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Amnesty in immigration: forgetting, forgiving, freedom

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Whether or not to grant 'amnesty' has been a contentious policy issue in a wide range of settings, from human rights violations to draft avoidance to library fines. Recently, the idea of amnesty has come to structure many debates over irregular immigration. While amnesty's meaning is usually treated as self-evident, the term in fact signifies in a variety of normative directions. This article employs amnesty as an optic to examine accountability questions that structure normative debates over irregular immigration in liberal states. It distinguishes among conceptions of amnesty emphasizing forgiveness, erasure and vindication, and argues that developing a vindicatory account of amnesty is both particularly difficult and particularly necessary in the immigration setting.

Keywords: accountability; immigration; citizenship; marginality apology; vindication; forgiveness; realism; idealism; memory

In many national settings, the politics of immigration are fought out by way of debates over 'amnesty.' While the forms that immigration amnesty may take can and do vary, the term broadly denotes a process through which unauthorized immigrants residing in a national state are given the chance to transition to legal status there. Amnesty for immigrants thus effectuates a kind of legal alchemy: through such policies, the irregular is made regular, the unlawful lawful. Amnesty, in this way, serves as a conduit from the farthest margins of citizenship to its possible, eventual center.

Not surprisingly, amnesty's transformative potency makes it extremely controversial. Indeed, the idea of amnesty has become a rhetorical flashpoint in many countries of immigration. On one side, the term is deliberately deployed by anti-immigration activists as a term of condemnation and derision, one meant to delegitimize policies that would protect and incorporate immigrants. Fueling the condemnation is the conviction that amnesty rewards lawbreakers and incentivizes further lawbreaking. From the critics' perspective, what is needed is not regularization of these immigrants but a renewed commitment to rounding them up and ejecting them, and to tightening the

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borders against future illegal entrants and visa violators. In the United States especially, we hear attacks on what some term 'the amnesty industry' (immigrants rights and protective organizations), against 'backdoor amnesty' (discretionary measures undertaken by the executive branch to grant short-term forms of relief to some irregular immigrants outside the context of legislation), and against what some have dubbed 'anchor baby amnesty' (territorial birthright citizenship for children of undocumented immigrants).

On the other side, many advocates for immigrants often invoke the idea of amnesty in an affirmative, aspirational way. Activist groups portray amnesty as a core political goal, and intellectuals continue to develop arguments on its behalf. It is true that some pro-immigrant activists have made a point of using different language in response to a perceived hijacking of the term by opponents; these advocates deploy the terms 'regularization' or 'legalization' instead. But for many in the immigrant rights community, idea of 'amnesty' remains a compelling idea, one that represents still a fulfillment of justice rather than its perversion as well.[1]

Amnesty's outsized performative role in the immigration debates inevitably prompts questions about the concept itself. I regard debates over amnesty, broadly, as condensed sites for arguments about social accountability – by which I mean arguments about answerability, responsibility, and rectification for perceived social harm. In every policy context, amnesty-talk implicates, and is understood to implicate, questions of how to move forward in the face of some social or political schism attributed to a particular set of political or social actors. Yet the amnesty concept is polysemantic and evokes multiple ways of thinking about accountability in its various dimensions. It is divided on questions of who is accountable, what accountability is for, and what holding accountable entails.

In this article, I am interested in thinking about how amnesty arguments are made and what they signify. My motivating case is immigration amnesty, but I look at amnesty debates in other policy settings as well. Amnesty has been a contentious idea in a variety of contexts, from transitional justice to draft avoidance to parking and library fines. Surveying these debates, I hope, can help to highlight what is at stake in the immigration arena. My aim is to use the concept of amnesty as an optic for examining key normative and practical questions that commonly structure our debates over irregular immigration.

In this respect, the paper primarily provides a diagnostic analysis of the structure of common normative arguments over amnesty. However, in the last section, I enter the normative fray somewhat by critically examining the main strategy that political and legal theorists have taken in advocating for immigration amnesty – the argument that an immigrant's time and ties in the receiving society justify amnesty. I suggest that this justification for amnesty, while apparently inclusionary, ultimately condones and reproduces some of national citizenship's marginalizing aspects. I conclude with a brief

depiction of an alternative account of amnesty, one which promises a more critical approach to national citizenship and its exclusions.

Amnesty's meanings

Let's begin with the fact that amnesty is an official act. We usually do not say, except in a metaphorical way, that a private entity can grant amnesty. Amnesty is a disposition extended by the state to another party.[2]

The class of amnesty's possible beneficiaries, however, is broader than its dispensers. Amnesty may be granted or denied to a party who might be an official or ex-official within the state. The grantee may also be a belligerent in a conflict, or a private individual or a group of individuals. Note, however, that the parties affected by the state's amnesty decision – whether affirmative or not – usually extend beyond the grantor and grantee. Others – relatives, descendents, the public in general – are affected by the outcome in various symbolic and material ways. This is why the amnesty question often becomes a heated question of collective political identity.

But what is the substance of this official act? Etymologically, the term amnesty comes from the Greek '*a*' plus *mnestis*, meaning non-remembrance. It is common to characterize amnesty as a kind of forgetting, in part by noting that amnesty shares a cognate with amnesia. On this reading, amnesty is an act of official forgetting.

Assuming this is so, one must then ask what is being forgotten. The general presumption is that the object triggering the need or request for amnesty is a transgression or an offense of some kind. For amnesty to be relevant, there must have been a bad act. As it happens, much of the debate in any given amnesty setting concerns the question whether the act or omission at stake should indeed be regarded as transgressive or offensive in the first place. But it is only if and when there is a transgression, claimed or acknowledged, that the amnesty question becomes relevant.

Beyond the question of amnesty worthiness, moreover, one needs to ask what exactly it means to 'forget.' With a little reflection, it seems clear that the idea of forgetting or non-remembrance is too facile to capture amnesty practice fully. Or perhaps it is more useful to say that, to the extent amnesty is always about forgetting, forgetting can take a variety of forms.

