

# Caught Between Rights and Restrictions

An Ethical Analysis of the Rights and Capabilities of Undocumented Immigrants in the Netherlands

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Narratives by Billy Walkman

*With gratitude to Ellen Fruijtier and Dr. J.M. Halsema*

## Abstract

Using the capabilities space of Martha Nussbaum as a measure of quality of life, this article analyzes what undocumented immigrants are actually able to do or to be within the rights and capability space made available to them by the Dutch immigration policy. It inquires into the practical implications of this policy by examining available quantitative data, supplemented with the testimony of one man, living illegally in the Netherlands. This article strives to answer the question whether the Dutch policy on illegal residents can ensure a life worthy of a human being, not a life of merely surviving. At the same time, it aims to urge the capability paradigm of Martha Nussbaum to address the issue of immigration; an ethical dilemma of human justice that is waiting at the sidelines of the theory.

**Keywords:** human rights, irregular immigrants, Dutch immigration policy, capabilities approach, Martha Nussbaum

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## Introduction

Sixteen years ago, in the year of 1996, Billy Walkman fled Liberia during the civil war and was stranded in Amsterdam. He was 19 at the time, and witnessed how his father and sister got murdered. The Dutch authorities did not grant Billy asylum, as he was unable to prove his Liberian nationality. Although Billy was born and raised in Liberia, his parents were Ghanaian immigrants, which complicated his case. However, knowing that other Liberians did get a refugee status, Billy decided to hang on in order to collect the right papers to prove his nationality. He was young, strong, and a believer. He could stay at the house of a documented country fellow, and had occasionally some work which generated some income. Fate turned against him when his host died in 2003, and he found himself on the streets. This is how Billy ended up in a shelter for drug addicts. In order to survive, he became the ‘assistant’ of one of them, meaning that it was Billy who had to keep the drugs on him, while the other tried to sell it to passers-by. He was caught by the police with 18 Ecstasy pills in his pocket. Fines added up to 240 Euro or three months in prison. Billy did not have the means to pay. It was the first time Billy was detained, and eight more times were to follow. Not for any criminal offence – he had sworn to himself to stay away from drugs forever – but for the fact that the authorities issued an exclusion order that declared Billy as undesirable; a public order measure that does not allow a pending application of residence, and makes continued presence on Dutch territory a crime. In 2006, Billy finally managed to have sufficient financial resources and the relational network to get his Liberian passport in order to prove his nationality. Too late for any status: the IND was quick to expel Billy to Liberia in response, albeit without the necessary stamps of approval from the Liberian Embassy. Observing his blank passport, the Liberian airport authorities refused Billy access, leaving the IND no other option than to take him back on their return flight. In the process, Billy’s passport was lost, and lost became Billy. In the past years, Billy has been presented 17 times to different African Embassies, neither of them willing to accept Billy as a citizen. He has accumulated four years’ time in alien detention. All this time, Billy was kept ‘ready for expulsion’. After each unsuccessful attempt by the IND Billy was released and left destitute.

The case of Billy Walkman must be a real headache for the Dutch authorities, and he is not the only one. In 2009, the Research and Documentation Centre (WODC) of the Dutch Ministry of Justice estimated that about 97,000 persons without residency rights live in the Netherlands.<sup>1</sup> In a growing socio-political climate that intends to criminalize irregular immigration, Dutch legislation mainly focuses on return policies. Measures are increasingly restrictive, including the detention of irregular immigrants and asylum-seekers, and marginalization of their standard of life. In 2011, 6,100 irregular immigrants were detained in order to be expelled.<sup>2</sup> The average length of detention was 78 days, one in six detainees stayed longer than six months in detention, and a number of detainees were imprisoned several times at short intervals.<sup>3</sup> The effectiveness of this policy is questioned, as the Dutch authorities were unable to expel between 48% and 75% of the detainees (depending on the source of data) to their country of origin.<sup>4</sup> Stretching this data to the total estimated number

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<sup>1</sup> Peter G. M. van der Heijden, Maarten Cruyff, Ger H. C. van Gils, *Schattingen illegaal in Nederland verblijvende vreemdelingen*, WODC, Den Haag 2009, p. 1.

<sup>2</sup> J. Verhoef, P. C. van Dorst, M. B. van der Kleij, S. Andric, “Vreemdelingenbewaring: strafregime of maatregel om uit te zetten, over respect voor mensenrechten bij vreemdelingenbewaring”, in: *De Nationale Ombudsman*, 2012, p. IV.

<sup>3</sup> *Ibidem*, p. 32.

<sup>4</sup> Amnesty International, *Vreemdelingendetentie in Nederland: het moet en kan anders*, Alternatieven voor vreemdelingen detentie, Amsterdam 2011; Schoordijk Instituut, *Terugkeermogelijkheden van vreemdelingen in vreemdelingenbewaring: het vergeten gelaat van de vreemdeling*, Vol I, 2004, p. XVI; The Dutch government insists that in the majority of cases, detainees are obstructing purposely their

of irregular immigrants indicates that between 46,000 and 72,000 people are unable to be expelled by the Dutch authorities. If these people do not voluntarily return to their country of origin, assuming they would be able to do so, they are in the Netherlands to stay, and prognoses predict that their numbers will not decrease in the near future.<sup>5</sup>

Focusing on the capabilities of undocumented immigrants, this article investigates whether the Dutch immigration policy, as it is today, is congruent with its statement that human rights are at its foundation and that it sufficiently respects and protects the human rights of irregular immigrants.<sup>6</sup> The Declaration of Human Rights and additional treaties ratified by the Dutch government do not allow unlawful restrictions of the human rights of irregular immigrants. The first section of this article briefly outlines the main pillars of Dutch immigration policy. Subsequently, the second and more substantial section investigates what this policy means for the agency of undocumented immigrants in practice; what is the capability space they have available for functioning? As the collection of qualitative and quantitative data on undocumented immigrants is fraught with difficulty, literature review is complemented with the narratives of Billy Walkman, in order to illustrate the effects of Dutch policy for real people in real life. As for Billy, after 16 years of being silenced, he felt it was time for him to speak out. During a four hour interview, Billy Walkman told his story about the way Dutch law and regulations determine the scope of his capabilities, what he is (un)able to do and to be, by going through Martha Nussbaum's list of ten Human Capabilities.

