

## Unauthorized Immigrants, Reasonable Expectations, and the Right to Regularization

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**Abstract:** This article brings an account of reasonable expectations to bear on the question of when unauthorized immigrants have a right to be regularized—that is, to be formally guaranteed freedom from the threat of deportation. Contrary to the current literature, which implicitly relies on a flawed understanding of reasonable expectations, this article argues that only those unauthorized immigrants who have *both* been tacitly permitted by the state despite lacking formal authorization *and* have remained long enough to develop deep social roots in the state have a right to regularization.

**Keywords:** unauthorized immigrants, reasonable expectations, regularization, social roots, tacit authorization, complicity

### 1. Introduction

When considering how states ought to respond to the presence of unauthorized immigrants, a central moral question is that of regularization: does justice ever demand that states grant a formal legal right to remain, free from the threat of deportation? One's circumstances matter morally: a state's right to deport is not absolute, and so a question arises under what conditions an unauthorized immigrant might have a right to remain within the state. Such a right to regularization might be permanent; it might be temporary. Either way, the upshot to the right to regularization is that any individual who enjoys it is guaranteed not to be deported.

In light of this question we might identify two distinct yet non-mutually exclusive kinds of unauthorized immigrant: the *tacitly authorized* and the *socially rooted* unauthorized immigrant. A tacitly authorized unauthorized immigrant is one without formal authorization from the state, but whose presence is effectively permitted by the state insofar as the state has intentionally forgone enforcement of its immigration policies with respect to certain classes of unauthorized immigrant, such as seasonal farm workers, because of the economic or political benefits that result. A socially rooted unauthorized immigrant is one whose presence is straightforwardly unauthorized but who has lived undetected in the state for long enough to have developed social roots in that

state. Both kinds of unauthorized immigrant are distinctive insofar as their circumstances seem relevantly morally different from ordinary unauthorized immigrants, whose circumstances are not special in any morally relevant sense, and who therefore have no special claims against the state not to be deported.<sup>1</sup>

Many scholars argue that socially rooted unauthorized immigrants have a right to regularization, and usually a right to permanent regularization. This has become a dominant view within the literature. Some scholars argue that tacitly authorized unauthorized immigrants also have a right to regularization. According to these views, tacit authorization and social roots are individually sufficient to ground such a right. As we shall see, both views find their firmest grounding in a notion of reasonable expectations such unauthorized immigrants hold that the state has an obligation to fulfill, one of which is the expectation to be allowed to remain.

In this article I will argue against these views. I will argue that these arguments fail to establish a right to regularization because they hinge on subtle misunderstandings about reasonable expectations. With respect to tacitly authorized and socially rooted unauthorized immigrants, I will argue that the expectation to be allowed to remain is not reasonable at all or it is not reasonable in the way required to ground a right to regularization, respectively. However, these arguments are not to be abandoned entirely. It is possible that unauthorized immigrants find themselves under both sets of circumstances simultaneously, and this, I will argue, does generate a right to regularization, and specifically permanent regularization. Rather than each set of circumstances being individually sufficient to ground a right to regularization, both are necessary. As I will argue, only those unauthorized immigrants who are simultaneously socially rooted and tacitly authorized can claim to have a reasonable expectation to be allowed to remain that is reasonable in the right way, and therefore have a right to regularization.

## 2. Preliminary Remarks

Arguments for regularization have a common and uncontroversial point of departure: states are morally restricted with respect to how they may respond to the presence of unauthorized immigrants. For example, states may not simply shoot and kill any and all unauthorized immigrants they detect, for this would violate a basic tenet of moral equality to which even the most ardent defend-

1. As Adam Hosein puts the point, since there is no real moral difference between someone who is prevented from entering a state and someone who successfully though illicitly crossed the border, say, a couple days ago (i.e., an ordinary unauthorized immigrant), the permissibility of deporting at least those individuals is part and parcel of the broader permissibility of states enforcing immigration restrictions, which is assumed in this paper. See Hosein, "Arguments for Regularization," 160.

ers of a state's right to restrict immigration are committed. However, it is also true that if a state enjoys a presumptive right to exclude immigrants (which I assume in this article), then it also enjoys a presumptive right to enforce its exclusionary policies, so long as it can do so via morally legitimate means.<sup>2</sup> This includes both securing the border and thus denying entry to individuals the state wishes to exclude, as well as deporting individuals who enter or remain without authorization and despite border enforcement mechanisms.<sup>3</sup> An upshot of this is that when immigrants enter or remain in a state without authorization they do something wrong, hence the state's presumptive right to deport. Indeed, this is accepted by arguments for regularization. So the nature of arguments for regularization is that there is something about the circumstances of socially rooted and of tacitly authorized unauthorized immigrants that supersedes the wrong they committed by entering or remaining without authorization, thus allowing their moral claims to be regularized to override the state's moral claims to deport them.<sup>4</sup>

Something very important, but hardly discussed in the literature, follows from this. Unauthorized immigrants who arrived as children appear to be excluded from, or at least not fully captured by, these arguments, and I think rightfully so. On any viable understanding of wrongdoing, most children do not meet the conditions to be held liable for many of their actions. In such cases of unauthorized immigration certainly a wrong has been committed, but *they* are not responsible or blameworthy.<sup>5</sup> This is significant because such individuals' moral situation is relevantly different from that of socially rooted and tacitly authorized unauthorized immigrants insofar as the point of arguments for regularization is to show that a right to regularization follows from some consideration that outweighs the wrong committed that otherwise provides the state the right to deport. But since children generally cannot be held responsible for being present in a state without authorization, a separate analysis is required to determine what claims they may have, for it is not clear that their rights would simply track the rights of their parents in all cases. The work done by arguments for regularization currently available cannot accommodate this distinction between children and adults, and so different arguments are required for individuals who arrived as children.<sup>6</sup> The point of this is to say that I

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2. For an argument that border enforcement is such that even this condition cannot be fully met by liberal democratic states, see Mendoza, "Enforcement Matters."
  3. For an argument that deportation should not be considered a violation of moral equality per se, see Blake, "Equality without Documents," 105–06.
  4. Linda Bosniak refers to these as "supersession arguments." See her "Wrongs, Rights and Regularization."
  5. See Hosein, "Immigration," 621, 627.
  6. It might seem obvious that what grounds any child's right to regularization is her social roots. If this were true it might present a serious challenge to my view. But more is at play

leave such individuals out of my analysis of arguments for regularization, and focus instead on individuals who entered or remained without authorization as adults. My own argument about regularization will provide tools to determine whether such individuals do have a right to regularization, which I suspect in most cases they will, but given peculiarities of their moral circumstances, I save an analysis of their particular claims for another paper.

I also assume that the unauthorized immigrants I consider in this article are not properly considered refugees. If they were, my assessment regarding their right to regularization might change and any change would be traceable to their status as refugees, not their status as tacitly authorized or socially rooted. An upshot of this is that returning to one's state of origin is assumed to be a morally viable option for the unauthorized immigrants this article considers—that is, one's basic rights are able adequately to be protected by the state from which they came and in which they presumably enjoy citizenship status.

Finally, regularization involves most saliently one's formally recognized freedom from the threat of deportation, which will likely include certain explicit legal protections. The extent of these legal protections is immaterial within the present context, for freedom from the threat of deportation is sufficient to distinguish anyone who enjoys this freedom from ordinary unauthorized immigrants, who do not. But I assume that any reasonable regularization program involves freedom from the threat of deportation for a significant amount of time, certainly longer than however much time would be required for one to pack one's things and leave the country.<sup>7</sup> Otherwise regularization would seem to be practically meaningless.

