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**Immigrant Legalization: A Dilemma between
Inclusion and the Rule of Law?**

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Abstract

Immigrant legalization policies pose an ethical dilemma for liberal democracies. On the one hand, liberal democracies aspire to respect the basic equality of all persons. Compelling moral arguments have been made for granting legal status and a path to citizenship to unauthorized migrants by virtue of the social ties that they have developed, their contributions to the host society, and their vulnerability to exploitation and subordination. On the other hand, legalization poses a challenge to another important value, the rule of law, which requires government to operate within a framework of law in accordance with well-established public norms, not in an arbitrary or *ad hoc* manner. Immigrant legalization programs are said to undermine the rule of law because they reward lawbreaking, allow queue-jumping, and incentivize further unauthorized migration.

This article clarifies each horn of the dilemma, focusing on rule of law arguments since less has been written about them. We assess both the empirical assumptions and normative interpretations embedded in rule of law arguments. We concentrate on the United States but also give some attention to legalization in other countries. We acknowledge that some of the rule of law objections to legalization have merit, but we argue that there are also rule of law arguments that *support* legalization, which help to mitigate, although not eliminate, the dilemma. We conclude by discussing the implications of our analysis and considering how liberal democratic states might better manage the dilemma.

Keywords

Amnesty, immigrant integration, immigration, legalization, regularization, rule of law.

1. Introduction*

On his first day in office, President Biden sent an immigration bill, “The U.S. Citizenship Act of 2021,” to Congress. It provides, among multiple provisions, legal status to many of the 11 million unauthorized migrants estimated to live in the United States.¹ The bill allows unauthorized migrants to apply for temporary legal status and after five years, to apply for permanent residence. Specific groups of precarious migrants—young people living in undocumented status (“Dreamers”), those in Temporary Protected Status (TPS), and farmworkers who meet certain requirements—would be eligible for permanent residence immediately (White House 2021). The House of Representatives subsequently passed part of Biden’s bill, giving permanent residence to Dreamers, TPS holders, and around one million farmworkers, but the legislation faces steep odds to pass in the Senate (Broadwater 2021).

Whether called ‘legalization,’ ‘amnesty,’ or ‘regularization,’ such policies have been used as a corrective device to grant unauthorized migrants some legal status, from protection from deportation and work authorization to a path to citizenship. We can distinguish between collective legalization and individual regularization. Collective legalization (often called ‘amnesty’) is a policy that extends some form of legal status to a large group of unauthorized migrants at a specific point in time. Such legalization can range from temporary protection against removal and temporary work authorization to permanent residence with a clear path to citizenship. One example from the U.S. is the 1986 Immigration Reform and Control Act (IRCA), the country’s last large-scale legalization, which provided permanent residence to 1.6 million unauthorized migrants under a general legalization program, 1.1 million farmworkers under the Special Agricultural Worker program, and 38,000 Cubans and Haitians (Kerwin 2010: 7-8). Biden’s bill is another example of collective legalization.

By contrast, individual regularization is a policy built into immigration law and applied to individuals who meet specified criteria. For example, the 1929 Registry Act allowed migrants unable to document their admission for permanent residence in the United States to register for permanent residence status if they had entered the country prior to June 3, 1921, resided continuously since then, and demonstrated ‘good moral character.’ Congress updated the qualifying date four times, in 1940, 1958, 1965, and 1972 (Kerwin 2010: 4). Today, any noncitizen who has been in the U.S. since January 1, 1972, or before, whether in some sort of lawful immigration status or not, can become a permanent resident (barring disqualifying criminal convictions). Because the cutoff date is far in the past, a very small number of people have become permanent residents through registry in recent years; only 135 noncitizens did so in 2012 (Dept of Homeland Security 2012). Don Kerwin (2010: 2) estimates that, from 1986 to 2009, in addition to the over 2.7 million people legalized via IRCA, the United States legalized the status of over 1 million other migrants through a variety of programs. This is a large number, but the total constitutes a small percentage (16%) of all 23 million lawful permanent residence (LPR) admissions over these years (Dept of Homeland Security 2019). This raises the question of whether legalization should be made a regular part of immigration law by, for example, automatically advancing the cut-off date for the Registry Act program.

This question is relevant not just to the United States, but to any country with unauthorized migrants living within its borders. For example, in 2010, South Africa instituted a ‘Zimbabwe

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¹ We use the terms ‘unauthorized,’ ‘undocumented,’ and ‘irregular’ migrants interchangeably.

Documentation Project' that provided four-year permits for residence, study, work, and entrepreneurship, providing relief for almost 243,000 of an estimated 1.5 million undocumented Zimbabweans in the country (Thebe 2017: 614). A 2013 campaign by Saudi Arabia to 'Saudiize' the kingdom's migrant work force combined regularization and enforcement: 4.7 million foreign workers regularized their status, while another one million were forced to leave that year, of which over half were actively deported (De Bel-Air 2014).

In this article, we are primarily interested in the normative dilemmas and public policy trade-offs of legalization for liberal democratic countries. Southern European countries such as Spain, Italy, Greece and Portugal have enacted a series of large-scale amnesties and regularization programs over the past decades: five in Italy between 1987 and 2002; three in Portugal between 1992 and 2003; two in Greece in 1998 and 2000-01; and a succession of Spanish amnesties starting in 1985, with the largest, in 2005, regularizing the status of almost 573,000 irregular migrants in Spain (Maas 2010: 241, 246).