For instance, the forgetting that amnesty effects may be direct: it may involve an intentional overlooking or erasure of an act or transgression. Amnesty here would entail an act of what the common law once called 'oblivion.' Acts of oblivion presuppose that 'certain kinds of conflict would be better forgotten than remembered for the continued health of the polity' (Meyler 2011, p. 13).

But amnesty sometimes also denotes the distinct idea of pardon or clemency. Indeed, forgiveness is probably the predominant contemporary understanding of the term; dictionaries consistently report this sense of the

word as the first definition. On this understanding, there is a forgetting too, but what is forgotten is not the triggering act itself so much as the consequences that were – or were to have been – imposed on the actor.

Add to this that the concept of amnesty is commonly associated with the idea of freedom from official restraint or oppression. The most widespread instance of this understanding is embodied in the name of the human rights organization Amnesty International. Amnesty International is commonly referred to by the media just as 'Amnesty' (as in 'Amnesty calls for release of prisoners of conscience'). This is not an outlying usage; in fact, it may be many people's first association with the term.[3] Arguably, this version of amnesty entails a forgetting as well, but what is to be forgotten is not so much the underlying act as attribution of responsibility and penalty to the originally designated perpetrator.

We thus might say that amnesty contains constitutive aspects linked variously to erasure, to pardon, and to freedom. In practical terms, however, these overlap to some degree and tend to combine in certain patterned ways. The result, I suggest, has been development of three distinct amnesty models which are in play in different settings and at different moments. I will call these (1) forgive-and-forget amnesty, (2) administrative-reset amnesty, and (3) vindicatory amnesty. Talk of amnesty may be intended to invoke one or more of these frameworks, and may be perceived according to one or more of these understandings, with intention and perception not always corresponding and not always internally consistent. Nonetheless, these three models are broadly distinguishable, and can be identified in multiple settings.

Forgive and forget

At the heart of amnesty as forgiving and forgetting is the notion that the amnesty recipient is the perpetrator of an officially cognizable offense or transgression of some sort. Amnesty here entails a pardoning of the underlying action and erasure of its effects. But the disposition of amnesty also correspondingly legitimates the state's claim that the act in question was wrong. Amnesty therefore performs a kind of expressive indictment alongside its grant of clemency.

Some dislike employing amnesty as a remedy for social rupture for just this reason; the symbolic cost to the beneficiary is too steep. The debates in the United States over possible amnesty for draft-avoiders during the Viet Nam era provides a good example. Many of the potentially covered rejected amnesty, notwithstanding its benefits, on grounds that it would entail acknowledging fault for what they claimed was a justifiable act (Laufer *et al*. 1981, p. 166).

However, it is more often critics of the triggering action for whom the state's granting of clemency is controversial. Critics argue that amnesty

produces impunity by way of its toleration of the offender's conduct rather than imposition of punishment. Additionally, some maintain that amnesty's toleration of wrongdoing is unjust to those who did not offend. Thus, as *Time* magazine mused in a 1972 Editorial on amnesty for draft resisters, '[w]ould it be fair to those who fought to forgive those who refused?' (*Time*, 1972). One response to this concern is to insist on imposing amnesty with conditions on the recipient – e.g., fines, loss of benefits, community service, public apology, required oath of allegiance – in order to expressively underline that amnesty is a settlement based on beneficence rather than any sort of entitlement, and to ensure that responsibility or fault continues to attach to the underlying act.[4]

Additionally, there are those who object that the problem with forgive-and-forget amnesty lies not only with the forgiving, but also with the element of forgetting itself. The impulse to oblivion that accompanies the pardon, in this view, is one of avoidance and repression. One hears in the transitional justice context, especially, the common view that amnesty's forgetting stands directly against any process of accountability. From bitter experience, we know that 'we must never forget,' yet amnesty precisely represents 'enforced forgetting' (Ricoeur 2004). Amnesty for human rights crimes is not merely inadvisable, according to many, but should be outlawed altogether (Laplante 2011, p. 915).

Certainly there are countervailing opinions. Some maintain that one need not forget in order to forgive. Defenders of the amnesty extended as part of South Africa's Truth and Reconciliation process, for example, make a point of saying that 'amnesty does not erase the truth' or the past – i.e., pardon does not entail oblivion (Transitions 2011). Others affirmatively emphasize the virtues of forgetting as part of reconciliation and 'moving on together.'[5] However, on the whole, the kind of forgetting that is linked to or entailed by forgiving is deemed by many to be unforgivable.

Administrative reset

A second amnesty model approaches amnesty as a kind of administrative or political reset mechanism. As before, the state views itself as responding to an offense or transgression that is recognized as such. But instead of lingering on the fault or responsibility of the perpetrator, the starting premise of proponents is that, as a descriptive matter, the law at issue is largely unenforceable. On this approach, amnesty functions as a response to administrative failure; there is a pragmatic need to bring the law and actual behavior into closer alignment for purposes of effective governance and systemic legitimacy. The amnesty mechanism serves, therefore, as account-clearing and slate-wiping; the transgression is to be institutionally forgotten in favor of systemic functionality (Vedantam 2007).

We see this sort of amnesty conception at work, most commonly, in such apparently mundane regulatory contexts as tax collection and library and parking fines, as well as the more charged settings of firearms, narcotics, and pit-bull control. The associated supporting discourse sometimes suggests that the transgression was, in fact, not so bad anyway (parking and libraries and marijuana), or else that its badness is counterweighed by the costs to the social order of widespread noncompliance.[6] Further, proponents of amnesty-as-reset sometimes maintain that a de facto amnesty is the state's unacknowledged policy in any event, whether through governmental incapacity or refusal. On this view, it is far preferable to govern transparently and directly rather than covertly or inadvertently.