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with this population. We could imagine a child with no social roots and who is not tacitly authorized—i.e., is an ordinary unauthorized immigrant—and yet has a right to regularization because her parents do. We could also imagine a child who has developed social roots yet is only fourteen years old. If his parents do not have a right to regularization, it is not obvious that the child does, and the fact of the child's social roots would therefore seem not to be dispositive because children are often forced to move with their parents, sometimes overseas. What seems more important in this latter case is the ability of the child to be cared for, as well as any claim the parents might have to maintain their relationship with their children. Finally, it may make a difference whether the child arrival is still a child at the time of adjudication. Indeed, there are cases of children arriving without parents. They are ordinary unauthorized immigrants, but their status as children seems to make a moral difference. Arguments for regularization do not take these kinds of considerations into account, which indicates that a full and independent analysis really is required to determine the rights of children in various circumstances, to include unauthorized adults who arrived as children. For discussion of parental claims to maintain relationships with their children and how this bears on related questions of exclusion, see Carnes, "The Right to Exclude Immigrants."

7. See Hosein, "Arguments for Regularization," 159–60.

### 3. Tacit Authorization and the Complicity Argument

The first argument for regularization concerns tacitly authorized unauthorized immigrants. Call this the *complicity argument*.<sup>8</sup> One proponent of this argument is Joseph Carens. He argues that “actual complicity, in the form of deliberately lax or fluctuating enforcement . . . does undercut the state’s right to deport [unauthorized immigrants].”<sup>9</sup> Three things stand out here. First, it is the complicity of the state that strengthens the claim a given tacitly authorized unauthorized immigrant might have against the state and this complicity is what distinguishes tacitly authorized from ordinary (as well as socially rooted) unauthorized immigrants. Second, what is undercut by state complicity is specifically the state’s right to deport tacitly authorized individuals, which, if correct, means the state must regularize those individuals in some form. Lastly, when Carens subtly emphasizes that the state’s complicity must be *actual*, he qualifies the scope of the argument: he means to say that the state must be genuinely complicit in the presence of such unauthorized immigrants for the argument to go through.

Carens rightly warns proponents of the complicity argument not to abuse it by ascribing complicity in cases where it is inappropriate, such as when the factors contributing to the presence of unauthorized immigrants remain beyond the state’s control.<sup>10</sup> In making a similar point about what is within the state’s power, Michael Blake focuses on a state’s limited resources. He points out that ascribing complicity to a state is inappropriate even in some cases where the state intentionally diverts enforcement resources away from certain segments of the unauthorized population.<sup>11</sup> They may focus limited resources on segments of the unauthorized population that are more violent or easier to apprehend and deport, or they may even choose based on which segments would be most beneficial to the state not to deport. But so long as the reason for failing to enforce is the state’s limited resources, and not because of the political or economic benefits that result, then it is not appropriate to charge the state with complicity. While they are surely correct to qualify the argument in these ways, we can put these concerns aside for now: even assuming genuine complicity is present, I argue the complicity argument nevertheless fails.

The complicity argument asks us to place tacitly authorized unauthorized immigrants on a moral par with conventionally authorized immigrants. Carens, for example, maintains that states owe tacitly authorized unauthorized immigrants “the same status and legal rights to which they would be entitled

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8. I follow Blake here. See his “Immigration, Causality, and Complicity.” Some might refer to it as the “contract argument.” See, e.g., Hosein, “Arguments for Regularization,” 163.

9. Carens, *The Ethics of Immigration*, 154.

10. *Ibid.*, 152–54.

11. Blake, “Immigration, Causality, and Complicity,” 119–23.

if they were recruited openly.”<sup>12</sup> But while he makes clear that the state’s complicity plays a central role in tacitly authorized unauthorized immigrants’ right to regularization, he never examines why this should be the case. One answer might be that it is the uncertainty with which tacitly authorized unauthorized immigrants are forced to live that grounds a right to regularization. Adam Hosein might be sympathetic to such a view when he discusses “at-will” immigrants, which could form the basis of a plausible argument about tacitly authorized unauthorized immigrants. The central feature of at-will immigrants is that they may be forced to leave at any time. Hosein says that admitting an immigrant on an at-will basis is impermissible because it is at odds with such immigrants’ autonomy: “The at-will immigrant is very limited in her ability to make long-term plans because at any moment the state may step in and cut those plans short.”<sup>13</sup> It seems unjust to allow the uncertainty of being at-will to compromise someone’s autonomy in this way. Since it is true that without any regularized status tacitly authorized unauthorized immigrants are essentially admitted on an at-will basis, it would seem a case could be made for them to be regularized. But their at-will status is not sufficient to ground this right to regularization, for this basis for a right to regularization is incapable of distinguishing tacitly authorized from ordinary unauthorized immigrants.

When ordinary unauthorized immigrants enter the state, at least many of them do so for specific reasons and with the intention of staying for some significant amount of time. While ordinary unauthorized immigrants are pursuing their reasons for entering, they constantly face the uncertainty associated with the standing threat of deportation should they be detected and apprehended. Their presence is essentially at-will despite the fact that their presence is straightforwardly unauthorized. Yet during this time they remain *ordinary*, that is, morally indistinguishable from prospective immigrants the state may permissibly exclude. Since the permissibility of their being deported is entailed by their being merely ordinary unauthorized immigrants, the uncertainty they face is not morally problematic. Uncertainty, then, cannot generate a right to regularization for tacitly authorized unauthorized immigrants.

The strongest basis for the complicity argument is the notion that tacitly authorized unauthorized immigrants are led by the state to form certain expectations due to the state’s behavior. The claim here is that the state has tacitly authorized these unauthorized immigrants, and this behavior by the state has induced in these unauthorized immigrants certain reasonable expectations, including the expectation that the state will allow them to continue living where they are living because their presence is politically or economically beneficial. On this basis the complicity argument purports to establish a right to regular-

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12. Carens, *The Ethics of Immigration*, 153.

13. Hosein, “Immigration,” 617.

ization. It affirms the presumptive right of the state to deport but maintains that the state has acted in certain ways with respect to tacitly authorized unauthorized immigrants—namely, by turning a blind eye to their presence and forgoing enforcement of its own immigration policies against them—and this implies the state’s approval of their presence. Such behavior by the state leads tacitly authorized unauthorized immigrants to form the expectation that the state will continue to forgo enforcement of its own immigration policies, allegedly leading to a right to be regularized.

The plausibility of this view emerges from the general moral principle that when one induces in another, either intentionally or negligently, an expectation, one must take reasonable steps to ensure the expectation is fulfilled or at least to prevent the other from suffering losses as a result of failing to fulfill the expectation.<sup>14</sup> If I induce in you an expectation, my role in inducing it is what produces my presumptive duty to help ensure your expectation is fulfilled. When this happens, you come to order your life around the expectation I helped create, and it typically seems wrong not to play my part in ensuring the expectation is fulfilled. This principle finds a specifically political expression in Alexander Brown’s “Responsibility-Based Account” of reasonable expectations, which recognizes both the importance of individuals’ reasonable expectations to their ability to successfully pursue their life plans and the fact that the state itself is “responsible for creating” many such expectations held by individuals who find themselves under the state’s authority.<sup>15</sup> The idea is that expectations are, at their core, predictions about the future that form an integral part of the backdrop against which we develop our plans and pursue our life projects.<sup>16</sup> They do this by both informing the routines and plans we attempt to make and execute, and by being informed by how our routines and plans actually unfold in practice. We seem constantly to be consulting and adjusting our expectations as we try to turn our plans and pursuits into reality. Having one’s expectations frustrated thus constitutes a genuine harm insofar as it inhibits or undermines one’s ability to effectively pursue one’s plans. If the state is responsible for creating expectations in people, the state has a presumptive duty to take reasonable steps to ensure those expectations get fulfilled.

