Royal-Decree Law on Approval of Single-Text of the Laws on Public Security, L. n.773, passed June 18, 1931, *published in Gazz.UFF. (Supp.)* June 26, 1931; see also Fasti, *supra* n.8, at 18-23 (noting that 1931 Royal Decree provided no individual or collective rights for immigrants).

111. See Fasti, *supra* n.8 (noting how foreigners' rights were ignored too large extent because foreigners were treated as criminals).

112. See Law 943/86: Norms on the employment and treatment of immigrant workers from outside the EU and the prevention of undocumented migration); see also Christensen, *supra* n.3, at 479 (describing Italy's first immigration statute 943/86); see generally Raimondo Cagiano de Azevedo, *LE MIGRAZIONI INTERNAZIONALI: IL CAMMINO DI UN DIBATTITO* [International Migrations: The Course of a Debate] (1995) (describing development of immigration policy in Italy beginning with 1986 provision).

113. See Law 943/86, art. 1, *supra* n.112 (providing for equality of treatment in housing, health services, and employment); see also Christenson, *supra* n.3, at 480 (describing aims of the law including equality of treatment between citizens and foreign workers in areas such as social and health services, education, housing, and family reunification).

114. See Fasti, *supra* n.8, at 18 (noting problematic provisions of 943/86 ignoring rights of refugees, asylum seekers); see generally Christensen, *supra* n.3, at 480 (discussing 943/86 and its lack of asylum or refugee provisions).

1. Martelli

In the 1970s, there were about 300,000 mostly European immigrants in Italy, but there was no law regulating their presence even though the regulation of non-Italian citizens was provided for in Article 10 of the Italian Constitution.¹¹⁵ Since emigration greatly exceeded immigration, the government did not believe that it was necessary to control the influx of immigrants, particularly since they were EC citizens.¹¹⁶ The Italian Parliament passed the Martelli Law in 1990, at a time when the presence of immigrants in Italy was over 700,000 and the annual increase was nearly 80,000.¹¹⁷ Scholars have opined that the increase in the immigrant population, as well as the death of Jerry Maslo, a young South African immigrant, murdered by a group of young Italians, prompted the government to address the void in immigration legislation as a means of preventing further violence against migrants.¹¹⁸ Martelli changed the preexisting law because it considered an immigrant not only as a worker, but also as an individual, taking into account entries, visas, family reunification, and even political asylum to an extent.¹¹⁹ The main pur-

115. See *Immigrati tra subalternità e integrazione – sicurezza e insicurezza – capitolo I*, at 154 (on file with author) (providing statistical information regarding immigrants in Italy and lack of legislation); see also Fausto D'Ambrosio, *Cittadini Extracomunitari: Regolamentazione a Sanatoria Tutela degli Interessi e Nuovi Problemi*, in CODEX CONVEGNO DI STUDIO: APPLICAZIONE DELLA LEGGE MARTELLI 35-41 (1991) (noting that Martelli was first law to deal more concretely with presence of immigrants, despite fact that art. 10 of Italian Constitution provides for regulation of immigrants).

116. See Christenson, *supra* n.3, at 477 (noting Italian government's realization of need for statutory intervention to address immigration issues); see also Bolaffi, *supra* n.6, at 296 (noting that Martelli symbolized end of makeshift measures and improvised immigration legislation and start of new restrictions).

117. See Martelli Law, L. n.39/90 – Special measures on political asylum, entry and sojourn for non-EU national and stateless citizens already present in the country); see also Christensen, *supra* n.3, at 482-83 (noting that increase in immigration led to enactment of Martelli); DOSSIER CARITAS, *supra* n.9 (providing statistical data: 156,179 recorded immigrants in 1971, 331,365 in 1981, 648,935 in 1991 and 1,550,000 in 2000 legally residing in Italy). Between 1999 and 2000, the increase in immigrants was twenty three percent, nevertheless extra-community nationals are still less than 2.5% of the population. *Id.*

118. See Christensen, *supra* n.3, at 461 (noting increasing concern over immigration on both sides of the political spectrum); see also Laura Balbo and Luigi Manconi, *Non sono razzista: sincero o buggiardo?* (I am not Racist: sincere statement or lie?), L'UNITA June 1, 1992 (discussing racism in Italian society after murder of Jerry Maslo, and noting that the murder was cause of new immigration legislation).

119. See Christensen, *supra* n.3, at 483 (noting comprehensive nature of Martelli, taking into account entries, visas, family reunification, and asylum); see also Campani,

pose of the law was to integrate immigrants into the labor force and to satisfy the market in terms of shortage of manpower by collaborating with the immigrants' countries of origin.¹²⁰ The second goal was to fight illegal immigration by enhancing control procedures and sending back all those without valid documents.¹²¹

Although politicians and scholars considered the law to be liberal and in line with human rights norms, many problems surfaced, particularly when thousands of Albanians arrived on Italy's shores.¹²² The law authorized expulsions of undocumented immigrants (including asylum seekers), and immigrants accused of committing crimes.¹²³ Scholars note that this practice was in opposition to the Refugee Convention, which prohibits the deportation of refugees and asylum seekers, as well as to the European Commission on Human Rights, which guarantees rights of access to courts for those charged with offenses.¹²⁴ Although these provisions were later challenged and eventually declared unlawful, thousands of Albanian refugees had been expelled during the time of the provision.¹²⁵ Martelli's failures, caused by factors such as lack of funds and the non-involvement of sending

supra n.10, at 523 (noting that two years separating Law 943/86 from Martelli Law were years characterized by hostile and racist attitudes towards immigrants).

120. See Fasti, *supra* n.8, at 19 (describing goals of Martelli to integrate immigrants into labor force and satisfy labor shortage); see also Christenson, *supra* n.3, at 483 (describing Martelli and need for labor).

121. See Fasti, *supra* n.8, at 19 (describing Martelli's expulsion measures); see also Christensen, *supra* n.3 at 485-86 (noting police power and deportation measures according to Martelli).

122. See Christenson, *supra* n.3, at 485 (noting Martelli was considered liberal); see also Franco Pittau & Marco Reggio, *Il caso Albania: immigrazione a due tempi*, 29 STUDI EMIGRAZIONE 227, 228 (1992) (discussing expulsions of Albanian immigrants and asylum seekers who committed crimes).

123. See Pittau & Reggio, *supra* n.122 (discussing expulsions of Albanian immigrants and asylum seekers who committed crimes as violation of Refugee Convention).

124. See Refugee Convention, *supra* n.46, art. 15 (prohibiting deportation of asylum seekers and refugees according to principle of *non-refoulement*); see also European Convention, art. 5(4). Art. 5(4) of European Convention states: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." *Id.*; PAOLO BONNETTI, PRIME OSSERVAZIONI SULLO SCHEMA DI DISEGNO DI LEGGE SULL'IMMIGRAZIONE (2001), available at <http://www.laboratoriosociale.org/immigrazione/BossiFiniFronte.htm> (describing problems with each Article of Bossi Fini and noting that as is Bossi Fini violates Refugee Convention); Enrico Pugliese Interview (noting that human rights violations are inevitable with Bossi Fini, particularly in terms of asylum rights and appeals against expulsions).

125. See DOSSIER CARITAS, *supra* n.9 (providing statistics on expulsions).

Nations, became apparent during the 1991 Albanian crisis.¹²⁶

2. Law 489/96

In the early 1990s, the immigration problem in Italy became more apparent and, due to the crisis in Albania, became an issue of emergency in Italy.¹²⁷ Intervention was needed, but there had been no planning to accommodate for the entrance of tens of thousands of refugees.¹²⁸ In 1995, at a time when the number of immigrants exceeded 700,000, the center right Dini government put forth a restrictive provision on immigration, which was pro-expulsions and made family reunification very difficult.¹²⁹ Although, the law was never passed, it symbolized a shift towards anti-immigrant measures.¹³⁰

126. See Carella & Pace, *supra* n.3, at 66-67 (describing and comparing Albanian crisis in Italy to Moroccan immigration in Spain, noting that Martelli failed because of lack of funding, and non-involvement of sending nations); see also Fasti, *supra* n.8, at 20 (explaining Italian reaction to rise in Albanian refugees in Italy). Thousands of Albanians landed on the Italian coastlines fleeing from violence and a denial of basic human rights in their Nation. *Id.* However, they were not refugees according to the Geneva Convention nor were they able to come in as workers because they had no sponsors. *Id.* The Government's response to the first arrival of Albanians was a decree that allowed Albanians to stay in Italy for a limited amount of time in which they could look for jobs and become regularized. *Id.* The second arrival of immigrants from Albania, however exposed the problems of the Martelli Law. *Id.* After a time of total chaos, the immigrants were escorted to the airport and were sent back to Albania. *Id.* These immigrants were taken to the airport in buses but were told that they were being taken to another part of Italy. *Id.* The U.N. criticized this action as a violation of human rights. *Id.* at 21; see generally, Associazione Studi Giuridici per Immigrazione, *Speciale Albania in LETTERA SOCI* (1997) (detailing entrance of Albanian immigrants in Italy in 1991 and the problems related to the new rise in immigrants).

127. See *Italy declares State of emergency over Albanian refugees*, at <http://www.cnn.com/WORLD/9703/19/albania/> (describing expulsion of Albanian refugees suspected of being criminals); see also Christenson, *supra* n.3, at 493 (describing Albanian refugee crisis as emergency).

128. See Christenson, *supra* n.3, at 494 (noting Italian government provided 21,800 residence permits to first arrival of Albanian refugees but then put most in soccer stadiums and deported thousands); see generally Pittau & Reggio, *supra* n.122 (describing government's reaction to waves of Albanian refugees as unorganized and hostile).

129. See Dini Decree, Law for Urgent Dispositions in the Matter of Immigration Policy and for the Regulation of the Entrance and Stay in the National Territory of Citizens from Non-European Union Countries, L. n.489, passed November 19, 1995, published in *GAZZ. UFF.* November, 28, 1995 [hereinafter Dini Decree]; see also Christenson, *supra* n.3, at 496 (noting Northern League's support of Dini decree which amended Martelli to secure swifter deportations and make family reunification more difficult).

130. See Christenson, *supra* n.3 at 496 (noting that effects of Dini were slight compared to social uproar it caused); see also U.S. Committee for Refugees, *Italy Country Report 2002* available at <http://www.refugees.org/world/countryrpt/europe/italy.htm>

3. Conso and Dini Decrees

Minister of Justice, Giovanni Conso, passed the Conso Decree in 1993 and the Dini Decree in 1995.¹³¹ These decrees intensified the anti-immigrant sentiment in Italy.¹³² The Dini decree was a response to Italy's increasing confusion over migrant labor and undocumented entries of illegal immigrants.¹³³ Reaction to the decree was split.¹³⁴ The right believed the decree was not restrictive enough and called for the immediate expulsion of all illegal immigrants, while the left and the Church urged for more tolerant measures.¹³⁵

The Conso Decree simplified deportation procedures for immigrants remanded for trial or detained in custody on suspi-

(noting inclusion of stricter rules concerning entry of immigrants as well as tougher measures on expulsion of "clandestines" and "other undesirable aliens"). Supporters of Dini Decree reportedly have seen it as a way to come to terms with the large number of irregular migrants already in Italy and simultaneously prepare for a tougher line on unauthorized immigration. *Id.* Italy's Western European neighbors have pressured Italy to shore up its porous borders, viewing this step as a prerequisite to Italy's being included in the implementation of plans for removing border controls within Western Europe. *Id.*

131. See Conso Law: Conversion to Law, with Modifications of the Decree — Providing New Measures in the Penal Treatment and the Deportations of Alien Citizens, L. n.296, passed on June 14, 1993, published in *GAZZ. UFF.* August 12, 1993 (with modifications).

132. See *ITT European Race Audit*, STATEWATCH 1995 (linking rise in anti-immigrant sentiment to Dini and Conso decrees); see also Andrew Gumbel, *Italy turns on immigrants in election run-up*, INDEPENDENT, Nov. 18, 1995 (noting racialization of election); Jude Webber, *Italy Hard-right demands all illegal immigrants out*, REUTER EUR. COMM. REPORT, Nov. 14, 1995 (describing anti-immigrant sentiment used by parties as electoral platform).

133. See John Hooper, *Italy's League Suffers Defeat*, GUARDIAN (London) November 20, 1995, at 10 (discussing Prime Minister Lamberto Dini's issuance of emergency decree on Nov. 16 which would permit expulsion of non-EU citizens who commit crimes within six to ten days); see also Philip Pullella, *Controversial Immigration Decree Divides Italy*, REUTER EUR. COMM. REPORT, Nov. 19, 1995 (discussing controversy created by Dini proposal); Jessica Taylor, *Italy moves fast to stem tide of immigrant crooks*, SUNDAY TELEGRAPH, Nov.19, 1995 (presenting Dini's arguments).

134. See Jude Webber, *Italy Hard-right demands all illegal immigrants out*, REUTER EUR. COMM. REPORT, Nov. 14, 1995 (noting two sides of debate over Dini Decree); see also Andrew Gumbel, *Italy turns on immigrants in election run-up*, THE INDEPENDENT, Nov. 18, 1995 (describing anti-immigrant sentiment on political platform to pass Dini Decree).