Through using the capabilities approach of Nussbaum as a quality of life measurement, van Egmond and Walkman aim to show that the limited account of human rights, which are granted to irregular immigrants within the Dutch immigration policy, do not allow them the basic human endowments that assure a standard of life which human dignity requires. Secondly, we aim to urge the capability paradigm to address the issue of immigration, in order to investigate the obligations towards non-citizens and to identify the duty holder. Martha Nussbaum states that domestically it is a nation's basic political structure which is responsible for distributing to all citizens an adequate threshold amount of all entitlements on her list. By concentrating solely on the duty governments have towards their citizens, the entitlements of non-citizens are left out of scope of her theory. In the context of this article: 'Does the Dutch government have a duty to ensure that the substantial number of irregular immigrants on its territory can live a life worthy of a human being, a life not merely of surviving but also one of human dignity? If not, who does?' This fundamental dilemma is waiting at the sidelines of this lecture. We aim to make it audible and want to recommend the capabilities paradigm to address this ethical dilemma of human justice.

## Dutch policy

The Dutch government pursues a restrictive policy on illegal residents that should discourage 'unmeritable immigration' of underprivileged people and motivate them to return voluntarily to their country of origin.<sup>7</sup> An important but internationally criticized pillar of this policy is its detention strategy, and the proposal being advanced on the criminalization of illegality. At the same time, this coalition agreement states that human rights are the foundation of the Dutch immigration policy.<sup>8</sup> Human rights are based on the idea of human

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expulsion.

<sup>5</sup> Roel Peter Wilhelmina Jennissen, *De Nederlandse migratiekaart, achtergronden en ontwikkelingen van verschillende internationale migratietypen*, WODC, 2011, p. 325.

<sup>6</sup> Regeerakkoord VVD - CDA, 30-09-2010, *Vrijheid en verantwoordelijkheid*, Den Haag, the Netherlands, 30-09-2010, <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2010/09/30/regeerakkoord-vvd-cda.html>, click on PDF document "Regeerakkoord VVD – CDA", viewed on 06.06.2012, p. 21.

<sup>7</sup> *Ibidem*, p. 23.

<sup>8</sup> *Ibidem*, p. 21.

dignity, something that not only individuals with legal citizenship are entitled to, but each and every person, independent of one's role in society. The Netherlands as a state is part of most of the major international and regional human rights organizations. An exception is The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (MSC, 1990), one of the seven core international human rights treaties, which the Dutch government has not ratified.<sup>9</sup> A brief outline of Dutch legislative and policy measures concerning irregular immigration:

### *1. A right to health care, a duty to pay for medical costs*

People without a residence permit have a right to essential medical care, including research, treatment and routine care which are deemed necessary on medical grounds. This extends the policy of some European countries in which illegal residents are entitled to emergency care only. At the same time, illegal immigrants in the Netherlands are obliged to pay for the delivered care, while they are excluded from obtaining health insurance. As doctors have a duty to care towards everyone irrespective of their residency status, and whether or not they are insured or able to pay, a health care provider can turn to the Health Care Insurance Board (CVZ) – a government collective – for a reasonable reimbursement of unclaimed costs. Some costs are not claimable, like dental care, dietician, physiotherapy, optician, and interpreters.<sup>10</sup>

### *2. A right to education up to the age of 18*

Education is not only a right but also an obligation for all children between the ages 5 and 18, including undocumented children. Dutch law states that children without residency papers may complete the education they are enrolled in when they turn eighteen. After their 18<sup>th</sup> birthday, applicants are denied access to a course. Until very recently, traineeship and apprenticeship were formally considered 'employment' by the authorities, and therefore required a special work permit for which undocumented minors were not eligible. A court verdict of May 2012 assured full access to education, and thus access to traineeship and apprenticeship, as they are essential parts of education.<sup>11</sup>

### *3. Child rights*

All children, including undocumented children, have the right to protection, healthcare, education and other basic services. Public health centres for children up to four years are freely accessible for all, including undocumented immigrants. Education is freely accessible for all children as well. Children are not allowed to spend more than two weeks in a row in alien detention.<sup>12</sup>

### *4. A right to legal assistance*

Those without a residence permit are entitled to legal aid from a lawyer, but obliged to pay for the legal services they receive. When irregular immigrants are unable to pay, it is possible for a lawyer to apply for reimbursement. The payment of court fees to begin a legal process are mandatory, adding up to Euro 400 to 950.<sup>13</sup>

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<sup>9</sup> Amnesty International, *The Netherlands: The detention of irregular immigrants and asylum-seekers*, Amsterdam-London 2008, p. 13.

<sup>10</sup> ASKV, *Dokters van de Wereld, Het Wereldhuis, Passport of Amsterdam*, Amsterdam 2012, pp. 6-13.

<sup>11</sup> *Ibidem*, pp. 21-25.

<sup>12</sup> *Ibidem*, pp. 14-20.

<sup>13</sup> *Ibidem*, pp. 26-30.

### *5. Limited rights to housing and shelter*

Dutch law gives irregular immigrants the right to rent accommodation in the Netherlands, but only from private landlords. Undocumented immigrants are excluded from receiving support from mainstream organizations like housing associations. People without residence permits are denied access to regular homeless shelters and crisis shelters, unless the temperature reaches below -5° C at night. Vulnerable groups such as children and the sick should be guaranteed access to food and housing. The Dutch courts have decided that parents and children should not be separated in case they have become homeless. In such case, the authorities must provide adequate shelter for the family as a whole.<sup>14</sup>

### *6. Exclusion from a right to work*

People without a residence permit are not permitted to work, and not allowed to volunteer. However, if an undocumented immigrant is working, (s)he has the same rights under Dutch law as other workers. The law regulates the minimum wage, minimum holidays, and protection from unfair dismissal amongst other things. These rights can be claimed only when in possession of a work contract or other sufficient evidence, like payment slips or statements from colleagues. Irregular immigrants can join a union.

### *7. Exclusion from social services*

The Linking Act (Koppelingswet) of 1998 excludes undocumented immigrants from public services and social benefits, and obliges each organization which offers a public service to check the residency status of the person involved. This means, e.g., that undocumented immigrants are not entitled to housing support, child benefit, unemployment benefits, a pension, health insurance or legal expenses insurance, or to open a bank account. Irregular immigrants are excluded from service from the Food bank [Voedselbank], an institutional body which provides free food to socio-economic poor individuals and families.

### *8. Exclusion from political rights*

Without a residence permit, people are not allowed to vote. Undocumented immigrants have a right to demonstrate under the condition that it does not treat national security.

### *9. Identification requirement*

The Identification Act of 1994 obliges anyone aged 14 and older to identify themselves by showing a valid ID. The police and other government officials with a monitoring or controlling role are allowed to ask anybody to identify themselves if this is necessary for carrying out their responsibilities. Controls take place in traffic, public transport, the working place, big events, in busy entertainment areas, and high-risk areas for public disturbances. Poor socio-economic areas where the majority of irregular immigrants live are regularly subject to controls. A minor violation allows a police officer to ask for an ID. A person may be arrested in case they fail to show valid identification, and there is a reasonable suspicion that the person is illegally resident.<sup>15</sup>

### *10. Exclusion order*

An exclusion order is a public measure declaring a immigrant or asylum-seeker to be an 'undesirable alien'. It intends to protect the Netherlands against further public order infractions by the designated person.<sup>16</sup> An exclusion order makes continued presence in or a return to the

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<sup>14</sup> *Ibidem*, pp. 31-35.

