

2015

The Case for 'Firewall' Protections for Irregular Migrants: Safeguarding Fundamental Rights

Bethany Hastie

Allard School of Law at the University of British Columbia, hastie@allard.ubc.ca

Follow this and additional works at: http://commons.allard.ubc.ca/fac_pubs



Part of the [Human Rights Law Commons](#), and the [Immigration Law Commons](#)

Citation Details

François Crépeau & Bethany Hastie, "The Case for 'Firewall' Protections for Irregular Migrants: Safeguarding Fundamental Rights" (2015) 2-3 Eur J Migr & L 157-183.

This Article is brought to you for free and open access by the Faculty Publications at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.

The Case for ‘Firewall’ Protections for Irregular Migrants

Safeguarding Fundamental Rights

*François Crépeau and Bethany Hastie**

Faculty of Law, McGill University, Chancellor Day Hall, 3644 Peel Street,
Montreal, Quebec, Canada H3A 1W9

**Corresponding author, e-mail: bethany.hastie@mail.mcgill.ca*

Abstract

The issue of irregular migration is experiencing heightened attention in political, social and legal arenas. While deterrence and crime-control discourse and practices dominate current approaches to irregular migration, this article seeks to focus on the problematic neglect of the treatment of irregular migrants in destination countries, in relation to their ability to access fundamental rights and basic public services. This article will put forth an argument for the establishment of firewalls – a separation between immigration enforcement activities and public service provision. This article will canvass existing trends and practices that have both contributed to the erosion of firewall protections, and have built and maintained meaningful firewalls between immigration and public service provision.

Keywords

Irregular migration – firewalls – immigration enforcement – fundamental rights

1 Introduction

The issue of irregular migration is seeing heightened political, social and legal attention in recent years, particularly in Europe with the apparent increase in fact and visibility associated with maritime arrivals. Responses in the legal, political and social arenas have focused significantly on deterring, controlling and

criminalising migration, with little attention paid to the situation of irregular migrants already settled in destination countries. This article seeks to address the neglect of this situation, and the negative impact of a migration-control framework on irregular migrants' abilities to access basic public services in the countries in which they are living. Contrary to the existing trends concerning migration- and crime-control models for immigration enforcement, this article will set out an argument for 'firewalls' – the separation of immigration enforcement activities from public service provision, and will argue for the necessity of this approach, both for upholding migrants' fundamental rights, and in relation to broader social and public goals.

Irregular migrants are increasingly associated with 'criminality' despite the fact that their underlying reasons and causes of irregularity are quite diverse, as are their potential future trajectories. Irregular migrants can be defined generally as a non-citizen who resides in a state without currently valid administrative status. However, 'irregularity' can be the product of vastly different scenarios. Migrants who are irregular have not always crossed an international border 'illegally'; they may have arrived to a state on a temporary tourist, student or worker visa.¹ They may have found themselves stranded while transiting through the state and trying to access another country.² Similarly, irregular migrants may have many future trajectories: their status may be regularized through a number of mechanisms;³ they may remain in a state long-term without detection or deportation;⁴ or, they may move on at some point or return to their origin country.

The increasing conflation of irregular migration with criminality has resulted in migrants being driven underground in many ways. In particular, an increasing trend in many Global North countries sees immigration enforcement officials carrying out operations where basic public services are provided, and requiring public service providers to report immigration status to immigration authorities. As such, access to basic public services, such as health care,

1 F. Cr peau (2014), Protecting Migrants' Rights: Undocumented Migrants as Local Citizens, in: F. Cr peau and C. Sheppard (Eds), *Human Rights and Diverse Societies: Challenges and Possibilities*, Newcastle upon Tyne: Cambridge Scholars Publishing, pp. 201–212, at 204.

2 *Ibid.*

3 H. Motomura, 'Immigration Outside the Law', 108 *Columbia Law Review* (2008) 2037–2097, at 2048–2051.

4 *Ibid.* See also, G. Cutting and J. Carens, When Immigrants Lose Their Human Rights, *The Stone*, *The New York Times* (25 November 2014), available online at <http://opinionator.blogs.nytimes.com/>.

are becoming increasingly difficult for irregular migrants who have reason to suspect and fear detection and deportation in attempting to access such services. Migrants might not try to register their children in schools if schools officials communicate their immigration status. Migrants might not seek health care or seek it only very late if health care officials can denounce them. Migrants who face exploitation in their work place will not call labour inspectors if the latter's first reflex is to check their immigration papers. Migrants who are victims of family violence will not call social workers if this might lead to their deportation. Migrants who witness or suffer violence or crime may not come forward if the police might arrest and deport them in the process.

Health care professionals, school personnel, social workers, labour inspectors, local police officers, and many other professionals and civil servants come into daily contact with migrants. They should be able to serve them as members of the community and therefore accomplish the public service mission of their trade. However, in the past decades, immigration enforcement authorities have often enlisted other public services as auxiliaries in the search for irregular migrants. In many jurisdictions, labour inspectors, local police officers, school authorities are routinely required to check the immigration status of the persons they encounter and whom they suspect might be irregular migrants.

This article presents the reasoning in favour of establishing firewalls between immigration enforcement and public services. Section 2 starts by setting out the fundamental rights that migrants possess under both international and European law. Section 3 then outlines what firewalls are and how they protect the fundamental rights existing under law. Section 4 explores how information sharing between agencies in the context of the securitisation of immigration policies is leading to further marginalisation of many migrants. Finally, Section 5 outlines a number of examples demonstrating how respecting, protecting and promoting the rights of all migrants, regardless of the migration status, are best implemented through the establishment of firewalls.

2 Fundamental Rights of Migrants under International and European Law

Before engaging in the substantive discussion which focuses this article, namely the idea of firewalls, it is first important to identify the rights and entitlements migrants do have under international and European law. This section thus sets out briefly the current state of the law on fundamental human rights

at the international and European levels, in order to ground the justification for, and analysis of, firewall protections.

2.1 *Rights under International Law*

The rights to which migrants are entitled – irrespective of status – under international law are well-known and understood. Several international treaties make-up what the Office of the High Commissioner for Human Rights terms ‘core human rights instruments’, including both general instruments establishing fundamental human rights, namely, the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*,⁵ and the *International Covenant on Economic, Social and Cultural Rights*,⁶ and specific treaties addressing an issue relevant to migration or categories of migrants, including the following: *International Convention on the Elimination of All Forms of Racial Discrimination*; *Convention on the Elimination of All Forms of Discrimination against Women*; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; *Convention on the Rights of the Child*;⁷ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*; *International Convention for*

5 GA Res 2200A(XXI), OHCHR, 1966. Under this instrument, a select number of rights are reserved for citizens (such as the right to vote under Article 25) and/or for ‘lawfully residing aliens’ (such as the right of movement and to choose a residence under Article 12). See UN Human Rights Committee, *CCPR General Comment No. 15: The position of aliens under the Covenant*, 11 April 1986. See also, European Union Agency for Fundamental Rights (EU FRA) (2011), *Fundamental Rights of Migrants in an Irregular Situation in the European Union*, available online at <http://fra.europa.eu/>, at 21.