Since the administrative reset approach to amnesty specifically sidelines questions of justice, it is rarely invoked in the human rights setting. Actors in the transitional justice debates tend to characterize any impulse to clear the decks as evincing moral failure. Outside the human rights arena, meanwhile, critics of amnesty-as-reset sometimes complain that the desire to 'start clean' ends up condoning and rewarding the activity in question. Tax amnesties, for example, have 'angered law-abiding taxpayers who dislike seeing tax breaks given to abusers of the system' (Leonard and Zeckhause 1987, p. 55).

Vindication

In addition to forgive-and-forget and administrative-reset, there is a third amnesty model – one I will call amnesty as vindication. This understanding of amnesty departs from the others in two key respects. First, amnesty here represents a commitment to protect, rather than censure, the purported transgressors. Those to whom amnesty is extended are approached now as victims rather than malefactors. Additionally, the grant of amnesty is understood to be an acknowledgement by the government that either the violated rule or norm, or the beneficiary's prosecution for it, was not justifiable in the first place. The laws or policies that defined the underlying act as a transgression are now deemed to require interrogation themselves – either because they are intrinsically unjust or because they have been wrongly applied.

This understanding of amnesty as vindication is associated most closely with the sense of amnesty as freedom. Through it, the state is read to convey that the offender requires release from penalty, at least in part because the government itself got things wrong. A normative reframing is undertaken, in other words: the former accountability calculation has been replaced by a new one, pursuant to which the original offender turns out to have behaved in a way that now appears comprehensible, excusable and, perhaps, justifiable.

There are strands of this vindication usage in various amnesty contexts. One of the clearest is the draft resistance setting. According to the afore-

mentioned *Time* magazine article on draft amnesty published at the close of the Viet Nam war:

> [n]early everyone, even those few who still favor pursuing the war, now agrees that the U.S. should never have become involved in the way that it did. Why punish those, ask the proponents of amnesty for avoiders, who saw the light first?

Here, the transgressors in the situation are no longer the draft avoiders but the war-makers. The nation was not victimized by the resistors' actions but redeemed by them; and meanwhile, the resistors require deliverance from the unjustified hardships imposed by enforcement of the draft avoidance penalties. Jean-Paul Sartre elaborated this understanding of amnesty precisely in a 1973 *New York Review of Books* essay on draft resistance. 'By amnesty', he wrote:

> deserters and resistors of the Viet Nam war […] did not mean 'pardon,' nor even forgetfulness. Certain of the justice of their cause, they simply wanted their rights recognized. And this could not be done unless the government was to reverse itself publicly, and, so to speak, say, 'If these men have the right not to wage this war, then we on our side had no right to declare it.' (Sartre 1973)

This notion of amnesty entails a normative reversal: the purported perpetrators were actually in the right, while the government itself is at least partly culpable.

At a perhaps less politically elevated level, some US states have proposed laws that would not only decriminalize marijuana possession, but also 'grant amnesty to anyone convicted of marijuana related crimes' (Morse v. Frederick 2000). The discourse invokes the analogy with past government prohibitions of alcoholic beverages, which are today widely regarded not only as misguided as social policy, but also as unduly intrusive in individuals' private lives.

Amnesty-talk and immigration

Across policy contexts, people tend to think they know exactly what is at stake when any question of amnesty is on the table, as if the word had a clear and determinate meaning. To some extent they are right: amnesty-talk always implicates, and is understood to implicate, questions of how to move forward in the face of social or political conflict. Any discussion of the subject presupposes some pre-existing, officially cognizable trouble or violation or rupture to which 'amnesty' would – either appropriately or not – serve as an institutional response. Yet, as I argued above, distinct understandings of amnesty take us in very different directions. At times, amnesty-talk looks

backwards and emphasizes fault, even where pardoning it. At other times, talk of amnesty is solution driven and emphasizes future political workability rather than liability. Occasionally, amnesty gestures toward protection and exoneration of the ostensible transgressor while also indicting the state. Each of the three versions of amnesty outlined above conceives of the character, agents, causes, and consequences of the underlying trouble distinctly and approaches possible solutions divergently as well. In short, political actors argue about social and political accountability by way of amnesty-talk, but the concept itself offers no consistent understanding of what such accountability entails and stands for no consistent approach for achieving it.

It is, therefore, not surprising that the idea of 'amnesty' in the immigration context, as elsewhere, cuts in various directions. I do not refer here to the fact that different parties' conceptions of the design and operation of any possible immigration amnesty program (whether they are for or against it) vary greatly, although this is true.[7] I mean instead that parties' conceptions in this debate of what is wrong, who is wrong, and what amnesty would or would not accomplish in response, are extremely diverse.

In practice, the center of gravity in the immigration amnesty debate lies at the intersection between forgive-and-forget and administrative-reset. Parties fight over amnesty both within and between these frameworks. Forgive-and-forget approaches treat the issue at hand as a moral one – as one turning on the questions of whether to overlook, or absolve, the immigrants for, the original transgression of irregular status (acquired through unlawful entry or visa overstay), and if so, on what basis. In this version of the debate, the familiar contending tropes of amnesty as either serving indefensibly to 'reward lawbreakers' or rightfully 'acknowledging immigrants' de facto membership' duke it out. Administrative reset amnesty arguments, in turn, are largely pragmatic in tone and content. Advocates and opponents focus on past government border enforcement deficiencies and on getting things rationalized going forward. In this setting, parties dispute whether amnesty correctly recognizes the reality of border failure and persistent market demand for immigrant labor, whether it runs the risk of incentivizing future illegal immigration, and whether amnesty will ultimately advantage or undermine the national community.

Additionally, beyond the debates within each framework, parties often argue, at a meta-ethical level, about how to go about talking about the amnesty issue in the first place. At stake is the propriety of stressing moral themes of fault and forgiveness versus pragmatic considerations of social utility.[8]

It is, however, vindication arguments in the immigration amnesty debates that are of particular interest to me here. Amnesty's proponents, it appears, are equivocal about such arguments. On the one hand, supporters of immigration amnesty commonly characterize its potential recipients as victims whom such a program would serve to protect. In so doing,

advocates engage in a moral reframing: the dominant view of immigrants as predatory opportunists is reversed, and they are now portrayed as hapless prey. Amnesty is characterized as emancipatory in the sense, and to the extent, that it will release its beneficiaries from the endless threat of deportation and vulnerability to social exploitation associated with their unauthorized status.