<sup>15</sup> Amnesty International, *Vreemdelingendetentie in Nederland*, p. 25.

<sup>16</sup> Dutch Government, *Alien Act 2000*, 2000, <http://www.legislationline.org/documents/id/4680>, chapter 6,

Netherlands a crime, it does not allow for a pending application for residence, and excludes one from the right to shelter and other basic facilities. Since 2002, an unconditional prison sentence of one month, or repeated minor criminal offences which incur a fine, suffice(s) to impose an exclusion order on irregular immigrants. Also, when irregular immigrants violate immigration regulation twice or more, such as the duty to report, an exclusion order can be imposed.<sup>17</sup>

### 11. Immigration Detention

Immigration detention aims to prevent irregular immigrants and asylum-seekers to enter the territory or to facilitate their expulsion. Immigration detention can be prolonged, in the Netherlands there is no statutory limitation on its duration. Detainees have the right to appeal their case before a district court within 28 days after detention. Detention may be lifted when it is considered unreasonably burdensome.<sup>18</sup> The first judicial review looks at the lawfulness of the grounds for detention. Subsequent appeals review the lawfulness of continued detention. If authorities are actively engaged in activities ‘with a view to the expulsion’ within a period of reasonable time, or when the person concerned is shown to be actively obstructing this process, continuation is usually granted.<sup>19</sup> Detention can be prolonged up to twelve or eighteen months. Although irregular immigrants are not detained as a disciplinary or punitive measure, its regime is based on one designed for regular prisons, and thus subjected to the same safety procedures, like the use of handcuffs, body search and visitation. At the same time, the regime is devoid of activities which aim for rehabilitation. Irregular immigrants in detention are locked up for 16 hours a day, with one other person in a room of 10 square meters. There are no educational activities, recreational activities are provided for one hour a day. Detainees are allowed to meet visitors for two hours a week.<sup>20</sup>

## Monitoring the Dutch policy: capabilities of undocumented immigrants

What does it mean to hold a right? The idea of capability can help to clarify the nature and scope of the idea of human rights, by providing an idea of what it means to *secure* human rights.<sup>21</sup> The Capabilities approach and human rights approaches share the idea that all people have some core entitlements just by virtue of their humanity, and that public arrangements are necessary to protect these.<sup>22</sup> However, it is the capability approach of Martha Nussbaum which emphasizes that the existence of an entitlement entails that society holds a duty to protect *and* promote these endowments; governments do not only hold a negative obligation (to respect human rights), but hold a positive obligation to defend and support human rights.<sup>23</sup> The capability approach intends to secure the ‘ends’ of the human rights discourse by insisting that it should be more than a ‘product’ of legal and institutional arrangements; rights and capabilities should contribute towards a life of human dignity.<sup>24</sup>

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viewed on 04.03.2012.

<sup>17</sup> Amnesty International, *The Netherlands: The detention*, pp. 24, 27.

<sup>18</sup> *Ibidem*, p. 43.

<sup>19</sup> *Ibidem*, pp. 23, 24.

<sup>20</sup> J. Verhoef, P. C. van Dorst, M. B. van der Kleij, S. Andric, *Vreemdelingenbewaring: strafre- gime*, p. 19-23.

<sup>21</sup> Polly Vizard, Sakiko Fukuda-Parr, Diane Elson, “Introduction: The Capability Approach and Human Rights”, in: *Journal of Human Development and Capability: A multi-Disciplinary Journal for People-Centered Development*, Volume 12, Issue 1, pp. 1-22, 2011, <http://dx.doi.org/10.1080/19452829.2010.541728>, viewed on 01.08.2012.

<sup>22</sup> Martha C. Nussbaum, *Women and human development: the Capabilities Approach*, New York 2000, p. 5.

<sup>23</sup> M. C. Nussbaum, *Creating Capabilities*, Harvard University Press 2011, p. 65.

<sup>24</sup> P. Vizard, S. Fukuda-Parr, D. Elson, “Introduction: The Capability”, pp. 3-4.

Using the Capability Approach as a measure of quality of life in the context of this article allows us to concentrate on the capability space which is made available to irregular immigrants by the Dutch immigration policy. What are irregular immigrants actually able *to do* and *to be* within this context? Does the Dutch Immigration Policy allow a life in dignity, or a life of merely survival? Martha Nussbaum proposed a substantial list of ten Central Human Functional Capabilities as the constitutive parts of a life in dignity.<sup>25</sup> It is this list of human endowments which is used within the scope of this evaluation. There is a close relationship of content between the capabilities on Nussbaum's list and the human rights recognized in the Universal Declaration and other rights instruments, covering political and civil rights, and economic and social rights.<sup>26</sup>

Two conditions complicate the process of monitoring. The first condition is inherent to Nussbaum's substantial list of capabilities. The natures of some of these endowments are hard to convert to quantitative data, and require intensive and time consuming qualitative research. Secondly, as been mentioned already, research among undocumented immigrants is met with obstacles; illegal residents tend to hide themselves in fear of being caught by the police.<sup>27</sup> Due to their preference to remain invisible to authorities, the available data is limited and outcomes rarely transcend a qualified estimate. It is for this reason that, complimentary to literature review, the testimony of Billy Walkman is given an important illustrative role within this evaluation.<sup>28</sup> The capabilities Billy has at his disposal are for an important part shaped by the Dutch immigration policy. His narratives can be taken as exemplary for the agency of the large number of irregular migrants that seem to be non-expandable by the Dutch immigration regime.

### 1. Life

Being able to live to the end of a human life or normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.<sup>29</sup>

No quantitative data has been published on the average life expectancy of illegal immigrants in the Netherlands. Billy tells us: "I came here in Amsterdam with four boys on a ship. I am the only one left. Two have died, maybe of drugs or sickness, I don't know. One has serious brain damage. He doesn't even recognize me anymore."

### 2. Bodily health

This capability includes general good health including reproductive health; to be adequately nourished and to have adequate shelter.<sup>30</sup>

The average medical costs spent per insured Dutch person in 2011 was Euro 3.287,76. In the same year, the costs claimed by healthcare providers for uncovered medical costs of undocumented immigrants were around Euro 229 per undocumented immigrant<sup>31</sup>. The major

<sup>25</sup> Nussbaum's list of basic human endowments contains 1) life; 2) bodily health; 3) bodily integrity; 4) senses, imagination, and thought; 5) emotions; 6) practical reason; 7) affiliation; 8) other species; 9) play; 10) control over one's environment, both political and material.