This is the best way to defend arguments for regularization, not just the complicity argument. Appealing to expectations is a particularly useful tool here because of the acknowledged wrong involved in unauthorized immigra-

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14. This is taken from Scanlon, *What We Owe to Each Other*, 300. See also Hosein, “Arguments for Regularization,” 163–64. I should emphasize here that inducing an expectation negligently is not the same as inducing it accidentally.

15. See Brown, “A Theory of Legitimate Expectations,” 444. I adopt the language of “reasonable” expectations, rather than Brown’s and others’ “legitimate” expectations, purely for the sake of remaining consistent with the literature with which this paper engages.

16. Meyer and Sanklecha, “Individual Expectations and Climate Justice,” 453.

tion. Given the state's presumptive right to deport unauthorized immigrants, showing that the state's own behavior undermines that very right by being partially responsible for an immigrant's decision to enter or remain without authorization, thus inducing a reasonable expectation that such unauthorized immigrants will be allowed to stay, would be a powerful way to establish a right to regularization. Since tacitly authorized unauthorized immigrants are essentially permitted by the state to be present, surely the state is responsible for at least some of the expectations they form. To the extent this is true, the state must take steps to ensure such expectations are not frustrated.<sup>17</sup> The question, though, is precisely what expectations the state's behavior can be said to induce in tacitly authorized unauthorized immigrants, and whether those expectations generate a right to regularization as part of the obligation on the state to ensure such induced expectations are not frustrated.

The arrangement pertaining to the tacitly authorized population amounts ultimately to authorization for tacitly authorized unauthorized immigrants to stay and work as a matter of state discretion.<sup>18</sup> The most obvious reasonable expectation induced by the state, then, is that they will be allowed to live and work under at-will conditions. It seems unreasonable to think that an expectation beyond this is induced by the state. To be sure, there is at least some degree of mutual knowledge between the state and unauthorized immigrant insofar as she knows she lacks formal authorization from the state to be present. Since formal authorization was never offered, it seems all that tacitly authorized unauthorized immigrants can reasonably expect is to be allowed to stay while their presence remains welcome by the state, and to be adequately morally protected while present, but that their status as being welcome is subject to change. It thus seems unreasonable, with no assurances from the state, that one would form long-term plans, or at least demand protection of such long-term plans, on the mere basis of tacit authorization. It is not as if tacitly authorized unauthorized immigrants are allowed to pass at the border with a wink from the border patrol agent. Such individuals often enter or remain surreptitiously while evading enforcement authorities. It is unlikely that their

17. This is of course only presumptive. It might be permissible, given the nature and functions of a state, for the state to frustrate or fail to fulfill a reasonable expectation it has induced. But this does not mean the expectation is no longer reasonable; it merely highlights the presumptive nature of one's rights that emerge from one's reasonable expectations, insofar as states may have interests that outweigh certain individuals' reasonable expectations. I assume here that most state interests will fail to outweigh the interests of unauthorized immigrants whose reasonable expectations generate for them a right to regularization. So the question will not be whether the state's interests outweigh unauthorized immigrants' reasonable expectations. Rather, the question will be whether regularization specifically constitutes one of the unauthorized immigrants' reasonable expectations induced by the state.

18. Motomura, *Immigration Outside the Law*, 107.



tacit authorization is granted to them at or before they reach the border; more realistically it would hinge, for example, on their ability to enter successfully and find their way to industries that are particularly benefitted by unauthorized labor. But it is no secret that political and economic winds can shift quickly, and so the lack of assurance from the state should reasonably give such individuals pause when forming or consulting their expectations and forming or executing their plans.

This suggests that a right to regularization does not follow from any expectations induced by the state, for tacitly authorized unauthorized immigrants enter fully aware of their status and have presumably crafted their plans accordingly—or at least had the opportunity to. Once one's status as welcome changes, it surely follows that the state must provide enough time for one to get one's affairs in order, but this hardly counts as regularization. What is more, termination of these kinds of arrangements does not appear to be inherently unfair or unjust. One might agree that the state does not, in tacitly authorizing some unauthorized immigrants, thereby induce an expectation to be allowed to remain, but insist that the state is acting unfairly when it changes its mind and seeks to terminate the tacit authorization arrangement.<sup>19</sup> Presumably, the reason the state would change its mind is that the political or economic conditions cause the state's interests to change and make tacitly authorizing certain unauthorized immigrants no longer advantageous. This is generally the basis for unexpectedly terminating ordinary employees who are not immigrants: economic forces can cause employers' interests to change, and this is not in itself an objectionable reason to terminate someone's employment. Just as it would be unreasonable for me to expect, on the basis of current employment, my employer to employ me irrespective of my employers' interests and how they shift over time, it would be unreasonable for a tacitly authorized unauthorized immigrant to expect, on the basis of current tacit authorization, the state to continue tacitly authorizing his presence irrespective of the state's interests and how they shift over time. Termination of tacit authorization is morally akin to being laid off: the state's tacit authorization should not be construed by tacitly authorized unauthorized immigrants as permanent. Although this can be harmful, it is not inherently unfair or unjust.

The upshot is that nothing unique to a tacitly authorized unauthorized immigrant seems sufficient to ground a right to regularization. Even with genuine complicity, the state's behavior fails to induce a reasonable expectation specifically to be allowed to remain. Something more than just tacit authorization is required to generate a reasonable expectation that yields specifically a right to regularization.

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19. I would like to thank an anonymous reviewer for pressing me on this objection.

#### 4. Social Roots and the Social Membership Argument

The most prevalent argument for regularization concerns socially rooted unauthorized immigrants. Call arguments that appeal to the moral significance of social roots developed over time *social membership arguments*.<sup>20</sup> Joseph Carens, the preeminent defender of social membership arguments, rests his argument on the notion that the passage of time matters morally insofar as it leads naturally to the development of deep social roots that make such immigrants de facto members of society. These roots within a community—connected as they are to one’s identity and life plans—are what apparently ground one’s claim to regularization.<sup>21</sup> Furthermore, his argument clearly distinguishes socially rooted unauthorized immigrants from ordinary unauthorized immigrants: “if there is a threshold of time after which it is wrong to expel settled [unauthorized] immigrants, then there is also some period of time before this threshold is crossed.”<sup>22</sup> Ordinary unauthorized immigrants are ordinary, in part, inasmuch as they have not been present long enough to develop social roots, and thus have no right to regularization on this basis.

