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Immigrant Legalization: A Dilemma between Justice and the Rule of Law
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Abstract:

Immigrant legalization policies pose an ethical dilemma between justice and the rule of law. On the one hand, liberal democracies aspire to the principles of individual liberty and equality. Building on liberal ideals of justice, compelling arguments have been made for granting legal status and a path to citizenship to unauthorized migrants by virtue of the social ties they have developed, their contributions to the host society, and their vulnerability to exploitation. 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. 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. We offer a critical reappraisal of immigrant legalization policies by reflecting on the normative meaning of the rule of law and by examining empirical evidence assessing the effects of legalization. Our central contention is that legalization policies can enhance the rule of law. We offer five rule of law arguments in support of legalization, which help to mitigate the dilemma between justice and the rule of law. We conclude by discussing some policy implications of our analysis.

Key words:

amnesty, immigrant integration, immigration, legalization, regularization, rule of law

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1. Introduction

On his first day in office, President Biden sent an immigration bill, “The U.S. Citizenship Act of 2021,” to Congress. It provided, among multiple provisions, legal status to many of the 11 million unauthorized migrants estimated to live in the United States.¹ The bill allowed 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 met certain requirements—would have been 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 bill failed to pass in the Senate and did not become law (Broadwater 2021).

Whether called ‘legalization,’ ‘amnesty,’ or ‘regularization,’ similar policies, in the United States or other countries, have granted unauthorized migrants some form of legal status. 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. Collective 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 provision of the 1986 Immigration Reform and Control Act (IRCA) that enacted the country's last large-scale collective legalization, providing permanent residence to 1.6 million 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 2021 bill is another example of collective legalization.

By contrast, individual regularization is a policy applied to individuals who meet the policy's specified criteria on a rolling basis over an extended time period. For example, the 1929 Registry Act allowed undocumented migrants 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 Act's qualifying date four times, to 1940, 1958, 1965, and 1972 (Kerwin 2010: 4). Today, any noncitizen who entered the U.S. before January 1, 1972, whether in some sort of lawful immigration status or not, can apply to become a permanent resident (barring disqualifying criminal convictions). This last update to the registry was enacted in 1986. In 1987, 8,153 migrants used it; the number peaked in 1988 at 40,029, with the highest number since then being 4,651 individuals gaining permanent residency in 1990 (Bruno 2001). Because the cutoff date (1972) is 50 years ago, 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). The last update to the registry was enacted by the same Congress that passed the collective amnesty in IRCA and the registry update was supported by virtually all lawmakers. Indeed, some opponents of the *collective* amnesty provision of IRCA supported updating the *individual* regularization via registry because they favored the slow, gradual qualities of registry. As Republican Congressman Eldon Rudd stated, "I oppose the very concept of such a mass amnesty, but I do believe there is a more reasonable alternative. The registry date provision approved by the Judiciary Committee would simply update an existing option of our immigration laws" (quoted in Cohen 2020: 155).

Don Kerwin (2010: 2) estimates that, from 1986 to 2009, in addition to the over 2.7 million people legalized via IRCA's collective amnesty provision, the U.S. 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, either through individual regularization or collective amnesty programs.

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 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 'Saudize' 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 an ethical dilemma for liberal democracies, a dilemma between justice and the rule of law. On the one hand, liberal democracies aspire to the liberal principles of individual liberty and equality, which have been instantiated in constitutions and interpreted by courts as requiring respect for the basic rights of all persons in the state's jurisdiction. Building on liberal ideals of justice, scholars and immigrants' rights advocates have made compelling moral arguments 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, and protecting migrants from exploitation. On the other hand, legalization poses a challenge to another value, the rule of law, which demands the regular, impartial administration of the law. While the rule of law, like justice, requires respect for certain basic rights, it imposes weaker moral constraints than justice. As John Rawls suggests in discussing the rule of law in *A Theory of Justice*, "because these precepts [of the rule of law] guarantee only the impartial and regular administration of rules, whatever these are, they are compatible with injustice" (1971, 236). In his recent book on the rule of law, Paul Gowder suggests that the rule of law may not require subjects of law to have any specific rights other than procedural rights to access the law and be heard in their own cases (2016: 26). Immigrant legalization policies raise a challenge to the rule of law since some individuals who have violated immigration law are not subject to legal penalties. Opponents of legalization have seized on the idea of the rule of law, arguing that legalization rewards lawbreaking for those who have violated immigration law and incentivizes further lawbreaking by encouraging unauthorized entry among those who have not yet migrated.