<sup>26</sup> M. C. Nussbaum, *Creating Capabilities*, p. 62.

<sup>27</sup> Marianne Anna Schoevers, "Hiding and Seeking", Health problems and problems in accessing health care of undocumented female immigrants in the Netherlands, Enschede 2011, p. 18.

<sup>28</sup> I have chosen to write Billy's narratives as much as possible in his own words, prioritizing his spoken language above the English grammar rules according to the United Kingdom standard.

<sup>29</sup> M. C. Nussbaum, *Women and human development*, pp. 78-80.

<sup>30</sup> Ibidem.

<sup>31</sup> College van Zorgverzekeringen (CVZ), *Zorgcijfersdata* [Healthcare statistics]

<http://www.zorgcijfersdata.cvz.nl>, English summary on:

<http://www.cvz.nl/en/healthcarestatistics/zvw-expenses.html>, viewed on 01.06.2012), 2012; College van

gap between these figures are an indication that irregular immigrants do not receive the same level of treatment as insured Dutch persons. Refugees, asylum-seekers and undocumented immigrants report lower utilization rates, and at the same time they suffer more health problems.<sup>32</sup> Complaints that irregular immigrants brought to the GP were more serious than those of regular patients.<sup>33</sup> Billy explains: “When you do not have an [health]insurance, you won’t get the services you need. Unless somebody with documents will stand in front of you.” Doctors of the World the Netherlands, an international NGO which aims for equal access to healthcare, reports that 50% of the irregular beneficiaries of their program in 2011 did not have access to a general practitioner (GP), and therefore no access to care other than emergency care. However, after mediation of Dutch speaking health professionals, almost all of them were – leaving aside the limited number of health care providers that refused to take care for undocumented immigrants at all – quite easily registered at a GP practice. The reason why immigrants could not organize access themselves is reported to be due to the fact that they are uninformed about their right to healthcare, feared being reported to the Dutch authorities, or had been refused on former occasions: 29% of the patients seen by Doctors of the World the Netherlands were told that unless they paid cash they could not be cared for by that particular health institution.<sup>34</sup> Actually, only a small number of health professionals are aware of the regulations on healthcare to undocumented immigrants. Additionally, a difference in willingness to assist irregular immigrants can lead to seriously delayed care, and causes unequal distribution of illegal patients among health care providers and institutions.<sup>35</sup> Billy explains: “What is most important when you have no rights because you have not staying permit is the fact that your bodily health gets damaged. The body is in need of food, soap for hygiene, and when you are ill, it needs medication. Without money, you can’t have these.” Most reported health problems appear to involve infectious complaints, mental health, and dental problems.<sup>36</sup> Costs for dental care are not reimbursable for health care providers. A study among 100 undocumented women found reported 51% dental problems.<sup>37</sup> As for Billy, he only has his front teeth left. After getting a mouth infection during one of his detentions, thirteen teeth had to be extracted.

In 2011, 48% of the visitors of the consultation hours of Doctors of the World in Amsterdam Southeast reported mental distress. Many more reported psychosomatic problems, such as chronic headaches, back pain, and constipation. Research among illegal immigrants in Rotterdam in 2009 reported depression and stress to be the most severe medical problems, and observed a correspondence with the severity of complaints and the duration of illegal stay: the longer illegal immigrants stayed in the Netherlands, the more severe were

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Zorgverzekeringen (CVZ), 6<sup>e</sup> monitor Regeling Financiering Zorg Onverzekerbare Vreemdelingen, CVZ, Diemen, 2012.

<sup>32</sup> Annette A. M. Gerritsen, Walter Devillé, F.A. van der Linden, Inge Bramsen, Loes H. M. van Willigen, Johannes E. Hovens, Henk M. van der Ploeg, “Mental and physical health problems of, and the use of healthcare by, Afghan, Iranian and Somali asylum seekers and refugees”, in: *Nederlands tijdschrift voor Geneeskunde*, <http://www.ntvg.nl/publicatie/psychische-en-lichamelijke-gezondheidsproblemen-van-en-gebruik-van-zorg-door-afghaanse-ir/volledig>, Issue 150, Week 36, 2006. p. 2; A. Schoevers, Maartje J. Loeffen, Maria E. van den Muijsenbergh, Antoine L. Largro-Jansen, “Health care utilisation and problems in accessing health care of female undocumented immigrants in the Netherlands”, in: *International Journal of Public Health*, Volume 55, Issue 5, 2010, pp. 422, 427.

<sup>33</sup> M.H.C. Kromhout, H. Wubs, E.M.Th. Beenackers, *Illegaal verblijf in Nederland*, WODC, Den Haag 2008, <http://www.wodc.nl/onderzoeksdatabase/1631a-literatuuronderzoek-illegalen.aspx?cp=44&cs=6799>, viewed on 07.04.2012, p. 50.

<sup>34</sup> Pierre Chauvin, Marie-Camille Mestre, Nathalie Simonnot, *Access to Health Care for Vulnerable groups in the European Union in 2012*, Médecins du Monde, France 2012, p. 8.

<sup>35</sup> M.H.C. Kromhout, H. Wubs, E.M.Th. Beenackers, *Illegaal verblijf in Nederland*, p. 54.

<sup>36</sup> *Ibidem*, p. 53.

<sup>37</sup> M. A. Schoevers, “Hiding and Seeking”, p. 56.

their complaints of stress and depression.<sup>38</sup> Other research shows that the occurrence of mental stress and dysfunctional behaviour are higher among irregular immigrants during and after immigration detention.<sup>39</sup>

C. Kelk, Emeritus Professor of criminal and penitentiary law, states that “the [Dutch] detention situation is one of great powerlessness, lawlessness, and dependence. It contains many oppressive elements, which generate a high degree of psychological frustration and resentment among those who are subjected to it”. Australian research reports an association between the length of time in detention and the severity of mental disorder. Prolonged detention is regarded to be a major factor to mental deterioration, despondency, suicidal tendencies, anger, and frustration.<sup>40</sup>

Undocumented immigrants live mainly in districts which are regarded as being socio-economically poor, and which are characterized by a relatively large number of legal immigrant residents.<sup>41</sup> As far as is known, they mostly live with family members or acquaintances, or in hostels or private rented accommodation. According to the available literature, undocumented immigrants who rent in the private sector live in rather poor circumstances, subject to overdue maintenance and a lack of hygiene. The prices paid for a house, a room, or a bed are well known.<sup>42</sup> Billy states: “Shelter is a real problem. Everywhere you go, you have to pay. You have to pay to sleep in somebody’s hallway, or even their storage box. At this moment, I pay 50 Euro to sleep in a chair in somebody’s living room, a room which is used by many other guys.” Concluding, the right to healthcare and shelter of irregular immigrants cannot be detached from the prohibition to raise an income through legal work. The inability to raise an income seriously risks depriving irregular immigrants of the capability to take care of their health and safety. The prohibition to work seems to work as a *corrosive disadvantage*, a concept introduced by Wolff and De-Shalit, referring to a deprivation which leads to failure in other areas.<sup>43</sup>