Legalization policies pose a particular ethical dilemma for liberal democracies. On the one hand, liberal democracies aspire to respect the basic equality of all persons. Compelling moral arguments have been made for granting legal status and a path to citizenship to unauthorized migrants. They include arguments about recognizing the social ties migrants have developed, rewarding their contributions to the host society (through their labor, serving in the military, etc.), and protecting migrants from exploitation. On the other hand, legalization poses a challenge to another value, the rule of law. Legalization policies are regarded as undermining the rule of law by rewarding lawbreaking for those who have violated immigration law and incentivizing further lawbreaking by encouraging unauthorized entry among those who have not yet migrated.

It is important to take these concerns about the rule of law seriously for at least two reasons. First, the rule of law is an important value in liberal democracies. It requires government to operate within a framework of law in accordance with well-established public norms, not in an arbitrary or *ad hoc* manner. Critics of individual regularization programs argue they are capricious, rewarding some migrants with legal status when they should be subject to legal penalties for breaking the law. Collective legalization or amnesty programs are arguably in even greater conflict with the rule of law, which requires not only penalties for rule-breaking but also stability of expectations about such penalties over time. If these criticisms are right, both types of legalization pose a serious problem for societies committed to the rule of law.

Second, the rule of law is also central to a civic ideal of citizenship, which says that a commitment to a set of ideals and institutions is the defining element of citizenship. On the civic ideal, immigrants are expected to adopt the political values of the host society; their inclusion as full members is not premised on sharing the ethnic, racial, or religious identity of the dominant groups in the society (Walzer 1990, Song 2009). According to research by the Voter Study Group, when asked about the meaning of American citizenship, 93 percent of U.S. respondents said "respecting American institutions and laws" is very important to what it means to be an American (Sides 2017). While U.S.-based respondents are especially likely to link respect for law and institutions to being a "true" national, in cross-national surveys from Australia to Austria, on average 82% of survey respondents feel the same way about membership in their country (Wright 2011: 605). Thus, to the extent that a civic sense of citizenship is prized by liberal democracies, threats to the rule of law may be regarded by many citizens as threats to citizenship itself.

In this article, we clarify each horn of the dilemma to show why legalization poses a genuine ethical dilemma for liberal democratic states. Since scholars have given more attention to the inclusion side of the dilemma (Bosniak 2006 & 2013, Motomura 2007, Shachar 2009, Carens 2010, Hosein 2016,), we focus on the rule of law side of the dilemma. We assess the claim

that legalization policies undermine the rule of law by examining empirical evidence and reflecting on the meaning of the rule of law. We concentrate on the U.S. but also give some attention to legalization in other countries. While we acknowledge that some of the rule of law objections to legalization have merit, we argue there are also rule of law arguments that *support* legalization, which help to mitigate the dilemma. We conclude by discussing the implications of our analysis and considering how liberal democratic states might better manage the dilemma.

2. The Dilemma, Part One: Claims for Inclusion

The first horn of the dilemma is rooted in the moral claims of unauthorized migrants for inclusion. There are a number of distinct moral arguments that have been made for legalizing unauthorized migrants and including them as full members of the political community. They include arguments about the state's consent to unauthorized migration, the social ties of migrants, the contributions of migrants to the host society, and the vulnerability of unauthorized migrants to exploitation and subordination (for an overview, see Hosein 2016). We discuss three of the most prominent arguments in greater detail but underscore that proponents of any one of these arguments for legalization face the dilemma we identify.

First, the *social membership* argument says that unauthorized migrants should be granted the right to stay in the host country because they have already become members in virtue of the social ties that they have developed. As Joseph Carens puts it, 'living within the territorial boundaries of a state makes one a member of society' and 'this social membership gives rise to moral claims in relation to the political community' (2013: 158). Time is used as a proxy for the degree of social membership. When migrants have been settled for a period of time (Carens proposes five years), they become full social members and are thus entitled to the right to stay and the opportunity to become citizens (2013: 147). Part of the legalization provisions in IRCA reflected this approach, requiring that those applying to the main program show proof of having continuously resided in the United States for at least four years (since January 1, 1982). Hiroshi Motomura has traced the development of a similar idea in U.S. immigration law, 'immigration as affiliation,' which says that unauthorized migrants' affiliations to individuals or communities in the U.S. deserve recognition (Motomura 2014: 176; see also Shachar 2009). Recognition can take the form of extending temporary or permanent legal status.