David Miller advances a similar argument. He claims that “immigrants who have lived in the country for many years may reasonably have acquired an expectation that they will be allowed to remain.” Miller, like Carens, connects our social roots to society broadly construed, which involves the notion of a reciprocal system of social cooperation in which socially rooted unauthorized immigrants participate. Miller contends that “once somebody belongs to such a scheme, it will be unjust to force them to withdraw from it after having made contributions that have not yet been reciprocated in full.” This reciprocal relationship, which is presumably present when one is socially rooted, is what makes the expectation such immigrants may acquire to be allowed to remain a reasonable one. Miller goes on to insist that this reciprocal relationship between state and immigrant entails a right of fair treatment on the part of the immigrant, which, regarding socially rooted immigrants, he explicitly takes to include “access to the full panoply of civil and social rights.” This part of his discussion pertains to all manner of socially rooted immigrants, authorized and not, and he concedes that one’s status as unauthorized complicates things from the perspective of his reciprocal relationship framework. But he nevertheless makes clear his view that the problem is not *whether* to regularize

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20. This follows David Miller. Michael Blake refers to it as the “argument from civil society” and Adam Hosein refers to it as the “affiliation argument.” See, respectively, Miller, *Strangers in Our Midst*, 123; Blake, “Equality without Documents,” 101; and Hosein, “Arguments for Regularization,” 172–75.

21. Carens, *The Ethics of Immigration*, 147–52. Hiroshi Motomura develops a similar argument grounded in the idea of developed affiliations. See his *Immigration Outside the Law*.

22. Carens, *The Ethics of Immigration*, 151.

socially rooted unauthorized immigrants, but rather *how* best to do so.<sup>23</sup> Again, this means ordinary unauthorized immigrants have no claim to regularization because they have not been present long enough to properly belong to the reciprocal system of cooperation Miller discusses.

The common thread of these arguments is that they claim that when individuals have developed sufficient social roots, and have thus become de facto contributing members of society, it is unjust to uproot and deport them. Since the social roots we develop in our communities are so deeply constitutive of our identities over time and the quality of our lives, it would seem morally obscene for a state to abruptly uproot someone and deport her, just because she happened not to have formal authorization to be present. This is a powerful argument. It should not be lost on us that the argument cuts across fault lines within the broader open borders debate. Miller and Carens appear to be in agreement on the question of regularizing socially rooted unauthorized immigrants, but they are diametrically opposed on the question of whether states have a presumptive right to exclude prospective immigrants in the first place.<sup>24</sup> This fact might signal the strength of the social roots argument, and it is indeed very plausible on its face. Nevertheless, I think the argument fails.

On my reading of Carens, the claim to regularization boils down to the individual's social rootedness, and that it is specifically the severance of social roots—and not the mere passage of time—that explains why deportation is wrong, an appeal to which is unavailable to ordinary unauthorized immigrants.<sup>25</sup> This seems to be the kind of case Carens builds. As socially rooted

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23. Miller, *Strangers in Our Midst*, 123–27.

24. It should be noted that in his discussion of unauthorized immigrants, Carens assumes merely for the sake of argument that states enjoy a right to restrict immigration, and therefore enforce restrictive policies. This allows him to explore the moral limits of such a right, were it to exist, given the fact that virtually all states do in reality enforce restrictive immigration policies, and at least most tend to do so in violation of the limits he proposes. Ultimately, however, he thinks states have no such right.

25. Some may read Carens as hinging his argument on the passage of time, and not on social rootedness. I think Carens provides evidence for both views, but in the end Carens's argument must hinge on rootedness, because it seems like the passage of time becomes morally relevant only *because of* the social rootedness that virtually always follows from the passage of time. Of course, Carens explicitly says he takes his argument to extend to recluses who establish no social roots, but he does not, in my view, adequately explain why. He compares unauthorized immigrant recluses to citizen recluses, and in scoffing at the idea of denying legal rights to the citizen recluse concludes that we therefore have no reason to deny such rights to the unauthorized immigrant recluse. But this is to commit a category mistake: the citizen recluse has already been authorized and the unauthorized immigrant has not, and so the reason we would refuse to deny rights to the citizen recluse may simply not apply to the unauthorized immigrant recluse. Indeed, if an unauthorized immigrant is a genuine recluse, or is a genuine nomad, and truly has no social roots, then I do not see what harm is done by deporting her, as long as she has access to the basic rights required to live a

unauthorized immigrants become more and more settled, he thinks the right of the state to deport such immigrants erodes. “There is something deeply wrong,” he says, “in forcing people to leave a place where they have lived for a long time.”<sup>26</sup> In saying this he has more in mind than just the passage of time. In articulating his theory, Carens acknowledges that “the deepest puzzle about the theory of social membership may be that it relies on two rather narrow criteria of membership: residence and the passage of time.”<sup>27</sup> Not only does he call his theory one of *social membership* (which evokes the idea of our connections to places and people), rather than one of time passed, but he posits residence (which again evokes the idea of our connections to at least a place, if not also people) as a necessary condition which is conceptually independent of the mere passage of time. “Most people form their deepest human connections where they live,” Carens says.<sup>28</sup> Here he begins grounding the moral relevance of the passage of time in terms of the contributions individuals make to their adopted societies, as well as the family and other community ties that require the passage of time to develop. He ultimately claims that it is inherently wrong to “uproot a person” when that person has lived in a place for a long time, and this wrongness is because of the roots that will be severed by the act of deportation.<sup>29</sup>

So Carens’s argument appears meant to establish that deporting socially rooted unauthorized immigrants (but not ordinary unauthorized immigrants) is wrong insofar as it severs social roots, and this severance is harmful enough to constitute an injustice. Given the distinction Carens makes between socially rooted and ordinary unauthorized immigrants, the implication is that the harms involved in deporting ordinary unauthorized immigrants are so much less harmful that imposing them via deportation fails to rise to the level of an injustice. But the harms involved in deporting the socially rooted need not be any more harmful than those involved in deporting ordinary unauthorized immigrants, thus undermining this claim of Carens’s that would serve to differentiate socially rooted from ordinary unauthorized immigrants. We can imagine realistic cases in which deporting someone who has remained unauthorized for

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minimally satisfactory (and presumably reclusive or nomadic) life. The only plausible way I see to claim deporting her is wrong is to appeal to her connections to *this* particular place, for if, as stipulated in the case, she has no social roots, that does not entail she has no roots at all. Otherwise I see no compelling reason to consider her deportation unjust. Rootedness, and in virtually all cases specifically social rootedness, therefore seems a much more cogent basis to ground a right to regularization as compared to the mere passage of time.

26. Carens, *The Ethics of Immigration*, 148.

27. *Ibid.*, 164.

28. *Ibid.*, 148–49.

29. *Ibid.*, 148–51. For similar readings of Carens as grounding his argument in some kind of social rootedness, see Hosein, “Arguments for Regularization,” 173–74, and Espejo, “Taking Place Seriously,” 72–75.

fifteen years would be less harmful than deporting someone who crossed the border two months ago.

What is more, the severance of social roots may not be as outright problematic as Carens would have us believe. Immigrants, for example, sever the social roots they had developed in their home countries as an inevitable part of immigrating into another country.<sup>30</sup> There is, of course, an important difference between voluntarily deciding to sever one's own social roots, and forcibly having one's social roots severed against one's wishes. But there are multiple contexts in which we seem not to find any problem with expecting people to give up the "social worlds" they have built. Some of these contexts include military reassignments, corporations sending employees to foreign subsidiaries, and students in foreign countries being expected to return to their countries of origin after several years of study.<sup>31</sup> In each of these contexts most such people are expected to move after having lived long enough to develop social roots in the place they are leaving.<sup>32</sup> And yet these situations do not strike us as inherently unjust. It is thus not clear that the severance of social roots is enough to bear the argumentative load.