It is important to take these rule of law arguments against legalization 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. Given its importance as a normative ideal in liberal democracies, it is not surprising that arguments about the rule of law are deployed in public debates about legalization. Critics of individual regularization programs argue that they are capricious, rewarding some migrants with legal status when those migrants 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 since collective legalization not only provides rewards rather than penalties for rule-breaking, but also undermines the stability of expectations about such penalties over time. Critics of undocumented immigration invoke the rule of law to oppose legalization policies and to argue for enacting harsh measures against undocumented immigrants to compel them to ‘self-deport.’ In his article ‘Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration,’ Kris Kobach, an American lawyer and politician who favors immigration restrictions, argues that state governments should ‘restore the rule of law in immigration’ by denying public benefits, resident tuition rates, and employment opportunities to ‘illegal aliens’ and ‘enacting state-level crimes that mirror federal immigration crimes’ (Kobach 2008: 482, 465). Kobach’s contention is that undocumented immigration undermines the rule of law, and any policies condoning it also undermine the rule of law.

Second, the rule of law is 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’ inclusion as full members in the polity is premised on adopting the political values of the host society, not 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. This has implications not only for citizens’ views about citizenship but also their attitudes toward immigrants and the integration of immigrants.

In this article, we clarify each horn of the dilemma—justice and the rule of law—with the aim of contributing to scholarly and public debates about immigrant legalization policies. Since normative scholarship has given more attention to developing justice arguments for legalization (Bosniak 2006 & 2013, Motomura 2007, Shachar 2009, Carens 2010, Hosein 2016, Sullivan 2019), we focus on the rule of law. We offer a critical reappraisal of immigration legalization policies by reflecting on the normative meaning of the rule of law and by examining empirical evidence assessing the effects of legalization. Our central contention is that legalization policies can enhance the rule of law. We develop a broader, more nuanced conception of the rule of law than the conception assumed by critics of legalization and offer five rule of law arguments in support of legalization, which help to mitigate the dilemma between justice and the rule of law. We conclude by discussing some policy implications of our analysis.

2. The Dilemma, Part One: Justice Arguments for Legalization

The first horn of the legalization dilemma is rooted in the justice claims of unauthorized migrants for legal status and a path to citizenship. There are a number of distinct moral

arguments that have been made for legalization. They include arguments about the state's tacit 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 (see Hosein 2016 for an overview). We focus on three of the most prominent arguments in greater detail.

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 significance of social ties in U.S. immigration law, what he calls 'immigration as affiliation,' which says that unauthorized migrants' affiliations to individuals or communities in the U.S. deserve recognition and recognition ought to take the form of extending permanent residence status and ultimately citizenship (Motomura 2014: 176; see also Shachar 2009).

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). As Michael Sullivan (2019) argues, migrants can "earn" citizenship through their contributions to the host society. Migrants who take on significant risks, such as soldiers serving in the military, are especially deserving of citizenship; migrant soldiers are already granted permanent residency in some countries. Yet, as Sullivan notes, the contributions argument runs into a difficulty in the case of unauthorized migrants: citizens might not owe duties of reciprocity to unauthorized migrants since citizens never consented to receive benefits from them. In response, Sullivan argues that the acquisition of citizenship by unauthorized migrants who contribute to the host society may be subject to an additional adjudicatory step in the form of a special "community sentencing board" (2019: 24, 30-31).