6 GA Res 2200A(XXI), OHCHR, 1966. Under this instrument, no distinction is made on the basis of nationality or legal status in respect of the rights set out therein. However, the interpretation of social rights, particularly, has ‘proven controversial’. The UN Declaration on *The Human Rights of Individuals who are not Nationals of the Country in which They Live* limited the application of social rights to migrants lawfully residing in a territory. However, three General Comments made by the Committee on Economic, Social and Cultural Rights later specified a right to health care and basic education, regardless of immigration status. See: EU FRA (2011), *supra* note 5, at 21.

7 The Convention on the Rights of the Child (CRC) also has broad scope. In Article 2 it states that its provisions apply to every child in a signatory state: ‘without discrimination of any kind irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status’ (italics added). General Comment No. 6 of the Committee on the Rights of the Child further specified that the rights enshrined in the CRC, if not explicitly stated otherwise, apply to all children irrespective of their status. EU FRA (2011), *supra* note 5, at 22.

*the Protection of All Persons from Enforced Disappearance; and Convention on the Rights of Persons with Disabilities.*⁸

Together, these instruments, along with several core International Labour Organization instruments,⁹ provide a number of fundamental rights and guarantees to migrants, regardless of their immigration status, including:

- (i) the right to life, liberty and security of the person, the right to be free from arbitrary arrest or detention, and the right to seek and enjoy asylum from persecution;
- (ii) the right to be free from discrimination based on race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status;
- (iii) the right to be protected from abuse and exploitation, the right to be free from slavery and involuntary servitude, and the right to be free from torture and from cruel, inhuman or degrading treatment or punishment;
- (iv) the right to a fair trial and legal redress; and
- (v) the right to protection of economic, social and cultural rights, including the right to health, adequate standard of living, social security, adequate housing, education, and just and favourable conditions of work.¹⁰

Most of the instruments above have been ratified by European states, and together, the international, European and domestic legal standards are thus intended to provide a core set of fundamental human rights for migrants,

8 See EU FRA (2011), *supra* note 5, at 19–21; see also Y. Ktistakis (2013), *Protecting Migrants under the European Convention on Human Rights and the European Social Charter*, Council of Europe, Paris: Jouve, available online at <http://www.coe.int>, at 10.

9 See, e.g., *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, GA Res. 45/158, OHCHR, 1990; *Convention concerning Forced or Compulsory Labour*, 1 May 1932, 39 UNTS 55; *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87); *Worst Forms of Child Labour Convention*, 1999 (No. 182); *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111). See also, ILO (2002) *The International Labour Organization's Fundamental Conventions*, Geneva: ILO.

10 COE (2013), *supra* note 8, at 10, citing also Global Migration Group (2010) *Statement of the Global Migration Group on the human rights of migrants in irregular situation*. In respect of sub-section (ii) on the list, see COE (2013), *supra* note 8, at 14–15. Relatedly, see Commissioner of Human Rights, Council of Europe (2007) *The Human Rights of Irregular Migrants in Europe*, CommDH/IssuePaper (2007) 1, at 13 (COE 2007).

regardless of status, in respect of basic issues such as health care, education, housing, employment, and other public services.

2.2 *Rights at the Regional Level: European Statutes and Jurisprudence on the Rights of Irregular Migrants*

At the European level,¹¹ rights applicable to irregular migrants are found in a broad array of instruments, though primarily under the *European Convention on Human Rights*,¹² the *European Social Charter (and revised Social Charter)*,¹³ and the *Charter of Fundamental Rights of the European Union*.¹⁴

Under the *European Convention on Human Rights* (ECHR), Article 3, which protects against torture or inhumane and degrading treatment, and Article 2, which guarantees a right to life, have been particularly instrumental in advancing certain rights for migrants.¹⁵ A right to health, specifically, is protected by virtue of Articles 2 and 3 of the ECHR.¹⁶ As concerns the right to health, the European Court of Human Rights has interpreted the obligation of states as including a duty to make health care available to their whole population, the denial of access to health care possibly implicating a violation of Article 2.¹⁷ In addition to the right to health, the right to education is expressly included within the ambit of Article 2, Protocol 1 of the ECHR.¹⁸ Here, the European Court of Human Rights has ‘raised the right to education to one of the “most fundamental values of the democratic societies making up the Council of Europe”, and, as such, constitutes a right to which *every person* is entitled.’¹⁹

11 This section includes a review of both the Council of Europe instruments (European Convention on Human Rights and the European Social Charter) as well as European Union instruments (including the Charter on Fundamental Rights, as well as several other instruments and directives).

12 *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

13 *European Social Charter*, 18 October 1961, ETS 35; *European Social Charter (Revised)*, 3 May 1996, ETS 163.

14 *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02.

15 EU FRA (2011), *supra* note 5, at 23.

16 COE (2013), *supra* note 8, at 56.

17 COE (2013), *supra* note 8, at 56–57. Regarding the denial of health care, see also: ECtHR, *Cyprus v. Turkey* (GC), 10 May 2001, para. 219; ECtHR, *Powell v. the United Kingdom*, Application No. 45305/99, decision, 4 May 2000; ECtHR, *Nitecki v. Poland*, Application No. 65653/01, decision, 21 March 2002.

18 COE (2013), *supra* note 8, at 61.

19 COE (2013), *supra* note 8, at 61 (emphasis added). See also ECtHR, *Timishev v. Russia*, 13 December 2005, para. 64.

In addition, Article 14 of the ECHR, protects against discrimination on the grounds of 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' 'Other status' has been interpreted by the European Court of Human Rights as including, 'age, disability, economic and social status, health situation, marital status, nationality, sexual orientation and gender identity.'²⁰

The *European Social Charter* (ESC) and *European Social Charter (Revised)* (ESC(r)) set out in much greater detail the scope of economic, social and cultural rights for individuals within member states. While the ESC Appendix specifically extends application only to 'lawfully present' foreigners, certain rights have been extended to all migrants in a member state territory, regardless of status.²¹ Specifically, following a similar path to that taken under the ECHR, the European Committee on Social Rights has extended a right to both medical assistance and basic education, as well as to a right to shelter (at minimum, as regards the last right, in relation to children with irregular status).²² Regarding a right to health, and access to health care, this has been affirmed at the European level as fundamentally linked to, and a 'prerequisite' of 'the preservation of human dignity.'²³ Relatedly, the right to education, granted under Article 17 of the ESC(r) has been interpreted to include all children, regardless of immigration status.²⁴ Finally, as concerns the right to housing or basic shelter, the Committee for Economic Social and Cultural Rights has determined that forced evictions carried out solely on the basis of irregular migration status violates the rights enshrined under the ESC, and can be considered a 'disproportionate response by the state in its attempts to control irregular migration.'²⁵

20 COE (2013), *ibid.*, at 14–15.

21 See EU FRA (2011), *supra* note 5 at 24.

22 See *ibid.*, at 24 and 59, citing also ECSR, *FIDH v France*, Complaint No. 14/2003, merits, 3 November 2004, and ECSR, *Defence for Children International v the Netherlands*, Complaint No. 47/2008, merits, 20 October 2009. See also, Ktistakis (2013), *supra* note 8 at 48, regarding restriction of medical treatment for children, citing ECSR, *International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003, merits, 3 November 2004, para. 30. See also ECSR, *Conférence of European Churches v the Netherlands*, Complaint No. 90/2013, 10 November 2014. Regarding a right to shelter, see also Ktistakis (2013), *supra* note 8, at 48–51.