One might concede that the severance of social roots is insufficient to establish the injustice of deportation, but maintain that deportation nevertheless remains unjust by appealing to *fairness* in the allocation of burdens and benefits: that is, deporting socially rooted unauthorized immigrants constitutes a disproportionate and therefore unfair response to a comparatively minor wrong, thus generating a right to regularization.<sup>33</sup> This would be to appeal to something more than just the harm associated with severing social roots by maintaining that it is not just that deportation is harmful that makes it wrong, but the fact that the harm is so disproportionate as compared to the wrong to which it responds. As such, an argument from fairness may offer us a more nuanced way to ground a right to regularization. Such an argument finds its most plausible expression in David Miller's idea of belonging to a reciprocal system of social cooperation, which allegedly generates a reasonable expectation to be allowed to remain. On this view people who become socially rooted thus become sufficiently contributing members of such a system. That is part of what it means to be socially rooted. Severing social roots is wrong, then, because it constitutes a failure by the state to properly reciprocate to individu-

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30. Miller, *Strangers in Our Midst*, 123.

31. Blake, "Equality without Documents," 106.

32. David Miller notes that a consensus seems to have been built around the idea that somewhere between five and ten years is long enough to develop social roots in a community. As an officer in the U.S. Army who has developed roots in multiple places that still play an important role in my life, I can attest to the fact that it need not always take even that long. See Miller, *Strangers in Our Midst*, 121.

33. I would like to thank an anonymous reviewer for pressing me on this.

als who have more or less become members of the political community, and this is unfair. Part of this failure can be accounted for by the idea that when one enters into a reciprocal relationship, that fact alone is often sufficient to reasonably induce certain expectations. One such expectation, given how long such immigrants have been present within the state, might be the expectation to be allowed to remain. And since the reasonable expectations they acquire in light of their special circumstances are frustrated by the state when the state severs their social roots through deportation, and the state has a presumptive duty to take reasonable steps to ensure reasonable expectations are not frustrated, deportation is wrong. This seems to be the strongest defense of socially rooted unauthorized immigrants' right to regularization.<sup>34</sup> The central idea here is similar to that of the complicity argument: if something about the circumstances of socially rooted unauthorized immigrants, namely, the state's failure to successfully enforce its immigration policy, creates a reasonable expectation that they will be allowed to remain, then the state's presumptive right to deport would seem to be undermined despite the initial wrong committed.

But a problem quickly arises. Setting aside concerns of circularity, the fact that socially rooted unauthorized immigrants are straightforwardly unauthorized seems to undermine the idea that the relationship is truly reciprocal.<sup>35</sup> By their very nature, socially rooted unauthorized immigrants had no right to develop their roots specifically where they developed them, and thus they developed them illegitimately. This illegitimacy suggests reciprocity is not present in the way that could generate demands against the state that go over and above the demands ordinary unauthorized immigrants can make. If someone breaks into my house and cleans it, I am not therefore obliged to pay for the unsolicited and unauthorized cleaning services. It seems dubious to appeal to reciprocity and fairness as grounds for alleging the state is doing something unjust in deporting socially rooted unauthorized immigrants. It does not strike me as unfair for the state to insist it has a right to stop individuals from amassing certain benefits that the state never agreed to provide in the first place—and has a right to refuse to provide. In this case, the benefits amassed manifest comprehensively as social roots, and a right to regularization would result in a right to have the state protect the social roots one has developed. But, to be sure, the state is under no obligation to protect one's social roots as

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34. Indeed, this seems an adequate way to understand why the other contexts, listed above, in which social roots are expected to be severed do not seem morally problematic. When I volunteered to serve in the Army, I knew I would move around a lot; when students are authorized to study abroad, they enter knowing they will be expected to return home upon completion of their studies. The reasonable expectations one forms within such contexts are surely informed by this knowledge.
35. Blake considers the extent to which Carnes's argument might be circular in "Equality without Documents," 107–09.

such, even citizens' social roots, and this becomes especially true if they are developed illegitimately. Criminals who are imprisoned might be a domestic example of this. Presumably they have their social roots severed in a manner relevantly similar to deported immigrants, and at least part of what renders this severance permissible, to the extent that it is, is that their illegitimate behavior demonstrates they are not playing their part in the purportedly reciprocal scheme. This seems especially true when one's social roots, or at least their particular nature, were developed or made possible by one's illicit behavior. I do not mean unreflectively to equate unauthorized immigrants with criminals: I am sensitive to the effect such comparisons within popular debates have had on treatment of unauthorized immigrants.<sup>36</sup> But one relevant similarity is that both violate a presumably legitimate norm established by the state that provides the state a right to seek roots-severing redress in response to the violation. Indeed, this roots-severing redress seems particularly appropriate in the case of deportation since the individual whose roots are severed had no right to develop roots anywhere in particular other than the individual's state of origin.

All of this is meant to suggest that the severance of social roots is not per se unjust, and that deporting socially rooted unauthorized immigrants need not constitute an unfair failure of the state to reciprocate. And if this much is true, the protection of ill-gotten social roots is not a reasonable expectation of socially rooted unauthorized immigrants. All they can reasonably expect with regard to social roots is access to adequately sustained conditions which enable and provide opportunities to develop and maintain social roots, since such conditions are connected to basic rights such as freedom and security. Similarly, I may have a basic right to the conditions that allow me to pursue my own conception of happiness, but that does not mean I have a right to any specific conception of happiness just because I happen to successfully attain it, irrespective of whether my means of doing so were morally legitimate. Assuming socially rooted unauthorized immigrants are not refugees, these more generalized conditions are presumably available to them in their states of origin. The upshot of all this is that while it is not the severance of social roots per se that renders deportation wrong, not having adequate opportunities to develop such roots *would* render deportation wrong.

This seems to be what Michael Blake has in mind when discussing the issue of socially rooted unauthorized immigrants. Blake, adopting a different approach in rejecting Carens' social membership argument, thinks instead that what is wrong is the fact that, in the cases he considers open to his version of the social membership argument, deportation is occurring against the back-

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36. For excellent discussions of related issues, see Mendoza, "The Contradiction of Crimigration," and "Illegal."

drop of unjust conditions in the country to which the deported is being made to return. In developing a more tenable argument Blake writes:

They have a right to some set of policies designed to make their unjustifiably bad countries of origin better, but not to the particular policy that allows them to remain *in situ*. The action of deportation, though, seems here to be an unreasonable exercise of the state's collective rights. . . . The individual in question is subject to enormous—indeed, catastrophic—harms should the right be exercised.<sup>37</sup>

It is interesting to note that without context, one could not tell whether Blake is addressing any specific kind of unauthorized immigrant. The consideration Blake points to here would render deporting an ordinary unauthorized immigrant wrong just as well as it would render deporting a socially rooted unauthorized immigrant wrong. But Blake is exclusively concerned with socially rooted unauthorized immigrants, and what is cited here cuts to the core of his argument about what makes the claims specifically of socially rooted unauthorized immigrants overriding. In placing the emphasis on the individual's country of origin, Blake is indicating that, because of the conditions in the country of origin, the individual would not have an adequate opportunity to, among other morally important things, develop social roots, and it is *this* fact that makes deportation wrong. Deportation does not involve some absolute wrong done to socially rooted individuals as such; rather, it can only be wrong insofar as it renders certain individuals objectionably vulnerable as compared to others.<sup>38</sup> But this seriously dilutes the social membership argument. By shifting the focus from local social roots to global conditions of injustice, Blake's version of the argument not only changes its nature, but also makes it the case that the argument could only be appealed to by some socially rooted unauthorized immigrants. Since the argument could be appealed to by ordinary unauthorized immigrants as well, this underscores the fact that it is not the special circumstances involving social roots that is doing the work of grounding one's right to regularization.<sup>39</sup> The arguments offered by Carens, Miller, and others thus fail to establish a right to regularization.<sup>40</sup>

The foregoing analysis calls on us to reevaluate Miller's claim that socially rooted unauthorized immigrants "may reasonably have acquired an expectation that they will be allowed to remain." If I am right to think their social

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37. Blake, "Equality without Documents," 119.