By contrast, Mollie Gerver argues that citizens owe duties of gratitude, even in the absence of their explicit consent, by virtue of benefitting from the contributions of unauthorized migrants (2021: 9). Frontline workers during the COVID-19 pandemic, such as doctors and nurses, farmworkers, and sanitation workers, bore significant risks for the benefit of citizens; citizens thus owe duties of gratitude to such migrants, even if they never explicitly consented to receiving their help. Gratitude to essential workers, in health care and other occupations, led Canada to extend a pathway to permanent residence for over 84,000 temporary workers and international students in 2021 (IRCC 2021a, IRCC 2021b). Unauthorized migrants in the U.S. have long been performing essential work, including help with rescue and cleanup at Ground Zero after 9/11 and Hurricane Katrina.² What are they owed? Duties of reciprocity and gratitude can be interpreted as requiring permanent residency. In March 2021, the Citizenship for Essential

Workers Act was introduced in the U.S. Senate to provide undocumented essential workers with a path to citizenship (*Citizenship for Essential Workers Act*, S.747), although it has little chance of being passed.

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 (Anderson 1999). 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).

While Walzer defends a qualified right of states to exclude migrants outside the territory, he suggests that migrants who are *inside* the state's territory are entitled to full inclusion into equal citizenship by virtue of being subject to the state's authority. Walzer's focus was on temporary labor migrants, but his argument about protecting migrant workers from exploitation can be extended to unauthorized migrants. This concern about exploitation is reflected in *Plyler v. Doe* (1982), in which the U.S. Supreme Court identified unauthorized migrants as a potential 'caste' in American society. The Court said that 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 (1982), emphasis added).

Such anti-caste concerns animate Owen Fiss's (1999) equal protection argument for extending certain rights, including welfare rights, to unauthorized migrants in the U.S. Undocumented migrants in the U.S. are ineligible for federal welfare benefits, except for certain emergency medical care. While formally they are entitled to the right of free expression and wages for work performed, in practice, their precarious status limits their ability to exercise such rights (Gleeson 2010). Fiss argues that such rights should be extended as matter of equality. Adam Hosein draws on similar anti-caste concerns to argue for granting unauthorized migrants the right to remain (2016: 169-172).

These three arguments—based on social membership, contributions, and equality—constitute the leading justice arguments in favor of immigrant legalization. They have been used in policy debates, where they often intertwine. In signing IRCA, President Ronald Reagan, a Republican, 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 Democratic White House 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 Europe, 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 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: Rule of Law Arguments against Legalization

Proponents of immigrant legalization must, however, face the second horn of the dilemma: commitment to the rule of law. The basic idea of the rule of law is that those who exercise the state's coercive power should not use it whenever and however they want; they must be bound by law in some meaningful sense. Jeremy Waldron (2016) captures this basic idea:

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.

Rawls provides a similar emphasis in discussing the rule of law: it is the regular and impartial administration of public rules as applied to the legal system (1971: 235). The rule of law regulates public officials when they exercise the state's coercive power over individuals; it does not regulate the private use of coercion, although it does require nonofficials to be sufficiently committed to preserving the rule of law (Gowder 2016: 9). 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), publicity (laws should be available for subjects to learn), 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) (Gowder 2016; Waldron 2016).

To understand why legalization poses a dilemma between the rule of law and justice, it is important to clarify and distinguish the two values. Justice is concerned with the substantive rights and material goods that the state owes to individuals, whereas the rule of law is concerned with the procedural standards that the state must respect in making and administering the law. While both justice and rule of law require respect for certain basic rights, the rule of law imposes weaker moral constraints than justice. As Rawls puts it, while the precepts of the rule of law provide "a more secure basis for liberty and a more effective means for organizing cooperative schemes," they impose "rather weak constraints on the basic structure" and thus "are compatible with injustice" (1971: 236). If one views laws enacted by a democratically elected body of legislators as legitimate, then one will regard immigration laws enacted by that body as

legitimate even if unjust. For example, U.S. immigration law selects migrants for permanent residence primarily on the basis of family ties and certain skills. One might view such laws as unjust – because one believes justice requires prioritizing refugees and other necessitous migrants or justice requires open borders – and yet still regard such laws as legitimate and enforceable in ways consistent with the rule of law.