### 3, *Bodily integrity*

Being able to move freely from place to place; having one’s bodily boundaries treated as sovereign, i.e. being able to be secure against assault, including sexual assault, child sexual abuse, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.<sup>44</sup>

Quantitative research data on the freedom of movement of undocumented immigrants date from 2008, and relate to the European context. Sixty percent of the respondents reported limiting their movements or activities because of fear of being arrested.<sup>45</sup> Billy states: “I avoid many places, like the shopping centre, because if the police sees me, they will put me in detention. They told me so, and they did it nine times before. I do not fight or do any criminal thing. If only they see my face, it is enough to put me inside detention. (...) I also fear the place where I am sleeping. There are many men there. They smoke, drink alcohol, and stay up late. I am worried the neighbors will call the police. They will put me in detention again.”

As for the safety of undocumented immigrants, their situation is often reported to be vulnerable for abuse and oppression, but few data are known. Counselors in Amsterdam South

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<sup>38</sup> M.H.C. Kromhout, H. Wubs, E.M.Th. Beenackers, *Illegaal verblijf in Nederland*, p. 49.

<sup>39</sup> Amnesty International, *Vreemdelingendetentie in Nederland*, p. 6.

<sup>40</sup> *Ibidem*.

<sup>41</sup> M.H.C. Kromhout, H. Wubs, E.M.Th. Beenackers, *Illegaal verblijf in Nederland*, WODC, Den Haag 2008, p. 4.

<sup>42</sup> M.H.C. Kromhout, H. Wubs, E.M.Th. Beenackers, *Illegaal verblijf in Nederland*, pp. 28, 29.

<sup>43</sup> M.C. Nussbaum, *Creating Capabilities*, p. 43-45.

<sup>44</sup> M.C. Nussbaum, *Women and human development*, p. 78-80.

<sup>45</sup> P. Chauvin, L. Parizot, N. Simonnot, *Access to healthcare for undocumented immigrants in 11 European countries*, 2008 survey report, Médecins du Monde, France 2009, p. 102.

East state that undocumented women report that they have performed unwanted sexual acts in exchange for accommodation. Of the women who were registered in 2006 as victims to human traffickers (due to cross-border human trafficking, and after arrival in the Netherlands), 63% lived in the Netherlands without a residence permit. Reported numbers probably constitute a major underestimation.<sup>46</sup>

Talking about his opportunities for sexual satisfaction, Billy laughs. “I have no privacy. There is no way I can meet a woman. I cannot take any visitor to the place I am staying, because it is not my home. And for the ladies: they only have a look at my ten Euro haircut and they will turn away. They like styles. I cannot talk to them.”

#### 4. Senses, imagination, and thought

Being able to use the senses, to imagine, think, and reason – and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including, but by no means limited to literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing self-expressive works and events of one’s own choice, religious, literary, musical, and so forth. Being able to use one’s mind in ways protected by guarantees of freedom of expression, with respect to both political and artistic speech, and freedom of religious exercise. Being able to search for the ultimate meaning of life in one’s own way. Being able to have pleasurable experiences, and to avoid non-necessary pain.<sup>47</sup>

As far as quantitative data goes concerning this capability we can only refer to the high rate of mental health problems which were reported.<sup>48</sup> Billy tells us: “The situation to be without rights because you have no documents causes brain damage. Because you cannot think in one direction, your thoughts are ever changing from one thought to another. Especially at night, when I cannot sleep because my brain runs overtime. It is because you cannot solve your own problems, you always need others. When you wake up in the morning, you don’t even know where to go. You are a useless person. You are a crazy man, walking the streets without going nowhere.” Like Billy, Kromhout relates the high occurrence of mental distress to a position of dependency, fear, and insecurity about the future.<sup>49</sup> Billy perceives his life as being deprived of adulthood. I recall him saying: “You now, when you are mature, you should be able to take care for yourself. But you cannot. You are always in need, you always need help. (...) The brain is always searching: where am I going to get life. And it makes the brain tired, that’s what damages a lot of people. You are trying to make something, but it will always collapse. You are still losing, losing everything. It’s like picking an apple. Everyone can do it, but when you do it, it falls, each time you try. In the end, you are not trying to pick it anymore.” It is not unlikely that the long time which Billy spent in detention has contributed to the emergence of these feelings of incompetence and frustration.

However, being pressured to say something about his talents, Billy said: “I am good with technical machines. Back in Liberia, I did have some training to become an electrician, just like my father. A couple of years ago, I had a black job at a large company. Within a month I became a *table chef*. Unfortunately, it all collapsed. When you get the opportunity, you can break out. People can see the qualities which are within you. But if you are not allowed to work, everything remains inside you. Like my friend. We came here together, on the same boat. He was a really good football player. ADO Den Hague [professional Dutch soccer club] selected him and trained him for some time. But his asylum was refused. Now, he can do nothing anymore. He lost his mind. The conditions made him bleed to death, although he is still alive.

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<sup>46</sup> M.H.C. Kromhout, et al., *Illegaal verblijf in Nederland*, pp. 36, 37.

<sup>47</sup> M.C. Nussbaum, *Women and human development*, pp. 78-80.

<sup>48</sup> M.H.C. Kromhout, et al., *Illegaal verblijf in Nederland*, p. 45.

<sup>49</sup> *Ibidem*.

But if he was given the opportunity in the beginning, by now he could be driving a Mercedes Benz with a golden watch on his wrist.”

Not all undocumented immigrants and educational institutions are aware of the right to education for children without papers, but the majority of undocumented children do attend school. However, specific qualitative data are not provided. Studies carried out in 2002–2004 show that a number of children who were living illegally in the Netherlands struggle with their own psycho-social problems and/or with their parents’ mental problems. Among undocumented pupils being absent from school occurred relatively often, resulting from psycho-social and other problems and changing houses. It is probable that a number of children who are living illegally in the Netherlands do not go to school at all.<sup>50 51</sup>

Billy’s lack of income influences his freedom of religious exercise, as well. He states: “I believe in God, everything is in his hands. I would like to go to church every Sunday. But, church involves a lot of things. You need clean clothes, for example. And you need small money to contribute to them. You can’t attend a ceremony without making a contribution. (...) Sometimes I get invited to a baptism at the church, but the situation will not allow me to go. People will give you a drink, they will give you meat, but they will expect you to contribute something. It puts me to shame to go without these things. So, my situation does not allow to move with them.”

