

The Case for Amnesty

Time erodes the state's right to deport

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Miguel Sanchez can't earn enough to pay the bills in his hometown. He tries for several years to obtain a visa to come to the United States and is rejected every time. In 2000 he enters on foot with the help of a smuggler. He makes his way to Chicago where he has relatives and friends and starts working in construction, sending money to his father. Miguel works weekends at Dunkin' Donuts and goes to school in the evening to learn English. In 2002 he meets an American-born U.S. citizen who lives in his neighborhood. They marry in 2003 and now have a four-year-old son.

Miguel, his wife, and son live under constant fear of his deportation. Driving to the funeral of a relative in another city causes high stress: a traffic stop or an accident can lead to Miguel's removal from the country. Nor can the family travel by plane. Their son has never met his grandparents in Mexico. Meanwhile, they have an ordinary life in the neighborhood: they own a home and pay taxes, their child attends preschool, and they have become friends with other parents. Current U.S. law provides Miguel and his family no feasible path to regularize his status.

Miguel Sanchez's story is true, but for a few identifying details. And there are millions of similar stories in North America and Europe. Some eleven million irregular migrants—noncitizens residing without official authorization—now live in the United States. The European numbers are smaller, but the reality is similar. People make their way across the southern Mediterranean or through Eastern Europe, or they arrive through authorized channels and overstay visas. Like Miguel, they find work, have families, and live ordinary lives—ordinary, but for one dramatic difference: their vulnerability to deportation.

How should a liberal democracy respond to the vulnerability of irregular migrants? Should it expel irregular migrants whenever it finds them? Should it accept them as members of the community, at least after they have been present for an extended period, and grant them legal authorization to stay? Should it pursue some third alternative, with a path to permanent residence mixed with penalties and restrictions?

The right answer, I think, is a (qualified) version of the second alternative. Irregular migrants should be granted amnesty—allowed to remain with legal status as residents—if they have been settled for a long time. Some circumstances—arriving as children or marrying citizens or permanent residents—may accelerate or strengthen their moral claims to stay, but the most important consideration is the passage of time.

Although most readers of *Boston Review* are Americans (as I am, in addition to being Canadian), I pose a general question about liberal democracies because they share some important principles and values. While particular features of American (or British or French or Canadian) legal traditions,

history, and circumstances may affect our stance toward irregular migration, there are common moral commitments that limit the range of acceptable policies. It can be helpful to remind ourselves sometimes of the wider moral communities we belong to, and, as we will see, Americans have something to learn from Europeans in this area.

Most people think that the state has the right to determine whom it will admit and to apprehend and deport migrants who settle without official authorization. Let us accept that conventional view about states and borders as a premise and explore the question of whether a state nonetheless may sometimes be morally obliged to grant legal-resident status to irregular migrants. The claims of irregular migrants are strong, even on this conventional assumption.

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Miguel Sanchez has been in the United States for almost nine years. Does that length of time affect his moral claim to remain? Some might argue that the passage of time is irrelevant. Some might even say that the longer the stay, the greater the blame and the more the irregular migrant deserves to be deported. In my view, the opposite is true: the longer the stay, the stronger the moral claim to remain. Consider the case of Marguerite Grimmond. Grimmond was born in the United States but moved to Scotland with her mother as a young child. At the age of 80, she left the United Kingdom for a family vacation to Australia. It was her first time away from Britain, and she used a newly acquired American passport. When she returned to the United Kingdom, immigration officials told Grimmond that she was not legally entitled to stay and had four weeks to leave the country. She was, in effect, identified as someone who had been an irregular migrant all those years, since she had never established a legal right to reside in Britain. And she clearly knew that she was not a British citizen because she obtained an American passport for her trip.

Despite all this, once the story appeared in the newspapers, Grimmond was not deported. The moral absurdity of forcing her to leave a place where she had lived so long was evident, whatever the legal technicalities. She had been an irregular migrant for all those years, but that clearly no longer mattered.