In public debate, opposition to legalization is often framed in terms of the rule of law. Critics of legalization insist that immigration law should be consistently and uniformly enforced. 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 able to escape legal penalties. Critics of unauthorized migration go further, arguing that the rule of law requires enacting harsh measures intended to deter further unauthorized migration (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 allude to 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 son or daughter 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 for Filipinos the date was June 2002 and for Mexicans, September 1998 (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 over their own claims. This can be viewed as unfair to the foreigners who have played by the rules and have been waiting for years to gain admission through the regular immigration system.

The third argument moves beyond the actions of specific rule-breakers or the particular harms experienced by others directly affected by rule-breaking 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 and consider the other two objections in the next section.

4. Assessing the Rule of Law Arguments against Legalization

We analyze both the empirical assumptions and normative interpretations about the rule of law made by the arguments outlined in the previous section. We tackle them in reverse order, from what we see as the weaker empirical arguments to the stronger normative ones.

Considering incentive effects, the claim is straightforward: 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 mostly 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 the claim about incentive effects is, however, difficult. There is certainly anecdotal 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 by migrants 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 that hired 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 and finds a statistically significant but substantively very small positive pull. After European countries bordering the Mediterranean Sea enacted amnesties, the numbers of migrants living in these countries ballooned, but push factors in sending countries, geographic proximity, and weaker bureaucratic capacity in receiving countries—both to process and enforce immigration laws—appears to play a much bigger role in the growth of clandestine migration as compared to 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 have been substantially lower?

Most migration scholars would posit “no” to this imagined alternative 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, is shaped by migration policy, and is affected by the legacies of interstate relations, such as prior temporary labor programs, colonial ties, and histories of military engagement and foreign policy (Sassen 1998; Garip 2016; de Haas et al. 2019). One-time amnesties like IRCA may not 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. Still, 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 ties 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 admissions 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 have 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 support legalization emphasize, 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 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 they condone lawbreaking. Citizens may thus be less inclined to support legalization, the regular immigration system, and the integration and naturalization of immigrants. A related concern is that legalization may also erode law abidingness among migrants by rewarding noncompliance with immigration law.

Consider first the perspective of citizens. It is the case that, when framed as law-breaking, public support for amnesty provisions declines among the U.S. general population (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 explicitly labeled as “illegal” immigrants (Sana 2019; Bloemraad, Silva and Voss 2016). Shortly after President 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). Such data suggest that there is considerable public support for legalization. Beyond this particular poll, it is important to recognize that 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.

If we consider the perspective of migrants, Emily Ryo’s research on the normative values of unauthorized migrants suggests that they view themselves as “moral, law-abiding individuals” who value legal order and respect national sovereignty (2015, 647). They distinguish their noncompliance with immigration law--which allows them to perform work that helps to build the

U.S. economy and meet their responsibilities to provide economic security to their families-- from noncompliance with laws prohibiting behavior that is self-evidently harmful or criminal such as murder and theft (2015: 654; see also Bloemraad 2022). Thus, from the point of view of migrants, far from condoning lawless behavior, legalization is more likely to be regarded as fostering the rule of law. We turn now to examine and respond to the normative claim that legalization undermines the rule of law by rewarding lawbreaking.

5. An Alternative View of the Rule of Law: Arguments for Legalization

The rule of law, like other fundamental values, is a contested concept comprised of different principles and precepts that must be interpreted and applied to specific institutional contexts. While we acknowledge that migrants who enter without authorization or overstay temporary visas have violated immigration laws, we argue that a range of countervailing considerations can and should be viewed as offsetting the immigration violation. These countervailing considerations include the justice arguments considered above. In addition, and critical for our discussion, we offer five *rule of law* arguments for legalization.