135. See Gumbel, *supra* n.134 (noting Italian sentiment of intolerance towards immigrants during Dini decree); see also GUARDIAN, December 12, 1995, at 2 (stating that one Northern League member proposed to simplify deportations using air force transport planes, and parachuting illegal immigrants into their country of origin). The Church and the left did not agree with immediate expulsion, and urged for tolerance and finding solutions to the problems creating immigration, rather than problems caused by immigration. *Id.*

cion of committing a crime.¹³⁶ Any deported foreigner had the right to return to Italy to undergo trial, yet, as many critics note, there was no consideration given to legal aid or how immigrants might meet the financial burden of returning to Italy to face the charges being brought against them.¹³⁷ Giovanni Conso stated the urgency to reinforce deportation, increasing efficiency and speed by allowing immediate accompaniment to the border even for those that have not been convicted of a crime.¹³⁸ Some academics have labeled these two decrees as racist and have drawn a connection between increased criminalization of immigrants and policies such as the Conso and Dini decrees.¹³⁹

4. Turco-Napolitano

Turco-Napolitano¹⁴⁰ was the first law, which took into account the crisis of immigration facing Italy, and required regulation in the areas of fundamental rights, health, education, and family.¹⁴¹ At that point, the number of immigrants had ex-

136. See Conso Law, *supra* n.131 (providing minor changes to deportation process of Martelli Law); see also Asale Angel-Ajani, *Italy's Racial Cauldron- Immigration, Criminalization and the Cultural Politics of Race*, 12(3) *CULTURAL DYNAMICS* 331, 338 (2000) (noting racial implications of Conso Decree and quicker deportation measures for immigrants of color); see also Italy: *New Decree aimed at immigrants*, STATEWATCH BULL. 1993, available at http://www.poptel.org.uk/cgi-bin/dbs2/statewatch?query=consodecree&mode=records&row_id=16752 (noting briefly Italian reaction to Conso Decree).

137. See Ajani, *supra* n.136, at 338 (reporting problems facing immigrants due to Conso Decree including lack of legal representation and facing criminal charges); see also Italy: *New Decree aimed at immigrants*, *supra* n.136 (describing law as discretionary channel for spiriting people from the ghettos to prisons and from prisons to frontier).

138. See Council Document, Assistance in cases of transit for the purpose of expulsion by air, 14348/98 (adopting resolution to increase speed and efficiency in expelling immigrants); see also MELIS, *supra* n.77, at 206 (stating that the European Council has adopted measures to ensure effective and speedy expulsion of illegal aliens).

139. See Interview with Enrico Pugliese, author and expert on Italian immigration, in Rome, Italy (July 20, 2002) (on file with author); see also STATEWATCH 1995 (quoting Giuliano Campioni, professor at Pisa University and President of Africa Insieme, declaring that Italians must stand up against the Conso Decree and the criminalization of immigrants). He also spoke about the policing operations, which reinforce the stereotypical image of immigrants as criminals and increase racism. *Id.*

140. See The Legislative Decree of 25 July 1998, L. n. 286 entitled: *Consolidated Text of provisions relating to immigration and the status of foreigners* (amending Martelli law of 1990 and uniting many disparate provisions into one unified text); see generally Alessia Di Pascale, *The New Regulations on Immigration and the Status of Foreigners in Italy*, 4 *EUR. J. OF MIGRATION & LAW*. 71, 77 (Oct. 14, 2002) (describing Turco-Napolitano in detail).

141. See Di Pascale, *supra* n.140, at 71 (noting that the Turco-Napolitano was first Italian immigration provision that took into account family, entry, health assistance, education, etc.).

ceeded one million¹⁴² and the government decided to address issues such as the legal situation of immigrants.¹⁴³ The government enacted provisions for entry, long-term residence, expulsions, and detentions, as well as work permits, seasonal work, and different types of visas.¹⁴⁴ The three goals of the Turco-Napolitano were to implement more effective planning to deal with persons entering for employment reasons, preventing illegal immigration, and integrating foreign citizens who had legal residence permits.¹⁴⁵

The law was considered a liberal, and even pro-immigrant law compared with the closed-door policies of other European nations, particularly those of France and Germany.¹⁴⁶ The law includes equal rights for workers, recognition, and preservation of the language and cultural heritage of immigrants, and even provides for the eventual participation of these immigrants on a local level.¹⁴⁷ The Turco-Napolitano set new anti-discrimination norms within the framework of entry and residence rules.¹⁴⁸ This law forbids direct and indirect discrimination¹⁴⁹ on the basis of race, ethnic origin, nationality, or religion.¹⁵⁰

142. See *Immigrati tra subalternità e integrazione – sicurezza e insicurezza*, Part I, at 154 (providing statistics of immigration in Italy).

143. See Christensen, *supra* n.3, at 477 (describing government's need to address immigration policy).

144. See PAOLO BONETTI, ITALY IN EXPULSION AND DETENTION OF ALIENS IN THE EUROPEAN UNION COUNTRIES (detailing changes in Italian legal system regarding civil and social rights of legal migrants); see also Di Pascale, *supra* n.140 (providing information on entry, residence, expulsions and detention of migrant workers).

145. See Achille Antonio Carrabba, *I Diritti Civili Dello Straniero*, QUADERNI DELLA RASSEGNA DI DIRITTO CIVILE (Pietro Perlingieri ed., 2001) (detailing civil rights of immigrants in Italy and problem of integration); see also European Industrial Relations Observatory Online, *New Legislation Regulates Immigration*, available at <http://www.eurofound.ie/2002/09/Feature/IT0209103F.html> (summarizing Italian immigration laws and comparing them to new Bossi Fini provision).

146. See *Zero Option: France*, *ECONOMIST*, June 12, 1993, at 57 (describing restrictive laws relating to immigration in France); see generally ROGER BRUBAKER, *NATIONHOOD AND CITIZENSHIP IN FRANCE AND GERMANY* (1992) (providing detailed information on status of immigrants in France and Germany and integration models in both countries).

147. See Fasti, *supra* n.8, at 20 (describing liberal provisions of Turco-Napolitano).

148. See BELL, *supra* n.35, at 164 (describing Turco-Napolitano's anti-discrimination provisions).

149. See BRUNO NASCIBENE, *LA CONDIZIONE GIURIDICA DELLO STRANIERO* 60 (1997) (describing Testo Unico's provisions against indirect and direct discrimination).

150. See Di Pascale, *supra* n. 140, at 77 (noting that Turco-Napolitano had provisions to prohibit discrimination as recommended by U.N. Convention on the Elimination of All Forms of Racial Discrimination); see also Turco-Napolitano L. n.40/98, art. 41. Article 41 states: What constitutes discrimination according to this Article is any

Since most of the immigration laws and international resolutions were in the form of soft law, Italy issued a Joint Action Against Racism, followed by other related Council Decisions and Directives to implement equality between persons without regard to racial or ethnic origin.¹⁵¹ Though the concept of discrimination was laid out, the Directive specifically pointed out that it did not cover differences of treatment based on nationality and specifically stated that it was not concerned with stateless persons or third country nationals.¹⁵²

Unlike the Joint Plan Against Racism which the Directives¹⁵³ followed, Turco-Napolitano bans racial discrimination against all individuals, regardless of nationality, national origin, or alien-

behavior which directly or indirectly creates a distinction, exclusion, restriction, preference, based on race, color, or national origin. . . *Id.*

151. See APAP, *supra* n.3, at 137 (noting Italy and Spain issued a Joint Action Plan Against Racism but specifically excluded immigrants and refugees); see also Joint Plan Against Racism, O.J. L. 180, 19/07/2000 (proclaiming Italy and Spain's desire to combat discrimination based on race or ethnicity).

152. See Council Directive 2000/43/EC, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, O.J. L.180, 19/07/2000, p.2-26, art. 3(2). Article 3(2) states:

This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Id. See also APAP, *supra* n.3, at 137 (noting that Council Directive's statement is only concerned with combatting racism against its own nationals, leaving out immigrants).

153. See EP Resolution on the Communication from the Commission on racism, xenophobia, and anti-Semitism O.J. 1996 C 152/57 (dealing with lack of action taken to prevent and combat discrimination); see also EP, Resolution on the resurgence of racism and xenophobia in Europe and the danger of right-wing extremist violence O.J. 1993 C 150/27 (linking lack of enforcement of antidiscrimination norms to rise of right-wing parties); MELIS, *supra* n.77, at 37 (critiquing lack of enforcement measures for anti discrimination Resolutions like Amsterdam Treaty). The Joint Action was passed because most immigration laws lacked enforcement mechanisms. The European Council and Refugees and Exiles (ECRE) held a Conference Against Racism regarding Human Rights of Refugees and Migrants on Oct. 2000. *Id.* Conclusion 9 regarding Effective and Adequate Measures to combat racism and stereotyping of immigrants states that this provision should be interpreted literally in the case of undocumented migrants in particular. *Id.* International standards provide a right to redress for undocumented migrants for labor violations, due process and security of person violations related to abuse suffered due to employers, traffickers, and State agents such as police. *Id.* Undocumented migrants should be able to seek effective remedies for a set of basic human rights violations, without fear of detention and summary deportation. *Id.* Human Rights Watch critiqued this conference and the Draft General Conclusions of the Conference for not providing mechanisms to implement the resolutions proposed at the meeting. *Id.*

age.¹⁵⁴ Despite the improvements and an increase in attention paid to the issues of immigration, Italian immigration legislation, including the Bossi Fini, has generally been characterized by numerous governmental and ministerial decrees providing incoherent and incomplete *de facto* regulations without providing measures to enforce the decrees.¹⁵⁵

5. Bossi Fini

The Bossi Fini amendment to the Turco-Napolitano was approved by Parliament on July 22, 2002.¹⁵⁶ The law was introduced and named after its two proponents, Umberto Bossi and Gianfranco Fini.¹⁵⁷ Experts contend that Umberto Bossi is a controversial figure in Italian politics.¹⁵⁸ He began his political career in the early 1990s, as leader of the Northern League, campaigning for the secession of northern Italy from the more economically depressed South of Italy.¹⁵⁹ This secession campaign, once popular, has since lost appeal, particularly due to Italy's recent inclusion in the EU and the introduction of the Euro.¹⁶⁰ Today, Bossi's secessionist politics have been trans-

154. See BELL *supra* n.35, at 164-5 (discussing Turco-Napolitano's ban on direct and indirect discrimination); see also Turco-Napolitano Article 41(1) (forbidding direct or indirect discrimination in provision of goods and services, employment, housing, training, and social services based on race, religion, ethnicity or nationality); see also Turco-Napolitano at 41(3) (establishing that ban extends to all individuals).

155. See Pugliese Interview *supra* n.139 (discussing lack of enforcement mechanisms for immigration decrees in Italy); see also Di Pascale, *supra* n.140 (discussing problems of enforcement of the Turco-Napolitano).

156. See Bossi Fini Law, L. n.290, passed July 12, 2002, published in GAZZ. UFF. July 22, 2002; see also *Il Senato approva la legge sull'immigrazione - Si definitivo con 146 voti favorevoli, 89 contrari e 3 astenuti*, CORRIERE DELLA SERA, July 11, 2002 (stating Bossi Fini was approved by Parliament with 146 votes in favor, eight-nine against, three abstain).

157. See Berlusconi's Allies, *supra* n.2 (describing political history of Umberto Bossi and Gianfranco Fini).

158. See *Fresh EU Dogs Rome*, BBC News, available at <http://news.bbc.co.uk/1/hi/world/europe/1856378.stm> (describing Bossi's controversial politics and quoting Former Foreign Minister Ruggiero, saying that if Bossi's ideas are not rejected, EU faces enormous risk that its credibility will carry less weight); see also Berlusconi's Allies, *supra* n.2 (noting controversial policies of Umberto Bossi).

159. See SABRINA NEGRI, SECESSIONE: VIAGGIO NEL NORD INQUIETO 32(1996) (describing rise of Umberto Bossi and Northern League); see also I. Diamanti, THE NORTHERN LEAGUE: FROM REGIONAL PARTY TO PARTY OF GOVERNMENT (113-129) (S. Gundle & S. Parker eds., 1998) (describing rise of Northern League); APAP, *supra* n.3, at 144 (noting electoral success of Northern League based on secessionist politics).

160. See I. Diamanti, *supra* n.213 (describing Bossi's secessionist policy as threat to Italian political cohesion); see also THE NEW ITALIAN REPUBLIC (1996) (discussing history of Umberto Bossi, his party and his secessionist politics, reasoning that loss of support

formed into a campaign against illegal immigrants¹⁶¹ whereby the Northern League conducts vigilante patrols, monitoring the activities of illegal immigrants.¹⁶² The League's members of the League patrol immigrant neighborhoods while spreading their anti-immigrant views on a megaphone.¹⁶³

Gianfranco Fini is the leader of the National Alliance¹⁶⁴ and the Deputy Prime Minister.¹⁶⁵ Fini came onto the political scene in 1994 when his "neo-Fascist" party was given five ministerial posts in Berlusconi's government.¹⁶⁶ These two politicians have caused much controversy with the new Bossi Fini amendment which has been praised by the Right and criticized by the Church and the Left.¹⁶⁷

for secession was caused by EU integration and development of Euro); *see generally* NEGRI, *supra* n.159 (discussing secessionist ideology of Bossi).

161. See Official Website of Northern League [WWW.LEGANORD.ORG](http://www.LEGANORD.ORG) (detailing scope of party in terms of illegal immigrants).

