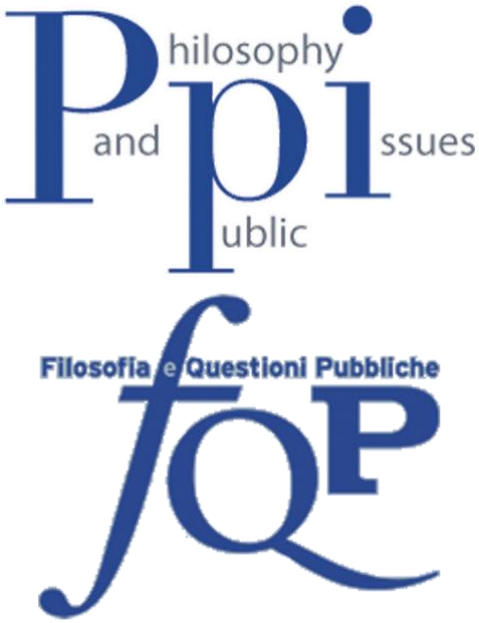

THE WRONG OF REMOVING THE LONG-SETTLED

BY

EILIDH BEATON

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The Wrong of Removing the Long-Settled

Eilidh Beaton

Introduction

In recent years, political leaders in a number of Western states have ramped up efforts to identify and remove undocumented immigrants, partly as a response to a rise in xenophobic populist attitudes among their populations.[1] These efforts are typically implemented regardless of how long the irregular immigrants have lived in the would-be removing state. This practice is in tension with the emerging consensus in political philosophy that anyone who has lived in a state for an extended period of time should be entitled to permanent residency and a pathway to citizenship.[2] In *Justice for People on the Move*, Gillian Brock adds to these voices, arguing that

[1] For variation, I use the terms 'undocumented', 'irregular', and 'unauthorised' interchangeably throughout this paper to refer to non-citizens residing in a state without immigration authorisation.

[2] See e.g. Higgins (2018), 5; Lenard (2015), 469; Miller (2016), 121-126; Rubio Marín (2000), 20ff; Shachar (2009), 184-188; and Song (2019), 185-188.

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removing long-settled undocumented residents is often unjustified and inconsistent with the requirements for state legitimacy.[3] Instead, on her view, states should regularise the status of long-settled undocumented people.

In this paper I will show that Brock's arguments in defence of this thesis are compelling but limited in scope. This is because – in line with her intention to address prominent contemporary challenges to migration justice throughout her book – her arguments are primarily made with reference to five specific groups who have faced threats of removal in recent years.[4] I argue that while Brock is right to claim that each of these five cases 'raise different issues' (88), they also have two important things in common.[5] First, in each case there are very clear and widely-acceptable reasons to think that the individuals in question should be excused for violating immigration law and residing in the state without required authorisation. Second, in each case Brock appears to assume that the individuals facing removal have only violated immigration law. As a result, it is unclear what her account says about the permissibility of removal in two more "difficult" contexts, namely: (1) contexts in which an adult entered irregularly or became unlawfully present at a time when that state's immigration policy clearly signalled disapproval of violations of immigration law; and (2) contexts in which an adult faces removal

[3] I use 'remove' to refer to *all* cases of compelled departure from a state under threat of force, whereas (consistent with its usage in UK law) I use 'deport' only to refer to cases where individuals face threats of removal after committing a serious crime.

[4] In this sense I share Matthew Lister's (2021) worries about Brock's 'piecemeal' methodology.

[5] All unmarked citations in this paper refer to Brock (2020).

after being arrested for violating criminal law.[6] I will argue that removing long-settled residents is also generally impermissible in these kinds of cases.[7]

The paper will be structured as follows. In §1, I will reconstruct Brock's argument against removing the long-settled and explain why it does not address these more "difficult" cases. In §2, I attempt to construct an account of how Brock's framework might apply in these cases, but conclude that the evidence from her chapter is indeterminate. In §3 I outline my own argument against removing the long-settled. Last paragraph concludes.

Before beginning, I should make clear that the following discussion will proceed by considering whether long-settled irregular immigrants have a right to remain even if we grant that states have a *prima facie* right to exclude non-members. I do not make this assumption because it necessarily reflects my personal views, but because we live in a world where states are presumed to have the right to exclude immigrants, and where removal is taken to be an appropriate response to violations of immigration law.[8] In such a context, it is practically worthwhile to show that even if we grant this assumption, it is still impermissible to remove long-

[6] I distinguish between irregular entry and becoming unlawfully present here because an individual who initially entered regularly can also become unauthorised if they fall out of status – e.g. by overstaying a visa.

[7] To qualify, my arguments against deporting long-settled undocumented immigrants who have committed crimes are meant to apply only to those who have committed "ordinary" crimes. I do not mean to make a stance here on whether deportation is permissible in extremely rare cases in which individuals have been involved in terrorism, genocide, or other egregious crimes frequently given distinctive status in international law. I take it that a case-by-case assessment is required in these contexts.

[8] Of course, it is an open question whether violating immigration law involves any wrongdoing at all. I take it that *if* any wrongdoing is involved, the violation in question is merely administrative as opposed to criminal. See Brock (2020) 107-108, and Carens (2009).

settled undocumented residents, including those in the more "difficult" circumstances of the kind Brock does not directly address.

I

Brock Against Removing the Long-Settled

I.1 *The General Framework*

In the first three chapters of *Justice for People on the Move*, Brock outlines her framework for addressing challenges of justice in migration. Two features of this framework are particularly important for understanding her arguments against removing the long-settled.