A second argument for legalization focuses on the *contributions* of unauthorized migrants to the host country. Migrants contribute to the economy through their labor and support the government through their tax payments. They work in agricultural and construction jobs, clean people's houses and yards, and care for the young, the ill, and the elderly. These contributions are morally significant because they generate requirements of reciprocity and fairness: migrants contribute to the host society and are owed something in return (Hosein 2016: 167; Song 2018: 187). Such claims have intensified during the COVID-19 pandemic as many have called for recognizing the contributions of migrants who are 'essential workers.' Unauthorized migrants have been performing essential work for much longer, including helping with rescue and cleanup at Ground Zero after 9/11 and Hurricane Katrina.² What are they owed? Reciprocity requires that migrants' contributions, especially economic contributions, be rewarded with material benefits. The state could provide stronger labor and employment rights to ensure that migrants retain more of the productive surplus created by their work and fund

² In her book *The Undocumented Americans*, Karla Cornejo Villavicencio tells the stories of undocumented migrants across the United States, including many who did difficult, dangerous work in the wake of crises and emergencies, including 9/11 and Hurricane Katrina.

health insurance to protect them from the risk of serious illness. Reciprocity can also be interpreted as requiring the right to remain. As Adam Hosein has argued, the U.S. benefits not only from migrants' labor but also from migrants having certain expectations and planning their lives around those expectations; the U.S. government bears responsibility for the expectations it generates among unauthorized migrants through its decisions as to whether and how to enforce immigration laws (2016: 167, 164). Whatever its official position, insofar as government has permitted unauthorized migration through its highly discretionary application and enforcement of immigration law (Motomura 2014: 107-110), unauthorized migrants have a strong fairness claim to the right to stay. The Special Agricultural Worker program of IRCA reflects this contribution rationale: it waived the residence requirement for this group of laborers and required only proof of a minimum 90-day work contract to apply.

A third argument for legalization is grounded in a concern about the *vulnerability of migrants to exploitation and subordination*. Equality is a core tenet of liberal democracies. In a society of equals, caste-like distinctions between groups, whether based on race, gender, or immigration status, are morally objectionable. Systematic inequality between groups renders some groups vulnerable to exploitation and subordination at the hands of others. This concern animates Michael Walzer's argument against the 'permanent alienage' of migrants:

Men and women are either subject to the state's authority, or they are not; and if they are subject, they must be given a say, and ultimately an equal say, in what that authority does (1986: 61).

Walzer's focus was on temporary labor migrants, but his argument can also be applied to unauthorized migrants. In *Plyler v. Doe* (1982), the U.S. Supreme Court identified unauthorized migrants as a potential 'caste' in American society. The Court said the U.S. government through 'sheer incapability or lax enforcement of the laws' had created

a substantial 'shadow population' of illegal migrants. This situation raises the specter of a *permanent caste* of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law (*Plyler v. Doe*, 457 U.S. 202, emphasis added).

Such anti-caste concerns ground Owen Fiss's argument for extending certain rights, including welfare rights, to unauthorized migrants (1999). Adam Hosein draws on them to argue for the right to remain (2016: 169-172).

These three arguments—based on social membership, contributions, and protecting migrants from exploitation—comprise the leading moral arguments in favor of legalization. They have been used in policy debates, where they often intertwine. Willem Maas (2010) argues that much of the European discussion of responses to irregular migration in the 1970s and 1980s focused on labor and human rights, portraying clandestine migrants as victims in need of protection rather than lawbreakers. In signing IRCA, President Ronald Reagan suggested something like the anti-caste argument:

The legalization provisions in this act will go far to improve the lives of a class of individuals who now must hide in the shadows, without access to many of the benefits of a free and open society. Very soon many of these men and women will be able to step into the sunlight and, ultimately, if they choose, they may become Americans (Reagan 1986).

In justifying Biden's 2021 bill, the White House has emphasized both contributions and social ties, arguing:

The bill provides hardworking people who enrich our communities every day and who have lived here for years, in some cases for decades, an opportunity to earn citizenship... The bill creates an earned path to citizenship for our immigrant neighbors, colleagues,

parishioners, community leaders, friends, and loved ones—including Dreamers and the essential workers who have risked their lives to serve and protect American communities’ (White House 2021).

In short, it is not just legal scholars and political philosophers who have articulated the importance of social ties, contributions, and mitigating exploitation to justify legalization; such claims also have been made by elected politicians from right-of-center and left-of-center political parties.

3. The Dilemma, Part Two: Commitment to the Rule of Law

Proponents of immigrant legalization who appeal to moral claims for inclusion must, however, face the second horn of the dilemma: commitment to the rule of law. The rule of law consists of a number of principles about how a political community should be governed. Jeremy Waldron provides a concise account:

The most important demand of the Rule of Law is that people in positions of authority should exercise their power within a constraining framework of well-established public norms rather than in an arbitrary, *ad hoc*, or purely discretionary manner on the basis of their own preferences or ideology. It insists that the government should operate within a framework of law in everything it does, and that it should be accountable through law when there is a suggestion of unauthorized action by those in power (Waldron 2016).

The formal principles of the rule of law include generality (neither the laws nor officials’ use of discretion under those laws should make irrelevant distinctions between subjects of law), clarity (laws should be accessible, not vague), publicity (laws should be available for subjects to learn), prospectivity (laws should be promulgated well in advance of individuals’ being held responsible for complying with them), and regularity (officials should be constrained to use the state’s coercive power only when authorized by good faith and reasonable interpretations of pre-existing legal rules) (Waldron 2016; Gowder 2016). Regularity and publicity lead to what Paul Gowder has called vertical equality: government officials cannot easily abuse their power, and individuals can be fairly secure in their legal rights against the state. Generality leads to horizontal equality: individuals are genuinely equal under the law (2016: 7-8).