23 Ktistakis (2013), *ibid.*, at 54–55, citing also *FIDH v France*, *ibid.*

24 Ktistakis (2013), *supra* note 8, at 59–60, citing ECSR (2010), *COHRE v. Italy*, Complaint No. 58/2009, merits, 25 June, para. 33.

25 EU FRA (2011), *supra* note 5 at 41, citing CESCR (1991), *General Comment No. 4: The right to adequate housing (Article 11(1))*, 13 December, para. 18.

The *Charter of Fundamental Rights at the European Union* (EU Charter) enshrines rights and principles largely to ‘everyone’, and thus irrespective of migration status. A limited number of rights, such as consular protection (Article 46), certain political rights (Articles 39 and 40), social security benefits (Article 34(2)), freedom of movement (Article 45), and access to the labour market (Article 15) are reserved for citizens and lawful residents.²⁶ In addition, the EU Charter replicates the right of freedom from discrimination, under Article 21, and includes ‘additional grounds’ such as ‘ethnic origin, genetic features, disability, age and sexual orientation.’²⁷

In addition to the provision and extension of certain fundamental rights to migrants, irrespective of migration status, particular instruments exist which seek to protect the workplace and labour rights of migrants in a similar manner. The *Treaty on the Functioning of the European Union*, for example, which sets out measures to ‘combat exclusion and to protect the rights of workers’ under Articles 151 and 152, does not expressly restrict application to nationals or lawfully present foreign nationals.²⁸ The *Employers Sanctions Directive* also provides for the rights of migrant workers in an irregular situation to claim outstanding remuneration or to lodge complaints against an employer.²⁹ In addition, the 1989 *Directive on Safety and Health at Work* does not restrict its definition of ‘worker’, or its application, to ‘regular’ workers.³⁰

Overall, it is clear that existing international and European law sets out a number of fundamental rights to which migrants are entitled, irrespective of their immigration status, including rights in relation to health, education, housing and employment, and developed from the principles of fundamental rights to life, to freedom from torture or inhumane or degrading treatment, and to freedom from discrimination. These fundamental rights and the basic public services to which they relate are of primary importance in understanding, then, the purpose and design of firewalls as ensuring migrants have effective

26 See EU FRA (2011), *supra* note 5, at 24.

27 Ktistakis (2013), *supra* note 8, at 14–15.

28 EU FRA (2011), *supra* note 5, at 25 and 47.

29 Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 on providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ 2009 L 168/24, cited in EU FRA (2011), *supra* note 5 at 25. See also, CJEU, *O. Tümer v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, Case No. C-311/13, decision, 5 November 2014. Concerning remuneration claims, see Article 6 of the Directive. The requirement for employers to pay fair remuneration can also be found under Article 5 of the 1989 Community Charter of the Fundamental Social Rights of Workers. See EU FRA (2011), *supra* note 5 at 48.

30 EU FRA (2011), *ibid.*, at 47.

access to these services. The next section will explain and discuss the concept of firewalls.

3 Firewalls as Implementing Basic Rights and Protection

At the core, the idea of firewalls seeks to ensure effective access to the rights, entitlements and protections listed above. Firewalls are designed to ensure, particularly, that immigration enforcement authorities are not able to access information concerning the immigration status of individuals who seek assistance or services at, for example, medical facilities, schools, and other social service institutions. Relatedly, firewalls ensure that such institutions do not have an obligation to inquire or share information about their clients' immigration status.

Firewalls of this nature are important because of the well-known fear and apprehension migrants, particularly irregular migrants, have in approaching or using services – particularly those located within the formal governance structure of a community – where they believe that they may be required to identify and confirm their (lack of) status. At the foundation, it is well-documented that migrants, particularly those in an irregular situation or with a precarious legal status, are unlikely to exercise their formal rights when they know, or perceive, that institutions cooperate with immigration enforcement authorities.³¹ Relatedly, measures to control and enforce migration laws can negatively impact migrants' abilities to enjoy their basic rights where migrants perceive that contacting the authorities regarding those basic rights may imply a risk of being detected and arrested on account of their legal status: this discourages them from, for example, contacting services such as the police, health care, legal aid, or school, among others.³² Yet, many migrants may regularize their status in the future; many others will not be otherwise detected and deported, thus becoming long-term, if undocumented, residents.³³ Substantive access to basic services, and the existence of meaningful firewalls to facilitate this access, is a vital necessity for these communities.

31 EU FRA (2011), *supra* note 5 at 54; J. Carens, 'The Rights of Irregular Migrants', 22 *Ethics & International Affairs* (2008) 163–186, at 167.

32 See, *inter alia*, EU FRA (2011), *ibid.*, at 39; Carens (2008), *ibid.* at 167; Cutting and Carens (2014), *supra* note 4.

33 See Motomura (2008), *supra* note 3, at 2048–2051.

Firewalls, in both their literal and metaphorical sense, seek to achieve a single, primary goal: the protection of the spheres of 'social services'³⁴ from interaction with, or obligations to, immigration and police authorities in respect of identifying, documenting or reporting on immigration status. In this way, the goal and function of firewalls is to create an environment in which migrants can feel safe in accessing and enjoying their basic rights and entitlements, and in approaching and using the existing services in that regard, without fear of denunciation to immigration enforcement authorities or perceived risks of detection or identification of their irregular status. It is specifically, in part, because migrants possess recognised basic rights and entitlements that their access to them should not be eroded through partnership or participation with immigration enforcement and other authorities whose primary aim is to detect and expel irregular migrants from the territory.³⁵ Thus, as a 'legal principle', the firewall seeks to establish that 'no information gathered by those responsible for protecting and realizing basic human rights can be used for immigration enforcement purposes' so that 'people will be able to pursue their basic rights without exposing themselves to apprehension and deportation.'³⁶

Firewalls are further important because, in the case of some institutions, information about their clientele must be gathered in order to carry out their mandates.³⁷ Thus, because migrants know they will be required to provide, for example, contact information, securing this against access by immigration enforcement and related authorities is of heightened importance. In fact, this type of situation should be protected by personal information, privacy and data protection laws.³⁸ These, indeed, are the more literal depiction of firewalls as digital information and data protection, which are premised on a closed-system of information, inaccessible to those outside its structure, and under which information cannot be shared or used for purposes other than those it was gathered for. With the advent of digital information and communication technologies, the 'potential for exchange of personal information, both basic data necessary to identify an individual and additional data that

34 Broadly defined as encompassing a wide array of services, such as health services, social work and family services, labour inspection, legal aid, education, housing authorities or services, income assistance agencies, settlement agencies, community, NGO or other advocacy organizations, and others.

