Giving Voice to the Vulnerable: Discourse Ethics and Amnesty for Undocumented Immigration

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LOYOLA UNIVERSITY CHICAGO

GIVING VOICE TO THE VULNERABLE: DISCOURSE ETHICS AND AMNESTY FOR UNDOCUMENTED IMMIGRATION

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CHAPTER ONE

INTRODUCTION

Jennifer Abreu was 13 when her family brought her from Brazil to the United States. Upon her arrival in Kentucky, she quickly began to immerse herself in her community. She learned English, became a Spanish language tutor, joined a local dance team, and became an active member of the community service organization TeenBoard. She planned on attending college to become a journalist in order to shed light on the issues that affect her community. Just before her 19th birthday, Jennifer was stopped by the police for a minor traffic infraction. What would normally be a routine stop turned into something much greater when the officers found an outstanding deportation order in Jennifer’s name. She was summarily arrested and placed into ICE custody to await deportation. In spite of all the work that Jennifer had done and planned to do for her community, she was an undocumented migrant. Jennifer’s plight highlights a growing problem, which unfortunately remains unresolved. What obligations do nations have towards those who enter their borders without official permission? Is the response to Jennifer’s presence justified, or can Jennifer make a claim to stay which overrides orders to deport.

The purpose of my dissertation is to explore the unique challenges facing undocumented migrants, and the claims to amnesty they can make. I will take a discourse theoretic approach to this issue, following in the footsteps of Jürgen Habermas and Seyla Benhabib, among others. My thesis consists of the following claims. First, a rights based approach to amnesty does not clearly distinguish between different types of immigrants (i.e. undocumented and potential immigrants). Second, the relevant distinguishing factor between undocumented and potential immigrants is what I refer to as rooted residency, a category which captures factors such as time spent in a nation, attachments made to a home, and contributions made in the community. Third, time spent in a nation, attachments made to a home, and contributions made in the community contribute value to the community and are of value to the undocumented. Fourth, forcibly removing these attachments causes great harm to the undocumented, which we must weigh against the illegality of entry. Fifth, this social membership calls for a pluralistic application of amnesty. Sixth, application discourses regarding this amnesty must include actual undocumented migrants, not simply virtual representatives. Finally nations must reform the ways in which undocumented migrants can participate in discourses, particularly regarding informal public discourses (e.g. protests) and application discourses in the courtroom.

This introduction is primarily concerned with laying a foundation for the discussion mentioned above. Philosophical debate regarding immigration has a long history, which has culminated in a debate between two dominant positions. I will begin with two of the more famous and influential historical figures in this debate, Immanuel
Kant and Henry Sidgwick. I will then move to the contemporary debate between communitarians and liberals, represented by Michael Walzer and Joseph Carens. Next, I will show how the discourse ethical approach of Seyla Benhabib and Jürgen Habermas attempts to mediate between the communitarian and liberal positions. I will then turn to the issue of human rights, which is closely tied to debate regarding immigration. Finally, I will discuss my own approach to the specific problem of undocumented immigration. This introduction aims to situate my project in the larger philosophical debate regarding immigration. We will begin with Kant.

**Historical Background**

The second section of Kant’s *Perpetual Peace* is an attempt to articulate three formally instituted articles which will serve as the foundation for a stable state of peace. The first and second of these articles, that “the civil constitution of every society be republican” and that “the right of nations shall be based on a federation of free states”, do not concern us insofar as discussion regarding immigration is concerned.\(^2\) Our interest lies with the third article, which states that “cosmopolitan right shall be limited to conditions of universal hospitality.”\(^3\) What does this mean? Put briefly, it means that a foreign individual or group of individuals who arrive in another country have the right to be treated without hostility. For example, U.S. citizens ought not harass a visitor to the United States from Mexico for their status as a member of a foreign community, and vice


\(^3\) Immanuel Kant. *Perpetual Peace*. Pg. 105.
versa. We ought to create a hospitable atmosphere for all visitors who arrive in the territory of another. This claim is not anchored in principles of charity. It is not the case that universal hospitality is, as Kant puts it, concerned with philanthropy. Rather it is anchored in human rights. Of course, as we shall see below, there are two important limitations on the claim to hospitable interaction in a foreign land.

The first of these limitations outlined by Kant is that while a foreign individual has a right to hospitable treatment after they enter another nation, the inhabitants of that nation have no obligation to allow the foreigner entry, unless doing so would result in the foreigner’s death (e.g. a persecuted refugee). To return to the example mentioned above, while the Mexican visitor has a right to hospitality, they do not have the right of free entry into the U.S., unless our denying the visitor this right would result in his or her death. The community still holds the keys to the front door, so to speak, and universal hospitality does not imply open borders. The second of these limitations, which follows from the first, is that foreigners do not have a right to demand membership from the communities that they visit. Kant goes so far as to deny visitors the “right of a guest”, because this would entail that the visitor becomes a member of the community for a brief period of time. They can claim only a “right of resort”, which is a result of humanity’s forced coexistence in a finite amount of space. Once again, to return to our example, the hospitably treated Mexican visitor has no right to expect the U.S. government to grant him or her citizenship, and the U.S. government has no obligation to provide the visitor

with a path toward membership. To summarize, the fact that every human inhabits the same planet, and must tolerate one another, only entails a right to universal hospitality. It does not entail admittance into a country and it does not entail the right to membership within another country. A foreigner simply has a right to be treated hospitably in any foreign land generous enough to allow them entry.

Before we move forward, it is important to highlight a tension that exists in Kant’s theory regarding immigration. As we have seen, there is no right to immigrate for Kant. A state has no obligation to allow an individual into its borders, nor is there an obligation to provide a path to membership. However, according to Kant an individual does have the right to emigrate. As he states in the *Metaphysics of Morals*, “the subject (considered also a citizen) has the right to emigrate, for the state cannot hold him back as its property.”\(^5\) The tension in Kant’s writings concerns a right to leave ones country of origin, which is not reciprocated by a right to enter into another country. In other words, I have the right to leave but I don’t have the right to enter anywhere else. In summation, universal hospitality and the right to emigration in Kant do not entail a right to immigrate. Entrance into another nation is a gift freely extended by the state. Entrance cannot be demanded by an individual on the basis of a state’s duty to others.

Leaving Kant behind and moving forward to the 19\(^{th}\) century, Henry Sidgwick was one of the forerunners to the contemporary immigration debate. According to Sidgwick discussion of immigration, particularly free (unrestricted) immigration, is a

natural offshoot of discussion regarding free trade.⁶ Insofar as the ideal of completely free trade is concerned, Sidgwick believes that unrestricted immigration must be a part of this ideal. After all (says Sidgwick), complete freedom of exchange would require the complete freedom for labor to move from place to place in order to fulfill the demands of growing industry. This ideal demand runs up against a practical reality, namely the principle of mutual non-interference between nations which “allows each State complete freedom in determining the positive relations into which it will enter with States and individuals outside it.”⁷ Free immigration draws out the conflict between national and cosmopolitan ideals of political organization. The national ideal seeks to promote the interests of a particular group of people “tied together by a particular nationality”, and considers admitting foreign individuals with this promotion in mind.⁸ The cosmopolitan ideal calls for the state to merely maintain order over a bounded territory. The state cannot prohibit others from inhabiting that territory or prohibit others from enjoying the nation’s “natural advantages.”⁹ So which wins the day, the national or cosmopolitan view?

Sidgwick claims that the cosmopolitan ideal may be the ideal for the future, but it is not the ideal for the present. A cosmopolitan system does not properly allow for the


⁷ Ibid.


⁹ Ibid.
national and patriotic sentiments which bind a nation together and are essential for social well being. Complete freedom of integration results in the destruction of internal cohesion, which manifests itself in two particularly important ways. First, attempts by the government to promote a particular moral and intellectual culture would become hopelessly difficult, due to an unrestrained flow of conflicting alien influences which bring varying cultural backgrounds across the border. Second, political institutions require people of a particular type of background to function, e.g. democratic governments require people accustomed to democratic principles. Large groups of immigrants who are brought up under different social institutions (dictatorship, oligarchy, etc.) would introduce “corruption and disorder into a previously well-ordered State.”

Given these claims, Sidgwick believes that imposing unrestricted immigration on particular states would adversely affect everyone. A state may place restrictions in order to protect the internal cohesion of the state, and to safeguard “an adequately high quality of civilized life among the members of the community generally.” This is not to say that the state has absolute control over immigration, but unrestricted immigration is certainly out of the question according to Sidgwick.

Communitarianism and Cosmopolitanism

Where do we stand today regarding the issue of immigration? The contemporary debate regarding immigration is primarily represented by two competing groups. The first

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10 Ibid.
11 Ibid.
group is the communitarians, who (broadly speaking) prioritize the value of communal political and cultural identity formation. The second group is the liberals, whose approach is aimed primarily at whether or not immigration policy is just concerning the individual, as compared to the community. In an effort to describe these two positions in a greater degree of detail, I have chosen two prominent thinkers who represent the competing sides. The first is Michael Walzer, representing communitarians. The second is Joseph Carens, representing liberals. I will focus on the former before turning to the latter.

Walzer begins his discussion of membership by stating “the primary good that we distribute to one another is membership in some human community… and what we do with regard to membership structures all our other distributive choices.” It should come as no surprise, given this claim, that Walzer is concerned with the questions surrounding immigration. What sort of individuals ought we to allow into our nation, should we have open admission policies, can we discriminate among applicants, etc? The initial approach Walzer provides echoes popular sentiment. We (as members) constitute membership as a social good according to our own understanding. As members of a nation, the value associated with belonging to our community is in our hands, and as such, we determine to whom we want to distribute this value. Members and strangers are two distinct groups, and as a result, members must decide who is included into and excluded from the community.


14 Michael Walzer. *Spheres of Justice*. Pg. 32.
In an effort to approach the issue of the general character of political communities, Walzer proposes an exploration by smaller (and more familiar) analogy. Is a political community like a neighborhood, a club, a family, or some combination? The first, a neighborhood, is “an association without a legally enforceable admissions policy.”15 It may be that you shun your neighbors and do not speak to them, but it is not the case that a neighborhood can prevent a new neighbor from moving into the community (at least Walzer presumes this). Applied to the level of political community, this would entail a land of open borders, where those who seek membership could not be excluded. Walzer rejects this view, and in doing so borrows from Sidgewick. He claims that while the community-as-neighborhood may be an ideal, realizing it today would result in a lack of patriotic sentiment and internal cohesion. “Neighbors would be strangers to one another.”16 If the nation is a large completely open neighborhood, the smaller neighborhoods would close themselves off in an effort to defend their local culture against foreign elements. As Walzer states, “to tear down the walls of the state is not, as Sidgwick worriedly suggested, to create a world without walls, but to create a thousand petty fortresses.”17 But even these petty fortresses would collapse after a few generations, leaving behind a nation completely lacking cohesion. Given that Walzer believes cultural cohesion and cultural distinctiveness have value, he argues that a

15 Michael Walzer. *Spheres of Justice*. Pg. 36.
sovereign state must control immigration to some extent. Otherwise the cohesion and distinctiveness which he believes are valuable will vanish.

Instead of the neighborhood model, Walzer argues that a nation resembles a combination of a club and a family. It resembles a club in that the nation affirms the tension between immigration and emigration. That is, a club (like a nation) has the right to protect its communal character through admission policies, but cannot prevent members from leaving the club. Such an action “replaces commitment with coercion.”18 A member who can emigrate is a member of a community due to shared values, but one who cannot leave is a member due to force. This is not to say that a state possesses an absolute ability to control admissions, in the way that some clubs do. In particular, Walzer claims that the moral life of political communities reflects an almost familial character. This is best represented by the way in which some nations open their doors to those they consider to be “national or ethnic relatives.”19 Policy in the United States, where priority is given to family members of current citizens, is explicitly mentioned by Walzer as an example of the familial aspect of the political community. While we can’t pick our family, so to speak, we can pick almost everyone else. Exclusion for the sake of communal cohesion is justified, for Walzer.

There are some limits to this exclusion according to Walzer. States cannot deny recognized guest workers membership in perpetuity, and indigenous populations cannot

18 Ibid.

19 Michael Walzer. *Spheres of Justice*. Pg. 41.
be expelled on account of seeming “alien” to new territorial occupants. Another limit highlights the extremes to which a nation can go in the name of maintaining cultural cohesion. This limit concerns a responsibility on the part of a community to provide aid to those strangers who have no other place to go (e.g. the severely destitute). One should note, however, that this limit does not automatically entail membership into a community. It entails a demand on a community’s territory. If a nation has large unoccupied spaces, it shouldn’t exclude desperate strangers. In such a case, the nation has the room and the resources to provide aid to those in need. However, the nation can still opt to exclude the strangers from society, provided that the community is willing to part with unused land.

The reasons for this exclusion don’t need to be of the sort most would see as justifiable, such as defending democratic ideals or some such presumably laudable goal. Walzer goes so far as to say that this exclusion (and forfeiture of land) can be justified on grounds as deplorable as racism. This is exemplified by his discussion of the “White Australia policy”. This policy sought to create a homogenous Australia by excluding immigrants of other ethnicities. Only whites were wanted. According to Walzer, this type of exclusion is acceptable. If a community determines that it is to allow entrance to members of a single race (as abhorrent as it seems), they should be allowed to do this. They simply can’t hold all the land, if other ethnicities have need of it and there is plenty to spare. “White Australia can only survive as Little Australia.”