38. *Ibid.*, 107.

39. Blake recognizes this point as well. See *ibid.*, 111.

40. Adam Hosein advances an argument, which he calls the "autonomy argument," which he takes to be conceptually independent of a social membership argument. I think Hosein's view ultimately collapses into a social membership view. While I do not have the space here to defend this claim, I do think everything he argues with respect to socially rooted unauthorized immigrants' ability to exercise their autonomy is subject to the same criticisms I have advanced against Carens and Miller. See Hosein, "Immigration."



roots cannot establish a right to regularization, then perhaps that must mean the expectation to be allowed to remain is not reasonable. But I think this would be to underappreciate Miller's argument. I contend that the expectation is indeed reasonable, but not reasonable in the right way. Considered in the previous section were the grounds for deriving rights and obligations from reasonable expectations induced by the state. That discussion was sufficient because my claim was that the expectation to be allowed to remain was not one of the expectations induced by the state, which means it is not a reasonable expectation for tacitly authorized unauthorized immigrants to form on the mere basis of their tacit authorization. However, with respect to socially rooted unauthorized immigrants, I concede the reasonableness of the expectation to be allowed to remain on the basis of their social rootedness, yet insist that even this is insufficient to ground a right to regularization. We need, then, a better understanding of what it means for an expectation to be reasonable.

At its core, an expectation is reasonable if one has good reasons for forming or holding it. But there are two senses in which an expectation can be reasonable: a descriptive sense and a normative sense. Expectations can either be claims about what *will* happen, or claims about what *ought* to happen; but the former of course does not entail the latter. Having good reason for forming and holding an expectation does not automatically entail any obligation to ensure it gets fulfilled. We ought, therefore, to distinguish between *epistemically* reasonable and *normatively* reasonable expectations. An epistemically reasonable expectation is just an expectation for which one has good epistemic reasons for forming or holding; a normatively reasonable expectation is one the frustration of which objectionably harms the individual whose expectation is frustrated. A normatively reasonable expectation entails a presumptive but overridable right to have that expectation fulfilled.<sup>41</sup>

To say one has an epistemically reasonable expectation is to say one is simply justified in having the expectation—that is, has good epistemic reasons for having it. Being justified in having an expectation, however, does not mean that one thereby enjoys a right to have the expectation fulfilled. Determining that must go beyond just the fact that one has good epistemic reasons for having the expectation. Consider a case in which I ask my friend to borrow \$100 and he agrees, but I in fact meant to say—and genuinely thought I did say—\$1,000. In this case I form an expectation that my friend will pay me \$1,000, and it is because I am convinced I in fact said what I meant, and my friend agreed; but my friend forms the expectation that he will give me only

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41. See Meyer and Sanklecha, "How Legitimate Expectations Matter in Climate Justice," 372. They analyze these concepts in terms of "legitimate" expectations (which is the basis on which Alexander Brown does as well), and what I call "normatively reasonable" expectations, they call "politically legitimate" expectations, but they are conceptually identical.

\$100, since I requested, albeit mistakenly, only the \$100. In this case it does not seem reasonable to say that I have a presumptive right to have my expectation of being paid \$1,000 fulfilled. But it is still plausible to call my expectation to be paid \$1,000 reasonable in a non-normative sense. My friend and I came to a genuine agreement; the only problem is that the terms are different for each of us without our realizing it. So I have good, though flawed, epistemic reasons for forming the expectation that I form. But since I mistakenly requested \$100 it is not reasonable to insist that my friend has any duty to give me more than that, despite the good epistemic reasons for my expectation. The principle articulated above according to which obligations arise from the inducement of reasonable expectations applies only to normatively reasonable expectations, and not expectations that are merely epistemically reasonable. The justifiability of an expectation and the right to have it fulfilled can come apart, and this is true of socially rooted unauthorized immigrants' expectations to be allowed to remain.

When unauthorized immigrants have lived in a society for a long time and have contributed to and developed social roots in that society, it seems natural to be uncomfortable with the idea of deporting such individuals. Part of the reason for this traces to socially rooted unauthorized immigrants' life plans. It is plausible, as Miller suggests, that socially rooted unauthorized immigrants form an expectation that their lives will not be abruptly and significantly disrupted through something like deportation. Recalling that expectations seem naturally informed by how our routines and plans actually unfold, it seems fair to say that socially rooted unauthorized immigrants have good reason to expect that their residing in the state without authorization will continue uninterrupted. This may plausibly lead them to feel a more secure sense of freedom from the threat of deportation, considering themselves *de facto* regularized if not formally so. I take this as adequate grounds for calling an expectation to be regularized epistemically reasonable: that one would have this expectation can be justified by appeal to how long they have already lived in the state without interruption. But it can only be epistemically reasonable. Since socially rooted unauthorized immigrants are straightforwardly unauthorized, and this strains the notion of a genuinely reciprocal relationship with the state, they cannot say that their expectation to be allowed to remain has been intentionally induced by the state. Since they are straightforwardly unauthorized, it seems unreasonable to insist the state is implicated in the formation of their expectation to be allowed to remain such that the state has a duty to ensure it does not get frustrated.

It might be objected here that the state really is implicated in the right way with respect to socially rooted unauthorized immigrants. Such immigrants can in fact claim to have a normatively reasonable expectation to be allowed to

remain by virtue of the fact that the state is responsible, *through negligence*, for the formation of the expectation. If negligence could be shown, this could form the basis of a plausible argument for regularization given the amount of time socially rooted unauthorized immigrants have lived in the state.

This looks like an appeal to the concept of “adverse possession.” Ayelet Shachar advances such an argument.<sup>42</sup> Adverse possession is a legal concept under which trespassers can become property owners under certain circumstances—namely, the trespasser occupies the land or property continuously and in an open manner such that the present owner has the opportunity to take steps to recover what has been taken from him or her, but never takes those steps. That the present owner never takes steps to recover the property suggests disregard and thus a form of negligence. If socially rooted unauthorized immigrants were akin to trespassers with respect to adverse possession doctrine, then an argument for regularization could begin with the claim that such individuals have lived in the state continuously, and the amount of time that has passed supports the notion that the expectation to be allowed to remain is induced negligently by the state.<sup>43</sup> Proponents of this view invoke adverse possession doctrine in this context because the circumstances of continuous occupation and the passage of time without steps of intervention taken against the occupiers appear to supersede the initial wrong of having entered or remained in the state without authorization.<sup>44</sup> The expectation to be allowed to remain might become normatively reasonable under such circumstances.