35 See, i.e., Carens (2008), *supra* note 31, generally concerning arguments in relation to the importance of accessing rights within a territory regardless of the right of the state to expel irregular migrants from its territory.

36 Carens (2008), *ibid.*, at 167.

37 See, *inter alia*, EU FRA (2011), *supra* note 5, at 45.

38 *Ibid.*

may include information that the individual regards as private and sensitive, raises a number of issues related to the privacy of personal information held by government.³⁹ While privacy rights are not similarly characterized as fundamental, like the rights explored above, they nonetheless remain important to ideas of 'personal autonomy and dignity in a modern democratic state.'⁴⁰ However, because of the non-absolute character of privacy rights, debate over the appropriate balance, or 'trade-off', between protecting privacy and promoting the collective good is heightened,⁴¹ and especially so in the current political climate, with its significant focus on national security.⁴²

Firewalls are important, however, not only for the ability for migrants to access and enjoy their basic rights and entitlements, but also for the wider public benefits that are realized when migrants are not driven underground. In effect, firewalls create an environment in which public services can fully perform their mission towards the whole of the community they serve, without interference from immigration enforcement authorities, an interference which could considerably reduce the ability of public services to effectively reach out to important sections of the community. Two prominent examples are typically put forth in this regard: the cooperation of irregular migrants who may witness or have information about a crime; and, the reduction or containment of contagious diseases within the realm of public health.⁴³ Indeed, there are a wide range of public benefits beyond securing law and order (under the criminal law), and sustaining a healthy public environment.

Another example of the importance of firewalls can be found in the progress of workplace conditions. Where, or if, migrants would feel comfortable coming forward regarding labour law violations, this could contribute to a reduction in the overall downward trends in respect of wages and working conditions in certain economic sectors, which experience such trends partly because of the readily available pool of silent and exploitable irregular migrant workers. In this arena, unions have played an important role and have done so, in some instances, on this basis – that *inclusion* of migrant workers and promotion of

39 R. Cullen, 'Culture, identity and information privacy in the age of digital government', 33 *Online Information Review* 33 (2009) 405–421, at 405.

40 Cullen (2009), *supra* note 39, at 407.

41 *Ibid.*

42 See, i.a., P. Swire (2006), Privacy and Information Sharing in the War on Terrorism, *Villanova Law Review* 41, 951–980. These arguments will be further taken up in Section 4.1 below, concerning the primary justifications put forth in respect of eroding firewall protections.

43 See, *inter alia*, Carens (2008), *supra* note 31, at 168.

their rights, in turn, advances the status and conditions of work for *everyone*. In other words, ‘denying irregular migrants the rights regarding working conditions that citizens and legal residents enjoy makes it more difficult to maintain these rights for citizens and legal residents.’⁴⁴ The same consequence can be seen not only with respect to *possession* of rights, but *access* to them. Yet, migrant workers – particularly those with irregular status – are, of course, very hesitant to report workplace violations, as noted above more generally.

In order to demonstrate the urgency and importance of the need for firewalls in relation to migration status, the next section will outline the consequences of *not* having firewalls, before moving on to discuss promising practices in relation to the construction of effective and meaningful firewalls. Each of these sections will focus primarily on the European context, though also drawing comparatively on the United States and Canada, both of whom have experienced similar trajectories in this regard.

4 The Erosion of Human Rights for Migrants in the Era of Information Sharing and Securitisation of the Border

The erosion of firewalls, and access to fundamental rights for migrants, cannot be separated from the broader context in which they are being retracted, nor from the broader context of ideas about ‘membership’, as the foundational basis upon which rights are retracted from in the migration context, specifically. The justifications put forth for the erosion of firewalls, as well as the consequences of their collapse, contain numerous significant implications, not only for individual migrants, but for wider communities and, arguably, the very foundation of democracy and the rule of law. This section will proceed to explore, first, the justifications put forth in respect of the erosion of firewalls. This section will then go on to document the myriad ways in which we can witness the collapse of firewalls in Europe, as well as in Canada and the United States. The final sub-section will address the consequences flowing from this collapse of firewall protection.

4.1 *Underlying Justifications for the Erosion of Firewall Protection*

Within the context of social and national membership, access to certain fundamental rights and freedoms, and to services which promote those rights and freedoms, are considered entitlements of individual members. These include, for example, a right to health care and access to health care, a right to basic

⁴⁴ Carens (2008), *supra* note 31, at 176.

education, freedoms of religion, political thought and expression, and rights of protection against information sharing, or in other words, rights concerning privacy of information.⁴⁵ While the latter are not characteristic of the same absolute nature as the former,⁴⁶ as discussed in Section 3, they nonetheless remain important, particularly in the spheres of health care, employment, social services and education, and especially so for irregular migrants.

It is the basis upon which social and national membership is constituted which enables and facilitates the exclusion of irregular migrants, particularly, from belonging. This is so despite many of these rights being characterized as 'human rights', and thus not dependent on citizenship as the defining criteria of membership.⁴⁷ Yet, as 'outsiders', arguments are often put forth that migrants either *do not* have rights, or *should not* have rights, by virtue of their unlawful presence in the community or territory.⁴⁸ This, in turn, is premised on the dominant representation today of the irregular migrant as 'criminal', which directly provides a basis on which to advance the justification of the need to 'combat' irregular migration and protect territorial and sovereign integrity from the 'criminals' who are irregular migrants.

Together, concerns and panic about the 'floods' of irregular migration, national security, and fragility of the welfare State have acted as powerful catalysts in the retreat of access to rights and services, and to protection and privacy with respect to information sharing, in respect of irregular migrants, specifically, and in some cases, migrants more broadly.⁴⁹ The link between irregular migration and criminality, specifically, is strong in advancing a response which restricts access to rights and protections under domestic law, and has been compounded by heightened concerns over national security in the post 9/11 age.⁵⁰ Within these contexts, the erosion or retreat of firewall protections for irregular migrants, specifically, is seen as necessary.

45 Re privacy protections, see generally Cullen (2009), *supra* note 39, at 405–407.

46 *Ibid.*

47 See, *inter alia*, Carens (2008), *supra* note 31.

48 See, *inter alia*, Carens (2008), *supra* note 31, at 182. See also Motomura (2008), *supra* note 3, at 2044.

49 See, *inter alia*, B. Hastie and F. Crépeau, 'Criminalising irregular migration: the failure of the deterrence model and the need for a human-rights-based framework', 28 *Journal of Immigration, Asylum and Nationality Law* (2014) 213–236, for a more detailed analysis of the constructed 'threats' associated with irregular migration. See also Motomura (2008), *supra* note 3, at 2044.

50 See V. Nanda, 'International Migration: Trends, Challenges, and the Need for Cooperation Within an International Human Rights Framework', 17 *ILSA Journal of International and Comparative Law* (2011) 355–378, at 359.