162. See Julian Pettifer "Italy – from emigrant to immigrant State" BBC news – World Edition – Jan.7, 2002 *available at* http://news.bbc.co.uk/2/hi/programmes/crossing_continents/europe/839963.htm. (describing patrols as controversial and inflammatory).

163. See *Lega Nord calls for a referendum*, 9(1) STATEWATCH BULL. (Jan.-Feb., 1999) (describing another initiative by the Northern League to clean and disinfect all train seats where Black women, who they presumed were prostitutes, were sitting). Three Northern League volunteers began cleaning train with disinfectant in all the train cars where they found any Black women, who they presumed were prostitutes. *Id.* When Borghesio was interviewed regarding his initiative, he explained that he thought it would be a good idea to segregate the trains in Italy so that whites would have their own carriages and Blacks would have theirs. *Id.* He added that he was not racist and that he thought this would avoid any tension and xenophobia. *Id.*; *see also* Ajani, *supra* n. 136, at 337 (stating that after anti-immigrant brutality and increase in racial violence, EU Nations responded by closing borders, reasoning that existence of immigrants, rather than prevailing racist attitudes were cause of violence); 10(1) STATEWATCH BULL. (Jan.-Feb. 2000) (stating that recently Northern League's secretary was charged with instigating racial hatred when he distributed posters depicting immigrants with the words "Vu stupra'" (Want to rape?)).

164. See *Berlusconi's Allies*, *supra* n.2 (noting National Alliance which traces its origins directly to Mussolini's fascist party).

165. See Jan Repa, *Italy's Post Fascist Hopeful* (Jan. 9, 2002), *available at* <http://news.bbc.co.uk/2/hi/europe/1751457.stm> (describing Fini as leader of the post-fascist National Alliance party).

166. See Repa, *supra* n.165 (noting Fini also ran for mayor of Rome in 1993 but lost to center-leftist leader and candidate, Francisco Rutelli); *see also Berlusconi's Allies*, *supra* n.2, *available at* <http://news.bbc.co.uk/2/hi/europe/1313113.stm>. (providing background information on Umberto Bossi and Gianfranco Fini, describing both politicians as controversial and right-wing).

167. See *La legge Bossi Fini punto per punto supra* n.2 (noting that Bossi Fini caused heated debates between right-wing parties and left-wing parties, supported by Catholic Church and other non-profit organizations) regarding constitutionality of law); *see also*

B. Racial Politics of the Immigration Discourse

Commentators have noted that problems relating to immigrants are often cast in terms of race; the greater the difference in race, nationality, or ethnicity, between the immigrant and the host country population, the greater the risk of exposure to xenophobia and racism.¹⁶⁸ Italians' opinions of the rise in immigration have been far from positive and the outbreaks of various forms of racism have become more frequent.¹⁶⁹ As scholars point out, factors such as race and ethnicity are being given much more consideration when shaping immigration policies.¹⁷⁰

Scholars note that in the European context, "European" appears to be white, wealthy, and Christian.¹⁷¹ Those, to whom the definition does not apply, in particular poor immigrants belonging to ethnic minority groups who are perceived as Black, are considered undesirable.¹⁷² Experts note that the targeting of

Profile Berlusconi's Allies supra n.2 (noting controversial nature of two proponents of Bossi Fini).

168. See CERD General Recommendation XI on non-citizens (42nd Session, 1993), para.3 (urging European Nations to actively combat racism and xenophobia directed to non-citizens); see generally 9(49) CENTRE D'INFORMATION ET D'ETUDES SUR LES MIGRATIONS INTERNATIONALES, 39-128 (1997) (examining racism and xenophobia in Europe); U. Mattei, *I Confini della terra promessa - Immigrazione, poverta, razzismo e i limiti del diritto*, FORO ITALIANO C 458 (1992) (discussing effect of xenophobic attitudes in Italy and limitations of rights afforded to poor immigrants).

169. See C. Bonifazi, *Italian Attitudes and Opinions Towards Foreign Migrants and Migration Policies*, 105 STUDI EMIGRAZIONE 21-42 (1992) (detailing influence of Italian racist attitudes on immigration policy); see also DOSSIER CARITAS, *supra* n.9, at 342-47 (providing statistical data on rise in violence against migrants in Italy and data on Italians' public opinion of immigrants).

170. See MELIS, *supra* n.77, at 15, 47 (1998) (stating that Nations tend to classify certain races or antecedents as inappropriate or undesirable). Measures for the expedited or stimulated return of skilled or wealthy immigrants with white skin are extremely rare compared to return and removal of skilled immigrants with black skin. *Id.*, at 207.

171. See MELIS, *supra* n.77, at 218 (asserting that race and wealth have become defining criteria for exclusions from visa lists and into EU in general; historical ties and humanitarian desperation are secondary factors); see also European Commission, Commission Communication in pursuance of Council Regulation 574/99 O.J. C 133/19 1999 (determining third countries whose nationals must be in possession of visas when crossing external borders of Member States).

172. For the purposes of this paper, "Black" will be used to define immigrants of African origin. In Italy, African immigrants are the most numerous. North Africans, who come mostly from Morocco (158,094) and Tunisia (46,494), constitute twenty percent of all immigrants in Italy and West and SubSaharan Africans constitute another twelve percent. DOSSIER CARITAS *supra* n.9, at 45 (providing that African immigrants constitute thirty eight percent of all immigrants in Italy). See Joseph H.H. Weiler, *Thou Shall Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nation-*

specific categories of migrants accompanied by the lack of proactive measures to ensure their inclusion and integration is only increasing racist and xenophobic attitudes everywhere in Europe.¹⁷³

Commentators note that all of these policies and practices contribute to the negative and racist stereotyping of migrants and refugees and provide the greater context, within which further discrimination and xenophobia against migrants and refugees thrive, and consequent acts of racist violence are rationalized.¹⁷⁴ The European Council on Refugees and Exiles (ECRE) has linked the rise of racially motivated violence against asylum seekers and migrants in Western Europe to the emergence of political movements founded on the manipulation of racist fears.¹⁷⁵ The support garnered by racist exclusionary policies

als — *A Critique*, 3(1) *EUR. J. OF INT'L L.* 53-64(1992); see also L. Hagendoorn, *Ethnic Categorization and Outgroup Exclusion: Cultural Values and Social Stereotypes in the Construction of Ethnic Hierarchies*, 16 *ETHNIC AND RACIAL STUDIES* 36, 43 (1993) (asserting that farther in color and ethnicity immigrant is from European ideal standards, more they are considered undesirable); N. Rathzel, *Racism in Europe, A Case for Socialist Feminists*, *WOMEN AND CITIZENSHIP IN EUROPE* 31 (A. Ward et. al., eds., 1992) quoted in MELIS, *supra* n.77, at 132-33 (stating that many in Europe link growth in immigration to growth in racism).

173. See ECRE, *The Human Rights of Refugees and Migrants: A Critique Draft General Conclusions of the European Conference Against Racism*, available at <http://hrw.org/campaigns/race/statement-genconc.htm> [hereinafter ECRE Report] (reporting that recent measures in European Union countries have reflected this increasing intolerance); see generally J. WRENCH, *RACISM AND MIGRATION IN WESTERN EUROPE* (1993) (linking increase in racism and racial violence to lack of programs of social integration and inclusion).

174. See *The Far Right in Europe: A Guide*, 32(2) *RACE AND CLASS*, 127-146 (1990) (remarking that far-right parties have exploited this increase in number of immigrants in EU in their campaigns); see also ECRE Report, *supra* n.173 (reporting on how overt and subtle forms of racist and xenophobic rhetoric lead to stereotyping asylum seekers and migrants as criminals and job usurpers). This stereotyping is used as a tool for political mobilization by nationalist parties and increasingly by some mainstream parties. *Id.* ECRE also reported on public acts of racist and xenophobic violence against asylum seekers, refugees, and migrants and their communities, often with the complicity of the police; and police abuse of migrants. *Id.*

175. See European Council on Refugees and Exile, *The Human Rights of Refugees and Migrants: A Critique Draft General Conclusions of the European Conference Against Racism*, available at hrw.org/campaigns/race/statement-genconc.htm; (discussing government plan of action against racism.) see also *Italian Minister praises new Immigration Law*, *CORRIERE DELLA SERA* July 12, 2002 (interviewing Italian Community Policies Minister Rocco Buttiglione who states that the law (Bossi Fini) is an attempt to “put the doors back on the hinges”). Rocco stated that the Italian people were beginning to feel as though they were living in a house with no doors, where just could walk in at an time and however he or she wanted to — including those that we do not want, those who pro-

makes discrimination against refugees and migrants a priority area of concern.¹⁷⁶

1. European Context

The European Commission has passed an Action Plan Against Racism in which it declares that racism is diametrically opposed to everything that Europe stands for in terms of human dignity, mutual respect and understanding citizenship in the broadest sense and that European diversity, as reflected by the range of different cultures and traditions is a positive and enriching factor.¹⁷⁷ Nevertheless, there have not been any attempts to provide the Community with legal instruments nor has there been any campaign to make the public aware of the problems related to racism and xenophobia.¹⁷⁸ Despite a confident policy of integration, the attitudes of society has been geared towards closing out new immigrants.¹⁷⁹

claim in front of the television cameras while they are being expelled that they will be back. *Id.* The Article also quotes Luciano Violante, head of the opposition Democrats of the Left who stated: "We are in the process of creating a climate of hate and fear." *Id.*

176. See The Legislative Decree of 25 July 1998 no.286 titled: Turco-Napolitano - Consolidated Text of provisions relating to immigration and the status of immigrants (defining racial discrimination as directly or indirectly creating a distinction, exclusion, restriction, or preference based on race, skin color, ethnic origin, religious practices or convictions to the effect of destroying or compromising recognition and the pursuit of exercising human rights and fundamental liberties in the political, economic, social, cultural or any other part of public life); see also UNHCR, *After the Terror: The Global Fallout*, 4 REFUGEES 4,9 (2000) (describing discrimination faced by refugees and asylum seekers based on fear and mistrust of host country).

177. See MELIS, *supra* n.77, at 23-24 (describing rebirth of Eurocentrism and insufficient measures to ensure inclusion and integration of specific categories of migrants); see also European Commission, An Action Plan Against Racism, COM (98) 183, Final (asserting that fight against racism goes hand in hand with promotion of society for all, which actively encourages integration and full participation).

178. See MELIS, *supra* n.77, at 24 (noting that despite many measures taken on EC level to combat racism and xenophobia, the measures have not filtered down into domestic legislature or public opinion); see also O.J. 1986 C 176/62 (citing 1986 Meeting of European Parliament, Counsel and Representatives of Member States meeting within Council and Commission). The parties to the meeting adopted a Joint Declaration against racism and xenophobia condemning all forms of intolerance, hostility and the use of force against persons or groups of persons on the ground of racial, religious, cultural, social or nationality differences. *Id.* Later in 1990 another Resolution to fight discrimination was passed.; O.J. 1995 C 296/13 (Resolution of the Council and the Representatives of the Governments of the Member States to fight racism in employment and social affairs); O.J. 1995 C 312/1 – (Resolution of Council and Governments of Member States to fight racism in education system).

179. See J. Andall, *Second Generation African Italians in Milan*, 28(3) J. ETHNIC &

The impetus to bring restrictive immigration legislation is a European-wide trend¹⁸⁰ which many scholars believe reflects the rise in racism in the EU.¹⁸¹ After the Schengen Accords abolished internal borders between some European countries,¹⁸² the

MIGRATION STUDIES (July 2002) (interviewing Eritrean male discussing invisibility and yet outright societal racism towards Black people in Italy); *see also* EP, Report on the Communication from the Commission on Action Plan against Racism, A4-0478/98 (1998) (noting how Action Plan Against Racism has brought platform for discussion but has been criticized for not implementing or achieving its ambitious objectives).

180. *See* Philip L. Martin, *Germany Reluctant Land of Immigration*, *CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE* 165 (Wayne Cornelius, Philip Martin & James Hollifield eds., 1994) (quoting German politician stating that "Federal Republic of Germany is not, nor shall it become country of immigration. . . rationale: to safeguard peace"). *Id.*; *see also* *Fortress Europe*, *GUARDIAN* (London), (Sept. 1, 1992) (providing statistics remarking difficulty to assimilate into host nations). The Netherlands now requires a resident alien who wishes to bring his wife or child into the country to demonstrate that his income is at least thirty percent greater than the minimum wage. *Id.* Immigrants are also forced to complete a Dutch culture and language course, which costs almost U.S. \$7000. *Id.* In Denmark, the waiting period for a residence permit has more than doubled from three to seven years. *Id.* In Portugal, an immigrant must now wait eight years for a residency permit and any immigrant who arrived post November 2001 will be deported. *Id.* In Germany, a recent poll found that seventy eight of Germans believed immigration to be a pressing problem. *Id.* *see also* Richard Klein, *Immigration Laws as Instruments of Discrimination: Legislation Designed to Limit Chinese Immigration into the U.K.*, 7 *TOURO INTL. LAW REV.* 1, 15 (2001) (describing German's response to immigration).