Grimmond had a moral right to stay for two reasons: she arrived at such a young age, and she stayed so long. Because Grimmond arrived as a child, she was not responsible for the decision to settle in the United Kingdom. Being raised there made her a member of U.K. society, regardless of her legal status. The importance of such social membership was implicitly recognized even in the British Nationality Act of 1981. This law restricted citizenship in a number of ways and abolished the traditional rule (still followed in the United States and Canada) that anyone born on the territory is a citizen (the *jus soli* or “right of the soil” rule). It limited automatic acquisition of citizenship to the children of citizens and permanent residents. Nevertheless, the law made an exception for anyone who was born in Britain and raised there during her first ten years of life. It appears that the United Kingdom did not want to deport people with such strong ties to the country.

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The rationale behind the British Nationality Act's ten-year rule is compelling, but neither it nor the laws of most other states recognize that the same rationale applies even more forcefully to children who are not born in a country but who spend ten years of their childhood there. After all, the ten years from six to sixteen (or from eight to eighteen) are even more important in creating a substantial connection to the country where one lives than the first ten years of life. The later years of childhood are the most important ones from society's perspective—the formative years of education and wider socialization. Human beings who have been raised in a society become members of that society: not recognizing their social membership is cruel and unjust. It is morally wrong to force someone to leave the place where she was raised, where she received her social formation, and where she has her most important human connections, just because her parents brought her there without official authorization. Yet current legal rules in North America and Europe threaten many young people in just this way.

The principle that irregular status becomes irrelevant over time is clearest for those who arrive as young children. But the second element in Grimmond's case—the sheer length of time she had lived in the United Kingdom—is also powerful. What if Grimmond had arrived in the United Kingdom at twenty rather than two? Would anyone really think that this difference would make it acceptable to deport her, 60 years later? Grimmond's case clearly illustrates that there is some period of time beyond which it is wrong to deport people who have settled illegally.

How long is too long? What if Grimmond had been 60, not 80? Would that have diminished her claim to stay? I assume not. What if she had been 40? The poignancy of the case certainly diminishes, but the underlying principle remains: there is something deeply wrong in forcing people to leave a place where they have lived for a long time. Most people form their deepest human connections where they live. It becomes home. Even if someone has arrived only as an adult, it seems cruel and inhumane to uproot a person who has spent fifteen or twenty years as a contributing member of society in the name of enforcing immigration restrictions. The harm is entirely out of proportion to the wrong of illegal entry.

When her ordeal was over, Grimmond expressed relief: she had “worried,” she said, “about moving to America because I don't have any friends or family there.” Normally we do not think of moving to the United States as a terrible prospect. But think about the fear and anxiety Grimmond must have felt, and then about the reality of irregular migrants, who can be and are deported even after very long periods of residence. Grimmond was lucky because her case attracted such public attention. Had it not, the immigration bureaucracy might well have sent her “home.”

Grimmond poses a particularly difficult challenge for those who would uphold at all costs the state's right to deport irregular migrants, but her claims are not unique. Hiu Lui Ng arrived in New York at the age of seventeen with his parents on a tourist visa. After that expired he applied for asylum and obtained a work permit while his application was reviewed. Although his application for asylum was denied, he managed over the years to attend a local high school and then a community college, acquiring technical skills as a computer engineer. He married an American citizen, had two children, a house in Queens, and a job at the Empire State Building. In 2007 he came to the attention of immigration officials because, following bad legal advice, he applied for a green card. Immigration and Customs Enforcement detained him and set out to deport him. Ng died before he could be deported. His story appeared in *The New York Times* primarily because of the ways in which he had been mistreated and neglected by those supervising his detention—he suffered from a broken spine and liver cancer that was diagnosed only five days before it killed him. But why was the United States trying to deport Hiu Lui Ng in the first place? He was an American in every respect that mattered, except legal status.

