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On the Impossibility of Moral Immigration Reform

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The Center for American Progress, in a 2013 article, made an elaborate case for Comprehensive Immigration Reform arguing that establishing a path to citizenship for millions of people will unleash billions of dollars of economic activity.¹ The economic stimulus argument for reform has become a cornerstone of progressive thought on the issue. A colleague of mine, in preparation for a panel we presented on together, posed a question to me that echoed this refrain, “What’s in it [immigration reform] for the average American?” How do scholars and policy makers my colleague asked, “...sell Americans on the value of immigration reform? What is their incentive to backing legalization?”

The argument goes something like this: Bringing two million people into the mainstream economy and extending basic labor protections to them will boost wages, decrease labor violations, improve working conditions and broaden the tax base. The presumption being that once on a path to citizenship, people will be more inclined to open their own small business, purchase homes and as a relatively youthful cohort, balance California’s aging workforce and help bring down the cost of healthcare. The economic argument for comprehensive immigration reform would appear to essentially write itself.

Scholars, judges and community members in favor of Comprehensive Immigration reform are asking people to back immigration reform because there is something in it, economically, for them. The argument being that there are 11 million people in the United States without authorization, working in low wage employment sectors that are legally barred from fully participating in the American economy.² According to the Public Policy Institute of California, there are between 2 and 2.5 million people that entered the country without authorization, whom comprise a full 10% of the state’s workforce. The IRS values the size of California’s “underground economy” at \$10 billion dollars a year.³ This figure of course encompasses a wide variety of employment violations and is not exclusively linked to undocumented labor but it gives perhaps the broadest possible picture of the issue.

Moreover, putting 2+ million people on a path to citizenship should decrease the number and extent of labor abuses, improve working conditions and raise wages throughout the state of California. If the limited enforcement data from the U.S. Department of Labor is any indication, the exploitation of undocumented labor in California is vast. According to the Department’s enforcement data, California employers were ordered to pay more than \$16 million dollars in illegally withheld wages to their workers. The number and scale of the violations were overwhelming concentrated in employment sectors with the highest densities of undocumented workers: apparel manufacturing, labor contracting for construction and full service restaurant work.⁴

Perhaps the most obvious and important support for this argument came in the 2011 California Supreme Court case of *Salas v Sierra Chemical*.⁵ The court considered whether a person working in California without authorization had sufficient standing to sue his or her employer for violating labor and

employment laws. The court, in a majority opinion, reaffirmed the lower court decision that, save for a few narrowly defined circumstances, unauthorized workers cannot sue abusive employers. The court's decision was merely the most recent iteration of a long-standing policy that sanctions the exploitation and abuse of undocumented labor.

As much as I would like it to be so, in the aggregate, it may be straining credulity to assert, without the appropriate qualifications, that comprehensive reform would make it easier for undocumented people to work more, make more, contribute more in taxes more than they already do. According to recent data from the Public Policy Institute of California, only 6.5% of unauthorized workers were unemployed in 2008, a rate well below the state or national average on the cusp of the Financial Crisis. The best post-crisis estimates are that as of 2011, $\frac{3}{4}$ of undocumented adults were active in the workforce.⁶ The qualitative literature on undocumented workers has consistently shown that underemployment, rather than joblessness, to be of far more prevalent and the recent data seem to support that position.

The Center for American Progress, one of the leading think tanks on the issue, tried to sidestep this issue in making an economic case for immigration reform. Their 2014 article states in part, "Immigrant's inability to invoke their rights [at work] results in weakened employment protections for all American workers - and in some instances, means that American workers are subject to violations of minimum-wage and overtime protections, wage theft, and other forms of employment violations, such as unsafe working conditions" (pg 7).⁷ The report, in a fairly explicit manner, links the exploitation of undocumented labor pulls with declining working conditions for U.S. born and other authorized workers.

A 2010 study from the Economic Policy Institute debunked the claim that working conditions and the wage suppression for undocumented workers spills-over to others. Their study found that U.S. born workers do not compete for jobs with undocumented workers and the presence of unauthorized labor actually boosts U.S. born wages. Previous wage regressions linked greater numbers of undocumented workers with lower wages for Americans with a high school diploma or less, which would appear to support the Center for American Progress' argument. The authors re-calculated the wages for American workers with a high school diploma compared to those without one [previous both were aggregated in a single category] and found - to the authors' surprise - that undocumented workers actually produce a small net boost to wages for American workers with at least a high school degree. Undocumented workers, therefore, actually boost the wages of more than 90% of American workers. Moreover, the only workers substantially harmed by increasing undocumented immigration, according to the report, is previous waves of undocumented workers.