## 5. Emotions

Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one’s emotional development blighted by overwhelming fear and anxiety, or by traumatic events or abuse or neglect. (Supporting this capability means supporting forms of human association which can be shown to be crucial in their development).<sup>52</sup>

Emotions are hard to be captured in quantitative numbers, data on the emotional development of undocumented immigrants in the Netherlands were not to be found, except for the high occurrence of stress among undocumented immigrants and detainees, as has been stated above. English and Danish research among refugee children up to 18 report that post traumatic and stress related symptoms are more frequent within this group and show that these complaints increase the longer children stay in refugee centers or when they need to regularly change houses.<sup>53</sup> When Billy was first asked about his emotions, he mainly talked about the emotions of others, like the state of mind of the man who he’s staying with: “From the emotions of others, their body language, you can see if people want to help you or not. For example the guy where I am living. He is not fit. He cannot refuse people. He helps them, but his body language shows that he does not want it. It stresses him out. You know, all these people, his water bill will go high.” Asking him what impact this has on his emotions, Billy said: “What it means to me, is that you are preparing yourself, always. I have some emotion in me, because I don’t want anything to go wrong. I don’t want to do anything which puts him off. You are scared, because maybe the police is coming. I cannot face anymore police disturbances anymore. It panics me.”

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<sup>50</sup> M.H.C. Kromhout, et al., *Illegaal verblijf in Nederland*, p. 58.

<sup>51</sup> The right to education and the living conditions of children without documents is inadequately covered within the scope of this article.

<sup>52</sup> M.C. Nussbaum, *Women and human development*, pp. 78-80.

<sup>53</sup> Joke Van Wieringen, Bram Tuk, “Migrantenjeugd en gezondheid”, in: *Migratie en Gezondheid, Feiten en Cijfers*, Utrecht 2011, p. 43.

Being asked about love, Billy expresses: “You have to love everybody, but in this modern world there are people who don’t like you. And others do want to see you. So, it’s balancing. I do not go to places where people don’t like me. I always try to avoid getting problems. You know, anyone can call the police if they don’t like you, and if they know I don’t have a staying permit.” Being asked about anger, Billy tells: “Sometimes I feel anger, not to someone, but on myself. Like when I was sleeping in a storeroom. Everybody is inside, but you have to hide yourself in the dark. You need to control your brain, otherwise you might even harm yourself. Like last year, an Iranian man facing the same conditions threw petrol over his body and burnt himself at the Dam square.”

Asking Billy about who is near to him, Billy expresses: “At this moment, nobody is close to me. Before, I had my girlfriend, I had my baby boy. Now, the people from the organizations which help me are closest to me.” The state of being constantly prepared to avoid trouble, to run if necessary, seems to push away Billy’s ability for emotional attachment. Again, Billy’s prolonged stay in detention might have an amplifying effect. The mental distress and dysfunction caused by prolonged detention raises the risks to the emotional capability of irregular immigrants.

## 6. *Practical reason*

Being able to form a conception of the good and to engage in critical reflection about the planning on one’s life. (This entails protection for the liberty of conscience).<sup>54</sup>

In the absence of any data, I refer to the testimony of Billy. At first, Billy explains how he thinks about right and wrong: “To pick a good choice is up to myself. To pick a bad choice as well. As a mature person, you have to know what’s wrong or right. People can advise you, but you have to make the right decision. When you can control yourself, automatically you get choice.” Immediately, he goes on explaining the impact of living as an irregular immigrant on one’s sense of right and wrong: “This is what I mean: when people cannot control their brain, they cannot pick the right choice. When a question comes, and you cannot sit down and think about it, you might give the wrong answer. Some people will take a bad choice, just to survive. When people are damaged, they will say ‘I had no choice’.”

Independent of whether one comes with or without documents, migrating into another culture will be unsettling. Like Billy expresses: “Things were easy in Africa. I could go and get a fish from the river. But here you cannot. In Africa, you can go to the bush, pick some apples and sell them on the market. Here, you are not allowed to sell things without a license. Things that were normal, will cause problems here. And what’s not allowed, is wrong. What was a good habit in Africa, is a bad habit here.” However, Billy shows that being undocumented does make things more complicated: “Being undocumented, you will do things bad. Because what you need to do to survive is not allowed. Like where I am sleeping, with six people in a one bedroom apartment. When the police comes, they will arrest us, because it is not allowed. But I cannot sleep outside as well, because it is not allowed. So what am I going to do?”

## 7. *Affiliation*

*A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another and to have compassion for that situation; to have the capability for both justice and friendship. (Protecting this capability*

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<sup>54</sup> M.C. Nussbaum, *Women and human development*, pp. 78-80.

*means protecting institutions which constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech).*

*B. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails, at a minimum, protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.<sup>55</sup>*

In the absence of research data, I refer to the testimony of Billy. Billy mentions that there are people who are dear to him, but the fact that they do not share their day-to-day life with him makes it a constant struggle to keep them close. According to Billy, he lost his son because he could not take care of him and his own mother. Although he tries hard to stay in contact, his efforts seem to be in vain. His mother is still alive. “Some people take care of me, but I would like to take care for them, as well. But I cannot. This disturbs me. Like the lady who is taking care for my mother. I would like to thank her, send her something, but I don’t have the chance. And they do not understand. They know I am in Europe, and that everything is there. So why don’t I help them? I had to explain them that I am not allowed to work, and that I am always in detention. She cannot believe me, but she has to believe me. It is the truth. I cannot do anything.” Asking Billy whether this affects his relationship with his mother, he says: “It does not disturb our relationship. She is always happy to hear my voice. She wants to see my face again. That is what I am fighting for, for her to see me again, and to see my son again.”

Contact with people that do surround Billy in his day-to-day life is difficult, according to Billy. “There is something here, in the *Bijlmer* [Southeast area of Amsterdam]. When people get to know that you don’t have status, they will not value you. They do not want to mix with me, others are always above you. (...) In the African community, I am not equal to someone with papers. In conversations, they always think that they are right and I am wrong. They always show me that I am below them. It makes you annoyed with yourself and with them. For example, if I am with someone with a Dutch passport, he can eat and drop his plate, and no matter how young this person is, he can make me clean it. And you have to accept, you can’t tell them that we are the same. I have to know how to live with them, but they will never know how to live with me. They don’t have to.”