There are three main rule of law arguments that have been made against legalization. The first is that it rewards and endorses lawbreaking. Unauthorized migrants have violated immigration laws by overstaying their temporary visas or by crossing borders without permission. Amnesty programs in particular seem directly at odds with the generality requirement of the rule of law since some lawbreakers (those who arrived prior to the amnesty deadline) are not subject to legal penalties. Arguably, when governments do not just ignore the legal violation but extend legal status to some migrants who have violated immigration law, they go a step further and send the message that governments condone the legal violation, thereby undermining the rule of law itself (Kobach 2008). In justifying amnesty programs, officials often underscore the ‘one-time’ or exceptional nature of legalization, presumably to stifle expectations of future amnesties. For example, responding to the slate of amnesties in southern Europe, the European Commission argued in 2004 that they should be ‘avoided or confined to very exceptional situations’ (cited in Maas 2010: 241-2). Yet, in being exceptional, such pronouncements suggest the *ad hoc* and ‘outside regular law’ nature of amnesty.

A second way in which both collective legalization and individual regularization programs are said to undermine the rule of law is by endorsing ‘queue jumping.’ Many would-be migrants wait years, if not decades, for admission through the regular immigration system. For example, U.S. immigration law allocates a specific number of legal permanent residence (LPR) visas for distinct sorts of family ties, such as spouses, children, parents, and siblings. The length of the queue and processing speed depends on the citizenship status of the migrant’s sponsor and

the national origin of the would-be migrant. The yearly visas available and concomitant wait times to access a visa when the annual quota runs out thus vary by a complex matrix of type of family tie, country of origin, and sponsor's citizenship. For example, in June 2021, the unmarried adult sons or daughters of a legal permanent resident had waited, on average, six years to receive a visa. But if the adult child was a Mexican national, they had been waiting 22 years. Similarly, in June 2021, the State Department was processing the LPR applications for siblings of U.S. citizens who had filed their paperwork in December 2006 for most countries in the world, but by June 2002 for Filipinos and by September 1998 for Mexicans (U.S. State Department 2021). From the point of view of those waiting in line in the regular immigration system, it may appear that the rule of law has been violated by privileging, in a seemingly arbitrary way, the claims of unauthorized migrants outside the system over their own claims. This is unfair to the foreigners who have played by the rules and have been waiting for years to gain admission.

The third argument moves beyond the actions of specific rule-breakers or the particular harms experienced by others directly affected by queue-jumping to focus instead on moral hazards. Specifically, the concern is that legalization programs incentivize future unlawful actions by those not yet directly engaged in the immigration system—in particular, that large-scale amnesties create incentives for new unauthorized migration. When prospective migrants learn about amnesty programs, they may be encouraged to migrate without authorization instead of seeking admission through the legal immigration system. This concern about incentives looms large in contemporary public debate. Objecting to 'Joe Biden's Amnesties,' a writer at the Center for Immigration Studies, a U.S. think tank advocating strict limits to immigration, argues:

Amnesties have always created an incentive for more migrants to enter the United States illegally, as new migrants enter illegally hoping that they will be able to take advantage of the *next* amnesty (Arthur 2020).

This objection rests on empirical assumptions. We examine evidence about the incentive effects of amnesty programs in the next section.

4. Assessing the Rule of Law Arguments against Legalization

Because political theorists and philosophers have given considerably more attention to arguments for migrants' inclusion in discussing legalization, we instead focus on the rule of law arguments outlined in the previous section. We analyze both the empirical assumptions and normative interpretations about the rule of law made by these arguments. We tackle them in reverse order, from what we see as the weaker empirical arguments to the stronger normative ones.

The first rule of law objection against legalization focuses on its incentive effects. The claim is straightforward and reasonable: if a country legalizes unauthorized migrants, this will increase the motivations of would-be migrants to attempt unauthorized migration, in the hope that legalization will be repeated at some future time. This objection has focused more on amnesty programs, which are more publicly visible and large-scale, rather than individual regularization. And the concern has been raised by people across the political spectrum, not only those who favor immigration restrictions but also those who favor a more open approach to immigration. If legalization programs incentivize further unauthorized migration, receiving states may enact 'hostile environment' policies to get unauthorized migrants to 'self-deport' and adopt increasingly strong measures to restrict immigration, which in turn may make border crossings even more difficult and dangerous (Lister 2020).

Evaluating this empirical claim about incentive effects is, however, difficult. There is certainly anecdotal evidence that observers point to as evidence of incentive effects. Maas notes that shortly after Spain's 2005 amnesty, "hundreds of would-be immigrants from sub-Saharan Africa attempted to storm the fences separating Morocco and the Spanish enclaves of Ceuta and Melilla" (2010: 240). However, we do not know what would have happened in what social scientists call the counterfactual scenario: if Spain had not enacted the 2005 legalization, would there have been no such attempt to reach Spanish territory? Beyond our inability to play out the social world in two parallel scenarios, researchers are also hindered by poor data in counting undocumented migrants (Kaneshiro 2013; Wehinger 2014) and uncertainty about the temporal period in which we should see incentive effects, whether immediately after a law is enacted, in the next couple of years, or even a decade after legalization.