On the other hand, amnesty supporters very rarely express the idea that amnesty rightfully emancipates irregular immigrants from unjust laws or unjustified enforcement of laws – that is, that amnesty represents a necessary repudiation of the country's border control policies which construct them as illegal – in the first instance. Nor do they maintain that the original act of the immigrants (whether via unauthorized entry or visa overstay) was justified. Although one occasionally sees intimations of such views in pro-amnesty rhetoric, this is not a standard framing. Indeed, in most cases, advocates conspicuously avoid such claims, and instead conjoin their call for amnesty with a commitment to a renewed enforcement of national borders. Certainly, this is the public stance taken by even the most liberal of pro-immigrant activists and scholars. Whether for reasons of political expediency or principal or both (Bosniak 1996a, 1996b, 2012), amnesty proponents routinely couple their calls for an incorporation of (some) territorially present insiders with continued, and perhaps enhanced, commitment to border restrictions.[9]

The fact that this is the standard framing among amnesty supporters has sometimes led more radical immigrants rights advocates to specifically eschew amnesty as a policy. Their position is that amnesty performs precisely the converse of vindicating the immigrants: instead, it effectively impugns them while also reifying and legitimizing the border laws which defined them as unauthorized to begin with.[10]

In short, amnesty's supporters often engage in discursive reframing by inverting the dominant narrative of immigrant as transgressor – with the immigrant now characterized as deserving victim, and amnesty pitched as providing a degree of rightful recognition and liberation from the legal structures that subordinate and marginalize. Nevertheless, most supporters do not say that the border rules which make unauthorized immigrants unauthorized – which constitute them as such – should be regarded or addressed as unjust, nor that, even if the laws are just, the immigrants' initial breach of them was defensible. In fact, most often, amnesty advocates make a distinct point of emphasizing their concession to, if not their affirmative support for, the nation's border control rules going forward, and concede some degree of fault or culpability on the part of the immigrants

Opponents of amnesty, by contrast, insist on characterizing amnesty as vindication for immigrants, full-stop. They argue that amnesty is objectionable, first of all, because it badly mischaracterizes the relative moral roles of immigrant and government. In particular, they ridicule the notion that illegal aliens need protection from the state. But in addition, they

emphasize that amnesty represents, and communicates, an indefensible justification of the immigrants' actions. As they see it, the trouble with amnesty goes beyond the fact that it provides beneficiaries with an undeserved windfall, unfairly advantages them in relation to those who have 'played by the rules,' and will encourage more of the same, thereby representing moral hazard. Above all, opponents view amnesty as condoning, or endorsing, immigrants' original and ongoing violation of national law and, by implication, as delegitimizing the state's project of border control.

Amnesty theory and the border

At the level of legal and political theory, most scholars who address the immigration amnesty question write on its behalf. They seek to provide justificatory ground for amnesty policies and to help to think through the proper design of amnesty programs so that they best conform to these justifications (see the essays in Carens 2010).[11] Certainly, there are dissenting voices, but not many (e.g. Swain 2009). Overall, academic commentators are amnesty champions.

The central justificatory account for according amnesty to irregular immigrants in this recent literature is based on an argument about the significance of time and ties. The claim attributes normative effect to the immigrants' residence in the receiving state. It links time spent in the destination state with quality and significance of connections made, or assumed to have been made, and uses these connection as a basis for affording recognition and regularization. The view holds that longer-term irregular immigrants have become de facto members of the national community and must be recognized as such.

The particular way in which this argument is articulated varies among scholars. For Joseph Carens, 'the longer the stay, the stronger the claim.' For Ayelet Shachar, 'rootedness [constitutes] a basis for membership' (Shachar 2009, p. 19).[12] For Hiroshi Motomura (Motomura 2010), 'affiliations' justify regularized status. These formulations diverge somewhat in emphasis and specifics (see also Rubio-Marin 2000).[13] However, all maintain that while the proposed subjects of amnesty originally transgressed against the state (whether by entering the territory without authorization or violating the terms of their initial visas), this original transgression has been overtaken – superseded – by an altered social reality.[14] These individuals' enmeshment in the day-to-day life of the resident country – as workers and consumers and family members and students and worshipers and home dwellers – produces a concrete social membership which, with time, comes to eclipse the original offense. An 'incremental process, in which [the immigrant's] center of life-gravity shifts' to the country of residence (Shachar 2009), recalibrates the calculus of blame and responsibility. Akin to property law's adverse possession concept in Shachar's analogy – or to a

statute of limitations (Ngai 2005) – the immigrant was once, but is no longer, blameworthy.

This claim about the normatively transforming effect of time and ties is often coupled with more instrumental arguments. For example, deportation of the entire class of undocumented immigrants would be 'impracticable' in any event. Further, '[d]eeply rooted immigrants' are integrated so fully into national life that it would be impossible to extricate them without unacceptable social costs to ourselves (Shachar 2009).[15] The core of the argument, however, is the claim that the immigrants' original trespass has effectively been cured by subsequent events.

In the context of today's inflammatory immigration debates, these time-and-ties arguments for amnesty are extremely compelling. They appear – and are intended to appear – sober and moderate and accessible. For those of us engaged in day-to-day exchanges about irregular immigration – in the classroom, in the media, around the dinner table – they are often the best we can offer. Clearly, they will not be convincing to many: the incessant anti-amnesty drumbeat in much popular commentary attests to this. But in response to those who argue that unauthorized immigrants are opportunistic lawbreakers whose ongoing illegal status should disqualify them from any social and political recognition, the supersession argument seems deeply humane and sensible.[16] It has the potential to persuade because it supports immigrant regularization by reference to familiar intuitions and commitments – to individual dignity, to community values, to democratic equality, to basic decency.

