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‘The basic rights of short-term immigrants also need protection’

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This article is a response to Joseph H. Carens’s Case for Amnesty, and part of a [New Democracy Forum](#) on immigration.

In any policy debate on the rights of undocumented noncitizens in liberal democratic societies, I will happily enlist Joseph Carens to represent me. I agree with him that community membership must be treated as grounded in social fact rather than formal state-given status. I agree that to treat a group of residents as nonmembers undermines liberal democratic commitments, and that both principle and common sense require regularization of out-of-status immigrants. Still, I believe that his core argument—that time matters morally—raises more complications in this setting than he allows.

On Carens’s account, the requirement of lengthy settlement as grounds for amnesty is a concession to the view held by “most people” that the political community has the right to determine its own membership. I say “concession” because Carens became well-known in the 1980s for advancing a stringent liberal critique of borders. A decade later, he had exchanged what he calls “idealism” for a more “realistic” approach, fueled by the conviction that “whatever we say ought to be done about international migration should not be too far from what we think actually might happen [and from] what we think our community might do.” This shift toward realism has led to his qualified acceptance of the view that states have the right to control their membership.

As a result, for Carens, the moral claim to regularization requires more than simply showing up. Indeed, showing up without authorization is a “wrong.” Instead, the claim requires staying. And the moral character of time is such that more of it increases the power of the claim; as Carens writes, “the longer the stay, the stronger the moral claim.”

Undoubtedly, this emphasis on time is a crucial corrective to a formalist preoccupation with assigned legal status. Its value lies in its moral attention to context and relationship: when a person inhabits a society for some period she develops affiliations, ties, and identifications, which change the moral calculus. Residence over the course of time produces social membership, which at some point trumps lack of legal status, thereby both justifying and requiring regularization.

But will this time claim bear so much weight? There is, first of all, the arbitrariness involved in establishing the length of the waiting period. Also, there is the fact that time is not always an ideal proxy for affiliations and stakes. Carens acknowledges these concerns. But there are other difficulties related to the fact that wherever the bar is set (whether at five years or ten), there will be some who fall short of it.

Carens’s approach presupposes a class of people who are territorially present but have not been here long enough to pass into the privileged group. What of them? Assuming continued restrictive state immigration policies, and assuming also these policies’ continued failures, as Carens does, this will be

a constantly self-replenishing category.

Although, on his account, shorter-term immigrants do not have a claim for automatic legalization, I am certain that Carens will not argue that they are beyond the protection of law in other respects. As a liberal democrat, he will insist that individuals who are present in the national territory, simply by virtue of that presence, are entitled to due process and equal protection, to marry and divorce, to own and transfer property, to make and enforce contracts, to worship freely, to send their children to school. He will insist that even those irregular migrants who fall short of the regularization threshold be recognized as legal subjects in the market and in civil society.

If so, Carens's stance is self-contradictory. These immigrants' lack of eligibility for legalization means that, all else aside, they remain subject to the state's power to deport. Carens here not only assumes that power but affirms it. Yet we know that for irregular immigrants vulnerability to deportation functions to undercut the basic rights that are formally available to them. Indeed, legalization is essential precisely because it combats the subordinating effect of deportability. As a practical matter, allowing the actual or threatened deportation of shorter-term unauthorized immigrants is tantamount to nullifying many of those rights and protections. It places these immigrants, in many respects, beyond the pale.

Notice, however, that the marginalization and subordination worked by the threat of deportation, while significant, is not total. In fact, it is precisely by virtue of liberal societies' treatment of these immigrants as basic civic and legal subjects—as entitled to buy and sell, gather and worship, recreate and procreate—that the immigrants' construction of the “social membership” Carens emphasizes is made possible. And again, this social membership—in neighborhoods, schools, families, churches, markets and even (“even,” given employer-sanctions rules) in workplaces—will, according to Carens, eventually provide a basis for amnesty.

There are two important points here. First, the immigrants' social membership is not prior to or independent of the state's law but, in many respects, a product of it. Carens is right that “social membership does not depend upon official permission” to stay, but it does depend on official recognition of individuals' rights and standing in the market and civil society during their stay. Arguably this makes liberal states indeed “complicit” in the process of unauthorized migration. They are complicit, however, not because they opportunistically encourage or tolerate irregular migration in the first instance (although I think there is sometimes merit to this claim), but rather, because they make possible, via liberal legal rules, the development of immigrants' social membership in the first place.

Of course, this argument risks encouraging those who would deny all civil and social rights to undocumented aliens from the outset. One can respond, however, that allowing for a resident caste of unprotected, uneducated “pariahs” (as Owen Fiss put it in a 1998 *Boston Review* article), not only harms everyone, but also violates our deepest principles: it is simply unacceptable on liberal democratic grounds to maintain a system of internal institutionalized caste.

Second, the most fundamental of liberal (or, more precisely, liberal-nationalist) constitutional norms holds that *all persons* within the state's jurisdiction are to be accorded basic rights, security, and recognition. This commitment lies at the core of our conventional morality, as embodied in law. And for this commitment, length of stay is irrelevant. Even granting that “time matters” for purposes of

political incorporation, it cannot legitimately matter for locational security (security against deportation) for the unauthorized, given the undermining effects of deportability on basic civil and social inclusion.

Accepting the deportability of shorter-stay unauthorized immigrants follows from Carens’s pragmatic allowance that states maintain the right to control membership. But I insist that, as a practical matter, borders often end up trumping core liberal commitments—not just at the state’s frontiers but in the interior itself. Carens may say that this is the price of doing realistic, policy-relevant theory. There are limits to what can be publicly argued and hoped for; tradeoffs are inevitable. His goal is to convince skeptics that long-term immigrants have any claim to regularization at all, and his argument is powerful in this setting.

But political realism comes at the expense of forceful social criticism. Carens demands too little of the state morally. The rhetorical and political compromises entailed make me miss the early Carens—the idealistic champion of open borders.

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