181. *See* T. Douraki, *Le Role des Droits de l'homme des immigrés face au racisme, a la xenophobie, aux préjugés, dans l'Europe des douze*, *HAGUE Y.B. INT'L LAW* 7, 95-112 (1995) (discussing role of human rights in the face of the rise in racism and xenophobia); *see also* European Council on Refugees and Exile, *The Human Rights of Refugees and Migrants: A Critique of the Draft General Conclusions of the European Conference Against Racism*, available at <http://hrw.org/campaigns/race/statement-genconc.htm> (linking restrictive immigration policies to negative stereotyping of refugees and migrants and acts of racist violent and holding governments, politicians, media, and public accountable for creating an atmosphere of racial tension and racial violence); NEVAT SOGUK, *STATES AND STRANGERS: REFUGEES AND DISPLACEMENT OF STATECRAFT* 223-224 (1999) (stating that often governments will argue that restrictive immigration legislation has nothing to do with racism, xenophobia or economic apartheid, rather it is necessary policy measures to protect the sovereign Nation's ability to absorb immigrants, while taking into consideration the host Nation's own security and economic well-being).

182. *See* Convention implementing Schengen Agreement of June 14, 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 the Common Borders, 30 *I.L.M.* 68, 73 [hereinafter Schengen Convention] (abolishing internal borders in some European countries); *see also* Marie-Claire Foblets, *Europe and Its Aliens After Maastricht. The Painful Move to Substantive Harmonization of Member States' Policies Towards Third-Country Nationals*, 42(4) *AM. J. COMP. L.* 783-805 (1994) quoted in MELIS, *supra* n.77, at 196 (noting difficulties in finding common immigration policy and concluding that EU is still not hospitable to third-country nationals, treating them like drug-dealers, criminals, and potential terrorists).

EU felt that with such soft borders, external policing was crucial, and created a "fortress Europe."¹⁸³ The EU criticized Italy because its border controls were considered to be unsatisfactory; consequently, Italy's proposed immigration legislation assured other EU Nations that Italy was taking strong steps to curb illegal immigration and fight crime.¹⁸⁴

2. Criminalization of the Immigrant Community

Scholars have noted that racialized coded language is used to link immigration and crime and talk about people of color without having to use racial language.¹⁸⁵ In the United States, African-Americans and Latinos are subject to this racialization, while in Italy, the image of an African criminal has become part of the day-to-day discourse that feeds the anti-immigrant sentiment at both the societal and political level.¹⁸⁶ Commentators posit that race and racism have shaped the Italian government's ideas and methods of implementing immigration policies.¹⁸⁷ They discuss the effect of European integration on the articulations of race and racism in Italian immigration policies, arguing that the rise in repressive immigration regimes and border controls in Italy and the EU, more generally, have created State sanctioned discourses and practices of targeting certain immigrant groups as potential criminals.¹⁸⁸ By focusing on the inter-

183. See John Hooper, *Fatal Allure of Fortress Europe*, OBSERVER, Jan. 5, 1997, at 6, available at LEXIS, World Library, CURNWS File (describing term fortress Europe and its relevance regarding immigrants today); see also Campani, *supra* n.10, at 523 (describing Europe's pressure on Italy to regulate its borders).

184. See Carella & Pace, *supra* n.3, at 66-67 (describing Italy's commitment to stopping influx of immigrants with proposed legislation); see also John Tagliabue, *A Land of Emigrants Turns Vengeful on Immigrants*, REUTER EUR. COMMUNITY REAT (Nov. 29, 1994), available in LEXIS, New Library, WIRES File (describing anti-immigrant reaction of countries new to immigration phenomena).

185. See Ajani, *supra* n.136, at 343 (describing sociological construct of crime and racialization of immigrants).

186. See Ajani, *supra* n.136, at 340 (noting racialization of African Americans and Latinos in U.S.); see also Felix Cohen, *Legal Realism and the Race Question: Come Realism about Realism on Race Relations*, 108 HARV. L. REV. 1607, 1614 (1995) (stating that most American media often refer to arrested criminals as "negro" and "alien", technique which author believes builds popular impressions as to criminality of Blacks and immigrants).

187. See Ajani, *supra* n.136, at 332 (noting race and racism shape Italian politics and immigrant policy); see generally PIER LUIGI ZANCHETTA, *ESSERE STRANIERI IN ITALIA* (1991) (examining stereotypes attributed to immigrants of color in Italy).

188. See Ajani, *supra* n.136, at 332 (defining racial formation as sociohistorical process by which racial categories are created, inhabited, transformed and destroyed and

play between notions of racial formation and the racial State, one commentator examines the reality confronting non-European immigrants in Italy, African immigrants in particular, remarking that Italian society often places these immigrants in the same category as criminals.¹⁸⁹

Scholars have noted that Italian courts are inexperienced in dealing with immigrant plaintiffs and defendants, leading to discriminatory arrests and imprisonment.¹⁹⁰ Although immigrants represented twenty three percent of those arrested in 2000, they represented fifty six percent of the total population who had complaints brought against them.¹⁹¹ A public opinion poll taken in 2001 showed that seventy two percent of Italians are convinced that immigrants are responsible for most of the crimes in Italy.¹⁹² According to other surveys, there has been a rise of fears that “the boat is full and there are too many aliens in Europe.”¹⁹³ Commentators have added that Umberto Bossi’s

where race becomes common sense way of comprehending, explaining and acting in world).

189. See Ajani, *supra* n.136, at 331 (expressing concern over Italian politicians linking immigration to increase in crime); see also Asher Colombo, *Hope and Despair: ‘Deviant’ Immigrants in Italy*, 2 J. OF MODERN ITALIAN STUDIES 1-20 (1997) (investigating relationship between immigration and crime in Italy and concluding that marginalization of immigrants of Algerian descent in Italy is incentive to engage in criminal activity).

190. See Emilio Reyneri *quoted in* Ajani, *supra* n.136, at 333 (attributing inexperience of Italian court to newness of immigration phenomenon); see also Colombo, *supra* n.189 (noting how Italian courts used criminal law norms to deal with immigrants).

191. See Salvatore Palidda, *Milanesi: Tutti Immigrati*, at http://www.casadellacultura.it/cec/01_milano_vostri_occhi/02_dirla_tutta/Immigrazione2.php (demonstrating fear and panic felt towards immigrants which has spread into the political system, mass media, and public opinion); see also Colombo, *supra* n.189 (attributing large numbers of immigrants in jail to rise in racism).

192. See DOSSIER CARITAS, *supra* n.9, at 201-204 (giving statistics on criminality by immigrants and Italians by region, type of crime and by nationality of criminals); see also *Osservatorio Contro Il Razzismo*, available at <http://briguglio.frascati.enea.it/immigrazione-e-asilo> (remarking racist attitudes towards immigrants leads to belief that immigrants are perpetuators of crime).

193. See Eurobarometer Opinion Poll N.47.1 *quoted in* APAP, *supra* n.3, at 145 (noting that sixty five percent of Italians consider themselves to be racist or somewhat racist); see also Interview by Radio Sherwood with Livia Turco, ex Social Affairs Minister in the former Italian government, who helped draft the previous Turco-Napolitano law, Venice, Italy (September 20, 2001) (on file with author) (transcribing Turco’s interview regarding Bossi Fini amendment). When asked about the effects she thinks Bossi Fini will have on immigrants in Italy, Turco responded: “The most pre-occupying part of the law is the cultural message and above all this moment of social and international uncertainty, the message of Bossi Fini remains — to insert as few immigrants as possible and dumping them after the work is done. *Id.* This apart, from being inhuman, provokes social tension, and it does not in any way guarantee security and social integration.” *Id.*

Northern League is adopting an increasingly racist viewpoint, which links crime and immigration and impacts Italians' views on immigration.¹⁹⁴ In Rome, fifty seven percent of those interviewed in a survey believed that the immigrants living in their city were involved in illegal activity, that they were mostly of African origin, and that their numerical presence exceeded that of which the Italian territory could handle.¹⁹⁵ In addition, to these questions, the interviewees were asked if they ever had contact with the immigrants and sixty percent said that they have no contact with immigrants.¹⁹⁶

3. Role of National Identity

Scholars have remarked that considering Europe's history

194. See 9(1) STATEWATCH BULL. (Jan. - Feb. 1999) (remarking that on Jan. 17, 2001, Bossi and Northern League held demonstration calling for tougher immigration laws to fight the rise in crime). There were calls for a referendum on immigration and Bossi made calls to stop clandestinity and immigration saying that Italians did not want a multiracial society. *Id.*; see also European Commission Against Racism and Intolerance (ECRI), SECONDO RAPPORTO SULL'ITALIA - STRASBOURG, DIREZIONE GENERALE DEI DIRITTI DEL UOMO, DGII 2002 (stating that ECRI is alarmed by participation in government of political parties whose members have resorted to xenophobic and intolerant propaganda). The report singled out the Northern League, stating that its members "have made a particularly intense use of racist and xenophobic propaganda." *Id.*; Targeted Socio-Economic Research Programme (TSER) Report (on file with author) (conducting surveys and concluding that there is no direct cause and effect link between immigration, crime and unemployment). The study also shows immigrants tend to accept marginal jobs EU citizens do not want, and, should immigration decrease, Europe could experience shortages of manpower. *Id.* "Ignorance is the basis of racism," said European Research Commissioner Philippe Busquin. "This new report will help to ensure that any future policies dealing with immigration issues take into account some of the latest information available about the problems that migrants encounter in Europe today." *Id.* The studies explore situations in both new immigration countries and in countries with a longer tradition of immigration, such as France, Germany and the UK. *Id.*

195. See *Immigrati - Tra Subaltermita e Integrazione* 167 (on file with author) (providing conclusions of 1997 Eurobarometer survey confirming that Italians are indeed racist). Thirty percent of the population consider themselves "very racist" and thirty five percent consider themselves to be "a little racist" while sixty nine percent agree that immigrants should not integrate or assimilate in order to be fully accepted as members of the Italian society. *Id.* Sixty two percent believe that their country has reached its limit in terms of immigrants. *Id.*

196. See DOSSIER CARITAS *supra* n.9 (noting statistical information); see also Bruna Zani and Erich Kirchler, *Prejudice and Emotion in Interethnic Relations - Pregiudizi ed emozioni nei rapporti interetnici*, GIORNALE ITALIANO DI PSICOLOGIA 2,1, Feb. 1995, at 65-85 (using two studies conducted in Bologna investigating prejudices of Italians against Africans, and concluding that contact with different groups lessen prejudice, intolerance, and stereotyping, investigating prejudices of Italians against African immigrants).

as colonizers and proponents of globalization of the slave trade, Eurocentrism, and cultural nationalism will play a significant role in unifying Europe and defining who is and is not European.¹⁹⁷ Europeans, particularly Italians, who have a low sense of national identity¹⁹⁸ and are new to the process of immigration, have fought to assume a unitary character and resist change.¹⁹⁹ The historically homogenous Europe has faced a tremendous rise in immigrant population influxes and consequently the far-right political parties have garnered support through their anti-immigrant stances, from citizens that are disillusioned by the rise in unemployment, crime, and failing economies.²⁰⁰ One commentator observes that “white supremacist” political parties have been key players in providing policy suggestions to European legislatures on the immigration issue.²⁰¹ The electoral trends have reflected the anti-immigrant sentiments, which often have spilled into outright racism.²⁰² The Bossi Fini

197. See Ajani, *supra* n.136, at 333 (noting how lack of national identity and history of colonization will create demarcations between European and non-European and thus create difficulties for integration and assimilation); see also GHOSH, *supra* n.8, at 82 (describing anti-immigrant sentiment in Europe and Italy).

198. See NEGRI, *supra* n.159, at 99 (describing Italy’s lack of national identity). When Umberto Bossi was asked why Italian Unification had failed, he replied that it never existed because Italians never understood that they were guests in their own land. *Id.* Bossi continued saying that integration occurred more with the bordering States than within Italy because of the deep cultural divide he believes exists, between Northern and Southern Italy. *Id.*; see also Bolaffi *supra* n.6, at 293 (explaining idea of “two Italies” as it applies to immigration); see generally Anna Triandafyllidou, *Nation and Immigration: A Study of the Press Discourse*, 5 *SOCIAL IDENTITIES* 1, 65 (March 1999) (tying increase in racism against immigrants to Italy’s lack of national identity).

199. See NICOLA PERRONE, *NE QUI NE ALTROVE – NEITHER HERE NOR ANYWHERE* (1989) (stating that overwhelming presence of ‘different people’ appears to be cause of xenophobic conflicts and of an increasing number of episodes of intolerance, making expulsion of ‘intruders’ sole remedy); see also Triandafyllidou, *supra* n.198 (noting that presence of immigrants leads to process of re-definition of Italian identity in exclusionary way which in turn causes symbolic and perhaps material boundaries between immigrants (them) and host society (us)).

200. See Frank Viviano, *Soccer More than a Game to Italy’s Right*, *S.F. CHRON.*, Dec 16, 1994, at A1 (noting rise in anti-semitic and anti-immigrant stances); see also Kitty Calavita, *Italy and the New Immigration*, *CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE* 303-26 (Wayne Cornelius, Philip Martin & James Hollifield eds., 1994) (discussing timing of immigration in Italy which is occurring when industrial production is low and unemployment rates are high; thus creating more tension in already difficult economic situation).

201. See Errol Anthony Henderson, *AFROCENTRIS AND WORLD POLITICS: TOWARDS A NEW PARADIGM* 176-77 (1995) (noting that European continentalism is causing upsurge in promulgation of white supremacist public policy).

