The Ethics of Migration Policy Dilemmas
Responding to critics

Sarah Song and Irene Bloemraad

Sarah Song is the Milo Rees Robbins Chair in Legal Ethics Professor of Law in the Jurisprudence & Social Policy (JSP) Program at U.C. Berkeley. She is a political theorist with special interest in issues of citizenship, migration, inequality, and democracy.

Irene Bloemraad is the Class of 1951 Professor of Sociology and the faculty director of the Berkeley Interdisciplinary Migration Initiative. Her research focuses on citizenship, immigrants' political engagement, and diversity policies.

We are grateful to Amelia Wirts, José Mendoza, Andrea Sangiovanni, Willem Maas, and Susan Martin for their thoughtful engagement with our article. In this short rejoinder, we respond to some of their many excellent points.

Amelia Wirts and José Mendoza (2022) are right to emphasise the importance of understanding the particular contexts in which arguments against immigrant legalisation arise and are deployed. They argue that rule of law arguments should be understood as a dog whistle over race, discrediting migrant claims, and ostracising undocumented immigrants. As they note, in our article, we focus instead on the merits of the arguments themselves. We agree with Wirts and Mendoza that some opponents of legalisation, such as Kris Kobach and the Center for Immigration Studies (CIS), appeal to the 'rule of law' but their rhetoric is really "for the sake of delegitimising and further subordinating undocumented immigrants" (ibid, 4). We are grateful to Wirts and Mendoza for shining the light on Kobach's and CIS's underlying motivations and discussing different mechanisms that they use to do so.

Yet we believe that genuine, principled rule of law objections to immigrant legalisation policies remain, and the main focus of our article is to identify and respond to such objections as well as identify rule of law arguments for legalisation. In retrospect, instead of Kobach and CIS, we should have pointed to the rule of law concerns expressed by members of the U.S. Select Commission on Immigration and Refugee Policy (SCIRP) as discussed in Susan Martin's response. Republican Senator Alan Simpson, a member of SCIRP, introduced the 1986 Immigrant Reform and Control Act (IRCA) in the Senate. IRCA enacted the largest general amnesty program in U.S. history. Simpson had two main reasons for supporting legalisation. One is among the justice arguments we discuss in our article, to bring undocumented immigrants "under the full protection of our laws" (Martin 2022, 3). The second goal was among the rule of law concerns we discuss, to deter future unauthorised immigration (ibid). Simpson and other members of Congress were also concerned that IRCA would be viewed

as 'rewarding' immigrants who had violated immigration laws, and they addressed this concern by imposing various 'penalties' or conditions, such that recipients of amnesty had to 'earn' it: they were initially granted a conditional status, required to wait 18 months, and pass an English language and civics course in order to gain permanent residency status. While we do not support such conditions on amnesty, we raise these points to show that Senator Simpson and other lawmakers – people who supported amnesty – had genuine concerns about whether amnesty could be reconciled with the rule of law.

We also note that while the current deployment of 'illegal' as a stigmatising, discrediting, and ostracising label certainly deserves normative and empirical attention for the reasons identified by Wirts and Mendoza, the historical rise of the term 'illegal alien' is actually much more complex. Wirts and Mendoza suggest that rule of law objections arose in reaction to pro-immigrant social movements' call for regularisation on justice-based arguments, a suggestion that would place appeals to rule of law and deployment of 'illegality' as an ostracising strategy in the 1990s and early 2000s. But as Martin recounts, concerns over the rule of law were common in the late 1970s and early 1980s. Indeed, analysis of newspaper text conducted by Edwin Ackerman (2013, 2014) reveals that 'illegal alien' came into the public lexicon in the late 1960s and the 1970s. Further, the term was not initially advanced by immigration foes such as Kobach and CIS. Rather, there was an intersection of interests between three groups: government bureaucrats in the Immigration and Naturalization Service wanting to use a legal term to describe this group of migrants that avoided the stigmatising label 'wetback,' which was common in public debate; Chicanx[1] advocates who wanted to distinguish anti-racism efforts from issues related to legality; and union leaders who did, indeed, have an anti-immigrant agenda, seeing undocumented workers as scab labour undermining their efforts to secure better working conditions. From quite distinct motivations, these groups converged on the term 'illegal,' which replaced the prior common label 'wetback.'

Knowing this history does not undermine Wirts and Mendoza's concerns over the contemporary work done by the label 'illegal.' Various social scientists have documented the racialised illegality that affects Latinx residents of the United States in particular (e.g., Pérez 2016, Zepeda-Millán and Wallace 2013). At the same time, recognition of this complex history suggests that contemporary use of rule of law arguments might, in some contexts, stem from diverse motivations, not just anti-immigrant racism, which warrants considering them on their merits.