The limited data available suggest little or very limited direct incentive effects. Studies of IRCA in the United States find no positive or negative effects of the legislation on long-term patterns of undocumented migration from Mexico (Donato, Durand and Massey 1992; Orrenius and Zavodny 2003). Using IRCA to assess incentives effects is problematic, however, since the law included both an amnesty provision and new employer sanctions that aimed to penalize businesses hiring undocumented migrants. Some observers had speculated that, rather than encourage future migration, IRCA might dissuade would-be migrants. More recent research, examining whether knowledge of proposed legalization programs incentivizes people in Mexico to head north, finds no evidence of increased intent to migrate among prospective migrants (Wong and Kosnac 2017). Similarly, the establishment of the 2012 Deferred Action for Childhood Arrivals (DACA) program had a limited effect on the migration of unaccompanied minors compared to the effects of violence and economic conditions in motivating migrants to leave their origin countries (Amuedo-Dorantes and Puttitanun 2016). In the European context, Frank Wehinger (2014) attempts to model the 'pull' effect of amnesty on clandestine migration to Europe and finds a statistically significant but substantively very small positive pull. Since the European countries bordering the Mediterranean Sea enacted amnesties, the numbers of migrants living in these countries have ballooned, but push factors in sending countries, geographic proximity, and weaker bureaucratic capacity in receiving countries—both to process and enforce immigration laws—appear to play a much bigger role than migrants' belief of their chances at legalization. Counterfactual thinking is again useful: absent the southern European legalization programs, would flows across the Mediterranean and overland be substantially lower?

Most migration scholars would posit "no" because the underlying drivers of migration go well beyond a person's assessment of amnesty's likelihood. Migration is driven by the pull of economic opportunities and push of economic stagnation, corruption and long-term humanitarian crises and political strife (Aslany, et al. 2021; Massey, et al. 1999). It is helped along by social ties to those who have previously migrated, shaped by migration policy, and affected by the legacies of interstate relations, such as prior temporary labor programs, colonial ties, and histories of military engagement and foreign policy (de Haas, et al. 2019; Garip 2016; Sassen 1998). One-time amnesties like IRCA may be unlikely to create a pull effect if there is credible assurance by the government that they will not be repeated. Periodic amnesties that are expected to occur at regular intervals may be more likely to have pull effects; some contend that irregular migration to Italy in the 1990s was partly driven by an expectation of periodical amnesties. Yet, given the deep structural drivers of migration, it is highly unlikely that amnesties do more than produce small ripples on human flows.

The second rule of law argument against legalization is that it enables 'queue jumping,' penalizing those who were following the rules within the regular immigration system by allowing rule-breakers to 'jump' ahead and gain legal status. To evaluate this claim, we can consider

the consequences on the ground—how many people are displaced? Empirically, the answer is very few. This is the case for two reasons. First, amnesty programs are usually enacted as special provisions outside the caps or numerical quotas of regular immigration law. Thus, those waiting in other lines (e.g., admitted based on family or chosen for humanitarian considerations) experience no measurable harm. Second, compared to the overall level of migration to a country, the number of those legalized tend to be a small percentage of flows over a longer time span. As we noted in the introduction, the significant legalization of 3.7 million people in the United States from 1986 to 2009 still only constituted 16 percent of those admitted to permanent legal status over this period.

One could argue that bureaucratic processing of legalization strains the administrative state, and thus likely produces some delays for others. This can be the case, but there is also the opportunity to work with civil society actors, such as nonprofit social service agencies or immigrant associations, to mitigate the bureaucratic burden. Following passage of IRCA, for example, an infrastructure of immigrant-serving civil society organizations worked in tandem with the U.S. government to help legalize migrants (Hagan and Baker 1993). Some critics of amnesty programs also note that those legalized will often subsequently sponsor their relatives to migrate through family reunification provisions, increasing the wait times for all would-be family migrants (North 2013). There is indeed evidence that legalized migrants sponsor family members (Massey and Espinosa 1997). However, as we discuss below, if they can now do so within the legal immigration system rather than have family members engage in clandestine migration, this can serve to strengthen rather than weaken the rule of law.

There is a further problem with the queue-jumping objection tied to the realities of public policy. Taking a step back, we need to recognize that all immigration systems privilege some migrants over others. In general, countries select migrants based on their economic contribution, family ties, humanitarian considerations, or specific historical or ancestral ties. In the U.S., the government has enacted much stronger preferences for migrants with family already resident in the U.S. and much weaker preferences for low-skilled but essential workers who have no family members in the country. Low-skilled workers can enter through temporary labor migration programs, but when it comes to admission for permanent residence, many unauthorized migrants had no possibility of getting in through authorized channels. In other words, there is no queue in the regular immigration system for low-skilled workers without family ties. This raises broader questions about what a country's overall immigration preferences and priorities should be. As scholars who advance inclusion arguments make clear, one can articulate multiple grounds to privilege low-skilled, long-term undocumented residents relative to prospective migrants outside the country. In this regard, legalization policies might be viewed as a way to integrate migrants who were shut out of the regular immigration system but who have become contributing members of the host society.