First, Brock's framework is grounded in a general account of justice in which moral agency plays a central role. According to Brock, moral agency is relevant for justice because it is only fair to meaningfully hold people responsible for their actions when the conditions for moral agency are satisfied (21). She outlines a number of core human needs that are particularly important for securing moral agency – including physical and psychological health, security, and sufficiently decent social relations – as well as other 'derivative needs' whose content varies depending on context, but may include needs associated with being able to support oneself in a particular economic environment, or the need for a reasonably large network of supportive personal relationships (22-24). Crucially, Brock argues that location plays a very important role here, because context determines how humans orient themselves to meet their needs. In particular, people form 'located life plans' – plans for the future that are importantly connected to one's social, geographic, and economic context (24). Brock argues that because these plans are typically very important to people, they

'demand respect' and should be accommodated where possible (24-25).

The second important component of Brock's framework is her set of requirements for state legitimacy. Brock acknowledges that the contemporary international system of sovereign states came about through a history of unjust acquisition. However, she argues that because individuals born into this system have developed located life plans in the areas in which they were born, and because the state system has a variety of good features – for instance, states as they currently exist already embody the kind of structure with sufficient administrative capacity needed to secure justice – the best and most efficient way to achieve just outcomes is by reforming the existing system to make it legitimate (26-31). According to Brock, there are a number of requirements states must fulfil in order to achieve legitimacy within the state system and thereby obtain a right to self-determination. In particular, states must: (1) fulfil the *internal legitimacy requirement* by respecting the human rights of people resident on their territory; (2) fulfil the *system requirement* by being part of a legitimate state system; and, to help achieve this, states must (3) fulfil the *contribution requirement* – that is, they must discharge their positive obligations to participate in the cooperative project needed to sustain a justified state system (38). The kinds of actions states must take to fulfil the contribution requirement include: maintaining a general ethos conducive to respect for human rights; practices of accountability; not promoting circumstances in which respect for human rights is worsened; and showing appropriate international concern for human rights practice, including by taking action when appropriately placed to do so (58).

I.2 *Against Removing the Long-Settled*

In the fifth chapter of her book, Brock turns to the question of whether states may permissibly remove long-settled irregular immigrants, where an individual can be considered 'long-settled' if they have resided in a state for at least five years (88). By applying her general framework for addressing challenges of justice in migration, and supplementing it with some additional analysis, she argues that legitimate states may not remove long-settled undocumented immigrants and should instead regularise their status.

In line with her intention to engage with contemporary migration challenges, Brock's arguments in this chapter are made with reference to five recent cases in which individuals deemed undocumented faced threats of removal (90-98). These are:

1. The Windrush generation: residents of Caribbean countries who were encouraged to come to the UK in the aftermath of WWII and held British citizenship under the 1948 British Nationality Act. In 2010, these individuals were falsely deemed unauthorised and faced threats of removal by the UK Home Office due to the UK government's failure to keep appropriate records of their right to remain.
2. El Salvadorian recipients of Temporary Protected Status (TPS) in the USA, where TPS is a non-permanent form of humanitarian protection. TPS status for El Salvadorians had been consistently renewed, but the status was not renewed under the Trump administration, causing many long-settled recipients to suddenly face threats of removal.
3. "Dreamers" – individuals brought irregularly to the US as children, who had spent their formative years in the US and lived the majority of their lives as undocumented residents of the US.

4. Individuals, like irregular immigrants to the US in the 1990s, who entered a state irregularly at a time when immigration enforcement was relatively lax and their labour was highly valued, which (Brock argues) tacitly signalled approval of the immigration flow.
5. Individuals who moved 'in response to state system failures' – that is, individuals who entered irregularly because they were fleeing persecution and widespread human rights violations, but did not formally apply for asylum out of fear that their application would be rejected.

Brock offers arguments for each of these cases to show that removal is unjustified. There are three common threads that run throughout her discussion.

First, Brock repeatedly emphasises that removal in each case would show insufficient respect for the located life plans of the long-settled.[9] The fact that these individuals have lived a substantial portion of their lives in the would-be removing state is significant, she argues, because over time people fall into patterns of living that become extremely important for their welfare and sense of purpose (98-100). For instance, they might have learned particular languages, or developed economic skills relevant to their specific social and economic context. As a result, Brock argues, removing a person from the place in which they have resided for a long time typically does severe harm to that person – and in addition, would also harm residents of the removing state whose own located life plans involve the individual who is forced to leave (100). Brock argues that since disrupting people's located life plans can be very harmful, states should generally refrain from removing long-settled irregular immigrants (102-103).

[9] See e.g. 89, 90, 94, 100, 101, 102-103, 106, 110.

Second, Brock frequently appeals to the importance of family ties. Many long-settled irregular immigrants have close family members in the would-be removing state who are either citizens or permanent residents. This is important, because close physical proximity is usually an important part of family life. Indeed, the significance of family unity is already recognised in immigration law: the majority of states currently offer more accessible routes to entry for the family members of citizens and permanent residents (101-102). In line with this, Brock argues that preserving family ties provides a strong case against removal.