Before developing these arguments, we lay the groundwork by elaborating three central principles associated with the idea of ‘rule of law.’ The first is *regularity*: the state’s coercive power must be exercised impartially. Officials must use the state’s power only when authorized by good faith and reasonable interpretations of preexisting legal rules (Gowder 2016: 12). Regularity forbids vague laws and retroactive laws and requires an independent judiciary, a fair trial, and other due process protections. The second principle is *publicity*: the law must be available for subjects of law to learn, and officials must publicly explain their application of the law in individual cases and offer those whom they coerce the opportunity to participate in the

application of legal rules to their circumstances (Gowder 2016: 16). Publicity forbids secret law and requires that subjects of law have notice and an opportunity to be heard before being coerced and have the right to be represented by counsel. The third principle, *generality*, is reflected in the formal precept ‘treat like cases alike’: when a law or exercise of official discretion treats people differently from one another, there must be public reasons to justify the differential treatment. We need some account of what makes the cases like or unlike, a relevance criterion governing the reasons under which officials may treat individuals differently (Gowder 2016: 30).

How do these rule of law principles apply to the issue of legalization in immigration law? Consider first the principle of regularity. 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).

The charge that legalization programs are an abuse of discretion has little force against legislative amnesties. A legislative enactment that says everyone who meets certain general criteria are entitled to a path to citizenship is not arbitrary or *ad hoc* in the relevant sense. The

principle of regularity demands that officials use the state's power only when authorized by good faith and reasonable interpretations of preexisting legal standards and rules. Under this principle, a legislative change in qualifications for public benefits in social welfare legislation or an amnesty provision such as the one in IRCA is not a threat to the rule of law. The main target of the charge that legalization reflects an arbitrary use of discretion seems to be executive, not legislative, action.

Consider a form of individual regularization in U.S. immigration law called 'cancellation of removal,' a form of discretion exercised by immigration judges who are executive branch officials. Cancellation of removal stands in contrast to the Registry Program outlined above, which was enacted by legislators. Cancellation of removal gives immigration judges the discretion to grant LPR status to individual unauthorized migrants who meet certain criteria—in particular, those who have relatives who are U.S. citizens or permanent residents, meet a hardship requirement, and do not have disqualifying criminal convictions (Motomura 2014: 189). 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? If one believes the rule of law requires deporting all those who violate immigration law, 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 understood as consistent with the rule of law. 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 suggests that cancellation of removal promotes regularity and predictability; it is ‘a principled way of applying the rule of law to control the discretion that has historically governed unauthorized migration’ (Motomura 2014: 197). Thus, not only legislative but also executive action can be defended as a reasonable exercise of discretion.

A second rule of law argument for legalization also flows from the principle of regularity: 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 earlier. 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 infraction, 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, in the words of the European Court of Human Rights, ‘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 liberty and 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). Such racist distinctions in the administration of discretionary relief are not only unjust but also antithetical to the rule of law because they violate the generality principle by treating individuals differently on the basis of irrelevant qualities. Congress abolished all statutes of limitations for excludable noncitizens in 1924.

We should restore the statute of limitations in immigration law. It applies straightforwardly to individual regularization: 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 is arbitrary when the state does not pursue undocumented migrants in a timely and reasonably predictable manner. As Ellermann argues, ‘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 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 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 long period of time.

A third rule of law argument in favor of legalization stems from the principle of publicity: legalization 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 usually legally entitled, in most liberal democracies, to 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 witness a crime may not report the crime out of fear that they will be reported to immigration enforcement officials (Wong, et al. 2021). Legalization would make migrants more secure in seeking official protection of their legal rights. This publicity-based rule of law argument converges with one of the justice arguments considered earlier: by enhancing migrants' likelihood of seeking protection of their legal rights, this would reduce their vulnerability to exploitation.