202. See GHOSH, *supra* n.8, at 82 (noting anti-immigrant sentiment as popular elec-

law has been praised by the right-wing and conservative forces in Italy as a method of tackling the "immigrant problem."²⁰³

Despite the aims of the Schengen Agreement to forge a common foreign policy, immigration policy, security policy, and to unify standards of justice, national identity is still problematic in the EU.²⁰⁴ Commentators note that Schengen's attempt to create a European citizenship, a sense of belonging is promoted among EC citizens, and a sense of exclusion and otherness²⁰⁵ is created for those outside the EC.²⁰⁶ The new rules, commentators note, are concerned with the *quantity* as well as the *quality* of new arrivals, so as to avoid the "wrong" migrants.²⁰⁷ Although it

toral move); see also Jorge Pina, *Italy: Tunisia to Accept Returning Migrants*, available at <http://www.oneworld.org> (quoting right-wing National Alliance deputy, Gustavo Selva, stating that immigrants should be selected like cigarettes or cars for consumption). Selva wrote in his political party paper that entry should be barred to all Muslims and Africans because of large cultural gap and a weak work ethic. *Id.* Eastern European immigrants, Selva remarked, are more assimilable because they are Christians and can offer more than Africans because they are more educated. *Id.* Berlusconi's government disagreed with Selva's remarks and deemed them to be racist. *Id.*

203. See *Italy's Fini on rise of right-wing in Europe*, STAMPA (Turin), June 7, 2002, at B4 (interviewing Gianfranco Fini on his position on rise of right in Europe and in Italy, remarking that right is garnering support because it is concerned with security). Fini continued stating that the malaise of many Italians has recently exploded in such a virulent way because for years Italy was plagued by Social Democratic governments. *Id.* Fini believes there has been an inability on the part of the Social Democrats to provide effective answers, because culturally they have always underrated the importance of the problems linked to the individual security of the people. *Id.* Thus, on the issue of immigration, the Socialists have not always posed themselves the problem of preparing way for real integration. *Id.* Fini proposed that integration is necessary and integral in immigration policy. *Id.* Fini recognized the temptation of Italians to see the foreigner as an enemy and to barricade themselves in their homes but he said Italians should not give into their fears. *Id.*

204. See MELIS, *supra* n.77, at 18-19 (linking low national identity to difficulty of assimilation for immigrants); see also Stephen Schelle, *The Politics of Western Immigration*, 3 *IND. J. GLOBAL LEGAL STUD.* 277, 277 (Fall 1995) (describing European national identity and prospects of assimilation for immigrants).

205. See Ajani, *supra* n.136, at 333 (describing sense of exclusion and otherness of immigrants in Italy); see also Scott Malcolmson, *On European Union*, 5 *TRANSITIONS* 4, 5 (1995) quoted in Ajani, *supra* n.136, at 333-34 (explaining that lacking national identity and need to create European culture ideal is created not only by legal means but through notions of cultural exclusivity that conflate race and Nation to point out where racial others are deemed incompatible with European culture).

206. See I. Ward, *supra* n.94, at 85 (discussing citizenship in Europe and low national identity leading to exclusion of non-citizens).

207. See MELIS, *supra* n.77, at 46 (noting that European Nations are now concerned with quality more than quantity of immigrants); see also Kig Layton Henry, *Britain: The Would be Zero Immigration Country in CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE* 274 (Wayne Cornelius, Philip Martin & James Hollifield eds., 1994) (discussing

may be well disguised, scholars note that new immigration policies and the ideal of “fortress Europe” are more likely to adversely affect racial and ethnic minorities, as well as women.²⁰⁸ Millions of immigrants who live in Europe are denied European status because of their ethnic origins and their race.²⁰⁹ The media’s focus on “invasions” and “hordes” of immigrants is evi-

British method of discrimination towards immigrants and distinctions made between welcome outsiders like Japanese and Americans and inassimilable outsiders comprised mostly of people of color from previous British colonies); *see also* Laura Balbo & Luigi Maconi, *I RAZZISMI REALI* 65-66 (1992) (stating that white immigrants are defined as “our immigrants” and Eastern European migrants are seen as more assimilable because they are often the same race and religion as the Italian population, while migrants from Africa are seen as unwanted and unassimilable); *Immigrazione Oggi: Albania* *GIORNALE*, Nov. 3, 1991 (expressing view that Albanians are more desirable immigrants because they are white and so there is a duty to help them); Claudio Martelli, *Emergenza Immigrazione*, *PANORAMA*, Mar. 24, 1991, at 66 (stating that European Nations have preference for immigrants with white skin: “the immigrant from the East doesn’t make a stain, you can’t see him, he is more absorbed”); Christine M. Chinkin, *Kosovo: A ‘Good’ or ‘Bad’ War?*, 93 *AM. J. INTL. L.* 841, 847 (1999) (noting that UNHCR was spending about eleven cents a day per refugee in Africa and U.S. \$1.23 per refugee in the Balkans); Penelope Andrews, *Articles and Essays: Making Room for Critical Race Theory in International Law: Some Practical Pointers*, 45 *VILL. L. REV.* 855, 875 (2000) (quoting Christian Miller and Ann M. Simmons, *Relief Camps for Africans, Kosovars Worlds Apart*, *L.A. TIMES*, May 21, 1999 at A1 (stating that U.N. High Commissioner for Refugees was spending 11 times more on refugees in Balkans than in all of Africa); Humanitarian aid to Africa is not met with same “eagerness” as it is in Eastern Europe. *Id.* The U.N.’s consolidated humanitarian appeal for Kosovo is U.S. \$690 million, of which fifty eight percent has been met while U.S. \$2.1 billion has just been pledged for regional construction. *Id.* A U.N. appeal for U.S. \$25 million for Sierra Leone was met with profound international indifference and a mere thirty two percent of the appeal has been covered. *Id.*

208. *See* MELIS, *supra* n.77, at 3-4 (addressing how Fortress Europe adversely affects racial and ethnic minorities as well as women).

209. *See* I. Ward, *supra* n.94, at 105 (providing statistics that African Nations constitute greatest number of countries in visa list and discussing legal problems facing immigrants considered “Others” in Europe); *see also* David Weissbrodt, *United Nations — Economic and Social Council — Comprehensive Examination of Thematic Issues Relating to the Elimination of Racial Discrimination — The rights of non-citizens* — Working paper submitted in accordance with Sub-commission decision 1998/103 (observing that distinctions are being made between different categories of non-citizens in EU law and that these distinctions may lead to exclusion of persons and deprivation of most fundamental rights, as well as having racist implications). My fieldwork at a Catholic immigration clinic allowed me to view first-hand the problematic reactions of Italians towards immigrants. Sadly, even those who have dedicated their lives to helping immigrants find employment, housing and food, were greatly affected by the racial stereotypes that plagued Italian society. My work coincided with the social and political debate of the Bossi Fini law. Manifestations, street riots, and informational sessions were held throughout Italy to protest the law. One woman that worked at the employment office told us during training to send her only those “girls that she would be able to place” and not to waste her time with any “darker girls.”

dence of a larger anti-immigrant sentiment in Italian society.²¹⁰ “Illegal,” “criminals,” “beggars,” “thieves of Italian jobs,” and “illiterate,” are frequent attributes used to describe the immigrant populations.²¹¹ Scholars note that these statements clearly stem from racial intolerance in Italy, although Italians would not classify themselves as racist.²¹²

Immigrants in Italy are generally classified into three categories: white Eastern European immigrants, white EC and American citizens, and *Marrochini*, literally Moroccans, but a category used to represent all immigrants of color, regardless of their country of origin.²¹³ Scholars note that in Italy, the word, *Marrochino*, conjures up stereotypical images of African immigrants, that is, violent, criminally inclined, oppressive to women, and connected to the Mafia.²¹⁴ Another stereotypical expression used to define North and Sub-Saharan African immigrants is “*Vu*

210. See *Immigrazione, altolà di Bossi: Basta Con le Invasioni*, REPUBBLICA available at www.repubblica.it/online/politica/immigradue/inizio/inizio.html (quoting Umberto Bossi stating “No to illegal immigration, and yes to the intervention of the Navy to stop the “invasion of our seas.” Bossi continued by saying that if it were up to him, the Navy’s intervention would be the first step but ultimately he wants to send all immigrants on the ships back to where they came from. *Id.* Bossi adds, this is the end of the invasions that are causing disappearance of the Nation State. *Id.*

211. See ALBERTO CAROSO AND GUIDO VIGNELLI, *INVASIONE SILENZIOSA – IMMIGRAZIONISMO: RISORSA O COMLOTTO?* (2002) (characterizing recent immigration as tribalization of Europe); see also ECRE Report *supra* n.173 (discussing a trend in the public discourse of government officials and political leaders to characterize asylum seekers and migrants above all as threats to the EU, generalizing challenge as one of “illegal migrants” and “bogus asylum seekers”).

212. See DOSSIER CARITAS, *supra* n.9, at Appendix C (providing survey on racism in Italy); see also Enrico Pugliese, *Villa Literno e Jerry Maslo*, MANIFESTO, March 3, 1989 (quoting rally of Italians chanting “We are not racist, but we don’t want Blacks here” after the incident of Villa Literno when the property of 200 African workers was burned to the ground). This was the main incident which brought the interplay between immigration and racism to the fore in Italy. *Id.* Immigrant lodgings were burnt to the ground in more than one episode; young thugs attacked and knifed Moroccan and Senegalese immigrants in Florence in 1989 and killed a South African refugee, Jerry Maslo, in Campania. *Id.* Many newspapers introduced a new column titled “La caccia al nero” (The Hunt for Blacks) which had many racist crimes to report over the last five years. *Id.*; see generally Laura Balbo and Luigi Manconi, *Non sono razzista: sincero o buggiardo?* *supra* n.118 (discussing racism in Italian society after murder of Jerry Maslo).

213. See Ajani, *supra* n.136, at 339-40 (discussing use of word “Marrochino” in contemporary Italian discourse).

214. See Ajani, *supra* n.175 (noting stereotypes used to define African immigrants including violent, criminally inclined, and connected to Mafia); see also MARIA PACE OTTIERI, *STRANIERI* (1997) (giving first hand account of racist stereotypes immigrants have faced).

Cumpra.”²¹⁵ “*Vu Cumpra*” is a popular term used to describe immigrant street vendors ridiculing immigrants’ use of Italian, mocking the mispronunciation of “*vuole comprare*” (do you want to buy?) “*Vu Cumpra*” is used to describe the poor nomadic “others,” who are usually Black and are in the business of selling inexpensive items on the streets.²¹⁶

II. *BRICK-BY-BRICK: THE PROVISIONS OF BOSSI FINI*

The new regulations proposed by Bossi and Fini have caused much controversy on the Italian political scene.²¹⁷ They intend to redesign the Turco-Napolitano law by changing the provisions that relate to employment, residency, asylum, and family reunification.²¹⁸ Scholars and politicians disagree on the impact the law will have on the immigrant community in Italy.²¹⁹ Some scholars consider the law xenophobic, while others believe it to be appropriate considering the exponential growth of migration to Italy.²²⁰

215. See Raffaele Viviano, *O Tripolini – 1925 poem*. (using word *vu cumpra* to describe a Neopolitan peddler in Libya).

216. See Jeffrey Cole, *THE NEW RACISM IN EUROPE: A SICILIAN ETHNOGRAPHY* (1997) (addressing racist use of *vu cumpra*); see also OTTIERI *supra* n.214 (gathering first hand stories of immigrants, called *vu cumpra*, in Italy and the racism they feel) see also PAP KHOUMA, *IO VENDITORE DI ELEFANTI* (1995), (detailing story of Senegalese immigrant in Northern Italy who sells African artifacts and feels as though he is not only selling and exploiting his country to survive but selling himself).

217. See *La legge Bossi Fini punto per punto*, *supra* n.2 (noting that Bossi Fini caused heated debates between Right-wing parties and Left-wing parties, supported by Catholic Church and other non-profit organizations regarding constitutionality of law); see also *Berlusconi’s Allies*, *supra* n.2 (discussing Bossi and Fini’s political careers).

218. See *La legge Bossi Fini punto per punto* *supra* n.2 (summarizing differences between Bossi Fini and Turco-Napolitano, noting the stricter restrictions imposed by Bossi Fini on immigrants at border and those already in Italy); see also *Berlusconi’s Allies* *supra* n.2 (noting controversial nature of Bossi and Fini).

219. See Gavin Jones, *supra* n.9, at 5 (summarizing some controversial points of the law); see also *La legge Bossi Fini punto per punto*, *supra* n.2 (noting disagreement on impact of law).