Andrea Sangiovanni's (2022) central claim is that justice is a more stable and compelling basis upon which to defend the rights of unauthorised migrants to access permanent residence and citizenship. We agree. This is why we framed the central dilemma in our article as one between justice and the rule of law; it is precisely because rule of law 'cuts both ways,' as Sangiovanni says, that immigrant legalisation policies pose a tension between justice and the rule of law. Our aim is to show that there are also rule of law considerations for (and not only against) immigrant legalisation, so that the dilemma is mitigated, though not entirely dissolved.

We respond here to three other points made by Sangiovanni. The first is about the second rule of law objection to legalisation we consider, that legalisation is a form of 'queue-

1 Chicanx is a gender-inclusive term for Chicanos.

jumping.' Our rebuttal is that this objection is misguided because there is no single 'queue' for immigration. Sangiovanni finds our rebuttal unconvincing, and to show why, he uses the example of people waiting in line for a concert while others sneak in. Assume that those sneaking in had tickets and their actions did not lengthen anyone else's wait in line or have any other material impact. The people waiting in line can still object that queue-jumping is unfair, even if it didn't cause them any harm, because those who did not enter through authorised channels have not done their part to respect the broader social or legal scheme. We agree with Sangiovanni that the most compelling version of the 'queue-jumping' objection is a claim about fairness. Fairness is an important part of the rule of law because each person subject to the system of laws is expected to do their part to comply with it. Defenders of immigrant legalisation would have to argue either that amnesty programs are not unfair in the way that sneaking into a concert is unfair or accept the claim about unfairness and argue it is outweighed by other considerations, such as the justice and other rule of law arguments we discuss. The latter is the position we adopt.

Sangiovanni also criticises our rebuttal to the third rule of law objection that we analyse, that legalisation rewards lawbreaking. We respond by appealing to facts: we cite survey data showing that public opinion can be supportive of legalisation, and empirical research demonstrating that unauthorised migrants distinguish noncompliance with immigration law and noncompliance with self-evidently harmful or criminal acts. Our aim, in part, is to show that ordinary people – the voters who would need to support or at least acquiesce to legislative legalisation – weigh multiple considerations in evaluating amnesty. Sangiovanni is right that these facts do not answer the normative objection that legalisation is a morally objectionable response to lawbreaking. Instead of directly answering the objection, we look to other rule of law considerations to show that the value of the 'rule of law' is comprised of multiple principles and precepts. The rule of law is about more than full enforcement of laws on the books; it is also about promoting the consistency, predictability, publicity, and legitimacy of the legal system. Insofar as immigrant legalisation programs promote these principles, we can appeal not only to justice but also the rule of law to defend such programs.

A third point that Sangiovanni makes is about publicity. Publicity is a rule of law principle that requires laws to be accessible to those subject to them. Officials must explain, on demand, their reasoning for the laws to the people who are subject to them, and those subject to the laws must be able to challenge and monitor the application of the laws to their particular circumstances. We argue that legalisation promotes publicity by bringing immigrants 'out of the shadows,' just like the legalisation of sex work or drugs brings sex workers or drug users out of the shadows. Sangiovanni recognises that legalisation can reduce crime, but he asks how legalisation can promote publicity. Legalisation promotes publicity by fostering greater transparency within the legal system and greater participation on the part of migrants. As Susan Martin writes in describing the SCIRP's position: "Society is harmed every time an undocumented [migrant] 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. labour laws" (Martin 2022, 2). Fostering greater participation by immigrants in the legal system is not only about fostering greater compliance with criminal and civil laws; it is also about promoting greater transparency about how the law impacts migrants and supporting their participation in the

administration of laws.

Willem Maas (2022) argues that the gap between justice and the rule of law may be narrowed by using variegated rights and statuses. Maas distinguishes between residence rights and a path to citizenship, arguing that "extending 'amnesty' to irregular migrants would likely be more palatable politically if it did not quickly and inexorably lead to the 'reward' of citizenship" (ibid, 2). He points to the example of the 16th century north Dutch provinces, which felt threatened by the growing power of immigrants from the southern provinces and responded by limiting access to citizenship. Such exclusion from citizenship for first-generation immigrants rested on "the longstanding tripartite distinction between citizens (with full rights), inhabitants (with most rights except political ones), and foreign residents (with rights to reside and usually little else)" (ibid). Foreign-born individuals could gain the status of inhabitant but never that of citizen.