Likewise, there is no strong evidence suggesting that unauthorized workers bring down working conditions for Americans or authorized immigrants. Saru Jayaraman, a scholar at U.C. Berkeley's Labor Center, argued that - at least for service sector work - that wages and working conditions are borderline inhumane and that this phenomenon is closely linked with the total absence of regulatory oversight and the existence of a separate minimum wage for tipped employees that has not been raised in two decades. Unauthorized workers have little to no effect in the presence of such massive market distortions. In fact, the causal line probably runs in the other direction.

The notion that CIR will boost the tax base is also questionable. Stephen C. Goss, the Chief Actuary for the Social Security Administration, noted in a 2010 Washington Post article that undocumented workers had contributed between \$120-240 billion total dollars into Social Security funds by the year 2007, comprising approximately 6%-10.5% of the administration's total assets under management. Additionally, the administration estimates that that $\frac{2}{3}$ of unauthorized migrants in the workforce actively contribute to the fund annually. In other words, 66% of undocumented immigrants are working and actively contributing tax withholdings to Social Security - benefits they will never collect - which by 2007 comprised between 6% and 10% of the administration's total assets under management. Finally, at the level of the state, 40% of California's budget comes directly from sales tax, a regressive tax that everyone pays regardless of income or legal status. Another 43% of the state budget is funded directly by income taxes, which presumably these workers are also contributing to.

The data on small business ownership is decidedly less clear than the evidence on employment, wages and taxes. According to - again - the Center for American Progress, over 900,000 of registered small businesses in the United States - or about 18% of the total - were owned by an immigrant in 2013. It remains unclear however, how many business owners were living in the United States without authorization but at nearly 20% of the existing total, legalization is unlikely to move that number significantly. In order argue otherwise you must assume that undocumented people constitute a trivial amount of the existing total. Holding that constant then and defining a "significant change" as 10%, you would then be arguing that nearly a $\frac{1}{3}$ of registered small businesses in the United States would be immigrant owned. Keeping in mind that the U.S. Department of Labor defines "small business" as any business with less than 800 workers, that's quite a statement to make. While there is not enough evidence to make any definitive statements, the logical implications that must follow in order make the argument viable seem wildly improbable.

Finally, the one economic sector that legalization could significantly improve is homeownership. The Pew Hispanic Center estimated that 35% of undocumented households owned their own homes in 2009, which starkly contrasts with the nearly 70% of U.S. born households that are homeowners.⁸ This does not account however, for the vast and incalculable value of undocumented surplus labor that most of us benefit from. It wouldn't even affect the job that you're working in now, as the wages you are paid are unaffected by increased undocumented labor. Besides the societal benefits of wide homeownership, it's not clear that most Americans would see much tangible, bottom line to legalization. At best, it's a push and at worst, its better the way it is.

The Moral Case for Immigration Reform

I would then urge that economics - labor, employment, taxes - is not the appropriate frame to convince American voters of its worth because it's not clear those in support of CIR can win that argument. The case for immigration reform must be made not on the terrain of the economic, but the moral. It is incumbent on those pushing for change to couch their argument not just in economic self-interest, but moral grounds. Alexander Aleinikoff, a professor of Law at Georgetown University maintained that moral arguments will fall prey to attacks of moral equivalency from the political right if they do not have a unified theoretical framework. Moral positions on immigration reform, according to Aleinikoff, are generally articulated along three axes: the recognition of societal membership, the importance of maintaining family

unification and legal proportionality between the crime of unauthorized entry and the punishment of deportation.⁹

First, the United States has a self-mandated duty not to deport long-term residents that, by virtue of their active contributions to society over considerable stretches of time, have become de facto members. Second, deportation fractures family units, especially in mixed status households, and thus violates internationally recognized rights to family unification. Finally, this position maintains that deportation, especially in cases of long-term residence, is a disproportionately harsh penalty for a relatively minor offense.

The rhetorical use of morality however, cuts both ways. Those opposing progressive change retort that one cannot simply deem one's self a member of any society no matter how long they have lived there. It is the voter in Democratic societies that decides upon whom to confer societal membership - right or wrong - and it a privilege that cannot be earned by propinquity. Moreover, the United States has a rich history of deporting refugees, whom by virtue of their legally sanctioned status are recognized members of society. Thus it would appear that the claim that deporting long-term migrants violates the ethics of American laws seems to lack precedence. Concerning the effects of deportation on families, the United States already has administrative procedures in place to adjudicate deportation in cases where there are dependent children in the family that are citizens. The final rebuttal is how could America with total clarity, draw such strident moral claims for certain groups and not others and not - in the process - undermine the legitimacy of our own system of legal entry? The claims for amnesty based on membership or family unity - if one looks at it coldly - appear to lack both precedence and moral equivalency.

The point here is not to shoot down moral claims to immigration reform, but to demonstrate how the debate over morality and comprehensive immigration reform has been deadlocked for quite some time. Aleinikoff writes, "Indeed, I worry that the attempt to make the argument on moral grounds could jeopardize the chance for a solution that would aid the persons [the author he is responding to] cares about, as opponents line up moral claims on the other side". He suggests that a more pragmatic approach to immigration reform - one that emphasizes the expense and logistical difficulty of deporting 11 million people - would be a more fruitful line of argumentation.