20 Michael Walzer. *Spheres of Justice*. Pg. 47.
community has regarding admission is sweeping according to Walzer. The right to communal self determination allows for numerous possible restrictions on immigration in the name of preserving a nation’s cohesion. Carens, on the other end of the debate, will disagree with this view.

Caren’s goal is to challenge the view that borders should be mostly closed with few exceptions, and that the state can exercise substantial discretion regarding admittance policies. This challenge largely concerns poorer immigrants attempting to enter more wealthy nations. Carens utilizes three popular approaches in an effort to demonstrate that there is little justification for restricting immigration. These are the libertarian approach of Robert Nozick, the justice based approach of Rawls, and the utilitarian approach. Each of these approaches, or rather Carens’ interpretation and application of them, “treats the individual as prior to the community.”21 Unlike Walzer and the communitarians, Carens will not give pride of place to the value of communal self determination. Carens is more concerned about doing justice to the individual by advocating for the right to immigrate. As he states, “my findings about immigration rest primarily on assumptions that I think no defensible moral theory can reject: that our social institutions and public policies must respect all human beings as moral persons and that this respect entails recognition, in some form, of the freedom and equality of every human being.”22 We will address each of the three approaches in what follows.

Nozick is a follower of the property rights tradition. According to Nozick, the state ought to take on a minimalist role in governing. So long as basic rights to life, liberty, and property are protected, the government has no business interfering with the free dealings of other individuals. Notice that the term “individuals”, rather than “citizens”, is used. Carens argues that according to this minimalist interpretation of government as protector of rights (and nothing else), it would be a violation of an individual’s freedom if the state interferes with, for example, a farmer from South Africa who wants to hire workers from Zimbabwe. The state cannot interfere with free exchange between individuals, so long as that exchange does not violate the rights of another individual. Carens goes so far as to claim that even if a foreigner is not invited into a nation by a citizen, the state has no grounds to stop the foreigner. If the foreigners are not violent, trespassing on private property, and the like, the free entry and movement through a nation’s territory is none of the government’s business. Of course, individual property owners may exclude whomever they wish from their territory. According to Nozick, this is the owner’s right. However, this is a right exercised by an individual, not a collective or community. To claim that “this is our land, and they have no business here” is an illicit appeal to communal property rights. This (according to Carens) is not upheld under a Nozickian government.


24 Ibid.
Carens moves on to Rawls, and argues that the principles Rawls develops for the governance of a just society can be applied to just interactions across various societies. Rawls’ use of the veil of ignorance is prominently featured in this discussion. Put extremely briefly, the veil of ignorance is a thought experiment Rawls utilizes to determine the governing principles of a just society. The selection of these principles occurs behind a veil of ignorance, where no chooser knows their class, race, sex, natural talents, goals, values, etc. Presumably, this would lead the choosers to two principles. One ensures equal liberty for all. The other allows social and economic inequalities only insofar as they benefit those who are worse off, and ensures that offices and positions are open to all under conditions of equal opportunity. Carens makes use of another distinction of Rawls’, between ideal and non-ideal theory. Ideal theory assumes that once the veil is lifted, that there will be no historical obstacles to just institutions and that the principles chosen behind the veil of ignorance will be accepted. Non-ideal theory takes into account these historical problems and the unjust actions of other individuals. Carens claims that in both ideal and non-ideal theory, restrictions on immigration are challenged.

Regarding ideal theory, Carens appeals to the veil of ignorance in an effort to address restrictions. Since the choosers mentioned above may belong to the group most adversely affected by immigration restriction (e.g. third world economic migrants), they would seek to enact an immigration policy without restrictions. After all, if the veil is

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lifted and the chooser belongs to an affluent nation, they have little to lose. If the chooser belongs to a class of desperate economic migrants, they have everything to lose. Those behind the veil would err on the side of caution, according to Carens. The only reason migration could be restricted, given this outlook, would be if migration would result in the destabilization and destruction of the public order. Carens is skeptical of this concern, and warns against invoking it without proper proof. Moving on to non-ideal theory, Carens says the following. While there are numerous concerns (need for state sovereignty, danger to social structure from non-liberal democratic migrants, etc.), Carens still argues that restrictions would be seriously challenged. First, one cannot justify membership restrictions that require a person to be born in a certain territory or born to citizens, given that these are contingencies that are “arbitrary from a moral point of view.”

Second, any economic concerns regarding the poor in the receiving nation becoming worse off would be trumped by the liberty principle. That is, the liberty of the immigrants to move across borders trumps the economic concerns. Third, the effect on a given culture or community (similar to Walzer’s concern regarding cohesion) is not a morally relevant concern. According to Rawls, no one behind the veil would accept this standard, given that they would potentially be sacrificing important goods for some communal ideal that may prove to have no relation to their own concerns. The grounds for restricting immigration in non-ideal theory are, as such, severely limited.


Finally, Carens addresses a utilitarian perspective which further challenges restrictions. Given that utilitarians are concerned with the promotion of the most pleasure and the reduction of the most pain, Carens asserts that any serious utilitarian calculus would be hard pressed to justify restrictions on immigration. This is due to the fact that the calculation would have to consider all those affected by the restriction, not just citizens. The amount of pain economic migrants flee is substantial, likely far more substantial than any inconvenience faced by members of an affluent nation upon the arrival of the migrants. Likewise, the increase in pleasure for the migrants would most probably dwarf any pleasure derived from excluding them. Since both aliens and citizens must have their interests considered equally, Carens asserts that true utilitarians would encourage less, rather than more, immigration restrictions. This claim coupled with the two mentioned above provide Carens with ample intellectual ammunition (in his view) in the debate for open borders and respect for equal treatment of the individual.

It is worth noting that while Carens utilizes Rawls’ position in *A Theory of Justice* to bolster the liberal position regarding immigration, Rawls’ position in *The Law of Peoples* seems to fall more in line with Walzer. Rawls does not have a great deal to say about immigration in this book. This is not surprising, given that the purpose of Rawls’ argument is to articulate the conditions for a realistic utopia. In such a world, Rawls argues that the primary causes for immigration (persecution, starvation, incompetent government, overpopulation, etc.) will no longer pose enough of a problem to force
individuals to leave their homes and attempt to enter another nation. Rawls believes that in any case, ineffective and irresponsible management of resources on the part of one nation does not give citizens in that nation a right to immigrate to a more prosperous state. It is here that Rawls shows a likeness to Walzer, claiming that all nations have some qualified right to limit immigration. One cause is the desire of a nation to protect its political culture and constitutional principles from alteration by foreign influences. Rawls explicitly draws upon Walzer’s previously mentioned “thousand petty fortresses” claim as an example of the need for border control. Beyond these limited comments, Rawls has little to say.

The communitarian and liberal debate is unresolved. Both sides present arguments valuing those things which many of us hold dear. On the one hand, self-determined communal character and cohesion seem to be valuable. On the other, respect for an individual’s ability to better their life seems laudable. Are we simply at an impasse, at some sort of immigrant antinomy? I, and others, think not. There is a way to find a middle ground between these two positions which does justice to both the liberal respect for the individual and the communitarian respect for the community. This position is best articulated by the discourse ethical approaches of Seyla Benhabib and Jürgen Habermas. While Benhabib has more to say about how discourse ethics bears on the immigrant question, Habermas is more explicit about how a discourse ethical


31 Ibid.
approach mediates between the communitarian and liberal arguments. This proposal will touch on both authors as they relate to our chosen topic of undocumented immigrants.

**Discourse Ethics**

Benhabib challenges strict, unquestioned democratic closure and the absolute control over entrance exercised by the state. She advocates for understanding the democratic state and its people as parts of an ongoing process of transformation and experimentation.\(^{32}\) It will be helpful to summarize Benhabib’s position regarding the transition away from the state centric model. In criticizing Rawls, she encapsulates this position quite succinctly:

> His own understanding of the person should lead him to view societies as much more interactive, overlapping, and fluid entities, whose boundaries are permeable and porous, whose moral visions travel across borders, are assimilated into other contexts, are then re-exported back into the home country, and so on.\(^{33}\)

The formation of a democratic people’s identity does not come down from on high in a single declarative act, or anything that would resemble such an act. The process, for Benhabib is “fluid, contentious, and dynamic”.\(^ {34}\) Benhabib’s hope is that this break from a state centric model will lead to a rise in sub-national and trans-national modes of citizenship.\(^ {35}\)

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\(^{32}\) Seyla Benhabib. *The Rights of Others*. Pg. 64.


\(^{34}\) Seyla Benhabib. *The Rights of Others*. Pg. 211.

Regarding membership, Benhabib claims that a “new politics of membership” will have to account for those who are territorial residents without official citizenship.\textsuperscript{36} What voice should they be given? Should it be a full voice? After all they live under the same government as citizens. Should it be less than full, or nonexistent? Irregular migrants who find themselves in these situations demonstrate the complex nature of community membership. Part of Benhabib’s project is to argue for a universal human right to membership, which will receive detailed attention below.\textsuperscript{37} Suffice to say, denying membership in perpetuity is an affront to human rights according to Benhabib. Criteria for acceptance can be placed, and processes developed, but no person should be continuously denied the opportunity to become an official member of the community. As she states, “theocratic, authoritarian, fascist, and nationalist regimes do this, but liberal democracies ought not to”.\textsuperscript{38} The procedures and requirements can differ (to a degree), but what is unjust is the complete absence of any procedure or impossible/discriminatory requirements.\textsuperscript{39} Certain models may be preferable to others, but a path to membership must be in place.\textsuperscript{40}

\textsuperscript{36} Seyla Benhabib. \textit{The Rights of Others}. Pg. 27.

\textsuperscript{37} Seyla Benhabib. \textit{The Rights of Others}. Pg. 50.

\textsuperscript{38} Seyla Benhabib. \textit{The Rights of Others}. Pg. 135.

\textsuperscript{39} Seyla Benhabib. \textit{The Rights of Others}. Pg. 141.

\textsuperscript{40} Seyla Benhabib. \textit{The Rights of Others}. Pg. 157.
Benhabib’s primary tools for advancing her project are the Habermasian concepts of discourse ethics, and its derivative deliberative democracy. Benhabib invokes the basic premise of discourse ethics, which asserts that “only those norms and normative institutional arrangements are valid which can be agreed to by all concerned under special argumentation situations named discourses”.41 Anyone with the capacity to do so should participate in the conversation, demand and offer justifications, and offer new topics. Of course, Benhabib is forced to recognize a problem. Who ought to be included and who ought to be excluded from discourse in a particular situation? Should we limit discourses regarding immigration policy, for example, to those who are members of the country in which the debate takes place? Benhabib does not immediately provide an answer from a legal standpoint, but from a moral standpoint she claims such limitations are disallowed. Moral conversation must be viewed as something that could extend to encompass all of humanity.42 This conversation would include, for Benhabib, practices of inclusion and exclusion.43 The distinction between morality and legality, and the moral and the ethical, is crucial here. If we conflate these terms, then on the one hand we are unable to criticize a nation for ignoring obligations to refugees (legal), and on the other

43 Seyla Benhabib. The Rights of Others. Pg. 15.
we cannot criticize the exclusionary membership practices of “specific cultural, religious, and ethnic communities”.\textsuperscript{44}

Benhabib attempts to ground the rights of discourse through a discourse theoretic model.\textsuperscript{45} Rights become something akin to the following statement; “I can justify to you with good grounds that you and I should respect each others’ reciprocal claims to act in certain ways and not to act in others, and to enjoy certain resources and services”.\textsuperscript{46} The will of each individual is bound equally to the other through these reciprocal positive and negative rights claims.\textsuperscript{47} Note the difference between this system and a Kantian justification. Rather than utilizing the categorical imperative to test for contradiction, the discourse theoretic model only accepts those norms as valid which would be accepted by all of those affected by those norms.\textsuperscript{48} It is dialogical, not monological, in that norms are the products of real discourse. Note also that this process requires certain norms, human rights or basic rights norms, to be present before the discursive process can begin. After all, norms of mutual respect for autonomy and the like are necessary for a discursive model such as Benhabib’s to work. However, according to Benhabib we need not worry about the seeming circularity of establishing pre-discursive rights in order to discursively

\textsuperscript{44} Seyla Benhabib. \textit{The Rights of Others}. Pg. 16.
\textsuperscript{45} Seyla Benhabib. \textit{The Rights of Others}. Pg. 93.
\textsuperscript{46} Seyla Benhabib. \textit{The Rights of Others}. Pg. 130.
\textsuperscript{47} Seyla Benhabib. \textit{The Rights of Others}. Pg. 131.
\textsuperscript{48} Seyla Benhabib. \textit{The Rights of Others}. Pg. 132.
establish rights, so long as all of the pre-discursive rights are themselves discursively justifiable after the fact.\textsuperscript{49}

How does all of this relate to our topic? How does it relate to the immigration issue? According to Benhabib, we can use this model to justify a reciprocal right to immigrate and find membership in another community. Is this right limitless? No it is not. So long as one’s communicative freedom is not denied, and one’s integrity is respected, membership and entrance can be denied. However, exclusion based on race, gender, language community, and the like are illegitimate.\textsuperscript{50} The process of exclusion would have to take the form of dialogue in any case, where a member of a community would have to justify on good grounds why the other is to be excluded. These grounds must be mutually acceptable, so that if the roles would be reversed, agreement would still be maintained. In this way, Benhabib hopes to anchor claims for membership in human rights tied to discursive freedom and respect for human dignity.