The overall goal, when it comes to policies and activities which erode these protections, is often centred on the idea of deterrence: '(t)he underlying principle is that the state should do nothing to facilitate the presence of irregular migrants within its territory or to reward those who have violated immigration laws, and indeed that it should actively make life more difficult for irregular migrants where it can do so in order to encourage those present to go home and to discourage new ones from coming.'⁵¹ This, as will be seen in Section 4.2 below, is a significant driving force underlying the specific policies and activities documented therein.

With this context in mind, in which irregular migrants are represented as criminals, and the primary goal of the state is exclusion and expulsion, the next section will establish what this looks like 'in practice' concerning the erosion and collapse of firewall protections for irregular migrants, before going on to also establish in Section 4.3 how the justifications and rationales put forth, and activities carried out, not only fail to achieve their objectives, but in many ways, undermine both their own goals and broader goals for the communities and society in which these policies and activities operate.

4.2 *A Survey of Eroded Firewall Protections*

The sites and manners in which firewalls are either absent, or have been eroded, in protecting the fundamental rights and privacy of information for irregular migrants are numerous and widespread. From coordinated vehicle and identification checks, to full-scale 'self-deportation' schemes, states are findings numerous ways to infiltrate the social sphere in search of irregular migrants. This section will outline and discuss the dominant trends identified in respect of eroded firewall protections for migrants.

4.2.1 Identification Checks

Random and coordinated checks for identification and validation of lawful residence are widespread throughout Europe and United States, and have also been tested in Canada. In Europe, routine traffic stops are used to check and validate immigration status.⁵² In addition, ID checks at a variety of public locations, including public transport, schools, health centres, and religious facilities have been reported in Europe.⁵³ Where ID operations are known to occur close to such places, this may deter migrants from approaching or using these

51 Carens (2008), *supra* note 31, at 182. See also Hastie and Crépeau (2014), *supra* note 49.

52 See EU FRA (2011), *supra* note 5, at 40.

53 *Ibid.*

services.⁵⁴ In addition to random ID checking, reports in Europe confirm that such operations may target particular nationalities or ethnicities, raising concerns about discriminatory approaches to policing in this regard.⁵⁵

In the United States, the controversial immigration enforcement laws passed in Arizona included a requirement for state and local police to ascertain the immigration status of individuals they encounter, and to further share that information with federal authorities.⁵⁶ This requirement sparked significant controversy and concern from civil rights and community-based advocates who objected that such laws would 'enable racial profiling, improper arrest, and violations of due process' as well as having the effect of 'driv(ing) wedges between local police and immigrant communities.'⁵⁷ Resistance to the proposed laws, and particularly the requirement to actively seek out the immigration status of individuals, was also voiced from within local police ranks.⁵⁸ While other components of the controversial laws were struck down by the US Supreme Court, the requirement for police to validate the immigration status during any lawful stop, arrest or detention of individuals, was upheld.⁵⁹

In Canada, a recent initiative which saw the Canadian Border Services Agency join local police and transportation authorities in using random vehicle safety checks in order to also check immigration status also sparked significant controversy.⁶⁰ During this operation, 21 individuals were arrested on the basis of violations under the *Immigration and Refugee Protection Act*.⁶¹ Several weeks later, and due to the controversy and objections raised after the initial

54 *Ibid.*

55 *Ibid.*

56 A. Kalhan, 'Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy', 74 *Ohio State Law Journal* (2013) 1105–1165, at 1106.

57 *Ibid.*

58 See, *inter alia*, Arizona Association of Chiefs of Police (21 April 2010), AACOP Statement on Senate Bill 1070, Law Enforcement Engagement Initiative; Police Executive Research Forum (2014), *Local Police Perspectives on State Immigration Policies*, Washington, DC: Police Executive Research Forum, at 4–5; P. Slevin (2010), 'Arizona law on immigration puts police in tight spot', *The Washington Post* (30 April 2010), available online at <http://www.washingtonpost.com>.

59 *Arizona v. United States*, 132 S. Ct. 2492 (2012). See also Police Executive Research Forum (2014), *ibid.*, at 7.

60 CBSA immigration arrests during spot checks stir controversy, *CBC News* (16 August 2014), available online at <http://www.cbc.ca/news>.

61 *Ibid.*

operation, cooperation between the Ontario Ministry of Transportation and the Canadian Border Services Agency was definitively suspended.⁶²

4.2.2 Mandatory Reporting Requirements and Database Sharing

In addition to identification checks by police and immigration authorities, mandatory reporting requirements and database sharing initiatives seek to 'co-opt' social service and humanitarian actors into the policing efforts in 'combating' irregular migration. Where irregular entry or presence is a crime, as it is in several European states, individuals, as well as public authorities and service providers, may have an obligation to report this crime to law enforcement.⁶³ In some other cases, specific public bodies, including health authorities, schools and landlords will have a duty to report an individual's irregular migration status.⁶⁴ In such cases, reporting requirements will undermine access to services for irregular migrants, who will have reasonable fear of detection and arrest.⁶⁵

Within Europe, reporting obligations appear to be complicated by the wording and potential interpretation of the *Facilitation Directive*, which criminalises the assistance of irregular entry and/or presence in member states. This appears to have had a particular impact in relation to housing and accommodations for irregular migrants. In several countries, individuals who rent or provide accommodations to irregular migrants can be punished, either through laws which expressly prohibit the renting of accommodations to migrants, or through the more general offences of facilitating entry or stay.⁶⁶ In some other European states, law enforcement authorities 'must be notified of the presence of foreigners in accommodations, which in practice makes it difficult to legally host, sublet or rent to migrants in an irregular situation.'⁶⁷ More directly, the Glasgow Housing Association recently agreed to an information sharing deal with the UK Home Office to identify and report irregular migrants who apply for housing, thus exposing irregular migrants to a position of enhanced vulnerability in respect of shelter.⁶⁸

62 R. Brennan, 'Transport Ministry cuts ties to border agency after migrant blitz', *The Toronto Star* (25 September 2014), available online at <http://www.thestar.com>.

63 EU FRA (2011), *supra* note 5, at 42.

64 See *ibid.*, at 44.

65 See *ibid.*, at 43.

66 EU FRA (2011), *supra* note 5, at 61–62.

67 *Ibid.*, at 62.

68 H. Spurr, 'Social landlord agrees immigration deal with the Home Office', *InsideHousing.co.uk* (21 February 2014), available online at <http://www.insidehousing.co.uk>.

Formalized database and information sharing structures are further used to erode firewall protections for irregular migrants. In the United States, the 'Secure Communities' program exemplifies this collapse. This program 'integrates the criminal records databases maintained by states and the FBI, which are routinely queried by police conducting background checks on the individuals they arrest, with the immigration databases maintained by the Department of Homeland Security.'⁶⁹ As a result, the DHS is able to 'identify potentially deportable noncitizens in state or local custody.'⁷⁰ The Secure Communities program is, in other words, able to 'automatically determine the immigration status of every person nationwide who is arrested (...) in order to identify potential immigration law violators.'⁷¹ This type of information sharing has significant implications, not just for irregular migrants, but for the broader communities in which they reside, in potentially contributing to a more general perceived fear or resistance to approaching law enforcement authorities when a crime has been committed, and further driving a 'wedge' between authorities and the communities in which they operate.