Ng's claim not to be deported, like Grimmond's, has two elements, though the details are different. Ng did not arrive here as a young child (although he was brought by his parents), so his early social formation did not take place in the United States. On the other hand, Ng, like Miguel Sanchez, was married to an American citizen. Marriage creates deep ties, not only with the person one marries but also with the communities to which that person belongs.

Living with one's family is a fundamental human interest. The right to family life is recognized as a basic human right in European human rights legislation, and concern for family values has played a central role in American political rhetoric in recent decades. All liberal democratic states recognize the principle of family reunification, i.e., that citizens and legal residents should generally be able to have their foreign spouses and minor children join them and that this takes priority over the normal discretionary power that the state exercises over immigration. (In fact, Ng was applying for residency on this basis.) Once Ng was married to an American citizen, his ties to the United States, his interest in living there, and his spouse's interest in living there all assumed a new importance and greatly outweighed any interest the state had in deporting him in order to enforce its immigration laws. Even if the state is entitled to enforce its immigration laws (as I assume here), it is not right to do so without regard for the harm done in such a case. If an irregular migrant marries a citizen or a legal permanent resident, he or she should no longer be subject to deportation.

In addition to the claim that he had to remain in the United States because of his marriage to an American citizen, Ng had a powerful claim to stay simply because he had already been in the United States so long and thus had become a member of society. Unlike Grimmond, he had not been present for over seven decades, but he had lived peacefully in the United States for fifteen years, getting an education, working, building social connections, creating a life.

People who live and work and raise their families in a society become members, whatever their legal status: that is why we find it hard to expel them when they are discovered.

Fifteen years is a long time in a human life. In fifteen years connections grow: to spouses and partners, sons and daughters, friends and neighbors and fellow-workers, people we love and people we hate. Experiences accumulate: birthdays and braces, tones of voice and senses of humor, public parks and corner stores, the shape of the streets and the way the sun shines through the leaves, the smell of flowers and the sounds of local accents, the look of the stars and the taste of the air—all that gives life its purpose and texture. We sink deep roots over fifteen years, and these roots matter even if we were not authorized to plant ourselves in the first place. The moral importance of Ng's social membership ought to have outweighed the importance of enforcing immigration restrictions.

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The moral right of states to apprehend and deport irregular migrants erodes with the passage of time. As irregular migrants become more and more settled, their membership in society grows in moral importance, and the fact that they settled without authorization becomes correspondingly less relevant. At some point a threshold is crossed, and irregular migrants acquire a moral claim to have their actual social membership legally recognized. They should acquire a legal right of permanent residence and all the rights that go with that, including eventual access to citizenship.

How can migrants become members of society without legal authorization? Because social membership does not depend upon official permission: this is the crux of my argument. People who live and work and raise their families in a society become members, whatever their legal status: that is why we find it hard to expel them when they are discovered. Their presence may be against the law, but they are not criminals like thieves and murderers. It would be wrong to force them to leave once they have become members, even when we have good reasons for wanting them to go and for preventing others like them from coming.

Over time the circumstances of entry grow less important. Eventually, they become altogether irrelevant. That is what happened in Europe in the 1970s when people who had originally been admitted as guest workers, with explicit expectations that they would leave after a limited period, nevertheless were granted resident status. Of course, the guest workers' claims to stay were somewhat stronger than those of irregular migrants because the guest workers were invited. But this difference is not decisive: after all, the guest workers' permanent settlement contradicted the terms of their initial admission. What was morally important was that they had established themselves firmly as members of society.

My argument that time matters cuts in both directions. If there is a threshold of time after which it is wrong to expel settled irregular migrants, then there is also some period of time before this threshold is crossed. How much time must pass before irregular migrants acquire a strong moral claim to stay?

Or from the opposite perspective, how much time does the state have in which to apprehend and expel irregular migrants?

There is no clear answer to that question. The growth of the moral claim is continuous, although at some point it becomes strong enough that further time is unnecessary. The examples I have cited suggest that fifteen or twenty years are much more than enough. Ten years seems to me like a maximum, and I would think that five years of settled residence without any criminal convictions should normally be sufficient to establish anyone as a responsible member of society. On the other hand, it seems plausible to me that a year or two is not long enough.