I have briefly articulated the claims of discourse ethics regarding giving each individual who is affected by a norm a say in the creation of that norm. But should these stakes be considered one to one, completely equal? Benhabib follows Ian Shapiro in claiming that this is not the case.\textsuperscript{51} In short, those whose interests are more greatly at stake have a stronger claim to participate in debate than those whose interests are less at

\textsuperscript{49} Seyla Benhabib. \textit{The Rights of Others}. Pg. 133.

\textsuperscript{50} Seyla Benhabib. \textit{The Rights of Others}. Pg. 138.

\textsuperscript{51} Seyla Benhabib. \textit{The Rights of Others}. Pg. 112.
stake. An admittedly extreme example will help to illustrate this claim. If denying me membership into a community would result in me being killed upon my return home, whereas it would result in a member of that community having to wait longer in traffic, then clearly my stake outweighs the stake of the member of the community. In this case, it would seem that there is a greater cause to include me in discourse. Benhabib does not think these stake claims should be limited to those who are already members of a community. Rather, they should act as a means for the “excluded and the downtrodden” to rise up and assert their political agency. What we can take away from the previous claims is that new paths for political agency are opening up, especially among those who lack official membership while residing within a given territory.

Irregular migrants, as I mentioned, raise a number of compelling and pressing questions regarding our society. Owen Fiss, for example, argues that restrictive immigration policies (in particular punitive policy) forces us to ask whether we can square these restrictions with the Constitution, given the documents focus on respect for persons, not simply citizens. When one adds to this the fact that the cause of most migration is either an attempt to escape discrimination, violence, or intolerable economic circumstances, Fiss’ call for introspective reflection is strengthened. These populations

52 Seyla Benhabib. The Rights of Others. Pg. 123.
53 Seyla Benhabib. The Rights of Others. Pg. 117.
54 Seyla Benhabib. The Rights of Others. Pg. 125.
55 Seyla Benhabib. The Rights of Others. Pg. 137.
are exceptionally vulnerable, with irregular migrants existing in a “murky domain between legality and illegality”.\textsuperscript{56} They lack the basic protections communal membership provides, and fear of capture drives them away from forces which protect us. Benhabib cites the number of undocumented migrants in the United States in the millions, many of whom work hard to contribute to the communities in which they live.\textsuperscript{57} However, given that citizenship is a precondition for political voice, these individuals are forced to sit quietly as policies which profoundly affect them are discussed without their input. Since social membership does not entail political membership in the United States, undocumented migrants are left in limbo. They live in the U.S., contribute to society in whatever way they can, and are denied the voice they seem to deserve.

Current immigration policies and the manner in which they are enforced regarding undocumented migrants do not follow the principles Benhabib sets down. They do not follow the principles of discourse ethics, as she describes them. However, our discussion of Benhabib regarding a discourse ethical approach to the problem of undocumented immigration, as interesting and pertinent as it may be, has not clearly highlighted the way in which a discourse ethical approach finds middle ground between the liberals and the communitarians. That is, while the preceding section has helped to demonstrate what a discourse ethical approach would resemble, it has not clearly placed itself between the other two sides in our debate. Habermas’ discussion of the immigrant

\textsuperscript{56} Seyla Benhabib. \textit{The Rights of Others}. Pg. 154.

\textsuperscript{57} Seyla Benhabib. \textit{The Rights of Others}. Pg. 214.
issue will help to situate a discourse ethical approach in its proper place between the likes of Carens and Walzer.

Habermas frames the issue of immigration in contemporary society in the following way. The system of rights which serve as the foundation of a constitutional state, which are universal by nature, are complemented by the ethical-political self understanding of a particular nation.58 This ethical-political element reflects the will of a particular legal community, and cannot conflict with basic rights so long as the legislative body is oriented towards the actualization of these rights. Habermas raises the following question. Under what conditions can a nation deny citizenship to those who “advance a claim of naturalization”?59 Under what conditions can a particular self determined legal community deny citizenship to immigrants in an effort to protect the existence of this legal community? For Habermas, it is not legitimate to deny citizenship to those who simply cannot or will not conform to the cultural practices of a particular community. In short, an immigrant does not have to abandon their own culture in order to be naturalized. The only legitimate demand a particular legal community may make is acceptance of universal constitutional principles as they are interpreted at that particular time by that particular community. The identity of the political community is thereby preserved.

This claim does not immediately address a question related to earlier stages in the immigration process, namely who has the right to immigrate? Habermas mentions those

58 Jürgen Habermas. Inclusion of the Other. Pg. 227.

59 Jürgen Habermas. Inclusion of the Other. Pg. 228.
who hold officially recognized refugee status according to the Geneva Convention on the Status of Refugees, women who are fleeing mass rapes, and those escaping civil war regions as unproblematic examples of those who can demand asylum. However, most individuals seeking to immigrate fall into the categories of those who move “in order to work as well as refugees from poverty who want to escape a miserable existence in their homeland.” What of these individuals who do not fall into the three categories Habermas recognizes as unproblematic, but who may still flee desperate situations?

According to Habermas, individuals fleeing desperate economic circumstances do not possess actionable legal rights to immigrate. However, he does argue that there is a moral basis for enacting liberal immigration policies in First World countries. Growing interdependencies across the globe and the rise of an international capitalist market provide initial justification for aiding those who flee their homes due to dire economic circumstances. This moral obligation is increased by the First World’s history of colonization and “uprooting of regional cultures by the incursion of capitalist modernization.” While creating immigration policy, Habermas charges those who live in affluent countries to take on the perspective of those seeking entrance in order to live

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60 Jürgen Habermas. *Inclusion of the Other*. Pg. 230.

61 Ibid.

62 Jürgen Habermas. *Inclusion of the Other*. Pg. 231.

63 Ibid.
“a life worthy of human beings.” A liberal immigration policy would seek to establish criteria and quotas that are acceptable to all parties involved. Both citizen and immigrant would need to be represented. Again, this is not an actionable legal right to immigrate. Rather, it is a moral justification for a liberal immigration policy in affluent nations.

This brief overview of Habermas’ take on immigration policy shows how a discourse ethical stance on immigration positions itself between the communitarians and liberals, though the later will require some additional discussion. In regards to the former, it is clear that Habermas does believe that immigrants need to acclimate themselves to the community in which they are residing. They need to accept a particular communally determined conception of “the good.” It is not the case that an immigrant can expect to earn citizenship while completely rejecting communally determined values. That being said, Habermas refuses to go all the way with Walzer and Sidgwick. The demands a nation can make on an immigrant are restricted to the particular way in which that nation interprets the universal principles which mold the constitution. These are particular ethical interpretations which are attached to universal principles, and it is these communally determined interpretations that the immigrant must accept in order to be naturalized. A nation cannot expect an immigrant to accept culture “across the full range” according to Habermas. The foreigner need not completely abandon their own culture of upbringing in favor of the new nation’s particular cultural values. In short, Habermas

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64 Jürgen Habermas. *Inclusion of the Other*. Pg. 230.
accepts the ability of a nation to preserve its particular political-ethical values. He simply does not believe an immigrant must completely fall in line with all values in order to gain citizenship. As he states, “the political acculturation demanded of them does not extend to the whole of their socialization.” Discrimination based upon arbitrary grounds, such as ethnicity, is also forbidden. There is no place for a White Australia according to a discourse ethical approach.

Habermas’ largest break from the communitarians concerns his cosmopolitan leanings regarding immigration policy. You will recall our previous discussion of Carens, and his use of Rawls’ veil of ignorance which requires us to select immigration policy from the position of those who would be most disadvantaged by restrictions. This in turn requires acceptance of a basic right to immigrate. While Habermas is certainly no Rawlsian, he does (in a way) side with Carens on this point. Habermas demands that immigration issues be addressed impartially, not simply from the perspective of current citizens, but also from the perspective of “immigrants who are seeking their well being” in that nation. To reiterate, Habermas is not Rawls. He is not advocating for a thought experiment similar to the veil of ignorance, given its monological structure. In this case discourse ethics demands actual discourse between parties affected by immigration policy. This includes representing the interests of those who are seeking their well being in another nation. That is to say, the community of the potential host nation should not

65 Jürgen Habermas. *Between Facts and Norms*. Pg. 514.

66 Jürgen Habermas. *Between Facts and Norms*. Pg. 511.
monopolize the discussion. Immigrants and potential immigrants who have a stake also have a claim to be involved in dialogue.\textsuperscript{67}

To summarize, Habermas’ approach mitigates the tension between a communitarian and a liberal conception of immigration policy. It is communitarian, in that immigrants must adhere to the particular political-ethical interpretation of the constitution in order to gain citizenship. However, immigrants need not completely abandon their previous culture, and they cannot be excluded on arbitrary grounds such as was done in the White Australia policy. Habermas’ approach is liberal/cosmopolitan, in that it requires those who formulate immigration policy do so impartially. Since discourse ethics demands actual discourse between affected parties, this would require open dialogue between immigrants and citizens of the host nation. Communal conceptions of universal morality are respected, as is the discursive involvement of the individual seeking to improve his or her well being.

\textit{Duties Towards the Undocumented}

It is worth reinforcing a claim that was briefly mentioned earlier, namely the fact that Habermas believes a liberal immigration policy is something we ought to enact out of a moral obligation, rather than a legal right. This distinction amounts to the difference between a duty that is not enforceable and a duty that is enforceable. In other words, while it is certainly the case that we should have a liberal immigration policy, the claim

\textsuperscript{67} David Ingram points out that this involvement would mean different things depending on whether the immigrants were already in the host nation or not. If they were, then they would likely require some form of direct representation. If not, the representation would likely to be (at a minimum) virtual. See David Ingram. \textit{Exceptional Justice? A Contribution to the Immigrant Question}. Pg. 17.
has no teeth. The dilemma posed here is the following. As Habermas argues, the need for law rises from the problem of enforcing morality (an issue which I discuss in chapter 2). Not only is morality in need of solidification to prevent unscrupulous alteration, but morality must be complemented by law in order to allow for enforcement. Morality needs law, just as law needs morality to supply prescriptive content. Without legal rights to immigration all that a desperate immigrant can cling to is a spirit of charity, a moral obligation that should direct liberal immigration law, but which lacks the teeth of a legal right to demand enforcement. Perhaps those who cling to xenophobic policies are acting in an indecent way, even an immoral way. But they are not violating basic rights, which by Habermas’ understanding are legal in nature. A strictly Habermasian approach to the problem of immigration doesn’t necessarily move us towards a conclusive answer beyond this call to charitable treatment, a call which can be ignored without violating basic rights. I should explicitly state that I am not arguing for a universal right to immigrate, which in turn would imply a universal amnesty. In fact, I will claim that human rights do not distinguish between prospective and undocumented migrants, and as such are not particularly useful in talking about the later as a unique group. In Chapter 4, I will explain why I hold this stance in reference to the work of Habermas regarding his 5 foundational rights and James Griffin’s discussion of welfare rights.

I want to propose two uncontroversial premises and a single observation. The first of these premises is that irregular migrants who enter a nation clandestinely violate established immigration processes. Whether one believes that these processes are just or not is beside the point for now. Nations such as the United States have established
guidelines for entrance applications, a process of naturalization, and quotas regarding admittance. Irregular migrants bypass controls such as these and, as such, violate them.

The second uncontroversial premise is that a nation founded on liberal democratic principles should not unjustly expel its members, nor should it unjustly strip members of their membership (though one implies the other). This act is often associated with authoritarian and fascist regimes, as Benhabib points out. However, it should not be associated with democratic governments.

My observation is an obvious one in some respects, but it is an observation worth mentioning. It is that deportation is a negative consequence of breaking the law, and it is often a very severe negative consequence. For those who have spent years building a home and sinking roots into a community, to be forcibly removed creates great hardship. This hardship is increased if the place to which they are being deported lacks the basic political freedoms or economic opportunities of the nation doing the deporting. In short, deportation is a serious negative consequence, not simply an act of “sending those back to where they came from.” As was stated above, the process undocumented migrants take to enter a nation involves circumventing established immigration procedures. They are breaking the law. But is this a serious offense, at least an offense serious enough to warrant deportation? After all, the entry process for an undocumented migrant is often a victimless crime.68 What’s more, many become contributing members in the community once they arrive. Perhaps in certain cases deportation is justified, but it seems reasonable

68 This is a claim which I will reinforce in chapter 5, when I take issue with economic objections against undocumented immigration.
to claim that in certain instances the consequence would not fit the crime. In the case of Jennifer Abreu, is her “crime” that was committed when she was 13 appropriate justification to take away the future she has planned for herself, and to rip her away from her friends and family? It seems, at first glance, that it is not. But more justification is required aside from this discussion, if a compelling case is to be constructed.

It is undeniable that some undocumented migrants, such as Abreu, become members of the communities in which they live. They participate in community functions, make friends and a home, and often contribute to the local economy. Following Carens, one could say that they become social members of a community, if not officially recognized political members. This is an important distinguishing characteristic, one which is also mentioned by Carens. Certain groups of undocumented migrants have sunk roots in the nation they clandestinely entered. They have made homes, contributed to the economy, and to the community at large. Certain groups have not yet done so, and as such cannot claim to be social members of the community in which they find themselves. Not all undocumented migrants are social members of a community, but many are, and this category is worth recognizing.