However, even where there may be easier justification for the sharing of law enforcement authorities' databases and information, data exchange practices are not limited to these bodies. In Europe, evidence of some data exchange practices between public bodies and immigration authorities exists.⁷² In limited circumstances, legal loopholes may also exist which enable access by immigration or related authorities of records that would otherwise be intended to be inaccessible under data protection laws. In the UK, the Home Office made use of a 'little-noticed exemption in the rules to access patients' non-clinical records, without any need for a court order' from within the NHS system.⁷³

4.2.3 Inspections and Raids

Another way in which firewall collapse can be witnessed is in respect of inspections and raids conducted for the purpose of identifying irregular migrants. While such activities can be considered appropriate for immigration authorities, it is the *sites* of these raids and inspections which raise concerns in relation to the protection of fundamental rights of migrants, and in producing problematic consequences for the communities in which they reside. The

69 Kalhan (2013), *supra* note 56 at 1108.

70 *Ibid.*

71 *Ibid.*

72 EU FRA (2011), *supra* note 5 at 45.

73 Home Office (2014), Home Office accessing NHS records to help track down illegal immigrants, *The Guardian* (13 July), available online at <http://www.guardian.co.uk>.

sites of such inspections and raids, at workplaces and in close proximity to the kinds of social and public services which irregular migrants may have need of, create, again, a situation of fear and apprehension in approaching and using such necessary public services.

In Europe, some reports suggest that police and immigration authorities specifically target public services, including schools and hospitals, to apprehend irregular migrants.⁷⁴ Such practices have a severe impact on the fundamental rights of irregular migrants, as the fear of detection and arrest will deter migrants from approaching public service providers, and thus from effectively accessing their rights.⁷⁵

In addition to targeting public service providers, workplace inspections and raids which involve immigration authorities are widespread throughout Europe, the US and Canada. The inclusion of immigration authorities in such inspection activities is particularly problematic because of the divided interests of the various actors involved. One could posit that the mission of labour inspectors is to ensure fair, safe and lawful working conditions and reduce exploitative behaviour on the part of employers: unfortunately, abuse or unsafe conditions are unlikely to be reported to labour inspectors, where other authorities, particularly immigration enforcement authorities, are involved, or where labour inspectors themselves are carrying out immigration enforcement duties.⁷⁶ In ‘almost all EU member states, workplace inspections are listed by civil society organisations as a policing measure used to detect migrants in an irregular situation.’⁷⁷ Thus, the overall goal of labour inspections is likely often undermined, and its activities ineffective.

4.3 *The Consequences of Not Having Firewalls*

The fear of being denounced as ‘illegal’ is the particular, powerful motivator for irregular migrants in not accessing their basic rights or necessary social services, and this fear is propelled forward directly by formal institutions and policies that aim to both increase (mandatory) identification of immigration status as a condition of access, and share that information with various authorities, typically police and immigration enforcement bodies. Thus, it is both the fear and knowledge that status will be specifically sought, and then shared with enforcement authorities, which prevents irregular migrants from

74 EU FRA (2011), *supra* note 5 at 41–2.

75 *Ibid.*, at 42.

76 *Ibid.*, at 40–41. See, relatedly, Motomura (2008), *supra* note 3, at 2052–2053.

77 EU FRA (2011), *ibid.*, at 40.

accessing basic services to which they should be entitled as a component of their fundamental human rights.

While policies and activities which erode firewall protections are often justified on the basis that they are necessary to effectively enforce and enhance immigration laws,⁷⁸ this stated objective – even if it is assumed that it is met through the policies and activities described – comes at a significant cost not just for irregular migrants, but for the wider communities in which they reside. In addition, despite claims that allowing access to basic services, without fear of denunciation, increases irregular migration, statistics do not appear to support this.⁷⁹

First, several of the policies and activities undertaken in the name of 'combating' irregular migration have the effect of further marginalising irregular migrants. These measures, which often aim to make the lives of irregular migrants more difficult, often only serve to drive them further underground and outside of their communities, but do not effectively prevent or decrease their entry or stay in a particular territory.⁸⁰ On the other hand, these measures do increase 'incentives to expand the informal economy (...) which reduced overall societal control over activities that the state wishes in principle to regulate.'⁸¹ They drive irregular migrants deeper under the control of criminal gangs and exploitative employers. Thus, while attempting or appearing to make efforts in relation to one goal (decreasing irregular migration), the state is simultaneously negatively contributing to other, broader, goals about its governance and regulation of society and communities.

In addition, the policies and activities that seek to erode firewall protections for migrants, combined with their underlying objective of deterring and 'combating' irregular migration, reproduces and propels forward widespread xenophobia, racism and discrimination amongst local populations.⁸² This can, in turn, at the community level, fuel further crime against migrants themselves, as well as contributing to increased tension between individuals and groups in society.

78 Carens (2008), *supra* note 31, at 182.

79 See, *inter alia*, PICUM (2013), *Submission to the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families. Day of General Discussion on the role of migration statistics for treaty reporting and migration policies*, Geneva: PICUM, available online at <http://www.ohchr.org/>, at 8.

80 See, *inter alia*, Carens (2008), *supra* note 31, at 182–183. See, relatedly, COE (2007), *supra* note 10 at 9–10.

81 Carens (2008), *ibid.*, at 182–183.

82 Nanda (2011), *supra* note 50, at 363. See also P. Pace and S. Shapiro (2009), *Migration and the Right to Health in Europe*, Brussels: International Organization for Migration, at 13.

These policies and measures also often violate basic, fundamental human rights, or access to them, including health care and education.⁸³ This, in turn, can have significant negative consequences for the broader communities in which irregular migrants reside. The issue of health care is perhaps the most striking, as denial of health care or effective access to it increases the risk of public health crises, and increases the cost of medical treatment (where, for example, a migrant will resist seeking medical assistance for an injury or illness until it becomes severe).⁸⁴ Similarly, as described earlier concerning labour standards, the erosion of firewalls and lack of protection for migrant workers can contribute to an overall decrease in the standards and conditions of work in a community, in turn producing negative economic consequences in a much broader way. Finally, as documented throughout this section, the collapse of firewalls has also produced a collapse in trust of law enforcement authorities, making individual police officers' ability to carry out their work, maintain law and order, and create safe communities more difficult.

Having established the numerous and widespread problems that results from the collapse of firewall protections, the next section will now explore promising practices in relation to the creation and maintenance of meaningful firewalls for irregular migrants.