Third, Brock argues that removal in many of these cases would constitute a violation of the internal and contribution legitimacy requirements outlined in her general framework for international justice. For instance, she suggests that separating mixed-status families would violate the human right to family life recognised in the Universal Declaration for Human Rights (UDHR) and the Convention on the Rights of the Child (104). Additionally, Brock suggests that removing the long-settled effectively amounts to banishment – a severe and outdated punishment once reserved for grave crimes – and thereby violates Article 5 of the UDHR against being subjected to cruel, inhuman, or degrading treatment or punishment (95, 104). She suggests that removal may also violate Article 9 of the UDHR against being subjected to arbitrary exile, and Article 10 on being entitled to a fair hearing (105).[10] Importantly, these human rights violations are inconsistent with her internal legitimacy requirements. Additionally, Brock also argues that her contribution requirements would be violated in

[10] Admittedly, many of Brock's assessments here are not reflected in current practice – e.g. most courts do not currently consider removing irregular immigrants a violation of the human right to family life. As such, I take it that the most plausible interpretation of her account is as a normative explanation of how we *should* interpret these human rights.

some cases of removal. For instance, removing El Salvadorian recipients of TPS would violate the requirement against worsening respect for human rights, because the US would be sending these individuals to a country where their basic human rights would not be secure (105).

I.3 *What is Missing*

Brock's arguments against the permissibility of removing long-settled irregular immigrants are compelling. In each of the five cases she addresses, removal would be unjustifiable for exactly the kinds of reasons she mentions. People's located life plans, family ties, and human rights deserve respect. However, an important shortcoming of her analysis is that it is limited in scope, in part because she focuses on these five contemporary examples. Although she rightly claims that each of the cases she considers 'raise different issues' (88), they also have two important things in common.

First, even very strong defenders of states' right to exclude immigrants could recognise that the individuals in the specific groups Brock discusses should be excused for their initial violation of immigration law. In cases 1-4 there are strong reasons to think that the individuals in question did not knowingly and intentionally violate an immigration rule that clearly aimed to exclude them. Brock herself describes the Windrush generation as an 'easy case', since these individuals entered regularly as citizens, the British government actively encouraged their immigration, and the Home Office was entirely to blame for failing to keep records of their right to remain (92). Similarly, El Salvadorian recipients of TPS had held robust residency rights TPS until the Trump administration refused to renew their status. As Brock rightly emphasises, by continuously renewing TPS for El Salvadorians so long – such that

the typical El Salvadorian recipient of TPS had been in the US for twenty-one years – several US administrations encouraged recipients to develop 'reasonable expectations' that their status in the US was relatively secure (93-94). As such, it is clear that the US was at fault for failing to provide these individuals with a pathway to permanent residency and/or citizenship. Moreover, although Dreamers – unlike the Windrush generation and recipients of TPS – *have* been consistently undocumented, because they entered the US irregularly as children it is clear that they should not be considered morally responsible for their irregular status. Finally, it is a core part of Brock's description of the people in her fourth category that they entered at a time when it was reasonable to believe that irregular immigration was welcome, or at least not frowned upon. She suggests that since these individuals were 'frequently employed', their labour was 'highly valued', and immigration enforcement at the time was 'lax', it was reasonable for people in these contexts to infer that 'their presence was welcome and immigration laws would not be enforced', at least so long as they 'stayed out of trouble' (96).

The individuals in Brock's fifth category are the only exception to this rule. Some people who move in response to state system failures knowingly and intentionally violate immigration laws that were clearly designed to exclude them. However, since these people are moving to escape persecution and human rights violations, there are very strong reasons to think these violations should be excused. The idea that refugees should not be penalised for violating immigration law in order to seek asylum is a core principle of the 1951 Refugee Convention.[11] Although the individuals in Brock's fifth category have not officially applied for refugee status, many would qualify for refugee status if they filed an application in a just system. Moreover, even those who would

[11] See UNHCR (1951 and 1967), Article 31.

not qualify for refugee status – for instance, because they were fleeing *generalised* threats to human rights as opposed to targeted persecution – are still morally on a par with refugees in the sense that it would be inappropriate to penalise them for violating immigration law, since the violation was necessary to escape threats to their most basic rights.[12]

As a result of her focus on these five specific examples, then, Brock's account fails to address cases in which long-settled irregular immigrants originally became unlawfully present as adults, at a time when the receiving state clearly signalled disapproval of immigration violations, and were not forced to leave their home country to preserve their human rights.

The second important omission that runs throughout Brock's arguments in this chapter is that she occasionally emphasises that the individuals facing threats of removal 'pose no threat to safety' (103). She does not explicitly state exactly what she means by this, but a reasonable interpretation of this point is that the individuals in question have a clean criminal record. Thus – whether due to accidental vagueness or intentional omission – her account also fails to explain whether it is justifiable to remove irregular immigrants who have violated criminal law.

It is unclear why Brock sometimes qualifies her arguments in this way. Perhaps she does not address these kinds of cases simply because she does not need to, as violation of criminal law is not the central reason for removal in her five cases. Alternatively, it is

[12] The Refugee Convention and its Protocol (1951 and 1967) require that an individual have a well-founded fear of persecution *for reasons of* race, religion, nationality, social group membership, or political opinion (Article 1). As such, individuals fleeing entirely indiscriminate or generalised human rights violations do not qualify as Convention refugees. However, the normative relevance of the Convention requirements have been widely criticised – for my own view, see Beaton (2020).

possible that Brock may have had more substantive reasons for avoiding these cases. For instance, she may have chosen to emphasise that the undocumented people in her examples do not pose a threat in order to resist the harmful and false stereotype that irregular immigrants are dangerous and violent. Similarly, she may have chosen to focus on cases in which irregular immigrants have very good reasons for residing in the state while unauthorised in order to counter harmful stereotypes that portray irregular immigrants as rule-breaking opportunists.