The third rule of law argument is that legalization rewards lawbreaking. This is perhaps the strongest argument against legalization because respect for the rule of law is an important value in itself and it is a key feature of civic conceptions of citizenship and national identity, which emphasize ideals and institutions as central to what it means to be a citizen. Although there is limited empirical evidence of incentive effects, there may still be a public perception that legalization programs undermine the rule of law because it condones lawbreaking. Citizens may thus be less inclined to support legalization, the regular immigration system, and the integration and naturalization of immigrants. Legalization may also erode citizens' own sense of citizenship rooted in shared civic ideals.

Consider the following evidence from the U.S. It is the case that, when framed as law-breaking, support for amnesty provisions decline among the U.S. public (Haynes, Merolla and Ramakrishnan 2016). It is also the case that public opinion tends to be more favorable to legalization when the beneficiaries are people who became undocumented as children

(Krogstad 2020), presumably in part because many children did not choose to migrate but came with parents, removing the idea of culpability in breaking the law. Yet survey data also show that as advocacy groups, immigrant communities, and some public officials make the case for legalization, public opinion can shift and be quite supportive of legalization, even when the beneficiaries are adults and are explicitly labeled as “illegal” immigrants (Sana 2019; Bloemraad, Silva and Voss 2016). Shortly after Biden proposed his comprehensive immigration reform bill in January 2021, a public opinion poll found that among likely voters, 69% of respondents supported a path to citizenship for undocumented immigrants (Narea 2021). This suggests that ordinary people are weighing multiple considerations in evaluating amnesty, and that a narrow view of the rule of law is less than decisive in their final opinions.

5. The Other Side of the Rule of Law: Arguments for Legalization

In response to the third rule of law argument against legalization, it is important to acknowledge that unauthorized migrants have violated immigration laws. Yet we should also recognize that a range of other relevant factors can be viewed as offsetting the immigration violation. What are these countervailing considerations? They include the moral arguments for inclusion considered above (e.g., social membership, contributions, protection from exploitation). In addition, and critical for our discussion, there are also *rule of law* arguments for legalization.

First, legalization can promote consistency and predictability in a system of immigration enforcement that is highly discretionary. As Motomura puts it,

The immigration law system is one of selective admissions, selective enforcement, and vast unpredictable and inconsistent discretion. It is not just a matter of enforcing a simple legal-illegal line... Respect for the rule of law in immigration law means identifying where granting lawful status is an appropriate way to restore some predictability and consistency to the U.S. immigration system (2014: 192).

Critics of legalization regard it as an abuse of discretion that undermines the rule of law. Their position finds support from scholars who insist that official discretion is antithetical to the rule of law (Dicey 1885, Hayek 1944). By contrast, other rule of law scholars argue that discretion is inevitable in the modern administrative state and the rule of law requires the use of discretion to be properly framed and authorized (Davis 1969, Waldron 2016).

These considerations about discretion can be applied to one form of individual regularization in U.S. immigration law called ‘cancellation of removal.’ It gives immigration judges the discretion to grant LPR status to individual unauthorized migrants who meet certain criteria (i.e., have relatives who are U.S. citizens or permanent residents, meet a hardship requirement, and do not have disqualifying criminal convictions). In 1996, Congress restricted the availability of cancellation of removal by adding the requirement that migrants seeking relief from removal must demonstrate that their removal would result in ‘exceptional and extremely unusual hardship’ to a close family member who is a U.S. citizen or LPR. Did this change promote or diminish the rule of law? The answer depends on whether one views cancellation of removal as an extraordinary or ordinary act of government. If one believes the rule of law requires deporting immigration violators, it follows that restricting cancellation makes sense. On this view, cancellation is an extraordinary act of grace. By contrast, if one believes cancellation is an ordinary feature of immigration law, it can be viewed as consistent with the rule of law. This is not to say that immigration judges can do whatever they want. Cancellation decisions are governed by legal rules that reflect threshold criteria, hardship requirements, and other standards that yield consistent results. Making cancellation more broadly available would allow such legal rules to counteract the unpredictable and inconsistent patterns of discretionary enforcement that brings an individual into removal proceedings (Motomura 2014: 189). The history of legalization in U.S. immigration law shows that it is not an aberration, but ‘a principled

way of applying the rule of law to control the discretion that has historically governed unauthorized migration' (Motomura 2014: 197).

A second rule of law argument for legalization is the rationale for statutes of limitations. Statutes of limitations in criminal law forbid prosecutors from charging someone with a crime that was committed more than a specified number of years ago. Each state in the U.S. establishes its own statutes of limitations, with different time limits for different types of crimes. Not all crimes are governed by statutes of limitations (murder has none), but statutes of limitations are common for less serious offenses. The underlying moral claim is that it is wrong to make people live indefinitely with a looming threat of serious legal consequences for a long-past action, except for the most serious offenses. As Antje Ellermann has argued, statutes of limitations are designed not only to ensure that legal proceedings are brought at a time when evidence has not been obscured by the passage of time; they also reflect the principle of legal certainty: the law should be clear and predictable to allow the person 'to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail' (quoted in 2014: 299). Legal certainty and predictability are closely linked to the concept of individual autonomy: clear and predictable law allows individuals who are subject to the law to plan their lives. As U.S. Supreme Court Justice Thurgood Marshall put it, 'The statute of limitations established a deadline after which the defendant may legitimately have peace of mind.'³