But the time-and-ties claim is premised on another commitment as well. This is a commitment to endorsing enforcement of national borders – not merely at the nation's edges, but also in the interior, by way of the deportation power. Indeed, its proponents make a specific point of conceding the continued authority of border rules. According to Shachar, recognizing the moral significance of rootedness would 'likely require [legalization supporters] to make concessions, such as accepting the…greater enforcement of border control and stepped up labor sanctions, possibly including tighter employment and employee identification and verification systems' (Shachar 2009, p. 46, n. 168). According to Carens, time-and-ties amnesty is not inconsistent with 'a government's moral and legal right to prevent entry in the first place and to deport those who settle without authorization, so long as these expulsions take place at a relatively early stage of residence' (Carens 2009).

Even if proponents did not say so directly, moreover, acceptance of the legitimacy of national borders is arguably inherent in the time-and-ties argument. Supporters seek an exemption from application of the basic border rules in a certain set of circumstances, but not in all. They do not question the initial assignment of irregularity of status, and they do not directly question the underlying rules which define such status. This

supersession rationale for amnesty begins with the notion that the immigrant committed an original wrong, or violation, against the state. It accepts that the wrong persisted after the initial entry or overstay – that is, it presupposes that this wrong or violation continued for at least some period after the triggering act. However, it maintains that this wrong is 'capable of "fading" in [its] moral importance by virtue of the passage of time and by the sheer persistence' 'of its effects' (Waldron 1992, p. 15).

What we see, in short, is that time-and-ties amnesty promises to forgive and forget some border transgressions and to wipe the slate clean going forward in relation to these. It allows for a *post hoc* excuse in some circumstances. But what it does not do is vindicate the amnesty recipients' initial act, nor does it interrogate the validity of the state's underlying border norm. Some immigrants deserve incorporation not because they were justified in their initial entry or presence, but because circumstances have changed. By virtue of their time and ties here, they have 'earned' their way out of the internalized exclusion of unauthorized status and onto a path to full membership (Carens 2009). However, the government is not asked to 'reverse itself publicly,' to paraphrase Sartre, and to say, in effect: if these people have the right to remain, then we on our side had no right to exclude them.

Realism, idealism and social criticism

I have no doubt that in order for an argument on behalf of immigration amnesty to have a chance of policy traction in today's political climate, it will have to be coupled with an acceptance of border control. Anything else is a complete policy nonstarter for the foreseeable future. Still, theorists need not be confined by the demands of short- or medium-term policy relevance. Political advocates must tailor their arguments to popular consumption, but theorists need not – and arguably should not. Why, then, do so many seem to feel compelled to present themselves as feasibilists rather than visionaries?

Fifteen years ago, Carens published a paper on method that defended what he called a 'realistic approach' to the ethics of migration. We ought to think about 'what is possible' as well as what is desirable, he wrote. We ought to be attentive to 'constraints which must be accepted if morality is to serve as an effective guide to action in the world in which we currently live' (Carens 1997, p. 156). This would mean – as he put it – that '[w]hatever we say ought to be done about international migration should not be too far from what we think actually might happen' (p. 157). For psychological, sociological, and epistemological reasons, '[w]hat is morally obligatory [should] depend to an important extent on what is [already] being done' (p. 160). Of course, what is already 'being done' in relation to migration is the maintenance of an international political system divided into nation-states deemed to hold sovereign authority to control their membership via border controls at the frontier and in the interior.

At the time he published this paper, Carens was best known for his earlier, deeply idealistic treatment of immigration matters. In a 1987 article, 'The Case for Open Borders', Carens had argued that national immigration controls contravene basic liberal egalitarian commitments. (As a shorthand, I will call this paper 'Carens 1'). However, in the subsequent methodological article ('Carens 2'), Carens suggests that 'realistic' approaches have been undervalued and underutilized in political theory on migration, and he endorses making greater – although not exclusive – use of them. Again, according to Carens there, the 'bedrock' element of the realistic approach in the immigration setting starts 'with a recognition that every state has the authority to admit or exclude aliens as it chooses since that authority is widely acknowledged to be one of the essential elements of sovereignty' (Carens 1997, p. 158).

I noted above that the time-and-ties justification for regularization which Carens has most recently championed in 'The Case For Amnesty' ('Carens 3') rests on what we now see he regards as this realist baseline. While maintaining that 'the longer the stay, the stronger the claim,' Carens also accedes that states retain the right to control their borders. As he writes there, '[n]othing in my argument denies a government's moral and legal right to prevent entry in the first place and to deport those who settle without authorization, so long as these expulsions take place at a relatively early stage of residence' (Carens 2009). This is not an affirmative case for state border control and deportation authority, but it is a legitimizing concession.[17]

In response to Carens, one may raise at least two kinds of objections. First, Carens' effort to salvage commitments to border exclusion alongside his commitment to incorporate (a portion of the) already-present immigrants ends up, in my view, partially undercutting the normative realism he wishes to exemplify. At least on measures of internal coherence and practical effectiveness – surely necessary constituents of any realistic theory – the time-and-ties position founders in some respects. To mention just a few: Making amnesty contingent on an immigrant's presence for a minimum number of years correspondingly excludes those who fall short of the cut-off. Line-drawing choices are inevitably difficult, but in this case, drawing the line at seven or ten years or even five means that amnesty will be withheld in some cases where it is – by dint of the significant ties immigrants have formed over time – arguably warranted, according to the approach's justifying rationale. Further, the division of the class of undocumented immigrants into the deserving longer-term and all the rest ensures that there will remain a sizable class of undocumented immigrants whose continued presence will undermine many of the aims that proponents claim justify amnesty in the first place, including protecting against exploitation and achieving the administrative and political gains of a reset. Finally, since amnesty is almost always conceived and described as a one-off event (indeed, proponents make a point of emphasizing its delimited, one-time-only character), and since the

national border will undoubtedly remain permeable to some degree notwithstanding any enhanced enforcement, the class of the still-undocumented will continue to grow.[18]