The significant difference between deporting undocumented migrants and denying entry to potential migrants is what this work will refer to as uprooting, and it is this significant difference which dominates chapter 5. A potential migrant is attempting to gain membership in a nation where they have not yet made a home. Undocumented migrants, in many cases, have made such a home and have become social members of their community. They have made attachments to those around them, and contributed to
the community in which they live. Deporting these people is the act of forcibly removing them from this home, due to the lack of official permission to stay. The deported individual may be forced to leave behind those things they have become attached to over the years, be it family, organizational involvement, the land itself, and so on. That these attachments have value is a claim few would reject. If there is a claim unique to undocumented migrants, it must be found in this rooted residency.

All too often public debate portrays undocumented migrants solely as individuals who are seeking to better their own lives. They are characterized as a group that takes but does not contribute, and it is this perspective that is likely responsible for a great deal of the xenophobic leanings in contemporary debate. However, the fact of the matter is that undocumented migrants often contribute substantial value to their communities in a number of different ways. These contributions can take many forms, ranging from economic contributions to public service functions. If we return to Jennifer Abreu, these sorts of contributions become more concrete. She was a Spanish language tutor, a member of a community service organization, a participant in cultural festivals, and an aspiring journalist with an eye for social justice. Most would be hard pressed to find an 18-year-old who contributes more to their community. While it certainly is the case that rooted undocumented migrants have a vested interest in remaining in their community, this relationship is not one sided. This attachment often contributes value to the community, in addition to being of value to the undocumented.

69 I discuss this claim in greater detail in chapter 5.
What is needed is a pluralistic approach to the application of amnesty for undocumented migrants. I am not alone in taking such an approach. Both Carens and Benhabib, who explicitly call for a more liberal immigration policy, accept a pluralistic approach. For Carens, this is evidenced by the fact that the state loses the right to deport undocumented migrants over time. The right exists, if even for a short while, before certain groups of undocumented migrants should be granted amnesty. It is not amnesty for all, it is amnesty for some. Benhabib’s pluralism is more evident in her discussion of first entry, where she claims that certain immigrants can be excluded, so long as this exclusion does not affect the migrant’s communicative freedom. To use an example regarding undocumented migrants, one could presume that undocumented migrants who met certain non-discriminatory criteria (involving economic contribution, or perhaps general community contribution), could make a claim for amnesty, whereas those who did not meet this criteria could not make such a claim. This is analogous to Benhabib’s discussion regarding entrance. While I may disagree with certain criteria used by these other authors, I accept a pluralistic approach in general. One paints with too broad of strokes to call for an unqualified human right to amnesty, just as one is too general in claiming the absolute right of a nation to expel undocumented migrants. I follow the likes of David Ingram in utilizing the second step of Habermas’ justification/application dynamic. The application of certain norms depends on the particulars of the case being discussed. There is no approach which correctly covers all dealings with undocumented migrants. One must pay attention to the particulars of each case.
So far, I have asserted that the relevant difference between undocumented and potential migrants is the rooted residency of the former, and that this rootedness both contributes value to the community and is of value to the undocumented. Furthermore, I endorse a pluralistic application of amnesty based upon this social membership. The problem, as Carens puts it, is that any limit we set regarding this pluralistic application will seem somewhat arbitrary in nature. Does someone need to live in a community for 5 years, or 10 years, before they are granted amnesty? Why not 4 or 9 years, or 6 or 11 years? In the end a decision must be made regarding time spent, and attachments made. Carens fails, in my view, to adequately address the setting of this limit. In an effort to address this problem, I will appeal once again to Habermas and the basic tenants of discourse ethics. The limits that are set should not be selected monologically. It should not be up to me, the philosopher, or a single organization (removed from public discourse) to set these limits. The limits that are set ought to be the product of actual discourse. In this way, the arbitrary element of the limits selected will face public scrutiny and any limit selected should (in theory) be mutually acceptable to all involved parties.

This brings me to my second and related point. This discourse must include actual members of the undocumented migrant community, not just virtual representatives of that community. There are at least two major benefits to this inclusion. The first is that it stands in line with the discourse ethical principle of including all parties affected by debate surrounding the application of a norm. No party is left out, which adds an element of authenticity to the outcome of debate. The second benefit is that it allows undocumented migrants the opportunity to represent their own interests. An actual
undocumented migrant would be more capable of representing undocumented interests, given their close personal connections to such interests. An undocumented migrant knows the difficulties facing their community first hand, and knows the importance of having and maintaining a home in spite of the lack of official recognition from the state. These sorts of connections and insights are lacking in virtual representation.

There are certainly many obstacles which stand in the way of realization of open discourse. Removing these obstacles is a priority regarding the practical application of an open discourse theoretic approach. While I will not attempt to provide an exhaustive list here, I will point to the most looming barrier to open dialogue. In most cases, undocumented migrants are forced into hiding and out of the public sphere. This is due to the fact that engaging in debate means exposure, and exposure carries the risk of deportation. Abreu was exposed by a minor traffic offense, and suffered dearly for it. Another example is the case of Maria Bolanos, whose deportation proceedings began after she called the police regarding her husband’s domestic abuse. Even as a victim, Bolanos was unable to safely engage with enforcement authorities. In order for debate to begin, actions which force undocumented migrants into hiding must stop. This would likely call for a temporary freeze on most deportation proceedings, and it would certainly

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70 Discussion of this obstacle, and application discourses in the courtroom, dominate the end of the 6th chapter.

call for enforcement officials to refrain from apprehending victims of crime and those attending political demonstrations.\textsuperscript{72} If undocumented migrants are to be included in discourse regarding a pluralistic amnesty, then we must stop driving them underground.

My primary goal in this introduction was to situate my project in the context of a contemporary philosophical debate regarding immigration. That is to say I have sought to lay groundwork for my larger project, focused on the treatment of undocumented migrants. My goal in pursuing this project is to address a relevant contemporary issue through a useful theoretic lens, in the hopes of providing a helpful and actionable contribution. Refusal to face this issue head on will only result in continued injustice. In the United States reform continues to stagnate, as is evidenced by the perpetual failure of legislation such as the DREAM Act to gain sufficient traction. Norway recently deported Maria Salamova, a Russian undocumented migrant who won a “Norwegian of the Year” award for her book outlining life as a “paperless immigrant.”\textsuperscript{73} Affluent nations across the globe continue to expel people from their homes, and often enough this sort of expulsion is accepted without question by the nation’s citizens. This is likely due to the fact that many think deportation is simply sending someone back home. But Jennifer Abreu’s home is not in Brazil. Her home is in Kentucky. Undocumented migrants are often our neighbors, members of our community. In the interest of social justice it is time

\textsuperscript{72} It is worth noting that the Obama administration in the United States has frozen deportation proceedings for non-criminal undocumented immigrants.

to expand the concept of community to recognize all of its members, whether they are citizens or not.
CHAPTER TWO
THEORY

Discourse ethical approaches to the issue of immigration in general, and undocumented immigration in particular, provide a unique theoretical set of tools to properly address the complicated issues of inclusion and political membership which we face when we encounter those making a claim to join our community. It is a third way, one which incorporates respect for communally determined values and individual rights. This approach is not without its own problems, and I do not wish to gloss over these issues in an effort to make my work easier. I aim to address these issues in due time. Before I can perform such a task, however, I must explain the content of a discourse theoretical approach as clearly as I am able. This is the primary purpose of the following chapter. In it, I will provide a general outline of discourse ethics as it is articulated by one of its earliest proponents, Jürgen Habermas. Part of this account will include a discussion of Habermas’ proceduralist paradigm of governance, as well as a brief discussion of basic rights. This section will end with an exegesis of Habermas’ justification/application dynamic, and the use of this dynamic by David Ingram as a contribution to the undocumented immigrant problem.

Following this exegetical exercise, I will introduce three case studies in an effort to highlight how a discourse ethicist might respond to issues relating to undocumented

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immigrants. These case studies will highlight the procedural, rather than substantive character of a discourse ethical approach. It is worth noting that these case studies will reappear in later chapters, mostly regarding how a discourse ethical approach brings with it numerous complications when addressing issues pertaining to the undocumented. I will not address these complications now. One must have a grasp on what a theory implies before one can discover potential practical problems with that theory. This statement encapsulates the purpose of this chapter. It is largely an exegetical exercise, and an effort to explore potential discourse ethical responses to concrete cases. Evaluation of the theory and the responses will follow.

_Habermas and Discourse Ethics_

The contributions to the complex issue of undocumented migration offered by Habermas and his theory of discourse ethics are quite useful. They will, of course, bring with them their own complications. We will address these soon enough. For now, it will be helpful to provide an extremely skeletal outline of what a discourse ethic brings to the table, so to speak. The cornerstone of discourse ethics is, unsurprisingly, dialogue. Habermas anchors his ethical theory in the claim that any given norm is valid if and only if all those affected by said norm could assent to being governed by that norm. One cannot simply assert that a norm is prima facie valid. Those who it affects may be completely unwilling to accept the norm. By itself, this claim regarding general acceptance is not entirely unique. Kant argued for a similar standpoint regarding testing maxims according to the categorical imperative to see if they could be willed as universal law. Rawls used the veil of ignorance to create a social contract based upon universal
agreement. The chief difference between Habermas and these thinkers is that Habermas believes the acceptance of a norm is something that should be decided through *real* dialogue. As he states, “only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse.”¹ Norms are universally valid if and only if agreement is reached in real dialogue. If we left discussion of discourse ethics at this level it would fail to capture the relevant aspects of Habermas’ thought.

Habermas’ account of discourse ethics is an example of postmetaphysical morality.² It is a moral theory that comes about following the weakening of religious structures as the primary arbiter of normativity. Postmetaphysical morality also has the characteristic of avoiding an appeal to pure reason in an effort to support itself. The moral point of view, where we care for the interests of others as equal to our own, is something that we can arrive upon given the necessary conditions for meaningful discourse. It is important to keep in mind that Habermas’ postmetaphysical morality is but one model amongst others (his being deontological). Why should we accept a deontological model, such as Habermas’, instead of a utilitarian or social contractarian model of postmetaphysical morality? The former, according to Habermas, fails to respect the inherent dignity in each individual, sacrificing this respect in order to maximize goods. The later runs into two problems. First, it is contrary to our common conception of moral

¹ Jürgen Habermas. *Moral Consciousness and Communicative Action*. Pg. 93.

obligation, given that individuals are motivated to act morally in order to avoid punishment, rather than because it is the right thing to do.\(^3\) Second, strong individualists hinder the model by refusing to enter into a mutually beneficial agreement, given that it requires certain concessions by the individual.

Habermas must not only advocate for the superiority of deontological postmetaphysical morality, but he must demonstrate why his version is superior to other deontological models (such as Kant’s and Rawls’). Habermas’ theory is Kantian, in the sense that we are free and rational agents who are duty bound and rationally accountable to others. The problem with Kant’s theory, according to Habermas, is its monological and metaphysical nature. For Kant, actions are moral insofar as they satisfy conditions set forth according to the preexisting rational consensus of the kingdom of ends. It is monological, causing us to uncritically project our maxims on society as a whole, potentially resulting in the justification of evil maxims.\(^4\) For Habermas, our wills are not in a state of preexisting consensus due to a metaphysical “kingdom of ends.” We must realize consensus in this world, and the means to do that is discursive, rather than monological.\(^5\) Through discourse we are constantly challenged to support our positions with new arguments, challenge others, and hone our beliefs. The process is ongoing, but necessary.

\(^3\) Jürgen Habermas. *Justification and Application*. Pg. 41.

\(^4\) Jürgen Habermas. *Justification and Application*. Pg. 52.

Rawls commits a somewhat similar monological error given his appeal to the veil of ignorance. This thought experiment eliminates the numerous differences between individuals that actually exist, in favor of creating a model where each individual is a homogenized rational decision maker. Once again, our standpoint is uncritically projected upon society as a whole due to a presupposed rational consensus. Rawls presents a monological theory which is not tested against the counter-arguments of others in real discourse. As David Ingram states, “none of the diversity which makes up the ‘social’ in the social contract remains” once Rawls has removed all distinguishing characteristics from choosers behind the veil. Habermas’ model is the only one which overcomes the issues associated with the monological approaches of Kant and Rawls. Discourse ethics proposes real interaction, where all those affected by a proposed norm are able to debate its acceptance. The norm acquires legitimation through actual consensus among all those affected by it, rather than from a presupposed monological consensus derived from the kingdom of ends or the veil of ignorance.

Habermas follows the Kantian tradition, and as such seeks an universalizability principle regarding the justification of norms. However, as you can see, this universalizability test differs substantially from Kant’s categorical imperative. What does Habermas put in its place? Habermas’ universalizability principle is derived from three premises. The first of these is a principle of discourse. This principle is one that we have


already seen, namely a principle that requires all affected parties to accept norms through practical discourse in order for those norms to be valid.\textsuperscript{8} From this principle we can infer that any norm which affects those who have not agreed to the use of the norm (through discourse) is invalid. This principle is coupled with an explanation of what a norm does, which is to help us regulate the mutual satisfaction of interests among participants.\textsuperscript{9} This is the content premise. Now the principle of discourse is complemented by a premise which helps to inform us what a norm should do; it assists in the mutual satisfaction of interests within a particular social group.\textsuperscript{10} The third premise, or rules of discourse, requires a somewhat longer explanation.