While many criminal and civil offenses have statutes of limitations, immigration law does not. This was not always the case in the U.S. Until 1917, most immigrants could only be deported in their first year and after 1917, only in the first five years after entry (Ellermann 2014: 299). Deportation was regarded as appropriate only for people who had been in the country for a limited period of time. Not all immigrants, however, were included in this statute of limitations. As Mae Ngai has shown, discretionary relief was available to European and Canadian immigrants; their illegal status was deemed to be technical and solvable through procedural channels such as suspension of deportation (which became 'cancellation of removal') and a pre-examination process (which became 'adjustment of status'). By contrast, these forms of discretionary relief were unavailable to migrants from China, Mexico, other Latin American countries, and the Caribbean; their exclusion was based on the racial logic of their inherent unassimilability (Ngai 2004: 56-90; 2010: 59; see also Motomura 2014: 200 and Chavez 2007). Congress abolished all statutes of limitations for excludable noncitizens in 1924.

The statute of limitations argument applies straightforwardly to individual regularization and suggests that discretionary regularization programs, such as cancellation of removal, should be replaced with legal certainty about regularization after a certain period of time. One reason is the idea of social membership discussed above, which allows the social ties formed over time to erode the state's power to pursue immigration violations (Carens 2013: 155). Another reason arises from the rule of law. Deportation can be said to be arbitrary when the state does not pursue undocumented migrants in a timely and reasonably predictable manner. As Ellermann argues, if the state is unable or unwilling to enforce immigration law in a timely and reasonably predictable manner, 'the principle of legal certainty demands that the state cut its losses, so to speak, and recognize the right of individuals, to move on with their lives' (2014: 301). The principle of legal certainty has served as the basis for a number of cases in European courts to determine the deportability of undocumented migrants. A German court held that continued issuance of stays of deportation violated a migrant's 'right to a private life [which] encompasses the sum of personal, social, and economic relationships that are constitutive of the individual and which, with increasing length of stay, are of central importance for the free

³ Walker v. Armco Steel Corp. 446 U.S. 740, 751 (1980).

development of a human being' (quoted in Ellermann 2014: 303). The statute of limitations argument is harder to apply to collective legalization or amnesties if they include more recently arrived migrants, but the principle of legal certainty can lend support to amnesties for migrants who have been settled for a period of time.

A third rule of law argument in favor of legalization is it can promote the rule of law by bringing unauthorized migrants 'out of the shadows' and the underground economy. Consider the legalization of certain drugs or the decriminalization of sex work. Although one might disagree with the practices in question, one might nonetheless agree that it is better to legalize the practice for the sake of reducing abuse, reducing criminal activity, and protecting vulnerable individuals affected by the practice. Unauthorized migrants are legally entitled to certain basic rights, including the right to personal security, freedom of expression, wages for work performed, and basic public goods such as emergency medical care, but they are less likely to exercise these rights because of the fear of being discovered by immigration authorities. Unauthorized migrants who are victims of or witnesses to a crime may not report the crime out of fear they will be reported to immigration enforcement officials. Legalization would allow these migrants to come out of the shadows and into the regular immigration system, fostering greater compliance with law. This rule of law argument is reflected in the rationale for U and T visas in the United States. The U visa for "Victims of Criminal Activity" is available to victims of crimes and their immediate family members – even if they are undocumented – if they demonstrate that they suffered mental or physical abuse and are willing to assist law enforcement of government officials in the investigation or prosecution of criminal activity. The T visa, for victims of human trafficking, operates similarly, and is justified by government authorities so as to "strengthen the ability of law enforcement agencies to investigate and prosecute" crimes such as human trafficking (USCIS 2021).

A fourth rule of law argument for legalization is that it can provide a fresh start for the immigration system. In particular, collective legalization programs can directly promote the rule of law by clearing up a large backlog of cases where the law has not been enforced. When policymakers are considering reforms to immigration law, the presence of large numbers of unauthorized migrants can undermine the credibility of the overall immigration system and divert resources needed for new policies. A key premise here is that the law at issue is largely unenforceable, not only in terms of state capacity to fully enforce the law but also in terms of the social and political costs of pursuing full enforcement. Legalization serves as a pragmatic response to administrative failure, bringing the law and actual behavior into closer alignment for the purposes of effective governance and systemic legitimacy (Bosniak 2013: 348; Maas 2010). We can see this practical logic at work in tax collection and parking fines. In these contexts, one often sees the related claim that the transgression was not so bad or that its badness is outweighed by countervailing considerations such that amnesty is a reasonable response. Similarly, amnesty in the immigration context offers a chance for an administrative reset for the sake of effective governance and legitimacy of the immigration system. The term amnesty derives from the Greek 'a,' plus *mnestis*, meaning non-remembrance. There are different ways to interpret the idea of not remembering or forgetting. It may entail a deliberate overlooking or erasure of an act. But in the context of immigration, amnesty can stand for a different idea: pardon or clemency such that the act in question is forgiven and the pardoned person is free to move on with their lives (Bosniak 2013: 346-347). Amnesty allows for a fresh start both for the givers and recipients of amnesty.