Of course, it is important to resist false, harmful, xenophobic and/or racist stereotypes about undocumented people. However, it is also important to be conscious of the impact that omissions in a theory can have. By arguing against the permissibility of removal in only the clearest cases, Brock's account leaves it open for readers to infer that removal *would* be permissible in more morally complex circumstances. Yet these kinds of cases are not so extremely rare that it is understandable for Brock's account to omit them entirely. Many existing irregular immigrants entered their state irregularly or fell out of status as adults in contexts of hostility towards undocumented people. Moreover, while evidence suggests that irregular immigrants are *less* likely to violate criminal law than "legal" citizens, a non-negligible minority of irregular immigrants do face deportation for this reason. A complete account of whether removing long-settled undocumented people is justifiable must directly address these more contentious cases, and not simply leave it open for readers to retreat to their own biases about whether removal is permissible in these contexts.

II

Filling the Gaps?

In §1 I argued that Brock does not directly explain whether it is acceptable for states to remove irregular immigrants in the two more "difficult" contexts identified. Still, it might be possible to *infer* from her analysis what she would be likely to say about these cases. After all, she opens her book by suggesting that she intends to provide a 'comprehensive framework for thinking about justice and migration issues' which can apply to issues beyond those she directly addresses (1-2). In this section I will attempt to construct such an account, but will conclude that the evidence from her chapter is ultimately indeterminate about the implications of her view in these two contexts.

As a first step towards reconstructing an interpretation of Brock's view, it is worth noting that each of the three reasons Brock provides for why removal would be unjustifiable in her five cases could also apply to individuals in the two more "difficult" contexts. In virtue of being long-settled, these people will also have developed located life plans which should be given 'significant weight' (89); many will have close family ties in the would-be removing state; and removal may also violate these people's human rights.[13] Moreover, throughout her chapter Brock emphasises that

[13] This final point is more controversial, because it is more unclear whether removal in would constitute a wrongful violation of the relevant human rights in more "difficult" contexts. For instance, Brock suggests that removing the long-settled would violate Article 5 of the UDHR against being subjected to cruel, inhuman, or degrading treatment, because banishment is a 'harsh and cruel punishment' that was once reserved for 'serious crimes', and yet – she emphasises – the irregular immigrants in each of her five examples have not committed any crimes (104). Again, this presentation renders it ambiguous whether might consider it acceptable to 'banish' long-settled irregular immigrants who *have* violated criminal law.

these combined harms are very severe. She describes threats to remove long-settled irregular immigrants as 'grave injustices on par with violating some of their most basic human rights' (89), suggesting that uprooting long-settled undocumented people would 'typically cause considerable hardship and disproportionate harm' to the individuals in question (90); and she argues that separating families in particular 'seems a particularly cruel form of punishment' (95). Altogether then, Brock clearly holds that removing the long-settled inflicts very weighty harms. As such, it might be reasonable to infer that Brock's account would condemn removing the long-settled in almost any circumstance.

On the other hand, however, some of the ways in which Brock presents her argument against the permissibility of removal in each of her five cases threatens to undermine this interpretation of her account. For instance, she frequently describes the located life plans that are deserving of respect as *reasonable*. For example, she suggests that the located life plans of El Salvadorian recipients of TPS were 'reasonable', presumably because the repeated renewal of TPS gave these individuals 'an understanding about how their lives would go forward' (94). Similarly, she suggests that individuals who entered the US irregularly in the early 1990s made the 'reasonable interpretation' from the state's lax attitude to immigration enforcement that 'there was no intention of ejecting them' (96). By qualifying her arguments in this way, Brock seems to suggest that unreasonable located life plans might not deserving of respect. While this idea in itself is not implausible, it raises potential issues because Brock offers no account of what it takes for a located life plan to be reasonable. As such, it is unclear whether she would consider it reasonable for an undocumented individual living in an openly hostile state to develop located life plans. This is important, because if Brock does believe that it is unreasonable for individuals to bank on continued residence in a state that has made it clear that it intends to send them home, then

the value of located life plans may no longer provide an argument against removal for individuals who entered irregularly or fell out of status as adults in contexts of state hostility.

The second relevant feature of Brock's presentation is that she occasionally qualifies her arguments by insisting that it would be especially wrong to remove the individuals in each of her five cases since they pose 'no threat to safety' (103). As discussed in §1, these ambiguities in her presentation leave it open to readers to infer that, on her view, it might be permissible to remove long-settled irregular immigrants who have violated criminal law.

A third related issue is that throughout her argument, Brock frequently highlights that many of the people in each of her five cases have made positive economic and social contributions to the society in which they live. She suggests that the Windrush generation were 'highly beneficial to Britain' (92); many El Salvadorian recipients of TPS 'made positive contributions to the USA' (94); many Dreamers 'are making important contributions to their adopted society […] such as by serving in the military' (95); and irregular immigrants are following long-established migration patterns which have historically been 'of high benefit to aspiring and dominant nations', for instance, because they have helped to meet 'seasonal labour demands' (96-97). It is unclear how much weight Brock means to give to these kinds of considerations. On the one hand, she explicitly states that she does not want immigrants' contributions to their host societies to be the sole basis for their claim to remain – partly because not all undocumented people make such contributions, and partly because it is unclear whether these contributions are sufficient in themselves to generate a right to remain (99, n. 24). On the other hand, the fact that Brock refers to these considerations at several points throughout the chapter, and only qualifies that they are not the *sole* basis of a right to remain, suggests that these factors are meant to

add some amount of weight to her arguments against removal. This outcome has significance for the case of long-settled irregular immigrants who have violated criminal law, because the most common alternative to removal – imprisonment – is financially costly. If economic benefits partially contribute to her argument against removal, it is possible that economic costs could count against the right to remain for long-settled irregular immigrants who have violated criminal law.

