

The Ethics of Migration Policy Dilemmas

Lessons from U.S. Legalisation: A Response to Song and Bloemraad (2022)

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In their article entitled “Immigrant legalization: A dilemma between justice and the rule of law,” Sarah Song and Irene Bloemraad (2022) contribute greatly to the recurrent debate over whether migrant legalisation programs can be justified under the rule of law, even if they are warranted by arguments of justice, equity, and inclusion. I was struck in reviewing their arguments by the relevance today of discussions that led to adoption of a program of legalisation under the 1986 Immigration and Reform Act (IRCA) in the United States. As IRCA is discussed throughout the article, and I was personally involved in the policy debates over legalisation as the Research Director of the U.S. Select Commission on Immigration and Refugee Policy (SCIRP), my commentary on their article will, I hope, shed some new light on this 36-year-old program and the rule of law. In doing so, I also hope that it will be relevant to current and future debates over justice and the rule of law.

The contours of the legalisation program that was enacted through legislation in 1986 became apparent in SCIRP’s final report. Not infrequently in American history, Congress appoints a commission to address controversial immigration issues and report its recommendations to both the legislative and executive branches. The Select Commission began in 1979 and issued its final report in March 1981. SCIRP had considerable political and policy clout. It was composed of four Senators, four members of the House of Representatives, four Cabinet officers (Secretary of State, Attorney General, Department of Labor, and Department of Health, Education and Welfare—now the Department of Health and Human Services), and four members of the public. It was chaired by Father Theodore Hesburgh, then the President of the University of Notre Dame.

Legalisation, in the view of the commission, was consistent with U.S. national interests and supportive of, not in conflict with, the country’s commitment to the rule of law. In support of that assertion, SCIRP organised its discussion of legalisation around the notion of the rule of law, facing head-on the dilemma that Song and Bloemraad tackle in their article. In fact, the commission staff report, which elaborates on the commission findings

and recommendations covers legalisation in a chapter entitled “Out of the Shadows—The Rule of Law Applied” (SCIRP 1981b, 631).

The commission unanimously recommended legalisation although there was some difference of views on the details of the program. The commission held: “Society is harmed every time an undocumented alien (sic) is afraid to testify as a witness in a legal proceeding (which occurs even when he/she is the victim), to report an illness that may constitute a public health hazard or disclose a violation of U.S. labor laws” (SCIRP 1981a, 72). Hence, the commission asserted, maintaining the status quo of an underground population with no rights was too risky to the rule of law to continue. The report also believed alternatives to legalisation were riskier to the rule of law than granting legal status. It concluded that “any program to remove 3.5 to 6 million residents would almost certainly violate the rights of many legal residents without reaching more than a small proportion of those aliens (sic) lacking proper documentation” (SCIRP 1981a, 73).

The commission determined, however, that it would be prudent to implement new and more effective enforcement measures to deter future irregular immigration before legalising those already in the country. This sequencing was in direct response to concerns that legalisation would spur new unauthorised movements. By a vote of 16-0, the commission recommended that “eligibility be limited to undocumented/illegal migrants (sic) who illegally entered the United States or were in illegal status prior to January 1, 1980, and who, by the date of enactment of legislation, have continuously resided in the United States for a minimum period of time to be set by Congress” (SCIRP 1981a, 76). The commissioners hoped this provision would discourage new unauthorised entry, thereby reducing further violations of the rule of law.

Further, the commission held that legalisation would aid in the enforcement of U.S. immigration laws, a key requirement in upholding the rule of law, by 1) enabling immigration authorities to target limited resources on “new flows of undocumented/illegal aliens (sic) and 2) “collecting reliable information about the sources [of such movements] and the characteristics of undocumented/illegal aliens” (SCIRP 1981a, 74). The staff report explained the data collection process in greater detail. Applicants would be asked to provide information on their experiences entering the United States, including their specific origins, date of entry, where and how they entered, and how many times they were removed to their country of origin. They would also be asked about their employment in the country of origin and within the United States, as well as their health condition, use of services, tax payments and family relations (SCIRP 1981b). During a consultation, unauthorized migrants assured the commission staff that they would be willing to answer such questions as long as there were procedures in place that would protect them from deportation (*ibid*).¹

Many of these same issues arose in the legislative debate over what became IRCA. Opponents of legalisation continued to argue that it would violate the rule of law and encourage others to migrate irregularly in the hopes of gaining legal status. Proponents countered with many of the same arguments put forward by SCIRP—that mass removals would be a greater threat to the rule of law and legalisation would be coupled with improved enforcement, thereby enhancing the rule of law. IRCA was introduced in the Senate by Alan Simpson,

¹ Such a survey was administered after the IRCA legalisation program was implemented.

a Republican legislator from Wyoming who had been a member of SCIRP. One of his staff members explained the purpose of IRCA's legalisation program in a journal article: "It is clearly Senator Simpson's intent, and I think the intent of many other members of Congress, that legalisation is not designed as a program primarily to benefit undocumented immigrants. It was not meant to reward law breakers. It was meant instead to preserve scarce INS enforcement resources in order that we may deter future illegal immigration" ([Hampe 1988, 501](#)). The author gave a second reason why Simpson supported legalisation: "we should remove this class [of irregular migrants] from its subclass status and bring it under the full protection of our laws. We felt that it was not healthy for a country that was allegedly committed to 'equality under the law' to have a large group of people living outside the protection of those laws" ([ibid](#)).