The policy implication of this analysis is that states should move away from the practice of granting occasional large-scale amnesties or providing a right to stay on a case-by-case basis through appeal to humanitarian considerations. Instead states should establish an individual right for migrants to transform their status from irregular to legal after a fixed period of time of residence, such as five to seven years.

Proving length of residence can be a problem, but past practice shows that this difficulty is not insuperable. For example, France had for many years a policy that granted an entitlement to legal-resident status to anyone who could show that he or she had lived there for at least ten years. When a right-wing government came to power in 2003, the policy was made much more discretionary and restrictive, but the change was spurred by ideological hostility to immigration, not by evidence that the previous policy increased the level of irregular migration or created other problems.

Similarly, for a long time, the United States permitted the Attorney General to grant permanent-resident status to migrants (including irregular migrants) who could establish that they had lived in the country continuously for ten years and met certain other requirements regarding employment, the lack of a criminal record, and so on. The same rule gave positive weight to family ties to American citizens and residents. Unlike the French policy, the American one was always a discretionary authority, and it did not give migrants a legal entitlement to the regularization of their status.

Nevertheless, it was used fairly often. Like the French policy, it recognized the moral logic I defend here: people become members of our community over time, even if they settle without authorization, and this membership should be recognized by law. In recent years, opponents of immigration have placed legislative restrictions on the exercise of the Attorney General's discretionary authority, and political dynamics have further limited its use. Today it is much more difficult for irregular migrants to gain legal status under this provision than it was once. Nevertheless, the principle is still on the books: the passage of time creates a moral claim to stay.

Identifying a specific moment after which irregular migrants have a legal right to remain inevitably involves an element of arbitrariness. No one can pretend that choosing five years rather than four or six involves any question of fundamental principle. It is more a matter of the social psychology of coordination, given the need to settle on one point within a range. But if one asks why five years rather than one or fifteen, it is easier to make the case that one is too short and fifteen too long, given common understandings of the ways in which people settle into the societies where they live.

Some people are puzzled by the weight I give to the passage of time, rather than to the actual range and intensity of the migrant's social ties in the new society. Is it really right to pay attention only to the passage of time?

There is merit in this concern. Individuals form attachments and become members of communities at different rates. And the harm done to someone in forcing him or her to leave will vary, too. It is not the passage of time *per se* that matters but what that normally signifies about the development of a human life. It is appropriate, for example, to give special weight to the fact that an irregular migrant has received her social formation in the country, to the fact that an irregular migrant has married a citizen or legal resident, to a clean record and a history of employment. But it would be a mistake to try to establish a much wider range of criteria of belonging and an especially big mistake to grant more discretion to officials in judging whether individual migrants have passed the threshold of belonging that should entitle them to stay.

In most states, violations of immigration law are treated as an administrative matter, not as a criminal offense.

This approach is justifiable partly as a matter of efficiency. When it comes to assigning legal rights and responsibilities, like the right to vote or marry, a state does not normally inquire into the capacities of each person. Rather it establishes rules that tie the possession of rights and responsibilities to an objective measure of the passage of time. The gain from a more detailed inquiry into individual capacities is much too small to warrant the expenditure of social resources that it would require. The same would be true of any effort to make individual determinations about depth of membership for irregular migrants.

More importantly, the very effort to determine these questions would run afoul of the normative commitment of liberal democratic states to respect individuals. We have every reason to worry that discretionary criteria would be interpreted and applied (whether consciously or not) in a discriminatory manner. In addition, there is something presumptuous in imagining that one person can make nuanced judgments about how deeply another belongs to the society in which she lives.



Many people find my argument about the importance of social membership unpersuasive. In their view, the conclusions are unfair to people who would like to enter but have respected existing restrictions (and perhaps waited in line); they reward lawbreaking; and they encourage others to enter and remain without legal authorization.

These criticisms have force, but they are also overstated. I explore them here because understanding their limits lends further support to the idea of an amnesty based on membership.