Finally, one feature of Brock's general framework for justice in migration is potentially in tension with the case against removing irregular immigrants who have violated criminal law. In particular, her conditional defence of the international state system is based on the idea that citizens of states occupying territories acquired unjustly have a right to remain 'only if their practices do not perpetuate wrongdoing' (89). However, if we apply this reasoning to the case of irregular immigrants who have committed a crime, it seems to suggest that a wrongful violation of criminal law could undermine the otherwise good reasons in favour of their right to remain.

Overall, then, it is not possible to straightforwardly infer what Brock's account might say about the permissibility of removing the undocumented in the two more "difficult" circumstances. On the one hand, her three main arguments against removing people in each of her five cases could also apply in the two more "difficult" contexts. On the other hand, her presentation of these arguments is nuanced and often conditional in ways that threaten to undermine the prospects of extending these arguments to these cases. Ultimately, then, it is simply unclear what Brock's general account suggests about the permissibility of removing long-settled irregular immigrants in these two contexts. In the next section I will argue that – whatever Brock's actual view on this matter might

be – it is in fact impermissible for states to remove long-settled undocumented people even in these more "difficult" contexts.

III

Against Removing the Long-Settled

III.1 *Family Ties*

As a first argument in favour of a more general right to remain, it is important to highlight that many long-settled undocumented people have close family ties in the would-be removing state, and that this has normative significance regardless of how an individual became unauthorised or the nature of their conduct in their state of residence. Most significantly, some irregular immigrants may belong to mixed-status families. That is, their spouse and/or minor children may have residency rights in the would-be removing state, but not in the state to which they would be removed. For instance, an undocumented immigrant residing in the US may have children who were born in the US and only have US citizenship. In this section I will show that in these sorts of cases, family ties alone provide sufficient justification not to remove the irregular family member, regardless of the other features of their situation.[14]

As Brock acknowledges, the majority of states already recognise the significance of family ties in their immigration law by offering more accessible routes to entry for the family members of citizens and permanent residents. In recent years, a number of scholars have offered accounts of the normative basis of these special

[14] The arguments in this section share some similarities to arguments I have made elsewhere regarding the nature of family reunion rights for refugees. See Beaton (forthcoming). For further discussion of the significance of family ties in the case of parent-child relationships, see Ferracioli's (2021) contribution to this issue.

relationship-based immigration rights. According to Matthew Lister (2010), families have special rights to unification because they are particularly intimate associations, and so the freedom of association rights of families trump the freedom of association rights of political communities. Alternatively, according to Luara Ferracioli (2016) immigration exceptions are appropriate for irreplaceable relationships like families that are deeply valued by the parties involved, so long as the relationship-type is taken to be valuable by the society at large. Caleb Yong (2016) and Sarah Song (2019), on the other hand, have each individually argued that families should be entitled to immigration exceptions because they serve a particularly valuable caregiving function.

Each of these arguments suggest that family ties are sufficiently weighty to generate a right to an immigration exception, even in cases where all family members already possess a set of residency rights that would allow them to live together in the same state. For instance, they suggest that if a UK citizen moved to US for work and became a permanent resident, they should be entitled to sponsor the rest of their family to join them in the US, even though the family already have the option of living together in the UK. Clearly, however, special immigration rights are even more important for mixed-status families who need immigration entitlements for family unity to be possible *anywhere*. For instance, if a mixed-status family of US citizens and one undocumented Mexican parent were living together in the US, lawful family unity would be impossible unless the US granted residency rights to the undocumented Mexican parent, or Mexico granted residency rights to all US-citizen family members. Importantly, one of these outcomes must occur not only to respect freedom of association rights, the value of the relationships, and the importance of care, but also because – as Brock highlights – the right to family life is

recognised in a number of human rights documents.[15] In order for this human right to be properly fulfilled, either the US or Mexico would need to grant residency rights to the non-citizen family members.

This is important, because when a family has already been residing together in one state – in the above example, the US – for an extended period of time, there is very good reason to think that this state should be the one to regularise the status of non-citizen family members. After all, failure to do so would threaten the located life plans of *all* family members, and – as Brock's discussion of the Dreamers suggests – would do a particularly egregious wrong to citizen children who have spent their formative years on the territory of that state. Both family ties and ties to the country in which one has spent their formative years are deeply important. As such, it is deeply morally objectionable to force the families of irregular immigrants to choose between being with their loved one and living in their home country.[16]

I take it that family ties of this sort are sufficient to justify a right to remain even in more "difficult" cases of the sort outlined in the previous sections. The collective weight of all the relevant interests in these contexts – the whole family's interest in preserving family life, and the located life plans of each individual family member – certainly outweigh any wrongdoing involved in violating immigration law. Moreover, these interests would also outweigh

[15] See e.g. Article 16 of the UDHR (1948); Article 23 of the ICCPR (1966); Article 10 of the ICESCR (1966); and Article 10 of the CRC (1989).

[16] While my discussion here has focused on mixed-status families, there are also cases in which the family members of the undocumented individual are dual-citizens or otherwise have residency rights in the state to which the undocumented family member would be removed. I take it that the combined weight of the located life plans of all family members will almost always be sufficient to outweigh any reasons in favour of removing the undocumented individual, even though family unity itself is not fundamentally under threat.

the reasons in favour of removing irregular immigrants who have committed crimes, because the total harm that separation would inflict upon all family members will surely be greater than the harms associated with any risk the individual might pose to members of the would-be removing state.