But beyond this internal weakness, I want to contend that the difficulties with the approach are more thoroughgoing. The problem lies with the methodological preference for ethical realism itself. Carens states in his methods essay (Carens 2) that the realistic approach to morality has been 'less developed theoretically' than the idealistic approach, and he therefore justifies elaborating and defending the former at great length (Carens 1997, p. 157).[19] Yet whether or not it is (or remains) true that realistic approaches have been insufficiently explored in political philosophy, realism clearly dominates methodologically at the level of applied ethics. In migration scholarship, this is especially the case. Views that morally de-center the state or question its exclusionary prerogatives are exceptional in scholarly immigration conversations in law and political philosophy.[20] What Carens describes as the bedrock of realistic immigration views – the legitimacy of national borders – is a largely uncontested operative baseline in the field. (Bosniak 2006). Ironically, Carens' own early piece on open borders (Carens 1) seems often to be a category of one: when you need a citation for idealist (non-state centric) immigration theory, you invoke this early Carens; otherwise, you are likely to locate yourself somewhere on the long spectrum of ('realistic') liberal nationalist views, pursuant to which at least some exclusion at the national borders is eventually conceded. Notwithstanding the many differences among approaches, all versions of liberal nationalism accept that national borders function as a preconditional, enabling frame for liberal society.

As I say, this is the conventional wisdom, and more often than not, the legitimacy of state border authority is presumed rather than defended. However, Carens himself expressly defends the exclusion position in his methodological essay (Carens 2). States' general authority to control borders, he maintains, derives from the pervasively and authoritatively 'entrenched character of the state as an institution' (Carens 1997, p. 158). Proposals imposing

> new external constraints on a state's power to set its own migration policies […] have no chance of being implemented or even of being given serious consideration. An ethics of migration that requires abolition or even radical transformation of the state system is not a morality that can help us to determine what is to be done in practice.

And since morality should arguably serve as a guide to 'what is possible […] in the world in which we currently live' – that is, since 'moral norms should not stray too far from what most actors are willing to do much of the time' in order for morality to be meaningful (p. 156) – a theoretical acceptance of state border authority as starting point is appropriate and necessary.

I absolutely understand the desire to be relevant. But the trouble with realism as characterized by Carens is that it functions as justification and even apology for existing conditions; it takes them as given and grants them normative weight by virtue of their existence. Carens states that he recognizes the dangers here, noting that realism can serve to 'legitimate […] policies and practices that are morally wrong' (p. 167). And once again, he does not urge exclusive reliance on realistic approaches to migration. But realistic theory, he argues, holds a crucial – and defensible – place in immigration theory.[21]

Carens is right that idealistic approaches to ethics have their own pathologies. I agree that moral knowledge is inevitably 'rooted in a particular social and historical context' and that idealism can be remote from 'the shared moral understandings of our fellow citizens' (p. 163). Michael Walzer, who Carens cites approvingly, has powerfully criticized certain dominant forms of ideal theory, including pronouncements of principle characterized as if 'discovered' objective moral truth, as well as 'invented moralities,' grounded in some agreed-upon procedure (Walzer 1987, pp. 5, 10). Walzer seems to me wholly right when he says that all social theory ordinarily can do is give shape and content to shared understandings and intuitions via the process of interpretation.[22] 'Interpretation,' however, is not a simple positivist enterprise, and the understandings and intuitions that theory draws on need not be the dominant and the commonplace – a society's received, and naturalized, wisdom (pp. 29–30). Interpretive social criticism entails identifying and fleshing out more subterranean themes in social consciousness precisely in order to challenge prevailing arrangements and understandings. This kind of critical theory may, it seems to me, be fairly characterized as both realistic and idealistic. It is epistemologically realistic in that it draws on actual intuitions and traditions of thought – however incipient or unpopular – as the ground for its claims. But it is also normatively idealistic in that it seeks to move beyond existing institutional power arrangements in substance.

Normative ideas that push beyond the liberal nationalist frame are already out there. We do not have to make them up out of whole cloth; we can find them in various corners of public discourse. In the immigration setting, specifically, there are resources to draw on–including some that go beyond familiar forms of liberal cosmopolitanism. For example, certain transnational migrant rights and justice organizations – including 'No Borders,' 'No One Is Illegal' and 'No More Deaths' – have each begun to articulate a morality, grounded in a rigorous humanitarianism, which specifically interrogates the necessity and legitimacy of borders to cross-national movement. Various progressive religious and transnational labor solidarity groups are likewise fundamentally critical of the prevailing normative migration order. These groups espouse the view that border controls 'can never be fair to those threatened by them.'[23]

Scholars across the disciplines have begun to approach such groups as part of a new social movement – and to flesh out their claims theoretically, and to read them historically in relation to earlier transnational social campaigns (e.g. Hondagneu-Sotelo 2008, Anderson *et al*. 2009, Cook 2010, Nyers 2010, Pallares and Flores-Gonzalez 2010, de Graauw 2012). As a whole, this work shows that, even while many pro-immigrant advocates experience themselves as constrained by dominant conventions of 'normative nationalism' (Bosniak 2006, 2012), some have begun to press up against it. Their efforts offer concrete discursive resources for developing critical theoretical approaches which take us beyond the nationalist bedrock that grounds 'realistic' migration theory. The kind of border skepticism these groups proffer doubtless appears fringy and out of touch with the mainstream – but of course, that is true of most other radical social movements in their earliest phases.

Immigration amnesty as vindication?

To return to amnesty, I stated above that immigration amnesty advocates rarely, if ever, make the full vindication argument. They do not say, to paraphrase Sartre once again, that the government must 'reverse itself publicly' on the legitimacy of border exclusion, and acknowledge that its own policy of exclusion was wrong. Nor do advocates generally argue that the immigrants were justified in having violated the law initially (though some say their violation was understandable). Instead, amnesty advocates generally concede the state's right to exclude; they concede its retrospective right *to have excluded* the immigrants for whom amnesty is now sought, and its prospective right to exclude new immigrants in the future. In short, they concede both the migrant's original misfeasance and the defensibility of the national frontier going forward.