5 Firewalls as Advancing Meaningful Protection, Promotion of Rights, and Prosperous Communities

As documented above, a number of obstacles – legal, practical, and social – ‘often prevent migrants, in particular undocumented migrants, from accessing basic essential services.’⁸⁵ Despite the widespread erosion and collapse of firewalls, several promising practices also exist which seek to enhance access to rights and participation in community life, and advance the overall goal of firewalls as separating and isolating the provision of public services from immigration enforcement authorities. Overall, meaningful firewalls thus recognize that ‘other legitimate interests, such as fundamental rights, public health concerns, fighting crime, legal certainty, (...) as well as social policy considerations

83 Nanda (2011), *ibid.*, at 370. See also Pace and Shapiro (2009), *ibid.*

84 See Pace and Shapiro (2009), *ibid.*

85 Social Platform (2013), *Position Paper on Migration: An opportunity for the EU*, available online at <http://www.socialplatform.org/>, at 10.

should also be taken into account when enforcing immigration law(.)⁸⁶ This section will thus set out a variety of promising practices identified which construct and maintain metaphorical and literal firewall protections for irregular migrants in accessing their basic rights and public services.

5.1 *Access to Services and Inclusion in Community Life*

Several initiatives seek to explicitly provide access to public services and facilitate participation in community life for migrants, irrespective of their immigration status. Recognizing the enhanced vulnerability and risk attending irregular status, and the impact of criminalization, the Tuscany region in Italy, for example, passed a law emphasizing the basic human rights of all immigrants and providing 'free access to healthcare and other forms of social assistance, such as meals at municipal cafeterias and beds in shelters.'⁸⁷ Under this law, migrants in the region can thus access basic rights and services without the attending fear of detection, arrest and deportation.

Access to health care, and the creation of firewalls to facilitate this objective, is achieved in various jurisdictions through a number of strategies. Several European states have taken various approaches to ensure the provision of emergency health care and related services. In Paris, Médecins du Monde operates 21 medical dispensaries for irregular migrants with the cooperation of local authorities.⁸⁸ Several European states further provide either partial or full access to health care for irregular migrants. Partial health care availability, in Belgium, Italy and the UK, provides 'explicit entitlements for specific services, and/or for specific sub-groups of UDM (undocumented migrants) (for example, children, pregnant women) and/or for a specific diagnosis (for example, medically necessary treatment) (...).'⁸⁹ Further, four European countries (France, Netherlands, Portugal and Spain) provide the same range of health care services and entitlements to irregular migrants as to nationals, where a variety of pre-conditions are met, including: 'proof of identity, residence,

86 EU Fundamental Rights Agency (2013), *Apprehension of migrants in an irregular situation*, available online at <https://fra.europa.eu>, preamble.

87 EU FRA (2011), *supra* note 5, at 43. See also S. Carrera and J. Parkin (2011), *Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union*, Brussels: Centre for European Policy Studies, available online at <http://cor.europa.eu/>, at 20.

88 *Ibid.*

89 U. Karl-Trummer, S. Novak-Zezula and B. Metzler, 'Access to health care for undocumented migrants in the EU: A first landscape of *NowHereland*', 16 *Eurohealth* (2010), 13–16, at 14.

destitution and minimum duration of stay.⁹⁰ Even where no explicit provision is made regarding health care services for irregular migrants, some states, such as Austria, operate on a 'functional ignorance' basis, allowing irregular migrants to access emergency health care services without inquiry regarding legal status.⁹¹ Similarly, in Italy, access to particular services and for particular populations is guaranteed, regardless of immigration status, including emergency care, prenatal and maternity care, vaccinations, preventive medicine programmes and in relation to infectious diseases.⁹²

The Toronto School Board in Toronto, Canada, has developed a 'don't ask, don't tell' policy concerning the immigration status of students in its schools.⁹³ This policy was passed in line with section 49.1 of Ontario's *Education Act*, which states that 'a person who is otherwise entitled to be admitted to a school and who is less than eighteen years of age shall not be refused admission because the person or the person's parent or guardian is unlawfully in Canada.'⁹⁴ Under this policy, schools do not inquire about a student's immigration status, nor do they share information or report to authorities where a student does have irregular status.⁹⁵ However, despite the passing of this policy in 2007, concerns remain about the substantive access that children have in enrolling for and attending public school.⁹⁶

Similar to the experience in Toronto, several local and regional authorities throughout Europe have extended the right to education for all children, irrespective of immigration status. For example, Florence, Torino and Genoa in Italy have publicly extended access to education by 'granting all children the right to attend nursery school regardless of immigration status.'⁹⁷ Similarly, the Hesse region in Germany has allowed children to enroll in school without proof of local residence since 2009, and several municipalities, including Frankfurt,

90 Karl-Trummer et al. (2010), *ibid.*, at 14. Regarding Spain, see also Carrera and Parkin (2011), *supra* note 87, at 20.

91 Karl-Trummer et al. (2010), *supra* note 89, at 15.

92 *Ibid.*, at 15–16.

93 Toronto school board pushes 'Don't Ask, Don't Tell' policy on immigration status, *CBC News* (3 May 2007), available online at <http://www.cbc.ca/news>. See also F. Villegas (2013), Getting to 'Don't Ask Don't Tell' at the Toronto District School Board: Mapping Competing Discourses of Rights and Membership, in: L. Goldring and P. Landolt (Eds), *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada*, Toronto, ON: University of Toronto Press, pp. 258–273; Crépeau (2014), *supra* note 1, at 208.

94 *Education Act*, RSO 1990, C-E.2, as amended by SO 1993, c11, s21.

95 *CBC News*, *supra* note 93. See also Villegas (2013), *supra* note 93.

96 *Ibid.*

97 CEPS (2011), *supra* note 87, at 19.

Hamburg and Munich have lifted the obligation of staff working in the education sector to report irregular migrant children in schools.⁹⁸ School authorities in Hamburg and Berlin, Germany, revised their data collection practices after parents' associations and other activists campaigned for data protection. Personal data are only retained at the server of each school, and 'any coding needed to process data for statistical requirements cannot be used by anyone other than a school official.' Further, it is forbidden to process data in relation to 'sensitive issues in a way that would allow individuals to be identified.'⁹⁹ Further, some cities in the Netherlands have extended practical access to education by covering school and related expenses for irregular migrant children who are otherwise unable to pay for items such as materials, sport clothing, and fees for school trips.¹⁰⁰ In Spain, prior to 2012, irregular migrants had full access to both the education and health care systems, 'with the only requirement being to enroll in the local registry denominated as *padrón*.'¹⁰¹

In several US cities, identity cards are now being issued without an obligation to establish immigration status.¹⁰² Such identity cards will enable migrants to access a wide array of public and social services available at the municipal level, including access to library services, signing leases and opening bank accounts, which typically rely on proof of local residence and which the identity cards will now be used to establish.¹⁰³ This kind of initiative will positively impact migrants by enhancing their integration and participation in the community and decreasing their fear of detection by or denunciation to immigration authorities. Relatedly, other states, such as Massachusetts, provide driver's licenses without a requirement of establishing immigration status.¹⁰⁴

Provision of legal assistance is another key area of need for irregular migrants, as it may lead many such migrants to be able to consolidate their

98 *Ibid.*

99 EU FRA (2011), *supra* note 5, at 45.

100 CEPS (2011), *supra* note 87, at 19.

101 *Ibid.*, at 20. A new law passed in 2012 (Royal Decree Act 16/2012, amending the Foreigners Act) limited access to health care for irregular migrants to only emergency services, except in the case of individuals under 18, and pregnant women. See I. Benitez, 'Health Care for Immigrants Crumbling in Spain', *Inter Press Service News Agency* (24 May 2013), available online at <http://www.ipsnews.net/>; PICUM (2012), *Spain: A step backward in the right to health care for all*, available online at <http://picum.org/>.