For Habermas moral argumentation takes the form of discourse. Claims regarding the acceptance of norms, whether or not a norm is “right” or “wrong”, are dependent on rational consensus derived from open and free argumentation. Norms derive their validity from this form of agreement between subjects involved in discourse, and this agreement is aimed at harmonizing the interests of those involved in discourse.\textsuperscript{11} This is the coupling of the principle of discourse and the content premise. But what can we say about the forum in which this agreement is supposed to take place? The answer to this question is defined by certain rules of discourse, the third and final element of Habermas’

\begin{itemize}
\item \textsuperscript{8} Jürgen Habermas. \textit{Moral Consciousness and Communicative Action.} Pg. 66.
\item \textsuperscript{9} Jürgen Habermas. \textit{Moral Consciousness and Communicative Action.} Pg. 67.
\item \textsuperscript{10} Jürgen Habermas. \textit{Moral Consciousness and Communicative Action.} Pg. 197.
\item \textsuperscript{11} Jürgen Habermas. \textit{Moral Consciousness and Communicative Action.} Pg. 181.
\end{itemize}
reconstruction of the universalizability test. Habermas’ account, as we have seen, is profoundly procedural. Keeping with this proceduralism, these are the rules of discourse as outlined by Habermas (following the work of Robert Alexy). The first rule of discourse concerns the logical product of discourse. This requires interlocutors to follow rules of logic while in the process of argumentation, such as rules governing consistency and the law of non-contradiction.12 The second rule concerns dialogical procedure, where the interlocutors engage in a competition in which both are motivated by rational arguments to discover the most mutually acceptable positions.13 The final rule of rhetorical process is divided into three sub-rules, which will help to illustrate Habermas’ commitment to inclusive discourse. The first is that every competent subject is allowed to take part in discourse.14 The second is that any individual in discourse may challenge any claim made, introduce any assertion, and express his or her attitudes, desires, and needs. The third is that no individual may be the victim of coercion which attempts to hinder them from exercising the first and second sub-rule of rhetorical process. Taken together, these guidelines attempt to create a space in which fair and free discourse can take place.

According to Habermas, the principle of universalizability follows from the three premises mentioned above.15 That is to say, any norm which is agreed to by all affected parties, which aims at achieving harmony of interests, and follows from the rules outlined

12 Jürgen Habermas. Moral Consciousness and Communicative Action. Pg. 87.
14 Jürgen Habermas. Moral Consciousness and Communicative Action. Pg. 89.
15 Jürgen Habermas. Moral Consciousness and Communicative Action. Pg. 92.
above, is universalizable. While this outline of Habermas’ deontological theory is skeletal in many respects, it is sufficient for our current purposes. A basic understanding of discourse ethics will allow us to examine the contemporary issues surrounding undocumented immigration, and determine whether or not this particular theory has anything to offer regarding the practical issues facing the undocumented. Certainly others think that discourse ethics supplies an answer. Benhabib is one of the more vocal supporters. This is understandable, given the appeal of deontological respect for freedom and autonomy, and the fact that a discourse ethic is anchored in these principles. We will revisit the issue soon enough through various case studies. For now this outline, however brief, is sufficient.

In summation, Habermas offers an account of postmetaphysical morality (does not appeal to God or pure reason) which demands unconstrained actual discourse as the means to create legitimate norms. This is a model for testing norms, rather than a system of pre-given norms. Of course, certain norms such as respect for individual integrity must be presupposed before communication can get off the ground, but these foundational norms must in turn be justified though discourse after the fact. With this model, Habermas gave a rich account of democratic government. While we will not focus on this account in its entirety, some discussion of his proceduralist paradigm and the foundational rights will help to put the discourse principle into a political context.

*Discourse Ethics and Politics*

The centerpiece of Habermas’ work regarding discourse ethics and law is the proceduralist paradigm. Before we discuss the proceduralist paradigm, it is necessary to
discuss both the definition of a paradigm in general, and the way in which two competing paradigms shaped contemporary government. Habermas introduces the concept of legal paradigms in order to overcome the normative indeterminacy of a discourse theory of law. This theory is indeterminate insofar as it provides “guidelines for a flexible set of principles and policies” which are only put into order during application discourses regarding particular cases.\textsuperscript{16} It is helpful to picture a courtroom environment when discussing this indeterminacy. A judge and jury are presented with a criminal case. The prosecution and defense both make claims to justified general norms. These norms conflict with one another, so the jury must decide which justified norm is most applicable in \textit{this} case.\textsuperscript{17} One norm is chosen over others, and the norms enter into a “specific order of relations” with one another.\textsuperscript{18} But this order of relations only exists in the application of the norm. Otherwise the principles are flexible, their ordering indeterminate. Habermas describes the problem in the following way:

\begin{quote}
If deciding a case in the light of a prioritized norm means that one exhaustively reviews an entire system of valid norms in the course of considering all the relevant circumstances of the case at hand and if this system is in constant movement because the priority relations can change with each new situation, then the orientation toward such a demanding ideal will, as a rule, overtax even professional adjudication.\textsuperscript{19}
\end{quote}

\textsuperscript{16} Jürgen Habermas. \textit{Between Facts and Norms}. Pg. 219.

\textsuperscript{17} This is a simplified version of Habermas’ justification/application dynamic, which I will discuss in greater detail below.

\textsuperscript{18} Jürgen Habermas. \textit{Between Facts and Norms}. Pg. 219.

\textsuperscript{19} Jürgen Habermas. \textit{Between Facts and Norms}. Pg. 220.
What this means is that in any given case, a judge or jury would have to sort through an entire system of historically shifting norms while considering all aspects of any given case. This is far too demanding. In order to overcome the problems associated with this indeterminacy, Habermas appeals to legal paradigms. I will discuss these paradigms below.

A paradigm is nothing more than a social ideal or model inscribed within a legal system through an interpretation of a basic system of rights. The paradigm serves as a behind-the-scenes ideal, which guides the way in which law is made and applied in any given society. Generally these paradigms sit in the background. They are not explicit. They are subtle elements which shape conceptions of rights. This subtle characteristic changes, according to Habermas, when the judicial branch of the government has to rule on “hard cases” without sufficient precedent. At these times, an appeal is made by the court to these background ideals of the “social model” in order to justify the ruling. These guiding models are not set in stone, so to speak. Over time, a society may shift from one paradigm to another in order to adapt to particular practical realities, or in an effort to address the shortcomings of any given paradigm. Habermas claims that the modern world is dominated by two competing paradigms of law: the liberal paradigm and the welfare paradigm. I will discuss each below.

The first of these paradigms is the liberal paradigm, and is best described as a private law society. The paradigm champions the formation of private law (mainly in the

forms of contractual freedom and property rights), which is kept separate from “the common good” and the state. In theory, each individual is free to pursue their own interests and is subject only to the spontaneous movements of free market mechanisms. These market participants find their own happiness, in other words. Negative rights regarding non-interference take center stage. Each individual is guaranteed equal protection from interference, and due to the supposed equilibrium of market processes, every individual should possess an equal opportunity to pursue their interests. Justice in this paradigm is reduced to an equal distribution of rights through formal law. However, such a system is not without its problems. Equal liberties are not factually guaranteed by the distribution of negative rights. It should not come as a surprise that this private law-focused system, with its dependence on the market, generates inequalities. The marketplace is not a great equalizer, and the state cannot take a hands-off approach if it is to guarantee equal liberties for all. The liberal paradigm had to change in order to account for factual inequality, and change it did.

Robert Alexy claimed that “legal freedom, that is, the permission to do as one pleases, is worthless without actual freedom, the real possibility of choosing between the permitted alternatives.” Inequality is not enshrined within the liberal model, but it exists due to the lack of actual freedom stemming from material inequality. The welfare paradigm rose to prominence as a way to solve this problem. In an effort to correct inequality, the welfare paradigm added new categories of basic rights which aimed at

ensuring a more just distribution of wealth and better protection from various social
dangers.\textsuperscript{22} The state begins to interfere with the lives of its citizens in order to provide a
minimal level of material wealth required for exercising the freedoms of the liberal
paradigm of law. Once again, however, this paradigm is problematic. The addition of
positive rights to material goods is purchased at the cost of the legal subject’s autonomy
and dignity. While the welfare state does supply goods such as housing and income
provisions to those in need, it does so while imposing patterns of behavior on its
citizens.\textsuperscript{23} The state becomes paternalistic.

Habermas does not suggest we simply slip back completely into a liberal
paradigm of law. Rather, he leverages his work regarding a discourse ethical approach to
law in order to create a new paradigm which addresses the factual inequality of liberalism
on the one hand, and the paternalism of the welfare state on the other. This is the
proceduralist paradigm. Rather than focusing on individual legal market protection or
distribution of social goods, the proceduralist paradigm focuses on the procedural
conditions of the democratic process. As Habermas states,

\begin{quote}
In the proceduralist paradigm of law, the vacant places of the economic man or
welfare-client are occupied by a public of citizens who participate in political
communication in order to articulate their wants and needs, to give voice to their
violated interests, and, above all, to clarify and settle the contested standards and
criteria according to which equals are treated equally and unequals unequally.\textsuperscript{24}
\end{quote}

\textsuperscript{22} Jürgen Habermas. “Paradigms of Law.” \textit{Habermas on Law and Democracy}. Pg. 15.

\textsuperscript{23} Jürgen Habermas. “Paradigms of Law.” \textit{Habermas on Law and Democracy}. Pg. 17.

\textsuperscript{24} Jürgen Habermas. “Paradigms of Law.” \textit{Habermas on Law and Democracy}. Pg. 18.
Private autonomy and public (political) autonomy reinforce one another through the creation of legitimate law, which is fed by free communication from the public sphere, which in turn is supported by civil society and the private sphere.\textsuperscript{25} The private sphere and political agency connect and support one another, and the paradigm shifts to emphasize informal will formation which connects and interacts with the institutionalized law generating process of the political system.\textsuperscript{26} Habermas claims that this procedural model requires a linkage between the actions of a governing body and the communicative power generated by the citizens. Of course this paradigm is supposed to guarantee the foci of the earlier paradigms, namely private freedom and social security, but this is not the thrust of proceduralism. The focus is the creation of a model which articulates the just procedures for a legal system. Filling in the blanks, as it were, is up to the citizens.

The procedural paradigm, the centerpiece of Habermas’ theory of law, is a product of an application of discourse ethics to the field of law. Law’s legitimacy comes from the government’s reliance on communicative power generated in the public sphere. Just as we saw regarding discourse ethics in general, in order for law to gain acceptance it must be the product of real public discourse. The paradigm is called procedural precisely because it is not supposed to prescribe concrete legal content. Certain basic rights guaranteeing freedom of speech and access to goods in order to exercise one’s

\textsuperscript{25} Private autonomy is justified functionally according to Habermas. The legal form of individual rights is given, without justification. It is simply the legal form of modernity.

\textsuperscript{26} One could claim that Habermas’ proceduralist paradigm is not a paradigm at all, given the fact that it is the result of procedure legitimated through public will formation. It lacks the concrete content of the previous paradigms, and as such the procedural paradigm may lack the power to solve the indeterminacy of a discourse theory of law.
communicative power are required, as is the basic Kantian premise respecting the freedom and equality of the individual. Beyond these ground rules, Habermas attempts to avoid filling in the product of real dialogue himself. This is not surprising. After all, Habermas’ primary problem with the deontological theories of both Kant and Rawls centered on the fact that the theories are monological. They uncritically project normative content without critical engagement in the real world. As such, Habermas’ paradigm only lays out the rules of the game, so to speak. It is up to political agents to fill in the content of law through actual discourse. To do otherwise would severely compromise Habermas’ project. In summation, this proceduralist paradigm is the product of a discourse ethical approach to law. It posits certain ground rules for the creation of legitimate law, without describing the content of this law. Such a description would change Habermasian theory into Rawlsian theory.

Moving beyond Habermas’ discussion of legal paradigms, Habermas posits five basic rights categories required for any modern democratic legal order. These are subjective rights to act freely, citizenship rights to political membership, rights to have my rights adjudicated according to due process, political rights to participate in legislating rights, and social rights to the background conditions required for effectively exercising the four previously mentioned rights. In order for a society to operate according to the requirements of a discourse theoretical approach, these legal rights must be in place. Again, this prerequisite is not negatively circular insofar as the democratic

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27 Jürgen Habermas. Between Facts and Norms. Pg. 122-123.
order ought to discursively justify these rights after the fact. So long as we are able to
double back to the foundational rights and affirm them through debate, Habermas’
communicative requirements are satisfied. However, none of this provides us with a
robust description of human rights. At this point we understand that these are legal,
enforceable rights and that these rights aim to create the power structures necessary to
protect individual autonomy and enable engagement in discourse. Habermas does provide
a fuller account of the nature of rights, particularly their moral nature, which I will
summarize below.

Habermas claims that the moral source of human rights is the concept of human
dignity. Before he provides a comprehensive defense for this claim, he is quick to claim
that human rights have only explicitly been tied to human dignity in recent history.
Habermas points to the holocaust as the primary example of human dignity charging the
concept of human rights.28 When we see the horrendous violations of human dignity
perpetrated by the Nazis, we begin to make claims about rights violations in response.
Habermas must face the following problem. This connection has only been explicit in
recent memory, but the concept of human rights appeared as a topic of debate in the 17th
century. How do we explain this gap, if human dignity truly provides rights with moral
content? Habermas claims that the gap is an illusion, and that human dignity has been the
implicit source of human rights since the very beginning.