How about contact with other undocumented people? Billy tells: “It is also difficult, because we all have problems, and we don’t want to burden each other. It isn’t friendship that brought us together, it is the conditions that brings us together. We live, but there is no happiness in our lives. We have to take care of ourselves. I put my towel somewhere, and it is used. I put my bread or soap somewhere, and it is gone. I don’t think I have real friends. I know people, but when it comes down to help, they don’t know you. And I have nothing to offer to them, only my advice when I can see they go through the same problem.”

How about contact with the Dutch community? Billy tells us: “Within the Dutch community, discrimination is everywhere. Some people do not even like to speak to me, because I am a black man. I understand, discrimination is a human condition. But in the end, we are all human.” Billy continues: “When it comes to respect, it comes down to people who are really sensible. The majority will not respect you, especially the Africans, they treat you any way they like. And you can never call the police when they cross the line. Sometimes I prefer to associate with white people, because they have their country. Only a country-owner can do something for me.”

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<sup>55</sup> Ibidem.

Billy's affiliation with others is for an important part narrated in terms of their (in)ability and (un)willingness to help him. This is likely to be reinforced by the fact that he is ultimately depending on others to survive, while he hasn't the resources to help others in return. Billy's perception does not allow him to build relationships which are reciprocal, and the community around him responds negatively to that in return.

### 8. *Other species*

Being able to live with concern for and in relation to animals, plants, and the world of nature.<sup>56</sup>

No relevant data was found. This endowment is not one which is associated with undocumented immigrants at first hand. Actually, it cost Billy quite some time to respond to this endowment. After a moment of initial silence, Billy responded: "Of course we are living with Mother Nature, so it must be important to you. It's normal, you cannot change it. Mother Nature can help humans, but she also fights them. If you do not have a place to sleep, a heavy rainfall, or the cold temperature, it can kill you. If you have no place to run to, to protect yourself, Mother Nature can kill you and you cannot fight her. So, I don't understand why the IND puts people on the street when they know we cannot fight Mother Nature. They do not give us a chance to secure from Mother Nature."

### 9. *Play*

Being able to laugh, to play, to enjoy recreational activities.<sup>57</sup>

There are a small number of Dutch organizations in Amsterdam, most of them church-based, which support undocumented immigrants, and organize activities with, through and for irregular immigrants on a regular basis. These activities are educative or recreational, often accompanied by a meal and an opportunity to meet with others.

The Dutch detention regime has been criticized by various parties for the absence of educational and recreational activities.<sup>58</sup> The Dutch government shows no intention to reverse this policy 'since it does not contribute to their return'.<sup>59</sup> Amnesty International points out that the provision of daily activities for detainees is first and foremost to guarantee respect for their human dignity and to make life in detention bearable.<sup>60</sup>

Billy states: "Of course I laugh sometimes, but it does not mean that I have access to happiness. You can laugh, you can enjoy, but it is not real. You are not in a position to face enjoyment." Billy stresses that he has no money to do any recreational activities. When asked about activities which do not necessarily involve any financial costs, like football, Billy tells: "To play football is possible. Sometimes I see fellowmen playing on the street. I can join them, but I don't feel real happiness on these things. Because my mind is telling me: 'If your leg breaks, you can't go to hospital, and you cannot walk'. I need my legs for transport. I don't have money for other transport. So, something in my mind is blocking me. You are stuck, every time you want to do something." Billy was asked whether he did any activity which is not directly related to survival. Billy told that he regularly spent the day in the library: "you have to choose the easy way. In the library there is no police control. When you play football, you can get a control. I can take shelter in the library. I sit behind the computer.

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<sup>56</sup> Ibidem.

<sup>57</sup> Ibidem.

<sup>58</sup> J. Verhoef, et al., *Vreemdelingenbewaring: strafregime*, p. 20.

<sup>59</sup> Letter from the State Secretary of Justice to the Dutch Asylum Lawyers Association (Vereniging Asieladvocaten en -Juristen Nederland) on 7<sup>th</sup> of September 2007, Amnesty International, *The Netherlands: The detention of irregular immigrants and asylum-seekers*, p. 20.

<sup>60</sup> Amnesty International, *The Netherlands: The detention of irregular immigrants and asylum-seekers*, p. 20.

It is a way to get through the day.” Actually, Billy could not assert any activity which was purely recreational.

## 10. Control over one’s environment

### A. Political.

*Being able to participate effectively in political choices that govern one’s life; having the right of political participation, protections of free speech and association.*

### B. Material.

*Being able to hold property (both land and movable goods), not just formally but in terms of real opportunity; and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure.<sup>61</sup>*

Undocumented immigrants in the Netherlands are unable to vote, but they do organize themselves in order to influence policy making. In the past two years, undocumented immigrants have demonstrated on a number of occasions, which caused outrage of some political parties. Police force has been used to end demonstrations of irregular immigrants in order to secure national security. Demonstrators who could not show valid identity papers, were reported to be detained. In almost all cases, the Dutch court judged this measurement to be illegal.

The largest trade union of the Netherlands, *FNV Bondgenoten*, supports domestic worker without residence papers through information and mediation, but the number of memberships remain small. Being informed about their rights and duties they are better equipped to bargain better working conditions. The three most pressing issues, as forwarded by undocumented members of FNV are: 1) access to healthcare; 2) recognition of domestic work as regular work; 3) a work permit which gives them the opportunity to visit close relatives in their home country.<sup>62</sup> FNV played an important role in contributing to the development of the ILO amendment to enhance the working conditions of domestic workers. Although Dutch government representatives supported the amendment, the Dutch ministry of domestic affairs stated, at the same time, that the Dutch Government was not to ratify the bill.<sup>63</sup>

As for Billy, being asked about political participation, he replies: “It is impossible for me to be effective in political issues. I never voted in my life. You can use your mouth, but without rights, nobody will listen to you. I know there are specific refugee laws, but they seized that right from me because the IND declared me to be undesirable. I cannot fight the decision of the IND. I contacted Amnesty International, I have contacted the World United Nations in Washington DC, Red Cross International, even a Human Rights Organization in France to which they referred me. But no one is interested in a single case. They cannot fight to get my right for me.” However, the fact that Billy did this interview, and participated in the documentary *Verloren levens* [lost lives] of Kees Vlaanderen, in the beginning of 2012, shows that he did not give up on a better future.<sup>64</sup> When asked, Billy explains why he is not interested to join the union or demonstrations: “Migrant and refugee organizations tell you that you have rights, even as an undocumented person. But it isn’t that way, because I am not allowed to

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<sup>61</sup> M.C. Nussbaum, *Women and human development*, pp. 78-80.

<sup>62</sup> FNV Bondgenoten, [http://www.fnvbondgenoten.nl/nieuws/acties\\_en\\_campaigns/gewoon\\_goed\\_werk](http://www.fnvbondgenoten.nl/nieuws/acties_en_campaigns/gewoon_goed_werk), viewed on 12.06.2012.