220. See Gavin Jones, *supra* n.9, at 5 (summarizing some controversial points of law, noting that some scholars deem law xenophobic and others see it as necessary); see also *La legge Bossi Fini punto per punto*, *supra* n.2 (summarizing Bossi Fini amendment point by point noting disagreement between Italian scholars, human rights organizations, politicians, and citizens with regard to impact of law). The law also included an amnesty provision for domestic helpers. *Id.* Each family can aid in the regularization of one domestic worker. *Id.* The family can also regularize as many helpers of the elderly. *Id.* The family must pay a fee and provide evidence that the helper has been with the family for at least one year prior to the passing of the law. *Id.* The family becomes responsible for the immigrant worker and must provide housing for each worker. *Id.*

1. Elimination of Employment Sponsorship

Every year, the government establishes a quota of immigrants who can be admitted into the country based on the necessities of the labor market and employers.²²¹ Turco Napolitano, the previous immigration law, provided that an immigrant can legally enter Italy to search for work if he has a sponsor — an employer who hires and vouches for him.²²² Bossi Fini restricts entry by basing admittance solely on whether the immigrant has a job already in place upon arrival.²²³ The “permission to stay” in the country has been replaced by a “contract to stay.”²²⁴ In addition, the employer must provide an apartment for the foreign citizen and must pay for any expenses needed for the worker to travel back to his country after the contract expires.²²⁵ Penalties have been raised for illegal immigrants and anyone who employs them.²²⁶ Some experts compare the Bossi Fini to

221. See Bossi Fini, at art. 3 (establishing quota for seasonal workers and other immigrants to be admitted based on labor market necessity). See also Gavin Jones, *supra* n.9 (describing Italy’s need for immigrant workers to sustain economy).

222. See Di Pascale, *supra* n.140 (describing idea of sponsorship as means for residency); *Immigrazione, la legge Bossi Fini punto per punto*, REPUBBLICCA, June 4, 2002 available at <http://www.repubblica.it/online/politica/improntedue/scheda/scheda.html> (noting elimination of sponsorship as a major change from Turco-Napolitano law).

223. See Ennio Codini & Monica Villa, *Immigrazione e Diritti*, QUADERNI DELL’OSSERVATORIO SOCIALE TERRITORIALE 37-42 (July 2002) (describing elimination of sponsorship and need for job placement before entering Nation). Commentators opine that rather than limit immigration, eliminating sponsorship will increase illegal immigration and add difficulties for Italian industry and agriculture to find necessary workers for their businesses. *Id.*; see also Interview with Livia Turco, *supra* n.193 (quoting Turco’s concern that businesses will be wary of hiring workers without seeing their face, thus creating shortage in labor markets); MELIS, *supra* n.77, at 14 (noting that ignoring importance of labor only leads to more illegal migration).

224. See *Immigrazione, la legge punto per punto*, *supra* n. 220 (detailing stay permits in Bossi Fini law); see also Bossi Fini, art. 4 (describing provisions for contract to stay). Article 4 states: The term of contract to stay is: not longer than nine months for seasonal labor; it cannot be renewed; no longer than twenty-four months for self-employment, in this case the contract can be renewed thirty days before it expires; no longer than twelve months for short term subordinate labor, contract can be renewed before it expires twenty-four months for long term subordinate labor, contract can be renewed ninety days before expiration.

225. See Domenico Paparella and Vilma Rinolfi, *New Legislation regulates Immigration*, EUROPEAN INDUSTRIAL RELATIONS OBSERVATORY ONLINE, available at <http://www.eurofind.ie/about/2002/09/feature/IT0209103F.html> (detailing some new provisions of Bossi Fini and their effects); see also *Immigrazione, la legge Bossi Fini punto per punto*, *supra* n.2 (noting penalties of Bossi Fini against employers).

226. See *Immigrazione, la legge Bossi Fini punto per punto*, *supra* n.2 (noting penalties raised for both illegal immigrants and their employers).

the American Bracero Program, whereby an employer holds all the power and the immigrant worker, who is often trapped in a low paying, non-paying, or other desperate job situation, is forced to stay because without a job, he will immediately be deported.²²⁷

2. Residence permit and Residence Cards

Only an immigrant who has a work contract will be given a two-year residence permit.²²⁸ If he is fired from his job, he will be repatriated or face the risk of remaining illegally.²²⁹ Unlike the residence permit, the residence card does not expire and is considered to be the final process for immigrants waiting to become permanent residents in Italy.²³⁰ Bossi Fini extended the period for obtaining the card from five years to six years.²³¹

3. Fingerprints

The issue of fingerprinting²³² all immigrants has been one of the most controversial provisions of Bossi Fini.²³³ All immi-

227. See Enrico Pugliese, *Una Legge Molto Cattiva*, MANIFESTO June 5, 2002 (linking elimination of sponsor to precariousness of Braceros); see also Lorenzo Alvarado, *Lessons From My Grandfather — The Bracero*, 22 CHICANO-LATINO L. REV. 2001, 55, 60-1 (describing attractiveness of Braceros to employers because of low-paying and risky jobs where employers had complete power over Braceros because without a job, they would be deported).

228. See *La Nuova Legge: Cosa Succederà?*, at <http://stranieriinitalia.it/news/nuovalegge4giu.htm> (describing provisions of new Bossi Fini law); see also Codini and Villa, *supra* n.223, at 39 (stating Article 4 of Bossi Fini deals with stay permits modifying Article 5 of Testo Unico).

229. See Bossi Fini, arts. 12-15 (noting that in case of expulsion from national territory, immigrant will lose any contributions he ripened while in Italy). This money will be used to finance the Temporary Stay Centers. *Id.*

230. See Bossi Fini, art. 5 (describing provisions for stay permit) and 9 (describing provisions for stay card).

231. See Celina Frondizi, NUOVI DIRITTI DI CITTADINANZA – IMMIGRATI (2000) (noting new rights of immigrants in Italy); see also Bossi Fini, art. 9 (modifying Article 8 of Turco-Napolitano and extending time needed to obtain residence card).

232. See Bossi Fini, art. 2 (requiring all immigrants to be fingerprinted); see also Enrico Pugliese Interview (July 18, 2002) (on file with author) (commenting that in environment where persons are forced to continuously migrate due to war, injustice, and violence, laws restricting immigration are often problematic and ignore many concerns that immigrants face); *Italy's Fini on rise of right-wing in Europe* (June 7, 2002) (interviewing Fini who states the row over fingerprints is a row for which there is no reason: It is a normal method of identification which is already adopted in many countries of the world).

233. See Marco Galuzzo, *Impronti e contratti, ecco le nuove regole*, CORRIERE DELLA SERA, July 12, 2002; see also European Press, *Northern League Update*, THE INDEPENDENT

grants wanting a stay permit, or a renewal of their stay permit must give their fingerprints to the authorities.²³⁴ Critics compare this forced fingerprinting to the A-card in Austria, which helps police track illegal immigration, and even the identity cards that the Nazis forced all Jews to carry in Nazi Germany.²³⁵ The government argues that this law will curb crime particularly that related to prostitution and drugs because statistics show that illegal immigrants are involved in drug trafficking, and petty street crime and thefts.²³⁶ Scholars, however, believe that the government does not take into account innocent immigrants who are not part of the crime wave and criminalizes them as well.²³⁷

4. Asylum

Article 31 and 32 of Bossi Fini intend only to prevent abuses.²³⁸ The UNHCR agrees with these Articles but adds that the Bossi Fini, as is, risks violating the basic rights of asylum seek-

(London), Sept. 19, 2002 (quoting Giancarlo Gentilini, Northern League mayor of Treviso stating that officials should take nose prints and footprints of all immigrants, not just fingerprints). There is also an Article in a left-wing newspaper, L'UNITA, headlining "Bossi Fini another massacre" covering story of fifteen Liberian immigrants who died off the coast of Sicily, "perishing in the shadow of the new immigration law." *Id.*

234. See Enrico Pugliese, *Una Legge Molto Cattiva*, MANIFESTO June 2, 2002 (describing fingerprinting as beginning of criminalization process); see also *Italy Asylum Bill Racist says MPs*, available at: <http://Cnn.com/2002.World/europe.06/04/italy.immigration/index.htm> (June 4, 2002) (quoting opposition leader Luciano Volante stating that fingerprinting created a climate of fear and hatred). Oliviero Diliberto, leader of the Italian Communist Party who believes that "it is undignified of a civil country to equate illegal immigrants with criminals and to say that those who help illegal immigrants are committing a grave crime." *Id.*

235. See OECD Observer 7274, 2000 WL 26546500 (comparing fingerprinting and A-cards in EU); see also *Racism in Brief*, 9(6) STATEWATCH BULL. (Nov.-Dec. 1999) (comparing fingerprinting to Nazi identity cards).

236. See Stephen Naker et al., *Crime and Politics – Suddenly it's the hottest of issues – and closely linked to immigration*, BUSINESS WEEK ONLINE (Mar. 18, 2002) (noting although many EU Nations are hesitant to draw connection between increasing crime and the rise in immigration) Claudio Scajola, Italy's Interior Minister says sixty four percent if drug arrests in 2001 involved suspects foreign to the EU and he credits Italy's 2.7% drop in theft to government's battle against immigration and to the Bossi Fini. *Id.*; ENRICO PUGLIESE, *DIARY OF IMMIGRATION* 45 (1994) (stating that Italians are no faced with an ever increasing tendency to denote immigrants as "deviated, drug-smugglers, exploiters of prostitution . . .").

237. See *id.* at 45 (noting that government groups all immigrants together even if most are innocent).

238. See Gubbini, *supra* n.56 (noting that Italian government intended only to limit abuses with regard to asylum).

ers.²³⁹ The law provides for an “accelerated process” whereby delegates from the *Questura* and a UNHCR representative, would have posts at the borders and examine those who enter seeking asylum in twenty days.²⁴⁰

Italy is the only EU country without a comprehensive asylum law.²⁴¹ The previous government had suggested a proposal for such a law, but the government was unable to obtain parliamentary approval before its mandate ended.²⁴² The U.N. criticized

239. See Gubbini, *supra* n.56 (noting UNCHR’s opinion regarding Articles 31 and 32).

240. See *id.* (describing accelerated process as a violation of human rights); see also Refugee Convention Article 33 (preventing expulsions).

241. See Gunther Kern, *UNHCR Italy urged to clarify asylum rights as immigrants rise 10%*, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/print?tbl=NEWS&id=3ae6b994b4> (noting UNCHR’s recommendations to Italy to adopt asylum provisions); see also Gubbini, *supra* n.56 (stating UNHCR has criticized the Bossi Fini Law for not incorporating comprehensive asylum law); ITALIAN CONST., art. 10 (expressing right to asylum for immigrants fleeing from persecution).

242. See European Commission Against Racism and Intolerance (ECRI), *Secondo Rapporto Sull’Italia. Strasbourg, Direzione Generale dei Diritti del Uomo DGII 2002*, in ITALY ECRI BULL. *European Commission against Racism and Intolerance* (Summer 2002) (describing previous asylum provisions after Martelli Law rejected by Italian Parliament). The changes to Martelli are as follows:

1. Suppresses the possibility of a temporary contribution (up to forty five days) in favor of those without sufficient means and accommodation. The Ministry of Interior will provide, on an annual basis, and depending on the resources of the National Fund, financial support to local authorities responsible for supplying assistance and services to asylum seekers;
2. Sets up different bodies, which will be responsible for dealing with asylum applications: Territorial commissions (i. e. Commissions located across Italy) will be taking decision concerning refugee status. Decisions will be written and communicated to the applicants with all the information necessary to lodge an appeal. The National Commission for the right to asylum coordinates the territorial commissions, provides training for their members and, most important, decides on cessation and removal of refugee status. The National Fund for asylum policy and services will finance the activities and services provided by local governments to refugees especially with regards to accommodation and essential needs.
3. Indicates in which cases applicants can be detained at border check-points or in accommodation centers depending on the different reasons for detention;
4. Provides an accelerated procedure when the applicant has tried to enter the country avoiding controls or when he/she has already been expelled or his claim has been rejected; the decision is to be delivered within 3 days from the applicant’s interview. Rejected asylum seekers can ask the territorial commission to re-examine the decision. It will be possible to lodge an appeal to the competent tribunal within 15 days from the territorial commission’s communication confirming negative decision. The appeal procedure, which can also be started abroad at diplomatic representations, does not suspend the deci-

and publicly denounced Bossi Fini for its lack of incorporation of political asylum provisions.²⁴³ Scholars and the UNCHR declared that, without modification, Italy would not achieve the 'minimum standard' required by international law.²⁴⁴

The UNHCR proposed four amendments prior to the passage of Bossi Fini.²⁴⁵ The first amendment required immigrants to present an application for asylum not only at the border but also, to the *Questura*.²⁴⁶ The second amendment required uniform criteria to determine asylum status in Italy.²⁴⁷ The third amendment provided that it is indispensable to allow appeals, particularly because errors are common and expelling an asylum seeker may be equivalent to killing him by putting his life at risk.²⁴⁸ The fourth proposed that there must be an acknowledgement of humanitarian protection when considering asylum status.²⁴⁹ The government responded to the accusation that Italy was the only EU Nation without a law specifically addressing asylum, by stating that it is awaiting the EU's uniform immigration standards expected in 2004.²⁵⁰

sion and the applicant will be asked to leave the country. However, he/she can ask for a permit to stay in the country until the final decision is reached.

Id.

243. See Gubbini, *supra* n.56 (discussing Amnesty and UNCHR critiques of lack of asylum provision in Bossi Fini); see also 9(5) MIGRATION NEWS, *supra* n.56 (presenting problems with Italy's asylum bill including vagueness of asylum law creating excessive police discretion at border).

244. See Gubbini, *Immigrazione: UNHCR; Critiche DDL Bossi Fini Modifica Su Asilo MANIFESTO* (recommending asylum-seekers be differentiated from immigrants); see also Gubbini, *supra* n.56 (stating that UNHCR has criticized Bossi Fini Law for not incorporating comprehensive asylum law).