Conceptually, this does not strike me as a powerful argument for regularization because to accept the analogy with adverse possession requires us to accept “the seemingly miraculous transformation of property relations” between the original owner of property and the continuous trespasser.<sup>45</sup> But there are two deeper problems, more germane to the issue at hand. First, it is doubtful socially rooted unauthorized immigrants have lived in the state truly *openly* in order to meet the conditions of the analogy. They typically do not advertise their presence and instead try to remain invisible to agents of the state. Second, and this may be a cause of the first, it is not clear the state can be said to induce the expectation through negligence. States typically have “procedures in place to deport those it discovers to have entered [or remained] illegally.”<sup>46</sup> That these procedures are in place, and that such individuals find it necessary to remain invisible, indicate the state is not indifferent to the point of negligence, and that the expectation to be regularized remains merely epistemically

42. Shachar, *The Birthright Lottery*, 184–88.

43. I take my description of adverse possession from David Miller’s consideration of it. See *Strangers in Our Midst*, 122–23.

44. Bosniak, “Wrongs, Rights, and Regularization,” 197.

45. *Ibid.*, 204.

46. Miller, *Strangers in Our Midst*, 123.

reasonable. Something more than just social roots is necessary to generate an expectation to be allowed to remain that is normatively reasonable.

### **5. Tacitly Authorized Social Roots and a Normatively Reasonable Expectation to be Regularized**

Unauthorized immigration is a wrong that generates a presumptive right on the part of the state to deport individuals who enter or remain without authorization. As mentioned previously, there are limits to this right: certain circumstances could outweigh the state's right to deport and result in a right to regularize certain unauthorized immigrants. This is what arguments for regularization attempt to show. These arguments acknowledge the presumptive right of the state to deport, at least insofar as they acknowledge that ordinary unauthorized immigrants cannot avail themselves of such arguments, and then maintain that something about the circumstances of tacitly authorized and socially rooted unauthorized immigrants overrides the state's right to deport in a way that results in a right to be regularized. The strongest versions of such arguments appeal to the reasonable expectations these kinds of unauthorized immigrant have. I have argued that the arguments currently on offer fail adequately to establish this, namely, by misunderstanding the allegedly reasonable expectations involved in some subtle way. But I think these arguments are right to point to the expectations unauthorized immigrants may reasonably form. The moral role expectations play in our lives, especially in terms of the obligations that may arise when one induces expectations in others, provides a particularly useful tool in examining when immigrants whose presence within the state is the result of wrongdoing can nevertheless claim that they now have a right to be present with formal authorization. This points to the relationship that the state stands in with these unauthorized immigrants and highlights specifically the kinds of state behavior that could undermine its ability to maintain its right to deport. While I do not agree that this is the case with respect either to tacitly authorized or to socially rooted unauthorized immigrants, the analysis changes for individuals who are simultaneously tacitly authorized and socially rooted.

I call the argument I advance in this section the *reasonable expectation argument*.<sup>47</sup> Despite rejecting the social membership and complicity arguments,

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47. For what might be a similar view, see Hosein, "Arguments for Regularization," 167–68. The view he articulates here is a combination of aspects of two independent arguments for regularization. He rejects as inadequate a version of the complicity argument I addressed above, and also arguments that rest on the contributions unauthorized immigrants make to society as grounds for a right to regularization (these are not the same as social membership arguments because the contributions appealed to are appealed to independent of any social roots). He then combines the two to form a view such that when the state benefits enormously from migrants developing certain expectations, "this plausibly is sufficient

I do think they get close to establishing their conclusion, namely, that a right to regularization follows from what appears to be a reasonable expectation to be allowed to stay. The social membership argument comes close because an expectation to be allowed to remain is certainly a reasonable one, just not the right kind of reasonable; the complicity argument comes close because the state's tacit authorization is enough to induce at least some normatively reasonable expectations that it then has a presumptive obligation to fulfill, but an expectation to be allowed to remain is not one of them. So if tacit authorization begets normatively reasonable expectations and social roots beget a reasonable expectation to be allowed to remain, then tacitly authorized social roots would seem to beget specifically a normatively reasonable expectation to be allowed to remain, from which a right to be regularized follows.

My rejection of each argument boils down to the same claim: the state never gave permission for either tacitly authorized or socially rooted unauthorized immigrants to form the kinds of relationships that result in deep moral connections to one's society that develop over time, and the expectations that would follow from this. The at-will status of tacitly authorized unauthorized immigrants suggests this, and so my claim is that, should the state demand such individuals to leave before they have enough time to form those relationships, forming an expectation that they will be authorized to remain long enough to do so is unreasonable. Similarly, socially rooted unauthorized immigrants' status as straightforwardly unauthorized suggests that the relationship they stand in with the state is not genuinely reciprocal, and so the relationships they have managed to form were never authorized by the state. Therefore, to insist that the state has induced any expectation to be able to remain and maintain those relationships, and that the state thereby has a duty to ensure this expectation is not frustrated, is unreasonable. But if the state's tacit authorization of immigrants either persists long enough for them to develop social roots or is offered after they have already developed social roots, then it is true that the state has approved the relationships they have formed and the long-term plans they have executed insofar as the state has tacitly authorized their social roots.

This tacit authorization of social roots is what ultimately allows the formation of an expectation to be allowed to remain to be normatively reasonable, since the state is now implicated in the formation of that precise expectation.

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to make the [state] responsible for the development of those expectations." It's not clear to me that this is substantively the same view, for Hosein, in suggesting this view, never deeply examines the nature of the expectations developed and whether they are *induced* by the state, or are of the kind that would warrant regularization, specifically, as a result. It thus seems plausible that we might arrive at different results depending on the cases. If it is, however, the same view as what I argue in this section, then my articulation of it specifies the conditions under which the argument will hold, thereby more fully fleshing out the view.

What is most significant here is that we now have a consideration that can override the state's presumptive right to deport specifically because of the state's actions. Tacit authorization of social roots indicates that the state is essentially waiving its right to deport by signaling its approval of such individuals' *sustained* presence. This is what distinguishes tacitly authorized unauthorized immigrants and socially rooted unauthorized immigrants from those who are simultaneously tacitly authorized and socially rooted, making the criticisms in the previous sections not applicable here. In the previous cases, the state never acted in a way that would make it reasonable to insist the state has induced an expectation to be permitted to remain, and this allows the state to maintain its right to deport. But in the case of unauthorized immigrants who are both socially rooted and tacitly authorized, that is precisely what the state has done. It is one thing for the state to declare that an individual should have known better than to develop social roots without approval because the state never authorized them, but another thing altogether to tacitly encourage individuals to develop them and then assert a right to sever them. So it is not the severance of social roots that is wrong here, but the severance of *tacitly authorized* social roots that is wrong, for the state's tacit authorization of one's social roots makes one's status more than merely at-will as well as no longer straightforwardly unauthorized. When the state tacitly authorizes social roots—effectively permitting individuals to commit to the relationships and life projects constitutive of their roots—*then* it is unjust for the state to force them to sever those roots. It is wrong in this case because the state's behavior communicates that such individuals have genuine (though only tacit) permission to pursue those relationships and projects where they currently are, and such individuals come to order their lives around this permission. Moreover, permitting such relationships and projects is practically meaningless without offering the time to develop social roots and then to maintain them over time. This is a reasonable basis on which such unauthorized immigrants would form the expectation to be allowed to remain, and it is—contrary to the previous cases—the state inducing this expectation, thus generating a presumptive duty to ensure that expectation is fulfilled. This gives rise to a right to regularization, and specifically permanent regularization.