However, like citizens who commit crimes, it may be acceptable to imprison irregular immigrants for violating criminal law when this form of punishment is otherwise justifiable and proportionate to the crime. Now, it might be objected here that this concession is inconsistent with my argument above, for if family ties are as important as I say they are, this (absurdly) suggests that it is also impermissible to imprison individuals who have families. However, I take it that this objection fails to appreciate two salient differences between the kind of family separation that occurs in contexts of imprisonment vs banishment. First, when an individual is imprisoned it is typically feasible for family members to continue to visit them on a regular basis. As such, some features of an ordinary family relationship lived in close proximity can persist during imprisonment, albeit on a more restricted basis. By contrast, when an individual is banished to another country, regular visits are typically not feasible. Second, imprisonment – unlike banishment – is temporary. Imprisoned individuals and their families will know that a return to family life in close proximity will be possible after the imprisoned family member has served their time. This is psychologically significant, because separation is typically more manageable when there is an end to separation in sight. By contrast, when a family member is deported, there is no guarantee that family life will ever be possible again in this form. Altogether, these differences suggest that while imprisonment *restricts* the family's ability to live together in a satisfactory way, banishment *undermines* satisfactory family relations entirely. As such, the harms inflicted by banishment are so severe that they will almost never satisfy proportionality requirements, whereas

imprisonment has the potential to be a proportionate punishment in certain contexts.[17]

In this section I have argued that it is not justifiable to remove long-settled irregular immigrants with close family ties in the would-be removing state, regardless of what other circumstances might obtain. In the arguments that follow, I will show that it would also be impermissible to remove irregular immigrants in each of the two more "difficult" circumstances, even in the absence of family ties.

III.2 *Becoming Unlawfully Present in Hostile Contexts*

In §2 I argued that Brock's account is vague about the permissibility of removing long-settled irregular immigrants who knowingly violated immigration law in hostile contexts, because it is unclear whether she would consider it reasonable for an irregular immigrant (who is not fleeing human rights violations) to develop located life plans in a state that is actively hostile to their presence. This matters, because if located life plans developed in hostile contexts are unreasonable, Brock's most prominent argument against removal – the importance of respecting reasonable located life plans – may not apply in this context. In this section, I will show that regardless of what Brock's actual view on this subject is, it *is* reasonable for irregular immigrants to form located life plans in a state in which they have resided for a very long time, even if that state has been openly hostile to their presence throughout their period of residence.

[17] Of course, none of this entails that existing forms of criminal punishment are currently proportionate in this way. Indeed the preceding discussion on the value of family life may provide further reason for states to reduce sentence lengths, or implement forms of punishment other than imprisonment for certain types of crime.

The basic idea behind this argument is quite straightforward: people simply cannot *help* but form located life plans in the place they have lived for a long time. It is natural and necessary for day-to-day functioning to make plans based on the social and situational ties we currently have. Of course, if a person is aware that their continued residence in a particular state is precarious, it may be prudent for them to form contingency plans to fall back on in case they are required to leave. However, the longer an individual resides in a state undetected, the more distant and theoretical these contingency plans will become. Over time, it will become increasingly difficult to care about or even imagine these back-up plans, and it will become increasingly natural to bank on and value plans made in the current location. Thus, since it is both unavoidable and necessary for day-to-day functioning to make plans in the area in which one has lived for a long time, a long-settled immigrant's located life plans cannot be dismissed as unreasonable merely because there is no official legal guarantee of continued residence.

Still, it might be objected that even if it is reasonable to possess located life plans in these contexts, the value of these plans still needs to be weighed against the reasons in favour of sanctioning the individual for any wrongdoing involved in violating immigration law. This is an important way in which more "difficult" cases would differ from the five cases Brock considers, because in Brock's cases there is either no immigration violation, or there are obvious countervailing reasons to excuse the immigration violation. Even so, I take it that there are good reasons to think that the value of located life plans would outweigh any reasons in favour of sanctioning immigration violations by way of removal. As Brock herself points out, these violations are most appropriately classified as administrative (as opposed to criminal), since immigration violations are nonviolent and say nothing about the likelihood that the violator will commit a more serious crime

(108). Thus, even in cases where there is no reason to excuse the original immigration violation, the reasons in favour of sanctioning would still be relatively weak. So, since located life plans are of deep importance to most individuals, their value will almost always outweigh any reasons in favour of sanctioning immigration violations by way of removal.

Thus far I have argued that it would be wrong to remove a long-settled irregular immigrant, even when there are no countervailing reasons to excuse their violation of immigration law. However, it is important to highlight that there typically *will* be considerations of this sort – even if these considerations are not always as weighty as the considerations at play in Brock's examples. This is because people do not generally choose to live irregularly in a country that is hostile to their presence if they can live a decent life in their home state. As José Jorge Mendoza explains, because of the ever-present threat of removal, irregular immigrants are 'some of the most vulnerable people in society', as their situation 'leaves them virtually unprotected against various forms of exploitation, oppression, and discrimination' (Mendoza, 2017, 104). As such, people who choose to live in such circumstances will usually have very strong factors pushing them to leave their home country. When these factors are products of domestic and/or global injustice, there is reason to at least partially excuse the violation.

In sum, in this section I have argued that it is not permissible for a state to remove a long-settled irregular immigrant, even if they knowingly became unlawfully present in a hostile state and did not move out of absolute necessity to protect their most basic human rights. In particular, I argued that the located life plans of individuals in these contexts *are* reasonable and therefore deserving of respect, and that the harms involved in disrupting these life plans easily outweigh any reasons in favour of sanctioning violations of immigration law – both because these violations are

relatively minor wrongs, and because there will typically be countervailing considerations in favour of at least partially excusing the violation.