Maas is correct that, in our article, we generally elide possible distinctions between legalisation that offers some rights and provisional residency without any access to citizenship (the current U.S. provision of Temporary Protected Status comes to mind) and full legal permanent residence, which provides a path to citizenship. We strongly favour the latter. Extending residency rights (and not access to citizenship) may indeed be more "politically palatable," as Maas argues, but as Maas himself notes, states have the power to revoke residence rights, making permanent residency status less secure than citizenship status. Furthermore, unlike the 16th century Netherlands, in contemporary liberal democratic societies, justice demands extending a path to citizenship to all those subject to the laws. As Michael Walzer argues, "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" (1983, 61). Variegated legal statuses, each with distinct rules, sets of rights, timelines for renewal, and so forth multiply the categorical inequalities between residents in a society, allow the possibility of inter-generational caste-like statuses, and increase rule of law problems such as regularity. Thus, extending residency rights (but not citizenship) may mitigate the rule of law objection that legalisation 'rewards lawbreaking' by lessening the 'reward,' but it would still be in tension with justice, showing the persistence of the dilemma between justice and the rule of law that is the focus of our paper.

Maas (2022, 4) also questions whether upholding the rule of law is even possible in the legal regulation of immigration: "the fact that immigration laws and policies as well as their application to individual cases constantly shift, and do so in unpredictable ways, undermines the entire notion of rule of law, because rule of law is premised on stability rather than volatility and insecurity". We agree with Maas's concern over the unpredictability and discretionary nature of immigration law. Indeed, this is a partial basis for our arguments as to why rule of law concerns can support amnesty. As we argue in our paper, the rule of law is a scalar concept, not a binary one. It is possible to foster greater stability and predictability. We recognise that the exercise of discretion is inevitable in the modern administrative state; as we argued, the rule of law requires the use of discretion to be properly framed and authorised. That is the aspiration.

Finally, as should be clear from our responses to our other interlocutors, we very much appreciate Susan Martin's (2022) reflections based on her experience serving as Research Director of the U.S. Select Commission on Immigration and Refugee Policy (SCIRP). We

learned a lot. She offers illuminating insights into how legislators and other stakeholders thought through the political and normative dilemmas of amnesty, including considerations about the rule of law. However, we do depart from Martin's conclusion that answering rule of law objections works best when balanced with more and better enforcement, whether at the borders, in-land, or against employers. We believe that more effective and more just strategies to tackle irregular migration exist, notably creating better immigration pathways for those currently shut out of migration systems and tackling root causes of migration such as poverty, violence and instability in places of origin.

References

Ackerman, Edwin F. 2013. "The rise of the "illegal alien"." Contexts, Vol. 12, No. 3, pp. 72-74.

Ackerman, Edwin. 2014. "'What part of illegal don't you understand?': bureaucracy and civil society in the shaping of illegality." Ethnic and Racial Studies, Vol. 37, No. 2, pp. 181-203.

Maas, Willem. 2022. "Residence, Citizenship, and Attempting Political Compromise on Regularisation: A Response to Song and Bloemraad (2022)." Commentary for 'The Ethics of Migration Policy Dilemmas' Project, Migration Policy Centre (MPC), European University Institute (EUI), pp. 1-5.

Martin, Susan F. "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), pp. 1-5.

Pérez, Efrén O. 2016. Unspoken Politics: Implicit Attitudes and Political Thinking. New York: Cambridge University Press.

Sangiovanni, Andrea. 2022. "Why Justice Provides Better Reasons for Legalisation Than the Rule of Law: A Response to Song and Bloemraad (2022)." Commentary for 'The Ethics of Migration Policy Dilemmas' Project, Migration Policy Centre (MPC), European University Institute (EUI), pp. 1-5.

Walzer, Michael. 1983. Spheres of Justice: A Defense of Pluralism and Equality. New York: Basic Books.

Wirts, Amelia M. and José Jorge Mendoza. 2022. "The Undermining Mechanisms of 'Rule of Law' Objections: A Response to Song and Bloemraad (2022)." Commentary for 'The Ethics of Migration Policy Dilemmas' Project, Migration Policy Centre (MPC), European University Institute (EUI), pp. 1-5.

Zepeda-Millán, Chris, and Sophia J. Wallace. 2013. "Racialization in times of contention: How social movements influence Latino racial identity." Politics, Groups, and Identities, Vol. 1, No. 2, pp. 510-527.

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

Song, S. and Bloemraad, I. (2023) 'Responding to critics', Commentary for 'The Ethics of Migration Policy Dilemmas' project, Migration Policy Centre (MPC), European University Institute (EUI).

Migration Policy Centre

The Migration Policy Centre (MPC) at the European University Institute (EUI) conducts advanced research on the transnational governance of international migration, asylum and mobility. It provides new ideas, rigorous evidence and critical thinking to inform major European and global policy debates.

Contacts

Website: https://www.migrationpolicycentre.eu/

Twitter: @MPC_EUI

Facebook: Migration Policy Centre

E-mail: migration@eui.eu

Address: Convento di San Domenico
Via delle Fontanelle 19

I-50014 San Domenico di Fiesole (FI)