Legalization would also foster greater compliance with law by enabling migrants to participate in the administration of law. The legal system cannot function as well when large groups of people are “outside” of the 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 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 (U.S. Citizenship and Immigration Services [USCIS] 2021a and 2021b). One study shows that Latinx residents of metro areas with sanctuary policies are more likely to report crime victimization to the authorities than places without such guarantees (Martínez-Schuldt and Martínez 2021); we can imagine that securing legal status might further encourage such activities.

A fourth rule of law argument for legalization arises from the generality principle in connection to the precepts ‘ought implies can’ and ‘treat like cases alike.’ ‘Ought implies can’ says that public officials and those subject to the law must believe that the law can be executed.

Full enforcement of immigration law is impossible where there is limited state capacity and a large number of undocumented immigrants. As the U.S. Immigration and Customs Enforcement (ICE) director John Morton wrote in an internal memo to employees, ICE ‘only has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population.’ Morton emphasized the need for ‘sound judgment and discretion’ in immigration enforcement and outlined ‘priorities,’ with the highest priority being ‘aliens who pose a danger to national security or a risk to public safety’ and the second priority ‘recent illegal entrants’ (U.S. Department of Homeland Security 2011: 1-2).

This executive branch memo brings us to the second precept, ‘treat like cases alike.’ ‘Treat like cases alike’ says that when a law or exercise of official discretion treats people differently from one another, officials must offer public reasons to justify the differential treatment. We can read Morton’s memo as offering a relevant criterion for distinguishing among migrants who have violated immigration law: targeting certain rulebreakers over others is justified to ‘promote the agency’s highest enforcement priorities, namely national security, public safety, and border security’ (DHS 2011: 1). Such prosecutorial discretion in immigration enforcement is presented as reasonable and consistent with the generality principle. That is the aspiration. In practice, however, immigration enforcement is rife with inequalities, targeting people on the basis of race and gender rather than promoting the stated goal of protecting national security and public safety. Tanya Golash-Boza, studying deportation from the mid-1990s into the Obama presidency, argues “mass deportation shares many similarities with mass incarceration”: deportations overwhelmingly target Brown and Black men from Latin America and the Caribbean, even though about half of noncitizens are women, and millions of immigrants hail from Asia and Europe (2015: 8-10).

Legalization can provide a fresh start for a deeply flawed immigration system and bring it in line with the generality principle. 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. 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 when amnesties or special grace programs are extended to those who have not paid taxes or fines. In these contexts, one often sees the related claims that the transgression was not as bad as more serious legal infractions and that the transgression 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.

A fifth and final rule of law argument for legalization is rooted in the principles of regularity and publicity, which require due process protections for all those subject to law. The current immigration enforcement regime in the U.S. fails to provide even the most minimal due process. Asylum seekers who enter the country are legally entitled to a credible fear interview, based on international law, including the 1967 Protocol Relating to the Status of Refugees to

which the U.S. is a signatory, and domestic law (Refugee Act of 1980). Yet asylum seekers often have to wait for long periods to receive an interview and few have legal representation in such proceedings (Cohen 2020, 61). Under regional human rights agreements, all migrants are entitled to due process guarantees, including a hearing and time to prepare, the assistance of an interpreter, legal counsel, and a decision on their rights and status that is reasoned and substantiated (Inter-American Commission on Human Rights 2015). However, few people subject to deportation by the two main U.S. immigration enforcement agencies, ICE or Customs and Border Protection (CBP), have access to legal representation. Immigration removals are civil, not criminal, proceedings, and there is no right to counsel in civil proceedings. Only a small fraction (15%) of people at risk of being deported ever appear before an immigration judge; instead, the vast majority are subject to ‘expedited removal’ with no chance to make the case that they should be permitted to stay (Koh 2018). After individuals are taken into ICE custody, they may be moved to a detention facility in another state or be deported before their families can locate them (Cohen 2020: 58, 60). Deportations happen so quickly that they are effectively denied due process.