To reinforce that the legislation was not rewarding those who violated the rule of law, the requirements for IRCA's main legalisation program² imposed various penalties on recipients. These were meant to demonstrate the seriousness of the infraction of illegal entry and stay. The idea was that to be consistent with the rule of law, the terms of legalisation should involve some types of penalties. Initially, recipients would obtain conditional legal status, not permanent permission to remain. After eighteen months, they could apply for legal permanent resident status upon showing that they had successfully completed a course in the English language and civics or had passed an examination that was comparable to the U.S. naturalisation test. To be legalised, the immigrants also had to demonstrate that they were not excludable under US laws related to public charge (i.e., that they would not be a burden on public assistance programs), criminal behaviour, certain health conditions, and other barriers to legal admission. Moreover, IRCA barred the newly legalised from most public benefit programs for the first five years after they received legal status. Exceptions were made for education and training programs – especially those that, like Head Start, helped children.

Subsequent proposals for legalisation in U.S. legislation would have imposed even greater penalties to demonstrate that the program was not at odds with the rule of law. For example, legislation proposed in the Senate during the 110th Congress (2007-2008) included what was called an earned regularisation program. It allowed unauthorised immigrants to regularise their status with a new non-immigrant visa (Z visa) ([US Congress 2007](#)). They would have to pay various processing fees as well as a financial penalty to obtain the status. It could be renewed every four years, with additional fees and with English and civics testing requirements applied at the renewals. Further, the persons granted the new Z visa would be at the back of a long waiting list to become a legal permanent resident, estimated to take about eight years to clear. Moreover, the bill would require what is referred to as a 'touch back' – the heads of all regularised families would have to return home to re-enter as permanent residents. Those granted legal status would also have to demonstrate that they had paid any taxes incurred while in the country without legal status. Although unauthorised

² These provisions applied to the regular legalisation program. A second program pertained only to seasonal agricultural workers. Under its terms, persons who could demonstrate that they had worked unlawfully in agriculture for ninety days during the twelve-month period ending on May 1, 1986, were eligible to be legalised. After demonstrating that they continued to work in agriculture during the following three years, they could become permanent residents.

migrants would immediately find relief from deportation, full regularisation would only go into effect when certain benchmarks were met in the enforcement of immigration laws. Even with these provisions, the bill failed to gain sufficient votes to become law.

Legislators on both sides of the legalisation argument were responding, in part, to failures in the implementation of IRCA. Although the sponsors argued that legalisation was consistent with the rule of law, IRCA's provisions did not accomplish what was promised, especially with regard to its enforcement measures. For example, legalisation occurred parallel to the introduction of new enforcement provisions, not following their implementation. Even had there been a sequencing as recommended by SCIRP, the enforcement measures themselves were faulty and unlikely to succeed. IRCA included provisions that made the hiring of persons unauthorised to work an offence resulting in fines and, potentially for recidivists, imprisonment. Verification of work authorisation, however, was cumbersome and subject to fraud. Employers were to verify two sets of documents: 1) those that established identity, such as a driver's license; and 2) those that established authorisation to work, such as a social security card. A passport could serve both purposes. Most of the documents used in the verification process could be counterfeited or borrowed from a work-eligible person. There were no requirements for documents with biometric identifiers. Not surprisingly, as technology improved, counterfeit documents became the norm for many without work authorisation. At the same time, the legislators who drafted IRCA deferred reforms in legal admissions of immigrants to a future bill (what became the Immigration Act of 1990, which prioritised high-skilled immigration). Some sceptics might argue that the legislation purposefully left a gap through which millions of unauthorised migrants could fill jobs that Americans tended to eschew, particularly given the low wages and poor conditions offered. Whatever the reasons, the legalisation program proved to be much more effective than the enforcement provisions were, allowing large-scale irregular movements into the United States during the 1990s and early 2000s.

The recommendations Song and Bloemraad offer to resolve the tension between justice and the rule of law are commendable. The experience with IRCA is two-fold with respect to this problem. First, it is possible to justify legalisation as a measure that supports the rule of law while also serving justice, as is the aim of their article. Second, if support for legalisation is dependent on good faith efforts to reduce future unauthorised immigration, then serious efforts to implement those measures must accompany legalisation, or the rule of law will indeed be undermined.

References

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About the “Dilemmas” project

This commentary contributes to the [‘Dilemmas’ project](#) at the EUI’s Migration Policy Centre. Dilemmas analyses and debates fundamental ethical dilemmas in policy-making on migration and refugee protection.

Suggested citation

Martin, S. F. (2022) ‘Lessons from U.S. Legalisation: A Response to Song and Bloemraad (2022)’, Commentary for ‘The Ethics of Migration Policy Dilemmas’ project, Migration Policy Centre (MPC), European University Institute (EUI).

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