245. See Gubbini, *supra* n.56 (recommending asylum-seekers be differentiated from immigrants).

246. See *id.*, (noting UNCHR's criticisms of lack of asylum provisions and making four proposals to Italian government including: making requirement for immigrant to present applications for asylum at both border and Italian immigration authorities).

247. See *id.*, *supra* n.244 (noting UNCHR's second proposal requiring uniform criteria to determine asylum status to prevent abuses of system).

248. See *id.*, *supra* n.244 (noting UNCHR's third proposal to allow asylum applicants to appeal asylum claim if rejected).

249. See *id.*, *supra* n.246 (noting UNCHR's fourth proposal to acknowledge humanitarian protection for asylum seekers).

250. See Paul Reynolds, *Fortress Europe Raises the drawbridge*, available at <http://news.bbc.co.uk/2/hi/europe/2042779.stm> (discussing Meeting in Tampere where EU promised to bring asylum under joint control within five years).

5. Expulsions

Turco-Napolitano established intricate deportation procedures of illegal immigrants and provided that after the immigrant had been arrested by the authorities, he could be deported only after a magistrate ruled on his case and the immigrant had a chance to defend himself in court.²⁵¹ After the magistrate entered a decision, the immigrant had fifteen days to appeal; however, during this time, many immigrants went underground to flee from deportation.²⁵² Bossi Fini would make it compulsory for all expulsions to be immediately enforced.²⁵³ There are four instances that could lead to expulsion of an immigrant from Italy including: security measures for anyone who has committed a crime; as a prevention, for any immigrant classified as a social danger like those involved in illegal or terrorist activity; administrative expulsions for immigrants whose residence visa has expired; and illegal immigration.²⁵⁴ If the immigrant has committed a serious crime or had no documentation to prove his identity, he would be accompanied to the border immediately or put in a temporary detention center.²⁵⁵ Bossi Fini established coercive accompaniment to the border but first the police authorities must communicate the reasons for expulsion to the judicial authority.²⁵⁶ Scholars deem this provision unconstitutional because Article 13 of the Italian Constitution provides that personal liberty can be limited only in exceptional cases but the Bossi Fini law bases the accompaniment to the border on the

251. See Turco-Napolitano *supra* n.176, at Article 12 (describing expulsion provisions); see also Fasti, *supra* n.8, at 22 (describing expulsion under Turco-Napolitano).

252. See Turco-Napolitano *supra* n.176, art. 12 (describing expulsion provisions); see also Fasti, *supra* n.8, at 22 (describing expulsion under Turco-Napolitano); see also Domenico Paparella and Vilma Rinolfi, *New Legislation Regulates Immigration*, European Industrial Relations Observatory available at <http://www.eiro.eurofound.ie/about/2002/09/feature/IT0209103.html> (noting deportation procedures in Turco-Napolitano law);

253. See APAP, *supra* n.3, at 150 (describing immediate enforcement of deportation); see also Paparella and Rinolfi, *supra* n.252 (differentiating Bossi Fini and Turco-Napolitano's deportation procedures).

254. See APAP, *supra* n.3, at 149 (noting four instances of forced deportation).

255. See *id.* (describing expulsion measures noting that immigrants who have committed serious crimes or lack identifying documents will be held in detention centers or immediately taken to border).

256. See Bossi Fini, arts. 12-15 (describing expulsion measures); see also Gubbini, *Espulsioni Facile, Niente Sanatoria* MANIFESTO, July 16, 2002 (noting changes towards coercive accompaniment to the border).

idea that all those irregularly present on the Italian territory will be expelled in the same way to preserve and protect public security.²⁵⁷ Scholars, however, disagree with the law and point out that according to Article 13, judicial approval is not enough to carry out expulsions; rather the judicial authority must make the decision regarding expulsion on its own.²⁵⁸ Thus, communicating the reasons for expulsions is not enough to preserve the constitutionality of the regulation.²⁵⁹

6. Appeals Against Expulsion

Under Turco-Napolitano, immigrants could appeal their expulsion within five days of their expulsion notice.²⁶⁰ Under Bossi Fini, appeals must be made within thirty days after the expulsion notification, but the appeal must be done through the Italian embassy in their country of origin or through a notary who delegates an Italian lawyer on behalf of the expelled immigrant.²⁶¹ Thus, the immigrant will no longer have the right to be

257. See Gubbini, *supra* n.256 (noting unconstitutional provisions of Bossi Fini); see also Bossi Fini, art. 13 labeled "personal freedom." Article 13 states:

(1) Personal freedom shall be inviolable.

(2) No one shall be detained, inspected, or searched nor otherwise restricted on one's personal liberty save by order of the judiciary for which the reason must be stated, and then only in such cases and in the manner as the law provides for.

(3) In exceptional cases of necessity and urgency, strictly defined by law, the police authorities may take provisional measures, which must be reported within 48 hours to the judiciary and which, if the latter do not ratify them within the next 48 hours, are considered as revoked and remain without effect.

(4) All acts of physical and moral violence on persons subjected to any restriction of freedom shall be punished.

(5) The law shall establish the maximum length of preventive detention.

Id.

258. See ITALIAN CONST., art. 13(2) (stating that no one shall be detained without order of judiciary); see also Gubbini, *supra* n.256 (noting unconstitutionality of expulsion provisions according to Article 13 of Italian Constitution).

259. See Gubbini, *supra* n.56 (quoting Bonnetti regarding unconstitutionality of the expulsion provision).

260. See Turco-Napolitano, *supra* n.176, art. 13 (regarding detention and deportation).

261. See DOSSIER CARITAS, *supra* n.9 (showing that expulsions have increased thirty percent since Silvio Berlusconi and his conservative coalition came to power last June); see also *Italy declares a State of emergency*, Mar. 20, 2002 available at <http://www.cnn.com/2002/WORLD/europe/03/02/italy.immigrants/index.html> (noting easier expulsions with passing of Bossi Fini); see also *G8 protestor expelled from Italy – and after protests allowed back*, STATEWATCH NEWS ONLINE (describing permanent State of precariousness caused

present and defend himself at his trial.²⁶² Although it seems that there is a way for the immigrant to appoint a lawyer to speak on his behalf, scholars point out that the array of technical difficulties makes appealing expulsions effectively impossible.²⁶³ The embassies usually receive the expulsion notifications *after* thirty days and the appeal must be filed *within* thirty days of the expulsion.²⁶⁴ Additionally, the immigrant who is able to obtain an Italian lawyer has thirty days from the time he receives the expulsion notification to file an appeal, however, another rule provides that appeals must be made by the lawyer in court within five days.²⁶⁵ These contradictions in the law make appeals impossible in practice.²⁶⁶ Effectively, even those immigrants who are integrated and have jobs will be in a State of permanent precariousness whereby any political activity or small offence will cause them to be expelled.²⁶⁷

7. Detention Centers

Detention centers are prisons where immigrants with a criminal record, those lacking identifying documents, or those

by expulsions specifically in regards to Reganne Bouchabib, a Moroccan immigrant who was legally residing in Italy and was expelled when going to renew his residence card because he had been a participant in environmental protests).

262. See Bergamo Social Forum, *Analisi disegno di legge Bossi Fini sull'Immigrazione*, available at <http://www.frosinone.org/oltreoccidente/09%20%20Vademecum%20sulla%20Legge%20Bossi%20Fini.doc> (noting that immigrants will lose opportunity to defend themselves at trial).

263. See Gubbini, *Analisi disegno di legge Bossi Fini sull'Immigrazione*, *supra* n.256 (noting array of technical difficulties which make expulsions not only difficult but usually impossible).

264. See Cinzia Gubbini, *Si puo ricorrere la consulta — Paolo Bonneti, docente all'universita Biocca: La legge Bossi Fini contiene molti profili di inconstituzionalita*, MANIFESTO, July 11, 2002 available at http://www.immigra.org/documenti/leggi_paolobonetti.pdf (describing Bonetti's view on constitutional problems of expulsion); see also *Analisi disegno di legge Bossi Fini sull'Immigrazione*, *supra* n.259 (noting technicalities of law).

265. See Bossi Fini, art. 22 (referring to expulsion measures); see also Gubbini (noting embassies receive appeals thirty days after demand for expulsion is made thus making appeals impossible because it is received thirty days after the expulsion). The law allows immigrants to obtain an Italian lawyer to deal with this within thirty days of the expulsion, however another rule establishes that an Italian Lawyer must propose the appeal in five days. *Id.*

266. See *Analisi disegno di legge Bossi Fini sull'Immigrazione*, *supra* n.263 (noting contradictions in law).

267. See Moroccan G8 protestor expelled from Italy - and after protests allowed back, available at <http://www.statewatch.org/news/2002/jan/g8expulsion.html> (providing story of a Moroccan immigrant who was forced to leave Italy and accompanied to border for protesting against new immigration law).

awaiting a decision regarding their asylum claim, are housed until a decision regarding their claims are resolved by the Italian authorities.²⁶⁸ Italian politicians and non-profit organizations have continuously criticized the detention centers in Italy.²⁶⁹ Fifty percent of the immigrants kept in these centers are usually there for the maximum period of thirty days.²⁷⁰ This period has been augmented to sixty days under the Bossi Fini law.²⁷¹ Several involuntary homicides have occurred in the centers and agents are still under investigation on charges of brutality.²⁷²

8. Family Reunification

Immigrants who have maintained a valid residency permit for more than one year can request family reunification.²⁷³

268. See Bossi Fini, arts. 12-15 (noting definition of detention centers as areas housing immigrants with no identity documents, immigrants with criminal records, or asylum seekers awaiting decisions are housed); see also Fasti, *supra* n.8, at 22 (noting detention centers are like prisons for immigrants who arrive on Italy's borders).

269. See *Human Rights Watch Reports EU: Protect the Rights of Migrants and Asylum Seekers in Seville Policy Proposals – Letter to EU Heads of State*, June 13, 2002 (urging EU leaders to change situation of asylum seekers in detention centers to prevent further "grievous abuses"); see also Fasti, *supra* n.8, at 22 (detailing new detentions centers including: Brunelli (Turin), Arcangelo Corelli (Milan), Ponte Galeria (Rome), Badessa and medelugno (Lecce), Derraino Vulpitta (Trapani), Francavilla Fontant (Brindisi), Catania, Termini Imereses (Palermo), Ragusa and Lamezia Terme (Catanzaro). New centers are due to open in Florence and Bologna. *Id.*; Italy: *United Nations Committee Against Torture Highlights Dangerous Trends Towards Racism by Law Enforcement Officers*, STATEWATCH REPORT (Feb., 1996) (discussing series of acts of torture in Italian detention centers against immigrants and minorities and recommending that Italy take action to include specific offence of torture into domestic law according to international human rights standards).

270. See Italy: *Immigration in Italy*, available at <http://members.aol.com/coor-deurop/p22en.html> (noting that fifty percent of immigrants in detention centers stay for maximum amount of time); see also MANIFESTO Nov.28, 2000 (describing rally called "No to concentration camps" held in Milan on Nov.27, 2000 protesting involuntary homicides which occurred at Trapani detention center in Dec. 1999).

271. See Bossi Fini, arts. 12-15 (noting period in detention centers for immigrants without identification has been raised to sixty days).

272. See Italy: *U.N. Committee Against Torture Highlights Dangerous Trend Towards Racism by Law Enforcement Officers*, *supra* n.269 (noting that majority of victims of mistreatment belonged to certain foreign countries or to minorities); see also Amnesty International's report, *Italy: Alleged Torute and Ill-Treatment by Law Enforcement and Prison Officers* (AI Index: EUR 20/01/95) (Apr. 26, 1995) (discussing involuntary homicides occurring in Italian detention centers).

273. See Bossi Fini, art. 23 (discussing family reunification provisions). Article 23 modifies the Turco Napolitano law by preventing sons and daughters over the age of 18 to enter Italy, unless it is for health reasons, that parents over sixty-five may not enter the country unless they have no other children living in the home country, that more documentation to prove familial ties will be required.

Under the Turco-Napolitano, an immigrant with a residence permit, or stay card, could bring his children, parents, and other family members including siblings into Italy and have them established as residents.²⁷⁴ Under Bossi Fini, the allowance for family reunification is limited to spouses, children under the age of 18, sons and daughters who are disabled, parents who do not have other children living in the home country, parents over 65 years of age, whose children are unable to help them because of serious health problems.²⁷⁵

Scholars note that the right to family reunification is made excessively complicated because of the number of documents that must be produced and the rigidity with which the authorities assess whether the conditions to obtain this right are fulfilled.²⁷⁶

9. Increased Naval Power

Article 9 of the Bossi Fini provides that the Italian navy, acting in its police power, may stop, inspect, and sequester a ship if it believes, or has reason to believe that the ship is being used for the illicit transport of migrants.²⁷⁷ Prime Minister Silvio Berlusconi's cabinet has affirmed this provision in stating that the navy would be authorized to board and inspect boats and to impound and destroy vessels found to be acting illegally.²⁷⁸ The UNHCR criticized Italy's plans to use the navy to intercept boats carrying illegal immigrants and warned that the policy could cause deaths.²⁷⁹

274. See Fasti, *supra* n.8, at 137 (discussing Turco-Napolitano's family reunification provision).

275. See *id.* (describing family reunification provisions); see also Bossi Fini, art. 33 (relating to family reunification).