<sup>63</sup> FNV Bondgenoten, [http://www.fnvbondgenoten.nl/nieuws/acties\\_en\\_campaigns/gewoon\\_goed\\_werk/nieuws/367164\\_ILOverdrag\\_huishoudelijk\\_werk\\_080611/](http://www.fnvbondgenoten.nl/nieuws/acties_en_campaigns/gewoon_goed_werk/nieuws/367164_ILOverdrag_huishoudelijk_werk_080611/), viewed on 04.06.2012.

<sup>64</sup> K. Vlaanderen, *Verloren Levens*, documentaire, HUMAN, 2012.

work. Without work you have nothing. You need income to survive. You have the right to see a doctor, but when you do not have the money to pay the doctor, you have no treatment. I have the right to see a lawyer, but you have to pay to start a procedure. I cannot rent a safe place to live, because I can't afford it. I am always depending. Somebody with papers need to go in front of you. I can see a lawyer, I can see a doctor, but unless somebody with documents is going in front of you, they are not doing anything. Who is going to tell the doctor or the lawyer to do anything? Nobody. They have the concrete power, because nobody tells them to do their work. Especially when you yourself are not able to pay them.”

In 2004, estimations suggested that between 65,000 and 91,000 irregular immigrants were working on the Dutch labour market. Researchers expect that the need for (informal) labour-intensive work will increase.<sup>65</sup> Irregular immigrants work mainly in the hotel and catering industry, the construction industry, the agricultural and horticultural industries, the retail trade and informal domestic work. Studies among illegal workers working in agriculture show that the working conditions are poor and are reminiscent of exploitation: they work without employment contracts, are frequently underpaid, and suffered from periods of unemployment and debt.<sup>66</sup> While the minimum wage for someone above 23 years is Euro 8,40, Billy asserts that it is not uncommon to be paid Euro 5,00 per hour. Billy did several jobs in the past 16 years, like loading containers or working in the meat industry, but never signed an employment contract. Since he has been frequently detained, Billy does not work for companies anymore. He states: “It is too risk full. When the police comes, you are arrested, and I can't face any more detention.”

Fear for another detention limits his employment options to working for private households, which are rarely checked or fined by the authorities. At the moment, Billy has weekly one cleaning job, offering him 25 Euro per week. Occasionally, he has an odd job, like helping people to move. “Last time, I took care for an elderly lady. I worked three hours and got five Euro, it was humiliating, I don't go there anymore. Somebody does you a favor by offering you a job, so they can give you what they want. If you accept it, you accept the conditions.”

Arriving at the material resources and property rights that are at Billy's exposal, Billy initially gave an evasive answer: “Of course it's impossible to have a house, a car, or to have big money in my pocket.” Billy had to be pressured to explain what he really owned, it was clearly embarrassing for him: “I have self-uses. I have a mobile phone, I have a watch.” He was asked whether he has household items, a place to store his belongings, where he could save money, and keep his letters. “That is depending on whether you have a place that you can stay.” During the times he could afford a room, it was possible for him to collect some household items. However, each time he had been detained, he had lost most of his belongings, like a mattress or kitchen utensils. At the time of the interview, it turned out that Billy had no wardrobe of his own, no place which he could lock, Billy's belongings fitted within the small backpack he carried around.

## Conclusions

The research data available on the agency and functioning of undocumented immigrants in Dutch society is insufficient to draw up well-founded conclusions. With exceptions in the areas of healthcare and immigration detention, academic research among this vulnerable group has been rare. The fact that irregular immigrants are not within easy reach for research purposes does not justify this shortcoming. The issue of immigration and illegal residency has been on top of the Dutch political agenda in the past, so it should only be

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<sup>65</sup> R.P.W. Jennissen, *De Nederlandse migratiekaart*, p. 311.

<sup>66</sup> M.H.C. Kromhout, et al., *Illegaal verblijf in Nederland*, p. 33.

reasonable that one has the tools and accurate data available to monitor the effects that this legislation has on the (group of) people that are directly affected. The testimony of one man cannot make up for this lack of data, but aims to make it audible that extensive research by social scientists needs to be conducted to obtain substantial and accurate data.

The Dutch immigration policy reduces the capability space available to undocumented immigrants. It is intentionally so, as the government closely links its legislation on irregular stay with its return policy, assuming that marginalizing the life of undocumented immigrants will motivate them to voluntary return to their countries of origin. The Dutch government asserts that the implementation of its immigration policy is within reason and respects the basic human rights of undocumented immigrants. This literature review and the illustrative testimony of Billy Walkman lead to suspicion that this is not the case. Although the Dutch policy on irregular stay facilitates the right to healthcare, education, and legal assistance, these regulations seem insufficient for full accessibility of these rights. The main obstacle is reported to be the lack of income because of the prohibition to work, making undocumented immigrants ultimately dependent on others, both professionals and private persons. The prohibition to work can be seen as a corrosive disadvantage, a type of capability failure which leads to failure in other areas. The inability to raise an income negatively influences virtually all aspects of a meaningful life, like one's capability of bodily health, adequate shelter, to affiliate with others, emotional attachment, and play. It creates a dependency on others that severely disrupts the possibility to build relationships in reciprocity, in turn making people vulnerable to disrespect, discrimination, and oppression.

Another corrosive disadvantage seems to be the detention policy of the Dutch government, which has been developed into one of the principal tools for 'combating' irregular immigration instead of an *ultimum remedium*. As research shows, and Billy's story tends to illustrate, immigration detention has a profound effect on the mental health of detainees, having a negative effect of one's capability of bodily integrity including the freedom of movement, the capability of emotions, senses, imagination, and thoughts.

Although some basic human rights are secured within the Dutch immigration policy, the prohibition of work and the detention policy threaten to undo these rights which are made available to undocumented immigrants, leading to a life that is deprived of those endowments that human dignity requires.

The capabilities approach of Martha Nussbaum allows monitoring of the effects of public policy on diverse facets of life, and allows exposure of types of capability failures that would otherwise be overlooked. It shows that a limited access to some human rights distorts the access to others, such as basic rights to food, shelter, healthcare, meaningful work, political rights, and recreation, which allow people to live a life in dignity. In the beginning of this lecture, the question was raised whether or not the Dutch government has a duty to ensure that irregular immigrants living within the Netherlands can live a life worthy of a human being; a life not of merely surviving but one of human dignity. Nussbaum's capability approach does not touch upon the issue of immigration, and leaves this question unanswered. Up to now, Nussbaum has concentrated solely on the duty government has toward its citizens. In her latest book, Nussbaum briefly comments that immigration is one of the topics that are waiting to be addressed within the capabilities paradigm. Through this lecture, we hope to underline the urgency of this dilemma.