102 See, *inter alia*, K. Semple, 'New York City Council Expected to Approve 2 Plans Aiding Immigrants', *The New York Times* (24 June 2014), available online at <http://www.nytimes.com>. See also Hastie and Crépeau (2014), *supra* note 49; Crépeau (2014), *supra* note 1.

103 See, *inter alia*, Semple (2014), *supra* note 202.

104 Crépeau (2014), *supra* note 1, at 208.

administrative status and gain residency rights: allowing them to access legal aid is one effective way of reducing the number of irregular migrants and the prevalence of precarious living conditions for numerous individuals and families. Several municipalities in Europe have extended the provision of legal assistance and services to all individuals regardless of immigration status. For example, the city of Ghent in Belgium provides free legal advice to all migrants in cooperation with Information Point Migration, organised by the Integration Service of the city of Ghent and funded by the local government.¹⁰⁵ Similarly, United Services Union in Germany has been identified as a promising practice for its provision of legal assistance to irregular migrants.¹⁰⁶ Civil society organizations have also played a key role in providing legal advice and assistance, often partially financed with government funds, such as the Kalaayan charity in the UK, and Fedelatina (*Federación de Entidades Latino-Americanas de Cataluña*) in Barcelona.¹⁰⁷

5.2 *Creating and Clarifying Prohibitions on Information Sharing and Reporting Requirements*

Clarifying obligations of public authorities through an explicit prohibition on information sharing both assists public actors in carrying out their duties with certainty of their position and obligations, and contributes to a reduction in fear that irregular migrants may have in relation to approaching public services. Several promising practices also exist in respect of building firewalls to protect against information sharing and reporting requirements in respect of immigration status between public authorities. For example, the Organic Law on Data Protection in Spain prohibits the disclosure of personal data to police, except where the cases concerns a criminal offence that is punishable with imprisonment of more than one year.¹⁰⁸

Similarly, in some European states, some public service providers, such as education and healthcare authorities, are prohibited from reporting irregular migrants to the police, despite this constituting a crime in some jurisdictions.¹⁰⁹ For example, health and education authorities in Finland, Italy and the Netherlands have exemptions from reporting requirements.¹¹⁰ Similarly, changes to Germany's Residence Act, Section 87, adopted in 2011, extended an

105 Carrera and Parkin (2011), *supra* note 87, at 22.

106 *Ibid.*

107 *Ibid.*, at 23.

108 EU FRA (2011), *supra* note 5 at 54.

109 *Ibid.*, at 44.

110 *Ibid.*

exemption from the 'general duty to report' to schools, nurseries and educational facilities.¹¹¹ In Portugal, firewalls exist to protect the information of children of undocumented migrants: the Ministry of Social Affairs has a database of all children of undocumented parents, which allows for the provision of resources to schools and hospitals as needed, and this database is inaccessible to immigration enforcement.¹¹²

Where exemptions or prohibitions on reporting requirements do not exist, civil society organizations have taken steps to protect irregular migrants in some contexts. For example, following a request from the Greek Vice-Minister of the Interior to provide a list of non-Greek children attending nurseries on the island of Crete, civil society actors in Crete 'mobilised in order to protect the right of all children to access public nurseries, irrespective of their ethnicity, religion, race, nationality or residence status.'¹¹³ Relatedly, following the proposal by the Italian government of a policy which would require health professionals to report the personal details of undocumented migrants (in contravention of the Italian Constitution art. 32, and the right to basic health care as exists in the EU), several organizations worked together to launch a joint public campaign, 'Prohibition of Reporting: We are doctors and nurses, not spies'.¹¹⁴ Following the civil society efforts, the proposed provision was not implemented in Italy, and the Italian Home Office publicly confirmed that access to healthcare services do not impose any duty to report on healthcare professionals.¹¹⁵

In some cases, individual municipalities have undertaken pro-active initiatives to create these kinds of firewalls by expressly passing laws refusing cooperation with immigration authorities. This has been a particular trend in some areas of the United States, where, '(f)or decades, major cities and a few small towns across the country have adopted various so-called sanctuary laws, or states, resolutions, and executive orders that limit the authority and ability of local and state authorities to cooperate with federal officials in

111 *Ibid.*

112 The firewall by Portugal was described by the representative of Portugal who took the floor during the interactive dialogue following the presentation of the Report of the United Nations Special Rapporteur on the human rights of migrants, relating to his regional study on the management of the external borders of the European Union and its impact on the human rights of migrants, to the United Nations Human Rights Council, on 27 May 2013, Palais des Nations, Geneva.

113 PICUM (2013), *supra* note 79, at 16.

114 *Ibid.*, at 17.

115 *Ibid.*

the enforcement of immigration laws.¹¹⁶ Specifically, several of the ‘sanctuary laws’ seek to prohibit the disclosure of immigration status information from local enforcement to federal authorities.¹¹⁷ While these regulations have taken on various characters, framing such policies around privacy rights has, in at least one case, successfully avoided jurisdictional conflict issues, and establishes the ability for privacy rights and laws to buttress rights-based arguments for firewalls.¹¹⁸

6 Conclusion

This article has sought to detail the ways in which the fundamental rights of irregular migrants need to be protected through the creation and maintenance of effective and meaningful firewalls, which aim to isolate and protect the provision of public services and access to basic rights from interference from immigration and related authorities. While this article has demonstrated numerous ways in which firewalls are being eroded, it has also established a wide variety of promising practices that create effective firewalls for the protection of irregular migrants and which enable them to access basic services in line with their fundamental rights.

Firewalls – the separation of immigration enforcement activities from public service provision – is a critical concept and practice that, as this article has shown, not only advance states’ obligations in upholding fundamental rights for everyone on their territory, but also advance important public goals in relation to health, education and social inclusion and cohesiveness in society. Firewalls enable public organizations to fulfil their mandates and contribute to the progressive realisation of fundamental rights and access for all. As approaches towards addressing irregular migration at local, regional, national and international levels continue to grapple with the tensions between effective management, and respect for fundamental rights, practices that establish and maintain firewalls may prove a key tool in balancing the competing interests at play.

116 C.M. Rodriguez, ‘The Significance of the Local in Immigration Regulation’, 106 *Michigan Law Review* (2008) 567–642, at 600–603.

117 See, *inter alia*, San Francisco, Cal, Administrative Code para. 12H.2(c) (2005) (approved 24 October 1989), cited in Rodriguez (2008), *supra* note 116, at 601.

118 See Rodriguez (2008), *ibid.*, at 602–603, discussing New York City’s approach to this issue.

Acknowledgements

This article was initially prepared as a research report to the European Commission against Racism and Intolerance. The authors wish to acknowledge the funding and support of ECRI in carrying out that report, and their agreement to allow academic publication of a revised version of the report.