Consider first the argument that an amnesty is unfair to those waiting patiently in line for admission. In many democratic states, there is no effective admissions line for those without family ties or special

credentials. Even in countries such as the United States and Canada that encourage legal immigration, there are almost no immigration lines for unskilled workers without close family ties to current citizens or residents. Most of those who settle as irregular migrants would have no possibility of obtaining authorized entry.

Second, consider the charge of lawbreaking. It is true that the rules governing immigration are laws, but so are the rules governing automobile traffic. We do not describe drivers who exceed the speed limit as illegal drivers or criminals. In most states, violations of immigration law are treated as an administrative matter, not as a criminal offense. But if immigration violations are not criminal offenses, those who violate immigration laws cannot reasonably be described as criminals.

In any event, we all recognize that laws vary enormously in the harms they seek to prevent and the order they seek to maintain. Laws against murder are more important than laws against theft, laws against theft more important than laws regulating automobile traffic. The laws restricting immigration are far more like traffic regulations than like laws prohibiting murder and theft. The laws serve a useful social function, but that function can be served reasonably well even if there is a fair amount of deviance and most of those violating the rules never get caught. For enforcement purposes, it makes sense to focus on the really dangerous violators — those driving drunk or so recklessly as to endanger lives in the case of traffic laws, those who engage in terrorism or crime in the case of immigration laws. For run-of-the-mill violations (ordinary speeding, irregular migration for work), just having the rules in place and occasionally enforcing them will maintain order at a sufficient level.

Settling without authorization violates immigration laws, but that does not mean that we should punish people many years after the fact. As the historian Mae Ngai has argued, there is a parallel between statutes of limitations for criminal offenses and a policy of not deporting long-settled irregular migrants. Most states recognize that the passage of time matters morally, at least for less-serious criminal violations. If a person has not been arrested and charged within a specified period (often three to five years), legal authorities may no longer pursue her for that offense.

Why do states establish statutes of limitations? Because it is not right to make people live indefinitely with a threat of serious legal consequences hanging over their heads for some long-past action, except for the most serious sorts of offenses. Keeping the threat in place for a long period serves no useful deterrent function and causes great harm to the individual — more than is warranted by the original offense. If we are prepared to let time erode the state's power to pursue actual crimes, it makes even more sense to let time erode the power of the state to pursue immigration violations, which are not normally treated as crimes and should not be viewed as crimes.

In a related vein, we should be wary of efforts to criminalize actions that irregular migrants take simply to live ordinary lives. Most jurisdictions have criminal laws prohibiting identity theft and the use of false documentation. These are usually sensible laws intended to prevent fraud. Of course, irregular migrants often provide false information to satisfy administrative or legal requirements. For example, they may provide a social security number that is not their own to an employer who uses

this to deduct taxes from their pay. In most such cases, the irregular migrants are only trying to conceal their presence, and are not engaged in deception designed to harm others. They pay their taxes, even when they are not entitled to the benefits that taxpayers normally receive (such as Social Security or unemployment compensation). Their actions may be technical violations of laws against identity theft and the use of false documents, but they are not normally the kinds of actions those laws were intended to prevent. Treating irregular migrants as criminals under these laws, as some authorities in the United States have been doing, is an abuse of the legal process.

The state does have the power to make irregular migrants the targets of those laws, just as it has the power to make violations of immigration laws a criminal offense. But if we weigh the harm criminalization aims to prevent against the social costs it incurs, criminalization makes no sense. The third objection probably worries people the most: the concern that an amnesty for long-term residents would encourage many others to come without authorization. Would the likelihood of regularization in the long term affect decisions to migrate (or to stay after arrival)?

The argument that I have been developing is a constraint on the state's right to control immigration, not a repudiation of it.