However, these concessions are not inherent in the idea of amnesty. A demand for immigration amnesty could conceivably be framed not only as a case for forgiving or forgetting or deck-clearing, but also as a demand for freedom and exculpation. I have argued here that the concept of 'amnesty' at least permits this.

So what might a vindication account of immigration amnesty look like? Making arguments of this sort will not come easily, but they are not inconceivable, and some are even discursively familiar. By way of conclusion, I want to briefly suggest four possible, partly overlapping, argumentative approaches.

First, a conception of vindicatory amnesty might be based on the claim that the receiving state has forfeited its exclusionary authority. The state purports to enforce its borders but in fact has engaged in long periods of de facto tolerance – sometimes quite 'open tolerance' (Motomura 2010, p. 235) – of irregular entrance and presence. On some versions of this

account, the stream of migrant labor is opportunistically managed and even disciplined via mechanisms of immigration enforcement. On others, the tolerance bespeaks lack of capacity and will as much as any instrumental self-dealing. But in all versions, the gap between the alleged violation and the actual condoning arguably supports extending protections to the tolerated class. The US Supreme Court itself once articulated this conviction in a case about school access for undocumented immigrant children:

> Sheer incapability or lax enforcement of the laws barring entry into this country […] has resulted in the creation of a substantial 'shadow population' of illegal migrants – numbering in the millions – within our borders. 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.[24]

It is not a long step from here to say the reality of state collusion or incapacity with regard to the reproduction of irregular immigration supports broader civic and political incorporation of immigrants as well.

Second, vindicatory amnesty claims might rest on the idea that, because the receiving society directly reaps the benefits provided by the irregular migrant population, it owes these migrants recognition and membership in return. The argument focuses mainly, though not exclusively, on the economic contribution made by the immigrants to the receiving society.[25] Immigrant rights organizations commonly call for 'full legalization for all people who work and pay taxes' (Franco 2007). The underlying ethic here could be framed as one of contractarian reciprocity, or as one of natural rights,[26] or alternatively, as a stand against social exploitation and domination. The latter claim might emphasize the often grueling and 'menial' labor that irregular immigrants tend to perform in receiving societies, and approach status regularization as necessary and just acknowledgement of that fact. Walzer made an argument to this effect when he contended, years ago, that 'hard work' – hard in the sense of 'harsh, unpleasant, cruel, difficult to endure' – should itself be considered 'a naturalization process, [one which] brings membership to those who endure the hardship' (Walzer 1983, pp. 165–166).

Third, a conception of vindicatory amnesty might be based in ideas about what the receiving country owes to certain classes of irregular immigrants by virtue of the history of the specific migration process of which they are a part. Rogers Smith recently offered a version of such an argument (Smith 2011, pp. 545–557),[27] maintaining that 'Mexicans may be owed "special access" to American residency and citizenship, ahead of the residents of the many countries less affected by U.S. policies, and in ways that should justify leniency toward undocumented Mexican immigrants' (p. 545). According to Smith, 'the U.S. government […] used [its] coercive authority in the late

nineteenth and early twentieth centuries in ways that displaced substantial populations from their former lands and homes and made them eager to gain better economic opportunities in the United States p. 550.' Smith's claim is not that immigrants are owed reparations or recompense for the past coercion; rather, the receiving state's own purported commitments to human rights and democracy currently, coupled with the history of its coercion, entail obligations of recognition and incorporation to those affected today.[28]

Finally, a conception of vindicatory amnesty could emphasize the receiving state's role in producing calamitous political or economic conditions abroad which propelled portions of the sending state's population to depart. Again, Walzer's argument in *Spheres of Justice* – this time about obligations produced in certain refugee scenarios – could support such a claim. 'Toward some refugees, we may well have obligations of the same sort that we have toward fellow nationals. This is obviously the case with regard to any group of people whom we have helped turn into refugees' (Walzer 1983, p. 49). Walzer here advances an idea of national 'owing'; the receiving state's past conduct abroad generates a later responsibility to extend protection to those populations who fled here as a result of it.

Obviously, all these arguments require extensive fine-tuning and development, either on their own or in combination. There may also be other ways to frame vindicatory amnesty claims in the immigration setting. But my point for now is that the amnesty idea need not be limited to arguments for state sufferance of irregular immigrants via forgetting and forgiving and administrative fixing. A claim for regularization, articulated as 'amnesty,' can also embody claims pressed by immigrants against the destination state, or, even in the absence of such claims, a recognition by the destination society of its responsibility to the immigrants present within. The vindication brings with it recalibrated understandings of blame and responsibility embedded in the situation of transnational migrants irregularly present in bordered national states. A critical migration theory can help to elaborate this emancipatory facet of amnesty's meaning.

Notes

1. The amnesty concept is not always deployed directly as part of a political fight. News outlets and governments sometimes speak of immigration amnesty in a neutral, descriptive way to designate regularization of status. In these settings, amnesty is presented simply as one policy option among others. Commonly, however, the word carries an emotional charge.
2. It would generally be nonsensical, except in a metaphorical way, for me to talk about seeking or granting amnesty in the setting of family and friendship.
3. I have identified these three denotative meanings mostly through looking at the word's use in different contexts. In dictionaries, also, all these meanings are there. In order of frequency, forgetting is first, pardon is second and liberty is third.