276. See *Family Rejoining: what the Bossi-Fini Has Changed?*, available at <http://www.meltingpot.org> (discussing difficulties of family reunification including documentation and strict standards used by authorities).

277. See Giovanni Palombarini, *Immigrati Spremi e Getta nella nuova legge Bossi Fini 24/10/01* (not yet published) (noting that ship does not have to be in Italian waters, which has raised other concerns for human rights agencies).

278. See 9(3) *MIGRATION NEWS* (March 2002) (describing that navy has been used to patrol for illegal immigrant ships for years, but has taken low profile since 1997 when naval vessel collided with and sank packed Albanian boat, killing more than eighty Albanians).

279. See *UNHCR slams Italy on boat interception*, at <http://www.tribuneindia.com/2002/20020207/world.htm#4> (stating that government said last week it planned to give navy tough new powers to check boats suspected of carrying illegal immigrants to its shores as part of new immigration Bill now before Parliament). The UNHCR expresses

III. DECONSTRUCTION OF BOSSI FINI: A HUMAN RIGHTS CRITIQUE

Italy's new immigration amendment, Bossi Fini, violates human rights standards as established by international, regional, and domestic law. It neglects to incorporate a comprehensive asylum provision, which is mandated by these human rights standards. Additionally, the law fails to provide a mechanism to filter human rights non-discrimination principles into its domestic law.

A. *Bossi Fini: A Violation of Human Rights*

1. Asylum and Expulsion

International human rights norms require State signatories to the ECHR and Refugee Convention to observe the principle of *non-refoulement* according to Article 3 of the ECHR and the Refugee Convention.²⁸⁰ This means that these Nations are obligated not to return immigrants who may have a well-founded fear of persecution if forced back to their country.²⁸¹

Article 22 of the Bossi Fini Law prevents an effective right to appeal an expulsion, in violation of Paragraph 10 of the ICCPR.²⁸² The appeal can only be made within thirty days from the expulsion notice and must be done through the Italian Consulate in the immigrant's home country or through a notary who delegates an Italian lawyer.²⁸³ In addition, the immigrant may not return to Italy to appear at his trial to defend himself.²⁸⁴ However, since the embassies usually receive expulsion notification appeals after thirty days of the expulsion, the appeal usually fails because it must be made within thirty days and an Italian lawyer must propose the appeal within five days of the expul-

concern over the possible repercussions in terms of asylum and in light of past experience, hopes that these measures do not cause other tragedies with serious loss of human life, the agency said in a statement. *Id.*

280. *See supra* n.59 and accompanying text (describing Article 3 of European Convention); *see also* nn.48-52 and accompanying text (describing Refugee Convention).

281. *See supra* nn.51-58 and accompanying text (discussing *non-refoulement* principle).

282. *See supra* nn.55-63 and accompanying text (noting anti-expulsion provisions in ICCPR).

283. *See supra* n.265 and accompanying text (discussing Article 22 of Bossi Fini and expulsion provisions).

284. *See supra* n.265 and accompanying text (discussing Article 22 of Bossi Fini and expulsion provisions).

sion.²⁸⁵

The problems with Bossi Fini, in terms of asylum, are far-reaching; without a provision addressing asylum-seekers specifically, there is a risk of sending people back to a country where they may be persecuted.²⁸⁶ Despite urgings by the UNHCR and other human rights organizations in Italy, the government has not incorporated a provision specific to asylum into domestic law.²⁸⁷ As it stands, Italy's immigration law takes no affirmative steps to deal with asylum requests due to the concern to avoid asylum applications from being made solely to prevent deportation and expulsion orders from being carried out.²⁸⁸

Bossi Fini has no provisions regarding humanitarian protection of those who may not fit the profile set out by the Refugee Convention, but nevertheless are considered at risk.²⁸⁹ In addition, it does not adhere to the provisions in the Italian Constitution, which state that a foreigner who cannot exercise his democratic rights, as guaranteed by the Italian Constitution, in his own country, has the right to asylum in Italy.²⁹⁰ Rather than adopt comprehensive asylum legislation, Italy has adopted a new Bill, which has accelerated border procedures (two days), allowed for the immediate expulsion of rejected asylum seekers, and eliminated the right to appeal against expulsions.²⁹¹ These restrictions have been detrimental to all immigrants, but, as many commentators have noted, the ones affected most are Blacks and other minorities.²⁹²

285. See *supra* nn.260-267 and accompanying text (discussing unconstitutionality of lack of appeal and difficulty in obtaining Italian legal counsel).

286. See *supra* nn.243-249 and accompanying text (describing NGOs and UNCHR's criticisms of lack of asylum law in Italy).

287. See *supra* nn.243-249 and accompanying text (describing NGOs and UNCHR's criticisms of lack of asylum law in Italy).

288. See *supra* nn.243-249 and accompanying text (describing NGOs and UNCHR's criticisms of lack of asylum law in Italy).

289. See *supra* n.50 and accompanying text (describing narrow scope of definition of refugee and problems arising from such definition).

290. See *supra* n.87 and accompanying text (discussing provisions of Article 10 of ITALIAN CONST.).

291. See *supra* nn.56-61 and accompanying text (detailing speedy and efficient expulsion procedures and removal of right to appeal against expulsions).

292. See *supra* n.208 (focusing on effect of restrictions on Blacks and other minorities).

2. Non-Discrimination

The UDHR provides and ordains that all persons are born free and equal in rights and dignity and that all are entitled to these rights without distinction as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁹³ The ICCPR and the ICERD also provide for a similar notion of equality before the law.²⁹⁴ However, international law does not prohibit all distinctions, only those that are unreasonable, arbitrary or malicious.²⁹⁵ Although alienage is not a protected ground for discrimination purposes, the use of all-inclusive language in the UDHR, ICCPR, ICERD, and other treaties, suggests that States shall not deny rights to aliens without objective and reasonable justification.²⁹⁶

The issue of race and racism in immigration policy and legislation is crucial to understanding the underlying root of the changes in immigration law.²⁹⁷ However, racism, particularly today, takes on a subtle form, thus rendering it difficult to challenge human rights standards on the basis of race.²⁹⁸ One must look past the seemingly integrative themes of international human rights and detect the inherent conflict between the ideals proposed by the international treaties and how they are actually applied in practice in the domestic sphere.²⁹⁹ Analyzing the idea of indirect discrimination may be useful in approaching this task.³⁰⁰

Bossi Fini has a disparate impact on people of color.³⁰¹ The

293. See *supra* nn.26-27 and accompanying text (describing all-inclusive nature and non-discriminatory provisions of UDHR).

294. See *supra* nn.39-44 (detailing ICCPR and ICERD).

295. See *supra* n.102 and accompanying text (describing Belgian Linguistics case defining discrimination only when the distinction has no objective and reasonable justification).

296. See *supra* nn.15-21 and 27-35 and accompanying text (describing UDHR and ICCPR's all-inclusive language).

297. See *supra* nn.179-188 (discussing racialization of immigration law).

298. See *supra* nn.100-104 and accompanying text (focusing on indirect discrimination).

299. See *supra* nn.100-111 and accompanying text (focusing on indirect discrimination test).

300. See *supra* nn.100-111 and accompanying text (focusing on indirect discrimination and justification of differential treatment).

301. See *supra* nn.100-111 and accompanying text (discussing commentators' views on indirect discrimination as hidden ethnicization or racialization or more overt form of discrimination).

first criterion of the disparate impact test is to prove an adverse effect upon a specific group, such as women or a racial minority.³⁰² Italy satisfies this prong. The law was enacted at a time when the number of immigrants from Africa greatly exceeded those from any other area.³⁰³ After the Albanian crisis in 1991, the Martelli law had several amnesty provisions to legalize immigrants, now the Bossi Fini law, enacted when there are more immigrants from Africa than anywhere else, seeks to close borders and prevent further immigration.³⁰⁴ It is no mere coincidence that in recent years, when immigration legislation has become more restrictive, between two-thirds and three-quarters of new immigrants to Italy are people of color who come from non-EC nations.³⁰⁵ Experts note that xenophobic sentiments cause states to perceive foreign nationals as a threat to social cohesion and public security and often have led to the restrictive immigration policies.³⁰⁶

Even visa lists, a seemingly harmless process, are ingrained with racism.³⁰⁷ In fact, there is an overwhelming majority of Black countries on the negative visa list.³⁰⁸ Visa lists are particularly problematic due to their over-inclusion of Nations where severe conflicts, civil wars, or grave human rights violations are taking place.³⁰⁹ Commentators note that race and wealth, rather than historical ties or humanitarian desperation, are the defin-

302. *See supra* n.100-106 and accompanying text (detailing requirements for disparate impact test).

303. *See supra* n.9, at 45 (providing statistical data showing that African immigration was on rise while less Eastern European immigrants were arriving on Italian shores).

304. *See supra* nn.122-129 and accompanying text (describing Martelli Law's amnesty provisions during influx of Albanian refugees); *see also supra* n.163 and accompanying text (quoting leader of Lega Nord's racial comments about disinfecting trains after African immigrants have been in them and blaming immigrants for the rise in racial violence).

305. *See supra* nn.170-176 and accompanying text (focusing on impact of racism on immigration policy).

306. *See supra* nn.179-188 (discussing how racism affects social and political policy proposals).

307. *See supra* n.209 (stating that race factors played an important role in formulation of visa lists).

308. *See supra* n.171 and accompanying text (remarking that very few nationals of white Nations need visa to enter Europe).

309. *See supra* n.171 and accompanying text (presenting racist implications of choice of countries on visa lists).

ing criteria for the exclusion of immigrants.³¹⁰

To prove the second part of the disparate impact test, the immigrant must prove that there is no objective justification for the adverse effect.³¹¹ To prove this objective justification standard, the ECHR has adopted a strict standard where the means chosen must be appropriate and necessary to achieve an otherwise legitimate end.³¹² However, scholars have noted that, in practice, the test is more lenient and the ECHR has not even required more than a reasonableness test.³¹³ Other EU Nations could argue that immigrants are taking away jobs; however this argument would not even pass the reasonableness test in Italy because of its labor shortage.³¹⁴ Italy, potentially, could argue that pressure from the EU and a need to more effectively control its borders are legitimate aims.³¹⁵ Italy, may and has, argued that Bossi Fini is needed to curb crime.³¹⁶ These ideas, however, are discriminatory in and of themselves because it links immigrants and crime.³¹⁷

B. Policy Suggestions

First, Italy must adopt an asylum provision into domestic law to prevent any further human rights violations. It must distinguish asylum seekers and refugees from economic migrants. Second, Italy must adhere to its constitutional provisions and international human rights obligations to protect the rights of refugees, as well as provide a system whereby appeals against expulsions would be permitted. Third, Italy must set up a more effec-

310. See *supra* n.171 and accompanying text (proposing that race and class rather than colonial ties or humanitarian need provide basis for excluding immigrants).

311. See *supra* nn.99-111 and accompanying text (putting forth test used by ECHR to determine whether disparate impact exists).

312. See *supra* nn.99-111 and accompanying text (putting forth test used by ECHR to determine whether disparate impact exists).

313. See *supra* n.99-111 and accompanying text (stating that increased lenience may be tied to fact that ECJ has faced major financial impacts that indirect discrimination has had on its Member states and is now bowing to political pressure to take more restrained stance).

314. See *supra* n.9 and accompanying text (presenting several citations regarding huge labor shortage in Italy).

315. See *supra* nn.183 and accompanying text (discussing Europe's pressure on Italy to tighten its borders).

316. See *supra* n.236 and accompanying text (noting Bossi Fini's goal to curb crime).

317. See *supra* nn.185-199 and accompanying text (discussing criminalization of immigrants as fueled by racism).

tive border patrol system whereby investigations to determine whether an immigrant can qualify as an asylum seeker are assessed by the Italian courts, and involve a thorough examination of the conditions of the country of origin.

Although Italy has signed most of the international human rights conventions prohibiting discrimination, in practice it has not met its international obligations. Few Nations in Western Europe have instilled policies to resolve some of the problems associated with immigration and to promote integration. It would be optimistic to state that what Europe needs is an education system, which teaches integration and the acceptance of others. Although education is important, as are programs to help the process of integration, the best way to attack the problem of racism towards immigrants in Italy is to focus on the labor market. The restrictive measures adopted in Italy have ignored the root of the problem, mainly the causes generating migration. It would be useful for the government to establish channels in the labor market so that immigrants could satisfy the labor requirements. Programs should be established to fulfill the labor shortage to help in the integration of immigrants. The absence of such programs only encourages irregular migration.³¹⁸ By focusing on the labor market, it makes it easier for Italians, who are ingrained with anti-immigrant sentiments, to be more accepting of immigrants because they are being used in a sector of the economy where they are desperately needed.

CONCLUSION

The Bossi Fini law reflects the rise of nativism and racism throughout Europe. By scapegoating immigrants, particularly immigrants of color, the Italian right-wing parties, as well as laws such as Bossi Fini, have garnered much support. There is no doubt that Italy needs a law addressing the rise in immigration. However, the law should integrate the principles of non-discrimination, which are lacking in Bossi Fini.

318. See *supra* n.223 (putting forth policy proposals and stating that ignoring importance of labor only leads to more illegal migration).