Metaphilosophy. Pg. 466.
From the beginning, the equal dignity of every human being is at the center of concretized human rights.29 Rights in the moral sense are too abstract to motivate action, so they must be concretized in particular legal communities in the form of law. While a more comprehensive discussion of Habermas’ theory of rights takes place in chapter 4, the basic package of rights contains two components. The first are classical civil rights which protect the private individual from government interference, ensure economic freedom, and allow equal participation in the legislation process. These rights are only actualized when they are supplemented by social and cultural rights, which enable all citizens to enjoy the necessary freedom regarding culture along with sufficient “levels of independence in their private and economic lives.”30 Normative human dignity grounds the indivisibility of these rights, and serves as a measuring device to determine which rights are needed if a society is to be constructed where members are able to respect one another as free and equal participants.31 Human dignity acts as the “portal” through which morality is imported into the law in the form of concretized human rights.

This goes back to Habermas’ discussion of the Janus face of human rights. On the one hand, rights exhibit a moral form regarding promises of equal respect. On the other, this promise must be fleshed out in terms of law in order to ensure compliance. Human


dignity connects the two. Legal recognition of equal treatment is more than an instantiation of reciprocal moral recognition. This legal recognition takes the form of a demand to recognize the inherent dignity in the claimant. While this dignity does tie back to concepts of hierarchized social honor, the modern concept of dignity applies to all of humanity. However, this dignity is still anchored in recognition of social status. In this case, it is the recognition of one’s social status as a member of a community organized in a particular space and time. The status is, of course, equal across the spectrum of citizens. However, it is important to note that dignity in this case acts as a portal through which universal moral concepts of equality are applied to socially recognized citizens in a particular community.

There is a tension between rights as universal (i.e. as they apply to all humanity) and legal rights as connected to a particular community. Efforts to increase the realization of these rights within particular nations and attempts to spread rights into the international sphere are only possible through conflict with oppression, according to Habermas. Refugee refoulment and violent border enforcement are cited examples of actions the West takes against those disenfranchised individuals who make an appeal to moral content espousing equality. As Habermas states, “the translation of the first human

32 Jürgen Habermas. “The Concept of Human Dignity and the Realistic Utopia of Human Rights.” *Metaphilosophy*. Pg. 472. This justifies Habermas’ efforts to posit a global human rights regime, where social recognition would likely take the form of belonging to the human community. This sort of recognition would allow for moral rights to gain the force of law.

33 Ibid.
right into positive law gave rise to a *legal duty* to realize exacting moral
requirements."34 Rhetoric regarding rights spreads, along with their blatant misuse by
such self-interested entities as the U.N. Security Council. This causes skepticism
regarding the use of rights, and claims that these rights are no more than mere tools for
justifying violent action.35 The system is not perfect, but Habermas implores us to hold to
the realistic utopia of rights as anchored in “the ideal of a just society in the institutions of
the constitutional states themselves.”36 We must continue to spread these rights, and
attempt to prevent their destruction.

While Habermas does explicitly mention firing upon undocumented migrants as
they attempt to cross a border, and the violation of universal human dignity this
represents, the Janus face of rights complicates certain rights appeals made by
undocumented immigrants (e.g. a path to membership). Habermas has stated, agreeing
with the likes of Carens, that there is a strong moral incentive to enact a liberal
immigration policy in developed nations. Perhaps this policy would include elements of a
qualified amnesty, something which most undocumented migrants would likely find to be
favorable. This incentive is the result of past imperial conquest of currently developing
nations, economic stress caused by predatory trade policies, the interconnectedness of the
global market, and so on. In short Habermas believes we have a moral reason to accept

34 Jürgen Habermas. “The Concept of Human Dignity and the Realistic Utopia of Human Rights.”
*Metaphilosophy.* Pg. 476.

35 See Carl Schmitt. *The Concept of the Political.*

36 Ibid.
not only officially recognized persecuted refugees, but also to accept economic
migrants who may resort to clandestine entry strategies.

It is here that the Janus face of rights reveals itself. While immigrants may make a
moral claim, they cannot make a legal rights claim to entry or amnesty. Habermas is
explicit about this. Rights claims, which through the concept of dignity transform what is
moral to what is legal/enforceable, are anchored in the recognition of social status. Again,
this is not a hierarchized social status. One is not recognized as having rights due to noble
lineage, or any such feudal belief. Humans, from a moral perspective, are all held to be
equally worthy of respect. In order for this moral perspective to reach realization through
legality, one must connect the perspective to social recognition of belonging in a
particular community. The state and its citizens must recognize you as a member, a form
of recognition which is denied to the undocumented. The right to amnesty founders on
the rocks of legality.37 Discourse theorists have little difficulty recognizing moral
imperatives to include undocumented migrants in discourse. After all they are affected by
the norms of the nation in which they reside. Without the addition of legal enforcement,
these moral rights become little more than an appeal to charitable acts. I will discuss the
issue of human rights at great length in chapter 4. This brief discussion of Habermas’
account is sufficient for the time being.

37 This is not to say that undocumented immigrants have no rights at all. They do have a right to a trial, a
right to life, etc. What they do not have is a right to appeal for membership in a host nation, nor a right to
directly participate in policy discourse.
Moderate Moral Pluralism and the Justification/Application Dynamic

We have seen how Habermas’ discussion provides a moral, but not legal basis for a liberal immigration policy which could include measures for undocumented amnesty and membership. I will now shift our focus away from Habermas’ discussion of rights and towards the cornerstone of a pluralistic discourse ethical approach. While I will discuss pluralism in greater detail later in this work, for now it is helpful to provide a basic description of what I mean by pluralism. What I have in mind is what Peter Wenz refers to as moderate moral pluralism.38 This form of pluralism is contrasted with minimal and extreme moral pluralism. The former is defined as any moral theory which does not supply an algorithmic procedure for solving all moral problems (moral monism). Such a formula would merely require one to enter some dilemma, and the formula could churn out the proper answer. Wenz believes that no such theory exists, and as a result all moral theories are minimally pluralistic. Extreme moral pluralism is characterized by jumping back and forth from one incompatible moral theory to another depending on the situation at hand. At one moment one is a consequentialist, the next a deontologist, and so on. In between these sits moderate moral pluralism, the sort of pluralism I have in mind regarding Habermas. Moderate moral pluralism is one theory (unlike extreme moral pluralism) which contains a number of independent principles. These principles may conflict with one another, as in the classic Kantian problem regarding lying to protect the innocent. In such cases, one selects the principle best suited for the problem at hand.

Given that the principles are independent, selecting one over the other does not imply that we reject the unselected principle. It is simply the case that this principle was not best suited to solve the issue. Habermas is pluralistic in this sense, as is evidenced by his discussion of the justification and application of norms.

Moral reasoning for Habermas is divided into two stages, justification and application. The first stage, justification, requires us to determine whether or not we can justify the rightness of a particular norm in a broadly defined generalized manner.\textsuperscript{39} An example of such a general norm would be “it is wrong to allow an individual to benefit from law breaking.”\textsuperscript{40} The norm, in this general form, is legitimated discursively. However, this general norm can run into conflict with other general norms in particular, rather than general, situations.\textsuperscript{41} For example, it might conflict with a norm which claims “it is wrong to force a parent either to abandon their child or force the child to live in extreme poverty.” One can imagine a particular example, such as the deportation of an undocumented migrant/parent, where these two general norms would conflict. The solution is to move to the second phase of moral reasoning, called application discourses. In this stage, those affected by the application of the norm enter into discourse regarding which of the two norms is most appropriate given the particular situation. Both cannot be applied since they conflict with one another in the particular situation, so the most appropriate one given the situation is chosen instead. Once the application discourse is

\textsuperscript{39} Jürgen Habermas. \textit{Justification and Application}. Pg. 13.

\textsuperscript{40} This example is introduced by David Ingram.

\textsuperscript{41} Jürgen Habermas. \textit{Justification and Application}. Pg. 13
complete, we must backtrack in order to determine whether a norm such as “it is wrong to allow an individual to benefit from law breaking, unless it forces a parent to either abandon their child or force the child to live in extreme poverty” can be justified according to more generalizable interests. Note that each stage is discursive. Justification discourses are followed by application discourses, which are followed by justification discourses.

**Ingram and the Exception**

David Ingram, in his article *Exceptional Justice*, provides a clear and comprehensive account of the justification/application dynamic as applied to immigration. Ingram, in an attempt to break from the dichotomy between legal domination and violent revolutionary justice, invokes discourse ethics as a means to “do justice to our moral revolutionary ideals” or “mediate the divide between concrete political life and abstract conceptions of law”, without appealing to violence.\(^{42}\) In other words, discourse ethics allows us to bridge the real and the ideal in a way that doesn’t require extra-legal measures. The purpose for this invocation, in Ingram’s essay, concerns an attempt to utilize the philosophical concept of the exception “for good”, to put it loosely. The concept was made famous by the famous jurist Carl Schmitt, as a means to justify authoritarian rule. Giorgio Agamben would pick up the concept in order to

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describe modern governance as dominated and defined by the state of exception, a zone of indistinction between law and chaos, inside and outside.

For Agamben, certain people (such as refugees in the modern era) serve as concrete examples of individuals trapped in a state of exception, in a legal “no man’s land” where they are subject to extreme injustice. Certain aspects of modern law demonstrate exceptional status as well, provided they are sufficiently vaguely worded and permit for a wide range of exemptions. Ingram’s hope is to look at one particular test case which is riddled with exceptions, namely immigration law. The hope, it would seem, is to find a redeemable aspect of the exception which can be used to exempt an individual from unjust law, and in turn open up a revolutionary possibility of altering the law in a positive way. Discourse ethics will be the vehicle for the revolutionary action, in that it will provide justification for the exception of an application of a potentially illegitimate law, and in turn will allow for a sort of revolutionary extension of positive legal coverage.

While Ingram and Benhabib cover much of the same ground, insofar as discourse ethics and its application to the immigration issue are concerned, this is not to say that the accounts are in complete agreement. Perhaps the most apparent conflict concerns what Ingram views as a shortcoming in Benhabib’s work, namely that it is too abstract. It

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stops the process of justifying a more inclusive immigration policy at the level of realizing general universal human interests. Ingram’s goal is to take the process a step further, in an effort to provide concrete application of these principles onto an actual living individual. To use Habermasian language, we must move beyond justification to the step of application.45

The individual in this case is Elvira Arellano, and the application concerns a call for a private bill allowing her to stay within the United States. Briefly, Arellano was an undocumented immigrant living in the United States who ran an organization dedicated to preventing family separation due to deportation. She had staved off deportation herself, for a time, in order to provide for her special needs son. Eventually she was deported, but not before she pled for a private bill allowing her to stay. This was denied under the logic that such an act would force the government to allow every undocumented migrant in her situation permission to stay. This private bill is a concrete example of Ingram’s use of the exception as a legitimate non-violent revolutionary tool. The concern of the legislator is the goal of the revolutionary exception. This one private bill would allow amnesty to explode forth, like the expansion of a tiny crack in a dam. So long as the private bill applies to a specific person “in accordance with constitutional norms”, then there is no objection from someone holding Habermas’ position.46

45 Ingram’s focus on application concerns taking relevant perspectives into account, as opposed to interests or arguments. We can virtually represent, with relative ease, interests and arguments. Individual perspectives, experiences, and understandings require real dialogue with actual individuals. The interest holder must be directly involved in the process, and not merely virtually represented.

46 Ibid.
Ingram sides with Benhabib regarding the possibility of mitigating the tension between a universal right to emigrate which is not reciprocated with a universal right to immigrate (a point that originated from Kant and is enshrined in modern policy). The solution to this problem is to recognize the porous nature of borders, which would be complemented by a “more flexible notion of local citizenship” that is in turn tied to a cosmopolitan notion of world citizenship.\(^{47}\) It is not that borders must be completely open or completely closed. These claims neglect the porous nature of borders which are a result of global interdependencies that are impossible to sidestep.\(^{48}\) These interdependencies, and their complimentary global imbalances, imply that our immigration policies ought to be subject to debate in the global public sphere.

In an attempt to confront the case of Arellano (and in turn the issue of immigration), Ingram turns to discourse ethics, which “instead of abstracting from historical differences- the chief weakness of Kant-inspired liberal social contract theory advocated by Rawls”, demands that interlocutors engage in actual discourse in order to reach rational consensus.\(^{49}\) As we have seen many times before, the way to determine whether or not a policy such as one regarding deportation is just is to ask whether it is

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rationally acceptable to all those affected by the policy. The only way to accomplish this is through actual dialogue with those affected, so that each topic of conversation and each argument may be aired in a coercion free environment. This is, of course, not to say that all exclusionary practices regarding admission into a community are disallowed. It is simply the case that they must be rationally acceptable to all individuals affected.

Discriminatory policies regarding communicative freedom, as a result, directly violate Habermas’ proceduralist vision. Some may claim that the interests of citizens should weigh more than the interests of “outsiders.” After all, the citizens have a more vested interest in preserving the makeup of their community, or some such reason. Ingram disagrees with this claim, and thinks we can assign the weights regarding voices in the immigration debate in a different manner. While Ingram does not appear to completely agree with Benhabib and Shapiro regarding giving greater weight to desperate immigrant voices, he certainly advocates for an equal voice provided by some sort of political representative. Some factors, such as community contribution and potential harm caused by deportation, may create different groups in the category of those affected (as Benhabib claims), but these groups must at a minimum have a fair voice in the debate.