III.3 *Exile as Punishment*

I will now turn to the second of the two "difficult" contexts identified in §2, and consider whether it is permissible to deport long-settled irregular immigrants who have violated criminal law. For the reasons previously indicated, it is important to emphasise that cases of this sort are not especially frequent. Recent research from the US suggests that irregular immigrants are half as likely as US citizens to be arrested for violent crimes, and less than half as likely to be arrested for drug and property-related offenses.[18] Contrary to xenophobic populist stereotypes, then, the vast majority of irregular immigrants are not criminals.

Moreover, it is also worth noting that even in cases where a violation of criminal law has occurred, there will be cases where the violation is partially or wholly morally excusable. For instance, the crime may have been victimless (e.g. drug use), conducted in self-defence, or necessary to meet basic subsistence needs. Cases in which an individual *wrongfully* violates a *serious* criminal law are among the rarest. Nonetheless, these are the cases I will focus on in this section, only because they are the most morally challenging. An irregular immigrant's claim to remain is weakest when they have no family ties within the state, became unlawfully present in a hostile context, and face removal after wrongfully committing a violent crime. Even so, I will show that deportation is impermissible even in these cases. It follows from this that removal of long-settled irregular immigrants is almost never justified.

[18] See e.g. Light, He, and Robey (2020).

Brock is not the only scholar to overlook long-settled irregular immigrants who have violated criminal law. Joseph Carens, like Brock, has forcefully argued that long-settled undocumented people should have a right to remain. However, he too says nothing about the rights of those who have committed crimes, and occasionally presents his arguments in ways that could be interpreted as suggesting that removal might be permissible in these contexts. For instance, in the very passage in which he defends long-settled undocumented people's right to remain, he reminds the reader that immigration infractions are relatively minor wrongs by emphasising that people who violate immigration law 'are not criminals like thieves and murderers', and that this is 'why we find it hard to expel them when they are discovered' (Carens 2013, 150). He further develops this point by suggesting that immigration laws, like traffic regulations, serve a 'social function' which can be achieved even when there is a decent amount of noncompliance, and he argues that it follows from this that individual infractions of immigration law are not particularly troublesome. As such, he concludes, 'for enforcement purposes, it makes sense to focus on the really dangerous violators – those driving drunk or so recklessly as to endanger lives in the case of traffic laws, and those who engage in terrorism *or crime* [my emphasis] in the case of immigration laws' (Carens, 2013, 155).

Now, this passage does not constitute conclusive evidence that Carens believes it is permissible to deport the long-settled who have violated criminal law, because he may only be referring to those who are not yet long-settled here. However, it is far from clear from the context that this is his intention. Indeed his repeated emphasis that removing the unauthorised is disproportionate *because they are not criminals* destabilises the assumption that he would oppose removal in contexts where criminal law has also been violated. Since he never directly addresses this matter, his final view on this point – like Brock's – remains indeterminate.

It is surprising that Carens is so vague here about whether it is permissible to remove long-settled irregular immigrants who have violated criminal law, because in an earlier chapter on the rights of legal permanent residents (LPRs), he argues at length that it would be impermissible to deport long-settled LPRs convicted for serious criminal offenses. In particular, he suggests that doing so would be unfair on the societies to which they are removed, would fail to respect significance of family ties, and – most importantly – would fail to appreciate that the long-settled have developed *social membership* in their place of residence (Carens 2013, 100-106). This notion of social membership plays a role within Carens's theory that broadly parallels the function of reasonable located life plans for Brock.[19] Just as Brock argues that the long-settled will have developed located life plans that deserve respect, so too does Carens hold that individuals who have lived in a community for a long time will have developed sufficient relationships and society-specific interests and identities to have become a *member* of a community. In his view, this membership is so morally significant it generates a right to remain and eventually obtain citizenship.

[19] In practice, located life plans and social membership will almost always overlap, but it is at least conceptually possible for them to come apart. An individual could develop located life plans but lack social membership (e.g. due to having insufficient social/political/cultural connections), and an individual could be a social member but lack located life plans (e.g. because they intend to move elsewhere). Brock suggests that her notion of located life plans is superior, (1) because she worries that an appeal to membership might convey the false impression that individuals should be entitled to a 'sense of comfort' in their community that is 'secure', and thereby foster hostility to diversity among "original" community members; and (2) may foster an 'unnecessary tension' between 'insiders' and 'outsiders' (98-99). Re (1), it is unclear to me that the potential for misuse of a theoretical concept provides sufficient reason to reject the concept (properly interpreted) itself. (2) does appear to be more internal to Carens's theory, though it is genuinely unclear to me whether the distinction itself 'fosters' a division or simply tracks the moral significance of identities that already exist.

Importantly, Carens explicitly argues that social membership is *sufficient* to protect LPRs who have violated criminal law against deportation.[20] Yet he also explicitly argues that long-settled irregular immigrants are also social members, so it is unclear why his position on the rights of the undocumented who violated criminal law is so ambiguous.