Existential Morality

In a brilliant rejoinder to classical philosophy, Sartre demonstrates how to construct an argument that cannot be stalemated by relativistic counters. The beauty of this school of thought - for our purposes - is that it helps us define a moral agenda uncluttered from ideology. Sartre wondered throughout his fiction and prose how to reconsider consciousness and morality in a world where God did not exist. If God does not exist, consciousness and thus morality lack definitive form, which is what he meant when he writes of "nothingness". Right and wrong, for Sartre, are social constructions that obscure our understanding of reality. Consciousness for Sartre is unadulterated potential - a necessary pre-condition - that only becomes essence when we ascribe meaning to it through the choices we make. Our freedom to decide and our willingness to be accountable for those decisions are what define morality in this context.

Morality, for Sartre, is thus consciousness book-ended by choice on one end and on the other by accountability.

Cruelty and fickleness therefore, can be virtuous to the extent there exists a clear connection between action and responsibility. The United States would be hypothetically free therefore, to fully militarize its border, deport all unauthorized residents without restraint or apology and still be within the confines of Sartrean morality. The caveat to this however, is that with the border sealed and 11 million people deported, the American electorate would have to accept the logical consequences of their decisions, which would mean the end of unauthorized labor in the United States. It is precisely this logical derivative - no matter how logistically implausible in reality - that Americans have yet to either experience or fully comprehend.

The Application of Sartre's Theory for Public Policy

This presents quite the pickle for voters because there is no shortage of research suggesting that immigrant labor - both authorized and unauthorized - has been an intimate if unacknowledged part of the American economy since the 19th century.¹⁰ Looking just at agriculture for example, the average American appears to enjoy a shaded position within the global food regime, albeit one they may not be fully aware of. This advantaged disposition allows them to glean the benefits of a system that relies on, shall we say, the flexibility of immigrant labor at every stage - from how their food is grown, harvested, prepared and served - to keep costs manageable.¹¹ The brilliance of our system is not just that it holds down prices through a variety of unsavory means but, by its very enigmatic nature, shields the consumer from the unseemly details about how this efficiency is achieved and maintained. Such casual dispensation allows consumers to make-believe that what they eat and what they pay for it are outcomes determined on the neutral terrain of the economic - where supply meets demand - rather than that of ideology. This in kind assistance in several sectors of the economy has become such a ubiquitous part of everyday life in the United States that most Americans do not recognize much less appreciate the services they render. Undocumented workers have been, in essence, the invisible subsidy to the American middle class.

Stephen Castles, an immigration specialist at the University of Sydney, maintains that immigration policies in high-income countries are often designed to keep Americans from having to make a choice. Sloganeering about "broken" immigration systems, for Castles, is an elaborate exercise in theatricality because the policies are working as poorly as they were meant to.¹² Lawmakers that attempt to placate all parties create a series of interlocking policies that - on the surface - appear contradictory but actually have a coherent logic underpinning them. Americans want to reform the immigration system but they don't want it to change.

¹ Lynch, Robert & Patrick Oakford. "The Economic Effects of Granting Legal Status and Citizenship to Undocumented Immigrants". Center for American Progress. March 20, 2013.

² Hill, Laura and Hayes, Joseph. "Just the Facts: Undocumented Immigrants". Public Policy Institute of California. February 2013.

³ State of California Employment Development Department. "The Underground Economy in California - What does it cost?". 2014.

⁴ United States Department of Labor, Enforcement Data Archive. <http://ogesdw.dol.gov/homePage.php>

⁵ *Salas v. Sierra Chemical*. Cal. Lab. Code § 1171.5.

⁶ Johnson, Hans & Laura Hill. "At Issue: Illegal Immigration". Public Policy Institute of California, 2011.

⁷ Kugler, Adriana & Oakfor, Patrick. "Comprehensive Immigration Reform Will Benefit American Workers". Center for American Progress. September 12, 2013. Page 7.

⁸ Passel, Jeffrey S. & Cohn, D'Vera. "A Portrait of Unauthorized Immigrants in the United States". Pew Hispanic Center. April 14th, 2009.

⁹ *Aleinikoff, Alexander*. "Forum: The Case for Amnesty". *Boston Review*. May 1, 2009.

¹⁰ Barry, Raymond P. "Child Labor in California Agriculture" Federal Writers Project. Oakland, CA, 1938. California Digital Library. University of California. <http://www.cdlib.org>.

¹¹ "Close to Slavery: Guestworker Programs in the United States". Southern Poverty Law Center. 2013 Edition.

¹² Castles, Stephen. "Why Migration Policies Fail". *Ethnic and Racial Studies* Vol. 27 No. 2. March 2004 pp. 205-227