For the minority of noncitizens who have the opportunity to appear before an immigration judge, they face long delays in having their case heard due to enormous backlogs. In 2019, cases were being scheduled out as far as 2023 (TRAC Immigration). The Department of Justice has responded by imposing work speedups and case quotas, which prevent judges from providing a fair hearing to people on their dockets (Cohen 2020: 62). Furthermore, there is evidence of egregious abuses of authority by immigration enforcement agents. CBP officers are five times more likely than any other law-enforcement agents to be arrested for abusing people in their custody, and ICE officials indicated to investigative journalists that they received 33,000

complaints of physical and sexual abuse occurring in their facilities between 2010 and 2016 (Cohen 2020: 20-21, 29). Unauthorized migrants themselves have pointed to the bias and unfairness in the U.S. immigration system to question its legitimacy: the racial bias in the enforcement of immigration law and the arbitrariness in which groups are granted opportunities to remain in the U.S. (Ryo 2015).

What is the appropriate response to such abuse and failures by the state to ensure the rule of law? The rule of law is a scalar idea; it is a matter of degree, not all or nothing. Currently, many governments are at the low end of the rule of law spectrum in their treatment of noncitizens. The U.S. government must improve access to legal counsel, adequately staff immigration agencies and courts, and hold immigration enforcement agents responsible for their behavior. As Elizabeth Cohen puts it:

A nation claiming to respect the rule of law cannot tolerate a large, powerful paramilitary police force that answers to no court or disciplinary body. To begin the process of disciplining ICE and CBP, Congress should recombine ICE, CBP, and USCIS into one agency whose mandate is a well-functioning immigration system, not an incarceration-to-deportation pipeline (2020: 199).

One important first step would be to grant a limited right of appeal and a more general right to receive notice of reasoning when CBP officers make decisions on admissibility. While anything like a full trial would likely be unworkable, some more modest form of review, such as requiring officials to justify their decisions in an accessible way, is possible (Lister 2018: 7). Another way to promote the rule of law in the immigration system is to grant legalization as a corrective measure for the government's past failure to ensure due process and the harms caused by the

lawless behavior of state agents. On this argument, it is not the migrants but the government who must seek forgiveness and pardon for acting outside the bounds of law.

In considering our five rule of law arguments, one might object that even if legalization can promote the rule of law in the ways we suggest, it still rewards lawbreaking. As Ryan Pevnick argues, ‘In the case of illegal immigrants, by entering the country illicitly such individuals took their place in their community without the consent of the citizenry’ (2011: 164-165). By this logic, citizens have no obligation to extend a path to citizenship to unauthorized migrants and are justified in demanding their removal from the country. In response, we can acknowledge that unauthorized migrants are present in the territory without the express consent of the citizenry but also emphasize that consent is not the only relevant consideration. We have countervailing reasons of reciprocity, social ties, equality, *and* the rule of law for granting a path to citizenship to unauthorized migrants. If citizens were asked to consider these countervailing reasons, many might well regard them as offsetting and superseding the immigration law violation and give their consent to legalization. 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 constituted a legal violation *and* a pardoning of the act (Bosniak 2013: 347).

Another objection to our arguments arises not from immigration restrictionists but from those who regard existing immigration law as unjust: there is no problem with disobeying immigration law on this view because the current legal regime of borders is unjust and unjust laws should not be obeyed. For those who hold this view, there is no moral dilemma between

justice and the rule of law because justice trumps the rule of law. 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). In response, we note that this argument will not persuade those who regard the rule of law as an important value in itself. Those who believe that states have a qualified right to regulate immigration and accept the rule of law as an important value will recognize that even after an immigration regime is brought in line with the rule of law, it may still permit injustice. So long as there is an immigration system that selects some and excludes others, there will be infractions of immigration law, and states that enact legalization policies will have to grapple with the tension between justice and the rule of law.