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We have seen above that Habermas provides a solution for the problem of conflicting norms by introducing the justification/application dynamic. Ingram proceeds, in an attempt to justify an exemption for Arellano, by demonstrating that a plethora of norms exist which conflict with norms demanding her deportation (e.g. the norm against benefiting from lawbreaking). These norms include, but are not limited to, not deporting individuals who have a stake in their community unless they have committed a serious crime, not forcing parent to choose between their leaving a child behind or forcing them to live in poverty, and so on.53 To this list Ingram adds more general norms, such as ones forbidding immigration law which is formed in a way which ignores communicative freedom, denying entry to anyone fleeing economic oppression, and treating citizenship solely as a function of birthright.54 There are many more relevant examples, but Ingram’s point is clear. In this case, there is significant reason to appeal to and apply norms which would allow Arellano to stay, as compared to applying norms which would deport her. This is especially important given her dependents, her contributions to her community, and her role as an activist voice for the downtrodden. An exception should be granted, one which hopefully could have revolutionary consequences.

Of course, Ingram is not blind to the fact that a number of obstacles stand in the way of immigration reform. In fact, he is quite sensitive to the roadblocks preventing the


type of necessary rational discourse required for the creation of immigration policy based upon communicative freedom.\textsuperscript{55} Other issues he recognizes concern local resistance to the substantially more open immigration policies he supports, and an acceptance that cosmopolitan law may presuppose liberal political leanings across all member states.\textsuperscript{56} Ingram accepts these difficulties, along with the fact that they may make his solution to the problem of irregular immigration impractical. In the end, however, Ingram believes that it may well be the case that we have to appeal to the exceptional and vulnerable circumstances that irregular migrants face. This calls on our universal respect for human dignity and our responsibility to aid when these individuals confront us face-to-face.\textsuperscript{57}

Ingram’s utilization of the justification/application dynamic adeptly demonstrates the pluralistic nature of application discourses. Society embraces a number of various independent principles aimed at motivating action. Among these is the principle most often appealed to in cases of undocumented deportation, namely that an individual should not profit from lawbreaking. By entering a nation outside of the officially recognized channels, undocumented migrants break the law. Allowing them to stay is of benefit to these migrants. As such, the state should deport them in order to stop undocumented


migrants from benefiting as a result of law breaking, or so the argument goes. This principle can clash with principles regarding duties to relieve poverty one has caused, duties to protect the integrity of the family unit, and so on. Perhaps we could add a duty not to uproot individuals who have made a home for themselves to these two duties implying amnesty. Whether these later duties are legal/enforceable is an issue we will return to in the next chapter. Suffice to say it is not Ingram’s claim that the later duties are legal. As Benhabib and Habermas both claimed, it may be that the duties are only moral. Be that as it may, the application portion of the justification/application dynamic complements other pluralistic accounts such as Carens’ “passage of time” argument.

Case Studies

Now that the survey of relevant literature regarding immigration and a discussion of discourse ethics are behind us, it is time to examine the implications of discourse ethics in the context of particular case studies concerning undocumented immigration. The following section will focus on providing background regarding the cases (3 in total), and after the introduction of each case I will supply what I claim is the most appropriate response given the demands of a discourse ethical approach. I have already introduced one case, that of Jennifer Abreu. I will save this particular case until the end, in order to discuss it in connection with proposed legislation in the United States. The three cases I chose are the Israeli law of return and recent child deportations, undocumented migrant access to limited social goods in the form of U.S. emergency healthcare, and a stalled piece of U.S. legislation know as the DREAM Act. We will begin with Israel.
One interesting case study regarding immigration preference to particular nationalities is Israel’s law of return. Also known as Aliyah, anyone of Jewish descent has the right to receive an oleh’s (immigrant) visa and begin the path to Israeli membership. This law also applies to the children or grandchildren of those of Jewish descent, as well as spouses of those of Jewish descent. The only groups excluded from this umbrella of immigration assurance are those who have demonstrated through past actions that they are a danger to the Israeli state (e.g. violent Zionist activism, criminal background). It is worth emphasizing that Aliyah is explicitly considered a right according to Israeli law. Many nations give pride of place to those seeking to immigrate who are of the same national ancestry, Germany being another past example. There is nothing wholly unique about Israel’s stance. It is simply a clear example of ethnic/religious preference regarding immigration. Israel is a nation with a particular identity, namely a Jewish identity. This immigration policy is keeping in line with a general desire to allow admittance to those who are “sufficiently like us”, so to speak. To put it into Walzerian terms, they are like family. While immigration policy often chooses who to admit and who to exclude from our dealings, one cannot choose their family. Aliyah is an instantiation of Walzer’s usage of the family concept in immigration.

While Israel supports a law of return, they have in the past deported individuals who were born in the country. In 2010, the Israeli government issued orders to deport 400

children born to foreign workers in Israel.\textsuperscript{59} These children had remained in the nation after their parent’s visas had expired. They had all grown up in Israel, spoke Hebrew, and attended Israeli schools. Interestingly enough this questionable act is the product of a compromise. Originally, Interior Minister Eli Yishai sought deportation orders for 1200 children. Prime Minister Benjamin Netanyahu lowered this number to 400 in an effort to solve the problem in what he referred to as a “fair and balanced” manner. The specter of Sidgwick and Walzer hang over this decision. Kosky, in his article regarding the deportations, is quick to point out that Netanyahu originally portrayed these 1200 children as a threat to the character of the Jewish state. Netanyahu made this claim regarding a country of 7.5 million people. This situation helps to provide a more comprehensive picture of Israeli immigration policy, or at least immigration rhetoric as it comes from the country’s conservative elements. The law of return regarding entrance is complemented by the expulsion of Israeli born “foreigners” regarding deportation.

At first glance, it would appear that Israeli immigration policy is pulled straight from \textit{Spheres of Justice}. The state wields wide authority to deny membership and deport foreigners, while accepting those who can trace a lineage back to the family line. Netanyahu’s stance regarding a threat to the character of the Jewish nation echoes Walzer. Internal cohesion is only possible through immigration control, closed borders, and selection processes designed to pick applicants similar to the self-determined

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character of the state. While I would not go so far as to say the grounds for the
deporation of 400 children are racist, they certainly fall under the same umbrella of
protection provided to “White Australia.” Of course this denial may result in Walzer
calling for Israel to give up land for the foreigners who are denied membership, but that
is an issue for another time and one which is entangled in claims to historical and
religious land rights. On the face of things a communitarian would claim that Israel is
operating within the legitimate limits of its power. To maintain the integrity of a Jewish
state, that state may have to take action against non-Jewish elements. I do not want to
come across as “picking” on Israel. Nations such as Japan and Germany are notable as
examples of countries with restrictive immigration policies. Margaret Thatcher famously
claimed in 1979 that commonwealth immigration was “swamping” Great Britain.
Canadian and U.S. immigration, while touted by Carens as more liberal than most, are
still restrictive in their own ways. Israel is simply an exceptionally suitable case study for
immigration preferences based upon ethnicity/religion. It is fairly clear that a
communitarian would accept this policy with open arms. What of a discourse ethicist?
How would this example fit into a theory which champions discursive norms agreed to by
all concerned parties?

You may recall Benhabib’s discussion regarding entrance policies and
discrimination based upon grounds which deny an immigrant’s communicative freedom.
Benhabib’s point was that certain forms of discrimination may be legitimate from a
discourse ethical point of view. If I can justify to you on good grounds, after making a
good faith effort to see your side, that there are legitimate reasons for excluding you from
my society, then the exclusion would be justifiable according to discourse ethical principles. Examples Benhabib mentions mostly seem to deal with contribution capability. In other words, entrance policies could require immigrants to demonstrate certain skills before they are allowed into the new nation. What lacks legitimacy are entrance policies which deny people entrance based upon arbitrary grounds such as ethnicity or religion. There is no “White Australia” for Benhabib. Applied to the example of the Israeli state, this restriction would seem to cast doubt on a discourse ethicist supporting Aliyah.60

The preference based upon one’s religious background denies the communicative freedom of non-Jewish immigrants. This adds up to a form of illegitimate discrimination, which is incompatible with a moral theory founded on human equality and freedom. The deportation of 400 children, coupled with the state justifying this action by portraying the children as a threat to Israeli identity, would be equally unpalatable. While one cannot deny discursive rights to those who have not gone through the process of will formation associated with adulthood, justifying the denial of membership and deportation in general on the grounds that an individual is not sufficiently “like us” is discursively illegitimate. Individuals are accepted and rejected on the basis of religious and ethnic background, once again denying the communicative freedom of those who do not fit the

60 It is worth noting that Benhabib (perhaps inconsistently) claims that Israel should be allowed to have an immigration policy which gives preference to those of a particular ethnicity, namely Jewish. They simply cannot exclude people based upon their ethnicity (e.g. Arab). Benhabib is not opposed to Israel’s attempts to preserve a national identity. It is simply that they cannot do this in a way which is racist, discriminatory, or warlike. See Seyla Benhabib. The Rights of Others. Pg. 138. See also Seyla Benhabib. “What is Israel’s Endgame?” Reset DOC. http://www.resetdoc.org/story/1184. Accessed 9/21/2011.
discriminatory mold. These children of the undocumented are sent back to whatever nation their parents had originally abandoned, potentially placing them in harm’s way. The state of Israel claimed these deportations are necessary in order to avoid creating, in the words of Netanyahu, “an incentive for the inflow of hundreds of thousands of illegal migrant workers.” Protection of state identity is purchased with principles violating norms regarding equality.

While Habermas does not have as much to say on the topic as Benhabib, there are some clues as to whether or not he would accept the restrictions created by Israel. You will recall that Habermas attempts to find a middle position between liberalism and communitarianism regarding the issue of immigration and adaptation to a particular culture. A nation may legitimately expect an immigrant to accept that nation’s particular interpretation of universal moral principles (e.g. the Constitution). This communitarian stance is complimented by the fact that the receiving nation cannot expect an immigrant to adopt the nation’s character full stop. The immigrant does not need to abandon their culture, their language, their religion, and so on. Given these facts, one can assume Habermas would not support immigrant discrimination based upon religious grounds. While the state may exclude an immigrant who does not accept the interpretation of basic rights enshrined in the Basic Laws of Israel, this state could not exclude an immigrant based on the fact that they refuse to fully assimilate into the new culture.

In summation, the application of a discourse ethical model regarding the case of the Israeli law of return and complementary deportations results in the challenging of Israel’s position. Netanyahu’s language and the intent behind the deportations may be in line with Walzer and other communitarians, but this sort of discrimination does not have a place in a Habermasian discourse ethical system. What’s more, any implementation of immigration policy would require impartiality, where each individual in debate is open to the arguments of the other and attempts to adopt the perspective of the other in order to reach agreement. Immigration policy, and the deportations that follow, which draw largely from ethnic discrimination seem at first glance to be the product of a one-sided decision making process which includes only the inhabitants of a particular land. The undocumented former guest workers are unable to engage in policy debates which profoundly affect them, and as such this sort of immigration policy regarding admittance and deportation does not hold to the requirements of a discourse ethical model.

Another useful case study highlights an incendiary topic of debate in the United States, namely undocumented migrant access to limited social goods. The issue, in general, focuses on a conflict between two positions. It is undeniable that undocumented migrants bypassed entrance policies. The first position is a sympathetic one. According to this position, the fact that an individual entered a nation illegally should not bar them from access to basic social goods. It may be the case that they are not able to exercise certain rights associated with full membership, but they deserve a level of assistance in line with basic humanitarian standards. These standards are not dependent upon legal status, sympathizers may say, and due to the fact that the new nation is (presumably)
capable of providing these services, the nation should do so. This position focuses on basic levels of access to goods that all individuals should enjoy. It is worth noting this position does not necessarily argue for membership rights. It is consistent to deny undocumented migrants membership rights given the method of entry, while claiming that as fellow human beings they deserve access to social goods, though the goods may be limited.

The second position focuses on maintaining limited social goods for use by legally recognized residents. Given the fact that we are discussing limited goods, one must be conscious of the fact that rationing these goods is the socially responsible way of managing them. It is dangerously wasteful, they would say, to expend these resources in any other way. In many cases, it may be true that the currently legally recognized population is quite taxing on these resources, perhaps to the point where their management is already unsustainable.\(^\text{62}\) Given this fact, those focused on maintaining the limited goods would disallow undocumented immigrant access. Allowing those who entered this country surreptitiously access to these goods poses many problems. The most prevalent strands of argument attempt to portray undocumented migrants as an unwanted burden on the resources of the state. Foreigners sneak across the border and take what they can out of a social support system without giving anything back, so the claim goes. What’s more, this claim is often connected to the objection that allowing undocumented

\(^{62}\) Arguments such as these ignore the fact that undocumented immigrants in the United States contribute a substantial amount of tax revenue to both individual state governments and the federal government. I discuss this in detail in chapter 5.
access to limited social goods only encourages more migrants to enter the new nation outside of official channels. More will come in, take what “we” have, and give nothing back. I do not want to make a caricature of this stance, though often enough it does devolve into a simple “they don’t belong here” claim. There is a legitimate concern expressed by this position. If it is the case that we must ration certain social goods which are limited, shouldn’t we preserve these goods for those who are members of the nation? This position claims we should. Now it is time to turn to a concrete example of this problem.