In any case, I take it that the most appropriate way to resolve these gaps and potential inconsistencies in Carens' and Brock's theories is by insisting that that it is equally unjustifiable to deport long-settled irregular immigrants and long-settled LPRs who have violated criminal law. There are various reasons to think that the rights of long-settled irregular immigrants should be on a par with those of long-settled LPRs. After all, for both Brock and Carens the operative feature that protects individuals against removal is moral, not legal – namely the possession of located life plans or social membership, a trait possessed by irregular immigrants and LPRs alike. Moreover, since Brock and Carens both agree that violations of immigration law are relatively minor administrative wrongs, it is unlikely that this difference between the two groups would be sufficient to generate different protections for LPRs and undocumented people when other much weightier values like located life plans or social membership are involved. This is especially plausible given the significance of the passage of time for the rights of irregular immigrants. As Carens plausibly argues, long-settled irregular immigrants in general should have a right to permanent residency, because after a sufficient period of residence 'a threshold is crossed', and the undocumented 'acquire a moral claim to have their actual social membership legally recognised' (Carens, 2013, 150). Crucially, I would add to this that once this moral claim to LPR status has been established, individuals also

[20] 'Long-term members are members of society, and, for that reason, ought to be entitled to stay regardless of their conduct' (Carens 2013, 102).

have a moral right to be treated on par with LPRs in all aspects of life. It follows from this that if LPRs who have violated criminal law have rights against deportation, the same should be true of irregular immigrants.

The question then becomes whether it is acceptable to remove an LPR for committing a violent crime. Despite the current practices in many states, the answer to this question is that it is not, for precisely the same reasons why banishment of citizens is no longer considered an acceptable form of punishment. As Carens points out, the problem with exiling citizens is that 'it does not pay enough attention to the claims of the exiles and the excluded':

> To deprive people involuntarily of their home society is (normally) to harm them in a fundamental way, so fundamental that it is no longer considered an acceptable form of punishment for citizens, even heinous criminals […] That is why forced exile of citizens is regarded as a violation of human rights (Carens, 2013, 101).

He then explains that it is wrong to deport long-term LPRs convicted of serious crimes for precisely the same kinds of reasons:

> Long-term residents are members of society, and for that reason, ought to be entitled to stay regardless of their conduct […] the right to remain in a society of which one is a member, even if not a citizen, is a fundamental human interest that ought to be respected (Carens, 2013, 102-3).

Here, then, Carens suggests that long-settled LPRs have a right to remain because they possess social membership. As outlined

above, this also applies to the long-settled undocumented. As such, it is unjustifiable to deport long-settled irregular immigrants who violate criminal law.[21]

Finally, and perhaps most controversially, I take it that these considerations should protect long-settled irregular immigrants from deportation even in cases where the violation of criminal law occurred *before* the individual had resided in the state sufficiently long to have developed social membership and/or located life plans and an entitlement to remain. This is because the justifiability of deportation is assessed by weighing reasons in favour of removal against the extent of the harm removal will do to the individual *now*. Once the threshold for being long-settled has passed, the harms involved in deportation will be sufficient to outweigh any reasons in favour of using removal as punishment for the crime. This is true regardless of when the crime was committed.

In my view, the reasons just outlined are sufficient on their own to generate a right against removal for long-settled irregular immigrants who have committed a crime. However, as a final supplementary point, the interests of the state to which the irregular immigrant would be returned provide further reason to think deportation would be unjustifiable in these cases. As Mendoza compellingly argues, when a state deports long-term residents for breaking the law it merely exports its criminals to another country (Mendoza, 2017, 127). At least in cases where residence and socialisation in the deporting state partially explain why the individual committed a crime, this is clearly unfair. For instance, Mendoza suggests that these circumstances may apply in the case of Honduran gang members who 'honed their criminal

[21] While the arguments here are made with reference to social membership, I take it this conclusion would also follow if all references to 'social membership' were replaced with 'located life plans.'

craft on the streets of the US', and whose deportation has contributed to increasingly violent gang activity in Honduras and a refugee crisis in Central America (Mendoza, 2017, 127). As he summarises:

> A just immigration reform would therefore remove the practice of deportable offenses both because it is unjust to the noncitizen resident and also because it presents an unfair imposition on countries that are forced to take in these deportees (Mendoza, 2017, 127).

While Mendoza is discussing the permissibility of deporting LPRs here, the same point applies to irregular immigrants, since – as argued above – they should be treated on par with LPRs.

Conclusion

In this paper I have evaluated Brock's arguments against removing long-settled irregular immigrants in *Justice for People on the Move*. I showed that although the arguments she offers are compelling, they fail to address two "difficult" cases, namely: (1) those in which an individual entered irregularly or became unlawfully present as an adult at a time when the state's immigration law clearly signalled disapproval of irregular immigration, and (2) those in which an individual faces threats of removal after being arrested for committing a crime. In §2 I argued that it is not possible to reconstruct an account of the implications of her framework in these contexts, because although her arguments against removing the long-settled initially seem to apply to individuals in these more "difficult" circumstances, she sometimes qualifies her arguments in ways that suggest they may

not apply in these cases. Finally, in §3 I argued that regardless of what Brock's final views on this matter are, it is in fact impermissible to remove irregular immigrants, even in these more "difficult" circumstances. If an irregular immigrant has family members in the would-be removing state, removal would fail to respect the deep importance of family ties. Moreover, even in the absence of family ties, the importance of located life plans is sufficient to override any reasons in favour of removal as sanction for violating immigration law. Indeed, as argued in §3.3, the significance of attachments to place are so weighty that they even make it impermissible to deport irregular immigrants who have violated criminal law. As Carens points out, deportation harms individuals in an unjustifiably fundamental way, and, as I have argued, the fundamental nature of this harm will occur regardless of whether the individual is a citizen, an LPR, or an irregular immigrant. In sum, then, it is almost always unjustifiable to remove long-settled irregular immigrants, even in some of the most morally controversial contexts.

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