6. Conclusion

Rule of law arguments have been advanced by both sides of the debate on immigrant 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 for societies committed to the rule of law. In response, we argue for acknowledging the immigration law violation by migrants, but we should also acknowledge the state's failure to ensure the rule of law for migrants. We offered a range of countervailing considerations, including rule of law considerations, that can be regarded as offsetting the migrant's violation of immigration law. We believe these rule of law arguments for legalization mitigate the dilemma between justice and the rule of law. It is not only principles of justice but also principles of the rule of law that offer support for extending a path to citizenship to unauthorized migrants. Still, the rule of law arguments for legalization do not eliminate the dilemma. The ethical dilemma will persist so long as there are borders.

How might liberal democratic states better manage the dilemma? We offer three proposals that build on the discussion above. First, there are distinct 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 we discussed 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 should 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 can be justified as a sparingly used corrective mechanism to enable a fresh start for an administrative system that has broken down, especially when enacted by the legislative branch. 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 the immigration violation. These considerations include the justice claims discussed above: the social ties of migrants, their contributions to the host society, and their vulnerability to exploitation. Governments should also emphasize the rule of law arguments advanced in this article: the reasonable use of discretion, the importance of legal certainty, bringing people out of the shadows, providing a fresh start for the immigration system, and rectifying the government's failure to ensure due process in immigration enforcement. When it enacts legalization, a government *both* recognizes the wrong of the immigration violation *and* wipes the slate clean in light of a range of moral and practical 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, while sensible and desirable for the reasons we have laid out, are insufficient by themselves; they 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 address actual migration pressures as reflected in patterns of unauthorized migration.

We can draw lessons from recent U.S. immigration history. The 1965 Immigration and Nationality Act (INA) was a major step forward in dismantling the discriminatory national origins quota system and had the effect of increasing immigration to the U.S. from Africa, Asia, and Latin America. Yet, the INA also enacted numerical limits on migration from the Western Hemisphere for the first time, and subsequent amendments allocated the same number of green

cards to Mexico as to any other country, despite much more substantial, established migration from Mexico. Around the same time, the Bracero program, which had allowed for circular migration of temporary workers from Mexico for two decades, was brought to an end, eliminating access to temporary visas for most low-skilled workers. These legal reforms created a problem of 'illegal immigration' as laws changed, but migration flows (and demand for migrant labor) stayed the same (Ngai 2004). As Massey et al. put it (2016: 1560), 'In practical terms, then, little had changed between the late 1950s and the late 1970s: similarly sized flows of migrants were circulating across the border and going to the same destinations in the same U.S. states. In symbolic terms, however, the situation had changed dramatically, for now the vast majority of the migrants were "illegal" and thus by definition "criminals" and "lawbreakers."' Border enforcement emerged as a policy response to a 'moral panic' about the perceived threat of Latino immigration to the U.S. The end result was a 'self-perpetuating cycle of rising enforcement and increased apprehensions that resulted in the militarization of the border in a way that was disconnected from the actual size of the undocumented flow' (1557).

A more humane and sensible approach, which would bring an immigration regime closer to the ideals of justice and the rule of law, would 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 sending countries to address structural push factors in migrants' homelands. Another lesson from the 1986 immigration reforms is instructive: IRCA, which did not include such broader reforms, enacted a large-scale amnesty program, coupled with employer sanctions and stricter border enforcement, but these measures did not prevent future unauthorized migration. Indeed, escalating border enforcement not only

failed in its attempt to reduce undocumented migration but also ‘backfired by increasing the rate of undocumented population growth and turning what had been a circular flow of male workers going to three states into a settled population of families living in 50 states’ (Massey et al. 2016: 1558). If the government does not increase the number of visas to meet U.S. labor market needs during times of robust economic growth and does little to respond to the structural dynamics of violence, poverty, climate degradation, and poor governance in sending countries, unauthorized migration could rise again.

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¹ We use the terms ‘unauthorized,’ ‘undocumented,’ and ‘irregular’ migrants interchangeably. The text of H.R. 1177 is available at <https://www.congress.gov/bill/117th-congress/house-bill/1177/>, last accessed April 1, 2022.

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

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