This allows us to resuscitate the analogy to adverse possession, at least with respect to a subset of the population to which the analogy had hitherto been applied. The primary argument against that analogy, as it has been used so far throughout the literature, is that it simply does not hold for socially rooted unauthorized immigrants because they do not live openly enough, and because the state has clear procedures for deporting such individuals it detects. But if the analogy could be shown to be apt, then any individuals for whom it is apt have a claim to regularization. Miller notes in his discussion of ad-

verse possession that it is an open question whether the state in fact pursues earnestly the deportation option with respect to socially rooted unauthorized individuals.<sup>48</sup> To the extent that it does, I think he is right to reject the adverse possession argument. To the extent that the state does not, however, the state may bear responsibility for the epistemically reasonable expectation such immigrants form to be allowed to remain, thus rendering it normatively reasonable. If the state is not constrained in its ability to pursue deportation due to lack of resources, or that is not why it fails to enforce its policies, then a case could be made that the state bears responsibility for the expectation, and that it is therefore a normatively reasonable one. This is true of socially rooted unauthorized immigrants who are simultaneously tacitly authorized. Consider an example.

Imagine a political situation in which groups representing the business interests of the agricultural industry aggressively lobby the state's representatives to reduce internal immigration enforcement efforts because those efforts are harming agricultural businesses that rely on unauthorized labor to stay afloat.<sup>49</sup> These efforts have sway over the state's representatives because of the outsized electoral impact the states spanned by the agricultural industry can have. But the political climate is also such that the state's representatives seek to appear adequately committed to immigration enforcement because a large portion of the administration's base of voters finds border control to be a serious national problem. The state's solution is to shuffle enforcement resources away from field offices in the region where most of the state's agricultural jobs are to other field offices within 100 miles of the state's borders. We can even imagine the state's representatives speaking out of both sides of their mouths by defending the policy on the grounds of border control and the importance of law enforcement while touting the economic progress made by the agricultural industry and the number of jobs it has recently created. The result of a policy like this is that the state is intentionally forgoing its enforcement efforts in that region, thus tacitly authorizing the unauthorized immigrants already there or who may successfully end up there. Furthermore, it is not hard for individuals, including unauthorized immigrants, to discern that the state's objective is to allow unauthorized labor to flourish within a particular industry while still being seen as committed to immigration enforcement.

This strikes me as a plausible scenario in which the state is reasonably aware of the presence of unauthorized immigrants in a given region and opts not to do anything about it for political or economic reasons and not because

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48. Miller, *Strangers in Our Midst*, 123.

49. It is easy to imagine that all affected parties, especially unauthorized laborers, are reasonably aware of the relevant features of the situation, to include the agricultural industry's interest in protecting access to cheap unauthorized labor.

of constraints on its enforcement resources. In this case, any unauthorized agricultural workers who are currently socially rooted just became tacitly authorized as well. Additionally, anyone who arrives and works in the agricultural industry is tacitly authorized, and if this policy remains in effect long enough, any social roots they develop would be tacitly authorized as well.<sup>50</sup> All such people thus have a right to regularization because the state's behavior induces in such people the expectation that they will be allowed to remain—thus granting genuine though tacit permission to pursue long-term relationships and life plans—at least so long as they continue living in that region and working in the agricultural industry. Of course, if the state decides to end this policy and returns its enforcement resources to the region, then any individuals who have not developed tacitly authorized social roots cannot claim a right to regularization. So while unauthorized immigrants who are simultaneously socially rooted and tacitly authorized have a right to regularization, no other unauthorized immigrants have this right.

One might object here that my argument is too narrow insofar as it leaves out a number of potential cases in which our intuitions would demand regularization. The best objection, I think, would insist that the passage of time by itself can make a moral difference in at least some cases, and my argument cannot accommodate such cases.<sup>51</sup> One might insist that someone who has been present without authorization for a very long time has a right to regularization, not because of the roots developed or the complicity of the state, but simply because the wrong associated with the individual's unauthorized status

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50. There may be a plausible argument that any individuals in that entire region, farm workers or not, become tacitly authorized by this policy, thus significantly expanding the pool of unauthorized immigrants who gain a right to regularization as a result of this policy. I am sympathetic to this view but cannot not pursue it here.

51. I will only discuss one of two cases I think might be offered by proponents of this objection. An anonymous reviewer suggested that someone who has lived in a state for one's whole life but has never developed any roots and has never been tacitly authorized seems intuitively to have a right to regularization. This example is a good one because it offers someone who satisfies none of my necessary conditions and yet many think she still has a right to regularization. This, if true, would show my argument to be obviously too restrictive and therefore implausible. I see two problems with the example, however. First, if the individual truly has *no* roots then my intuition is that deporting her is not morally problematic so long as she has the ability to live her rootless life somewhere (see note 25 above). Second, if she does have a right to regularization, my sense is that it will arise from the fact that such an individual arrived as a child, and this is a special case I set aside as requiring its own analysis conceptually independent of either the social membership argument or the complicity argument (see note 6 above). I consider child arrivals special cases in this way because my sense is that something over and above social roots would ground any right to regularization such individuals may have, and this fact is not something social membership arguments can accommodate. I should thank the anonymous reviewer for also prompting me to think harder about the case I move to consider now.



has exceeded its statute of limitations.<sup>52</sup> An appeal to a statute of limitations is compelling here because the moral legitimacy of a wronged party seeking redress for the wrong seems to diminish over time. But I think this fails to recognize that unauthorized immigration is in fact a continuous wrong and not a discrete wrong that happened long ago but is now over with.<sup>53</sup> This indicates that an appeal to statutes of limitations, like appeals to adverse possession, are not properly applicable to the case of long-term unauthorized immigrants. The point of an appeal to statutes of limitations is to say that the passage of time can supersede the original wrong, but this will not work because as time passes, the wrong continues. Appealing to the passage of time is incapable of doing the work it intends to do. This suggests that for the passage of time to make any substantive difference, it must attach to something else of moral significance. But this forces us back to one's social rootedness and considerations of fairness, which I argued earlier are also incapable of grounding a right to regularization.

## 6. Conclusion

In sum, I think the complicity argument and the social membership argument are unable to establish a broad right to regularization for every tacitly authorized and every socially rooted unauthorized immigrant, respectively. The more plausible versions of each argument appeal to a notion of the reasonable expectations such immigrants might hold and how that helps to demonstrate a right to regularization. The problem with each argument, however, is that each misunderstands something about the relevant expectations appealed to. The complicity argument thinks that the state's tacit authorization of individuals induces in those individuals a reasonable expectation to be allowed to remain, thus grounding a right to regularization, when in fact that particular expectation is not reasonable. The social membership argument thinks that the expectation to be allowed to remain is reasonable, which I submit it is, but fails to notice that the expectation is merely epistemically reasonable and not normatively reasonable in the way required to generate a right to regularization.

Although the arguments currently on offer cannot establish a right to regularization, their appeal to reasonable expectations highlights the fact that the state's behavior can potentially undermine its own right to deport inasmuch as it induces an expectation in unauthorized immigrants to be allowed to remain. While this expectation is not induced either in tacitly authorized or socially rooted unauthorized immigrants, I argued that it is induced in those unauthorized immigrants who are simultaneously tacitly authorized and socially

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52. See Carens, *The Ethics of Immigration*, 155.

53. Thanks to Scott Carnes for pointing this out to me.

rooted. The state, in such a case, has acted in a way that signals its approval of such individuals' sustained presence and by extension the formation of relationships constitutive of social roots. A right to regularization follows from this because it would be unjust for the state to sever such roots after having authorized them, even if only tacitly.<sup>54</sup>

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