One might object that even if legalization can promote the rule of law in these ways, it still rewards lawbreaking. As we said above, it is important to acknowledge that unauthorized migrants have violated immigration law. Proponents of open borders may see no problem with such lawbreaking because they regard any legal regime of borders as unjust and unjust laws should not be obeyed. On this view, amnesty is owed as a kind of vindication, an

acknowledgement by the government that the violated rule was not justifiable in the first place (Bosniak 2013: 349). By contrast, those who believe that states have a qualified right to regulate immigration or those who accept the rule of law as an important value will recognize that legalization embodies a tension between equality for migrants and the rule of law.

The rule of law, like other fundamental values, consists of different principles and admits of different interpretations. When governments grant amnesty or extend individual regularization to unauthorized migrants, they are not condoning lawbreaking. Instead, they recognize *both* that migrants have violated immigration law *and* that countervailing considerations ultimately outweigh that violation. On this view, legalization entails *both* a recognition that the act in question was wrong *and* a pardoning of the act (Bosniak 2013: 347). The worry that such pardoning is tantamount to rewarding lawbreaking is reflected in the conditions that governments have attached to amnesty programs. To signal a commitment to the rule of law, regularization programs have tended to require unauthorized migrants to show they have no criminal record and have paid taxes (Lister 2018). While we do not necessarily endorse such conditions, our point here is that legalization can strengthen, rather than weaken, the rule of law if it is pursued in a way that acknowledges the immigration violation and expresses a commitment on the part of recipients to be bound by law.

6. Conclusion

Rule of law arguments cut both ways in the debate on legalization. Opponents of legalization contend that it encourages further unauthorized migration. We find limited empirical evidence for this claim. The claim that legalization rewards lawbreaking raises a serious normative concern. In response, we argued that it is important to acknowledge that unauthorized migrants have violated immigration law, but legalization need not be interpreted as endorsing lawbreaking. Instead, it acknowledges the immigration violation but also recognizes that countervailing considerations, including rule of law considerations, offset the violation. We believe these rule of law arguments for legalization mitigate the dilemma between inclusion and the rule of law, but they do not eliminate it. The ethical dilemma persists for those who regard the rule of law as an important value.

How might liberal democratic states better manage the dilemma? We offer three proposals based on the foregoing discussion. First, there are distinctive rule of law arguments for different types of legalization programs and it is important to be clear which arguments apply to which programs. Individual regularization programs are a reasonable exercise of discretion aimed at ensuring consistency and predictability in a highly discretionary immigration system, and they should be made a regular feature of immigration law, especially when targeting long-settled migrants. One example is the U.S. Registry Program. It grants legal status to unauthorized migrants who can show they have been residing in the country since before a specified date. The cut-off date could be regularly updated. Such a built-in approach is both more efficient and less intrusive of privacy than a more detailed case-by-case inquiry into an individual's particular circumstances of the kind conducted by immigration judges in cancellation of removal proceedings. It would also send the message that individual regularization is a regular, not extraordinary or one-time, feature of immigration law, akin to having a "statute of limitations" for other infractions. By contrast, large-scale collective legalization or amnesty programs are harder to justify as a regular feature of immigration law. Instead, they are justified as a sparingly used corrective mechanism to enable a fresh start for an administrative system that has broken down in certain respects. A collective legalization program that targets designated groups of unauthorized migrants, such as Dreamers and farmworkers, as Biden's bill does, may be more feasible politically, but such targeted programs are less inclusive than a policy that encompasses all unauthorized migrants who have resided in the country for a specified period of time.

A second implication has to do with how governments frame and justify legalization policies. In response to the objection that legalization policies reward lawbreaking, governments should acknowledge that unauthorized migrants have violated immigration law but emphasize the countervailing considerations that they regard as offsetting and ultimately outweighing the immigration violation. These considerations include the claims for inclusion discussed above: the social ties of migrants, their contributions to the host society, and their vulnerability to exploitation. Governments should also emphasize the benefits of legalization for the rule of law: the reasonable use of discretion, the importance of legal certainty, fostering greater compliance with law by bringing people out of the shadows, and providing a fresh start for the immigration system. When it enacts legalization, a government *both* recognizes the wrong of the immigration violation *and* forgives it in light of a range of morally compelling considerations. Migrants who have set down roots and contributed to the host society should be able to move on with their lives without the looming threat of deportation.

Third, legalization policies alone are insufficient; it must be part of a broader transformation of immigration law. Individual regularization and amnesty programs can only correct the shortcomings of immigration laws in the past; they do not fix immigration laws going forward. Policymakers should ask how the regular immigration system can be transformed to minimize future unauthorized migration. One way to do this would be to design migration programs to reflect actual migration pressures as reflected in patterns of unauthorized migration. Possible reforms along these lines might include increasing pathways for admission to permanent residence for less skilled workers without family connections, providing for temporary worker programs that enable circular migration but also provide a pathway to more permanent status, and development assistance to address structural push factors in sending countries. One lesson from IRCA, which did not include such broader reforms, is that a large-scale amnesty program, coupled with employer sanctions and stricter border enforcement, will not prevent future unauthorized migration. By failing to increase the number of visas to meet U.S. labor market needs during a time of robust economic growth and by doing little to respond to structural dynamics in sending countries, unauthorized migration could rise again.

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