If irregular migrants think about their own long-term prospects, then they surely understand that immigration policies shift over time in response to changes in the political climate. Opportunities to move to regular status may disappear when political opposition to immigration increases. Alternatively, new opportunities for regularization may appear if the political dynamics shift again. All this is beyond their control. What they can control is more immediate. Most irregular migrants compare their situation at home with what they think they will face in the near term. Most irregular migrants come because they think they can find work that is considerably more financially rewarding and because they think they will be able to evade the immigration authorities, at least long enough to make it worthwhile. In the absence of evidence to the contrary, it is plausible to suppose that such a long-term consideration as possible regularization years down the road would have little impact.

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The argument that I have been developing is a constraint on the state's right to control immigration, not a repudiation of it. Nothing 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.

At the same time, it is only a minimalist argument (though doubtless it will not appear so to many). I identify only general moral constraints upon acceptable policies for the deportation and exclusion of irregular migrants in all liberal democratic states, not all of the moral considerations that might generate responsibilities to irregular migrants.

One such consideration is the claim that states are complicit in irregular migration. Many argue that rich, liberal democratic states do not actually want to exclude irregular migrants, despite loud public

pronouncements to that effect. From the state's perspective it is precisely their irregular status that makes them desirable as workers because their vulnerability makes them tractable and easy to exploit. If this is true, then it undermines the argument that irregular migrants are present without the consent of the political community and so not entitled to the same rights as legally authorized migrants. If a state covertly encourages migrants to enter, it owes them the same status and legal rights to which they would be entitled if they were recruited openly. Even if the question is not one of the state explicitly recruiting irregular migrants, but only of failing to enforce immigration laws and controls when it could do so, the state bears considerable responsibility for results of its inaction. So state complicity in irregular migration reinforces the moral case for amnesty. And this is not just a point of principle. Recognition of the state's complicity in irregular migration movements has played a role in Spain, Italy, and even the United States in the past in generating public support for legalization policies for irregular migrants.

But we should be careful not to overuse the complicity argument. First, the argument that the state is complicit in irregular migration only makes sense when there is scope for state action (or inaction) to make some difference in the number of irregular migrants. To the extent that irregular migration flows are determined—as many analysts argue—by structural factors beyond the state's control, the state cannot be held responsible for failing to prevent the entry and settlement of the irregular migrants. We can criticize state policies for being ineffective or counterproductive but not for complicity.

Second, we cannot simply infer the state's complicity from the fact that some employers within the receiving society want to hire irregular migrants. No state can be held responsible for the desires or actions of every citizen or corporation within its jurisdiction. To establish complicity, it is necessary to show that the state is facilitating or permitting irregular migration despite its formal policies by, for example, relaxing enforcement efforts against migrant workers during the hiring season. This is sometimes the case, but not always.

Third, one cannot charge a state with complicity simply because of its failure to deter unauthorized immigration. Every enforcement effort has some failure rate. In some cases a state's effort to prevent unauthorized immigration and to expel those who are discovered may legitimately be hampered by other considerations. For example, some argue that efforts in the United States and Southern Europe to keep people out already go too far because they cost too many lives. If border officials were to cut back on some of these measures in order to save lives, we should not turn around and accuse them of complicity in letting the migrants in.

Similarly, the mere presence of visa overstayers does not by itself show that states are encouraging unauthorized immigration. Visitors from poor states to rich ones already face severe and discriminatory restrictions on admission. Tightening those restrictions further because a few of the visitors do not leave when they are supposed to would impose too high a cost to be a defensible way of restricting irregular migration.

Various moral considerations will always limit the ways in which states may try to control irregular migration, even if one fully accepts the legitimacy of the goal itself. But these limits and the surplus of irregular migrants generated by them do not represent evidence of a state's complicity in irregular migration or undercut its right to try to restrict it.

Even if we accept the state's right to control immigration as a basic premise, that right is not absolute and unqualified. The state's right to deport irregular migrants weakens as the migrants become members of society. Over time an irregular migration status becomes morally irrelevant while the harm it inflicts grows. Liberal democratic states should recognize that fact by institutionalizing an automatic transition to legal status for irregular migrants who have settled in a state for an extended period.