4. President Ford called his program 'earned re-entry.'
5. For example President Ford on issuing amnesty (which he ultimately re-characterized as 'clemency') for draft avoiders in 1974: 'The primary purpose of this program is the reconciliation of all our people and the restoration of the essential unity of Americans.' President Gerald R. Ford's Remarks Announcing a Program for the Return of Vietnam Era Draft Evaders and Military Deserters, September 16, 1974. http://www.fordlibrarymuseum.gov/library/speeches/740077.asp
6. As an example of the latter, many universities have recently implemented 'medical amnesty' rules, which insulate students reporting drug and alcohol-related illness from charges for underage drinking (Lewis and Marchell 2006).
7. There is a great range of proposed ideas on issues of immigrant eligibility, associated penalties, duration of program, availability of a 'pathway to citizenship,' and so forth.
8. Amnesty advocates will deploy pragmatic arguments against opponents' moral ones, and moral arguments against opponents' pragmatic ones. It is common to hear both kinds of arguments strategically utilized by both sides.
9. I say 'some' because virtually all proposed amnesty or legalization programs would extend regularization to only a portion of the irregular population – based on years present (discussed in text below), criminal history, family ties or other factors.
10. The non-governmental organization (NGO) No One Is Illegal states: 'We consider it vital to question the assumption that immigration amnesties are necessarily progressive and benign. Just the contrary, we consider they can be positively dangerous for many undocumented people.' No One Is Illegal, p. 12.
11. 'Irregular migrants should be granted amnesty – allowed to remain with legal status as residents – if they have been settled for a long time' (Carens 2009).
12. '[T]he longer the person resides in the polity, the deeper his or her ties to its society, the stronger the claim for inclusion and membership' (Schachar 2009, p. 19).
13. Ruth Rubio-Marin (Rubio-Marin 2000) argues for regularization for long-term undocumented immigrants by virtue of their 'social membership.'
14. See the discussion of supersession of wrongs in Waldron (1992).
15. Moreover, permitting so many to remain in an irregular status guarantees their continued exploitation and marginalization. This is indefensible in human rights terms and contrary to the national interest in maintaining public safety and welfare.
16. It does beg various questions, however. For example, is it appropriate to treat presence as a proxy for ties? For a discussion of the normative weight given to territorial presence in arguments about immigration, see Bosniak (2007, pp. 389–410).
17. To use David Owen's phrase (in this issue), Carens has here chosen to 'build [in] features of the existing normative architecture of politics' into his account.
18. I have made these arguments in more detail in Bosniak (2010, forthcoming).
19. Carens ultimately pronounces himself agnostic about the relative merits of realistic and idealist approaches, contending that both are valuable and necessary. He suggests that his preferred approach may be to 'try to combine the two' (Carens 1997, p 168). Thus, 'one might try to take as a presupposition of a given inquiry a world divided into sovereign states like the one we live in today and begin a discussion of the ethics of migration from that point without accepting all of the other constraints that the most realistic approach might

impose' (p. 168). I believe that Carens' later (post-1987) work on migration can be characterized as framed by these assumptions.

20. This is probably less the case in the fields of sociology and anthropology, where the critique of 'methodological nationalism' has been more fully embraced (e.g. Wimmer and Glick Schiller 2003).
21. Carens has briefly explained his shift away from his earlier liberal approach to immigration in Carens (2004). (Chronologically, this piece could be called 'Carens 2.5'.) Carens there states that after writing on behalf of open borders in the 1980s, he turned his attention to claims of aboriginal peoples in Canada and in Fiji, and found that both cases 'succeeded in challenging my liberal presuppositions in ways that I found fruitful. […] I now have a more complicated view of the ways in which the claims of culture and community should be taken into account and a deeper appreciation of their moral weight. […] I am confident that turning my attention to cases that did not fit comfortably with my presupposition has enabled me to reflect more deeply about citizenship, culture, immigration and community' (pp. 125–126). That Carens recognizes that deep tensions exist between substantive normative commitments – liberal universalism and communal particularity – is laudable. I am skeptical of his efforts to resolve this tension in ways that, substantively, give a trumping effect to nation-state closure and, methodologically, privilege the feasible in this arena.
22. Carens seems to describe realist immigration theory at three levels: in substantive terms (the view that states have authority to admit to exclude aliens as they choose); in meta-ethical terms (the view that we should 'avoid too large a gap between the "ought" and the "is"' in order to ensure that theory is relevant to policy); and in epistemological terms (the view that 'our moral knowledge […] is rooted in a particular social and historical context'). I embrace realism in the third sense, but not the first and second.
23. See 'No One is Illegal, Right to Come and Stay for All, Not Amnesty for Some' at: http://www.noii.org.uk/files/righttocomeandstayforall.pdf/; 'Freedom of Movement and Equal Rights for All' of the No Border Network at: http://noborder.org/; 'No More Deaths – No Mas Muertes' at: http://www.nomoredeaths.org/; and 'Faith Based Principles for Immigration Reform' at: http://www.cpt.org/work/borderlands/reform_principles/.
24. Plyler v. Doe, 457 U.S. 202, 217 (1982).
25. In the context of an article on naturalization, Jonathan Seglow extends the contribution argument to include 'migrants active in unwaged voluntary activities,' characterizing these activities as adding 'to social, as opposed to economic capital' (Seglow 2009, p. 791).
26. Here one might posit the Lockean idea of the 'mixing of labor' as underlying the immigrant's claim for recognition (Waldron 1992, pp. 6–18).
27. According to Smith's 'principle of constituted identities,' 'the greater the degree to which the U.S. has coercively constituted the identities of non-citizens in ways that have made having certain relationships to America fundamental to their capacities to lead free and meaningful lives, the greater the obligations the U.S. has to facilitate those relationships' (Smith 2011, pp. 545–557).
28. 'In sum, governments that are committed to respecting and assisting people's aspirations to lead free and fulfilling lives and who have exercised their coercive power to make those people's aspirations what they are, have special duties to help them pursue their preferred ways of life' (Smith 2011, p. 548). Note, however, that Smith's argument resembles that of Carens (1997),

Motomura (2010), and Shachar (2009) in that he couples a call for inclusive amnesty policies for a large portion of extant irregular migrants with a concession to border enforcement. He calls for 'credible efforts to enforce effectively the immigration limits that remain' (p. 553). I have termed such positions elsewhere as 'hard on the outside and soft on the inside' (Bosniak 1996a, p. 124). Further, some of these arguments seem to implicate national obligations that should extend to persons located beyond our territorial borders – beyond those who happen to be territorially present. On this, see Bosniak (2007).

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