Perhaps the best example of this debate concerns undocumented migrant access to emergency healthcare. U.S. Federal law, since the 1986 Emergency Medical Treatment and Labor Act, requires a hospital to treat anyone who walks through their doors. Regardless of one’s ability to pay, one has access to life saving emergency treatment. A Pew Hispanic Center report in 2005 found that while only 14% of U.S. citizens lack health coverage, over 59% of undocumented migrants lack insurance to cover basic medical expenses. This means undocumented migrants who require medical attention and are unable to pay will either go to free clinics or hospital emergency rooms. According to a 2008 Medical Expenditure Panel Survey, the average cost of a trip to the

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64 The average household income of undocumented immigrants in the United States was $36,000 in 2007. This was below the average income for other families ($50,000) and generally did not rise over time spent in the nation. See “A Portrait of Unauthorized Immigrants in the United States.” Pew Hispanic Center. http://pewhispanic.org/files/reports/107.pdf. Accessed 10/1/2011.
emergency room in the U.S. was $1265. It should come as no surprise that a migrant worker in North Carolina, for example, may be unable to pay this cost. Normally when this occurs the hospital writes the treatment off as a loss, and presumably healthcare costs for paying consumers goes up. However, in 2003 U.S. lawmakers passed a provision (Section 1011) providing some reimbursement for those hospitals that were required to provide medical aid to undocumented migrants. The total contribution was $250 million. In late 2009, the Bureau of National Affairs stated that this funding was running out. This left two possible options. Either increase the amount of funding for Section 1011, or force hospitals to “eat” the cost of treatment.

One particular case concerns dialysis treatment in Nevada at the University Medical Center in Las Vegas. In early 2010, up to 80 undocumented migrants visited UMC for emergency dialysis treatment, running an estimated bill of $2 million per month. One should keep in mind that this is emergency dialysis, rather than the thrice weekly procedures U.S. citizens are eligible for under Medicare. The migrants wait until their condition worsens enough to enter the E.R., an act that is undeniably risky. Lawmakers in the state had not adequately addressed the issue, and UMC efforts to convince the migrants to return to their country of origin for treatment were unsuccessful.


Lawrence Weekly, a chairman on the UMC hospital board of trustees, summarized the problem quite nicely:

The cost to our taxpayer is astronomical. Many people are justifiably outraged…but we are governed by Federal Law on this issue so in some way the Federal Government has to help us out. *We can’t just stand by and let people die in the streets. We wouldn’t want that on our conscience* (emphasis mine). 67

Some, such as U.S. Rep. Shelley Berkely, have proposed sending these individuals back to their country of origin, provided medical treatment is guaranteed. On the face of it, however, a general dilemma confronts us regarding the distribution of social goods to those who lack political membership. Do we have a duty to provide for those in need, in spite of membership? Or, as UMC’s COO Brian Brannman claims, does this sort of distribution only encourage individuals to clandestinely bypass established immigration channels? To put it another way, are undocumented migrants receiving something that they don’t deserve?

As you will recall, discourse ethics as a procedural model focuses on communicative agreement in the real world which includes participation from all affected parties. Given that this model is procedural, an attempt to provide a concrete answer to the questions posed above is illegitimate. Once again, Habermas is not Rawls. Resolution of this issue ought to play out in the real world. 68


68 Some have objected that approaches such as Habermas’ and Behabib’s contain a problematic tension in this regard. While both authors argue for a procedural approach, they sneak liberal values into the rules of discourse. In other words certain types of normative outcomes are all but guaranteed, in spite of the
first glance, there are some rather important points to make regarding a discourse ethical approach to this particular problem. The first plays on Benhabib’s claim that from a moral point of view, excluding non-citizens from policy decisions is disallowed. The relevant category for inclusion in debate regarding norm creation is whether or not one is affected by the implementation of said norm.\footnote{We should not use the word “affected” without qualification. Carol Gould provides one when she argues that we should limit the category of “all those affected” to those who stand to suffer manifested harm, or have their basic freedoms and interests (as articulated by human rights) violated. Denying live saving treatment certainly falls into the former category, and likely falls into the later as well. See Carol Gould. Globalizing Democracy and Human Rights. Pg. 211-212.} Citizenship is not the relevant category, at least from the moral point of view. From a legal perspective, the issue is more difficult to address. Legal rights to participation in debate and policy creation, part of the basic rights package advocated by Habermas, are actualized through social recognition as a citizen. So, from a moral point of view, this debate regarding access to limited social goods would have to include undocumented immigrants as well as the citizens of the particular nation. Debate in Nevada, for example, would have to include undocumented kidney dialysis patients along with hospital administrators and all other affected parties. From a legal point of view, this inclusion is less certain. I will return to this uncertainty in the next chapter. For now it is sufficient to claim that the undocumented would be included in the debate from a moral perspective, and that they would receive the same protections and follow the same rules as all those engaged in discourse. The outcome of this debate is

emphasis on actual dialogue. See Stanley Fish. “Mutual Respect as a Device of Exclusion.” Deliberative Politics.

\footnote{We should not use the word “affected” without qualification. Carol Gould provides one when she argues that we should limit the category of “all those affected” to those who stand to suffer manifested harm, or have their basic freedoms and interests (as articulated by human rights) violated. Denying live saving treatment certainly falls into the former category, and likely falls into the later as well. See Carol Gould. Globalizing Democracy and Human Rights. Pg. 211-212.}
determined in the real world, and as such articulating a substantive discourse ethical problem is illegitimate. Such an act would remove the “discourse” from discourse ethics.

Another potential issue is reporting undocumented migrants who seek medical treatment to local authorities. In 2011, the Arizona state senate introduced a bill which would require hospital officials to demand proof of citizenship for non-emergency treatment. If the hospital discovers the would-be patient is an undocumented migrant, they must report the migrant to the Federal Immigration office.\(^\text{70}\) If the migrant requires emergency care, the hospital is required to contact the Federal Immigration office immediately after providing treatment. It is already the case that most undocumented migrants are afraid to seek medical attention, due to the fear of deportation. They wait until health problems become critical, resulting in higher cost of care and greater risk of adverse outcomes. As Genaro Diaz, a legal resident and advocate for the North Carolina migrant community states, “they’re scared to see the doctors, they think they’ll (the doctors) send them back to Mexico.”\(^\text{71}\) Organizations such as the American College of Emergency Physicians (ACEP) do not seem to back such legislation:

In some states, legislation has been proposed to require emergency physicians to report to immigration authorities any undocumented immigrants who seek care. Such requirements differ from other mandatory reporting requirements in that their purpose is not patient protection but policing of U.S. borders. If such reporting were successfully mandated, many acutely sick or injured persons


would avoid seeking medical care for fear of detection and deportation. In addition to causing these illegal immigrants unconscionable pain and suffering, it would cause the spread of many contagious diseases that should be treated and stopped.\textsuperscript{72}  

The result of this legislation requiring hospitals to report undocumented migrants would likely be twofold. First, it would discourage even emergency visits by the undocumented, thereby assuaging concerns regarding cost to hospitals and tax payers. Second, and related, it would result in increased suffering from adverse health states among the undocumented population. I sincerely doubt that these two consequences are spurious speculations.

Note that ACEP has two additional concerns outside of the obvious problem of avoiding treatment. The first is that it requires medical staff to take on a role outside of their profession. It is not the job of a medical professional to engage in acts of “border control.” They are supposed to care for the sick and assist in the maintenance of healthy population. ACEP’s concern, from the above statement, seems to be that in order to perform the state mandated task of “border enforcer” they must compromise their primary role of caregiver. The second problem outside of causing migrants to avoid treatment is that such legislation could endanger the general population. Disease control is an important function of the medical profession. Stopping the spread of contagions through treatment requires both an effort on the part of the caregiver to treat, and the patient to seek treatment. What’s more, contagions do not discriminate between

politically recognized members and undocumented migrants. By driving undocumented migrants out of hospitals and away from treatment, ACEP is concerned that they will pose a health risk to the general population. “Border control”, designed to protect limited healthcare resources, is purchased at the cost of promoting the spread of communicable disease.

Once again, from a discourse ethical standpoint no substantive dictum regarding reporting undocumented migrants seeking emergency care exists. The same discussion from above regarding the procedural aspect of discourse ethics applies to this particular situation, notably the moral imperative to include undocumented migrants in the debate regarding this proposed rule. Unlike the previous evaluation, this standard regarding reporting the undocumented may represent a violation to which a discourse ethicist can speak. This would be a procedural violation regarding denying participation in discourse through coercion. One could claim that rules regarding reporting, in general, have the consequence of driving the undocumented migrant underground. Fear of deportation would stop them from entering hospitals, and compound a pre-existing fear of deportation as a result of being “exposed” in public. The rule may indirectly act as a coercive restraint limiting undocumented participation in public debate, and if this is the case, then a discourse ethicist could object that the reporting rule is a part of a larger coercive structure removing the undocumented from discourse. Of course, this rule regarding reporting does not deny access to discourse, or even access to medical care. However it does create an environment which is hostile to the undocumented, one which would certainly cause migrants to avoid necessary healthcare and which would probably
drive them further away from the public sphere.\textsuperscript{73} Again, I will qualify this response in the next chapter regarding the difference between moral requirements and legal requirements for inclusion. For now, it seems plausible that a discourse ethicist could object to this particular reporting rule on procedural grounds.

I would like to pause briefly and revisit a concept which is quite important for this project, namely a pluralistic application of amnesty for undocumented migrants. This chapter focuses on the theory lying behind a discourse ethical approach, and as such pluralism has focused on the discourse theoretic concept of justification and application as articulated by Habermas and Ingram. A state could utilize a pluralistic amnesty in a manner similar to the way in which Ingram justifies amnesty for Arellano. Certain norms may trump a general prohibition against benefiting from law breaking, and the particulars of each case may warrant the application of norms in support of amnesty or deportation. If certain requirements or conditions are met, such as community activism or acting as the caretaker for a special needs child, an appeal to amnesty may exist. This application is pluralistic in the sense that it is not a “one size fits all” model. All undocumented migrants would not face deportation, just as all undocumented migrants could not make claims regarding amnesty. With this brief exposition out of the way I will turn to a

compelling case study regarding a pluralistic application of amnesty, which is a piece of failed legislation known as the DREAM Act.

An excellent example of a pluralistic application of amnesty regarding community contribution is the currently stalled U.S. DREAM Act. The act, which has received notable bipartisan support from such senators such as Richard Durbin and Richard Lugar, aims to provide a path to citizenship for undocumented migrants who entered the country as minors. The individual who applies for inclusion through the DREAM Act must meet numerous requirements. They must have entered the country at the age of 15 or below, they must have lived in the United States for a period of no less than five years, they must possess a GED or high school diploma, and they must be of “good moral character” (an admittedly vague requirement). At that point, the immigrant will receive a conditional stay. During this conditional stay, the immigrant is required to either attend college or serve in the military for 2 years. Following completion of this phase, and another round of criminal background checks, the individual can apply for permanent resident status. This act would only apply to those who are already in the United States, and then only to the young. The reasoning behind this is that many children are brought into the United States at a very young age, grow up in the U.S., are educated in the U.S., and don’t know any other home. One cannot reasonably say that they are responsible for breaking the law when they entered the U.S., if they are too young to act on their own behalf. They are, so to speak, innocent bystanders.

Once again, it is worth pointing out that this legislation, stalled as it may be, is an excellent example of a reasoned and pluralistic application of amnesty. It does not seek to provide a universal amnesty, given the numerous requirements one must meet for eligibility. It largely sidesteps criticism regarding encouragement of clandestine entry into the U.S., due to the fact that those targeted by the act are most often brought into the U.S. without something which would qualify as adult consent. It emphasizes communal commitment and contribution, and the application of norms which reward such acts over the application of norms geared towards deportation. One must maintain a clean criminal record, and better themselves in a way which contributes to the society in which the young immigrants now live. Opponents of immigration reform often claim that amnesty encourages increased offense, and that this increased offense creates a financial burden on the state due to lack of contribution by the migrants. Even if someone accepts these challengeable claims, the amnesty provided by the DREAM Act is beyond the claims’ criticism. Not only are these immigrants innocent regarding clandestine entry (presumably), but the DREAM Act would turn a supposed “burden” into a societal benefit through education and military service. To apply a norm forbidding benefit from lawbreaking does not clearly apply in cases such as those that fall under the DREAM Act, given that the minor commits no crime so long as they can make an appeal to innocence through their youth.

To return to a discourse ethical evaluation, it once again disallows providing a thoroughly substantive evaluation. However, one can make the following comments regarding procedure. The DREAM Act does share support among some immigrant
advocacy groups, such as the National Immigration Law Center. Assuming that this proposed legislation does have the general support of the undocumented immigrant community, the DREAM Act as a piece of publicly debated legislation does allow for representation of undocumented interests in discourse. In this way, the DREAM Act may represent an effort to hold true to the principles of discourse ethics on the part of some legislators. This claim is strengthened by undocumented migrants’ vocal support of the act during various protests, such as one held in North Carolina in September of 2011. The DREAM Act could represent a procedural step forward by including those formerly excluded from normative discourse. I do not believe I am being too bold by stating that any discourse ethicist would welcome such a step forward.

Returning to Jennifer Abreu, it should come as no surprise that those activists who brought her case to light tie the case to the DREAM Act. Jennifer was a high school graduate, with an exemplary public service record, who planned on attending college. Barring some hidden issue, she would qualify for a temporary stay and even permanent resident status under the DREAM Act. Ingram listed some of the norms which conflict with rules forbidding individuals from benefiting from lawbreaking in connection with the case of Elvira Arellano. Jennifer’s case affords us the same opportunity. Norms aimed at amnesty could include: it is wrong to punish an individual for an illegal act they had no choice in committing, it is wrong to forcibly remove someone from the home they have made for themselves through years of community involvement, actions aimed at bettering one’s community (community service, educational volunteering) should receive the public recognition they are due, and so on. I am certainly not claiming that Jennifer’s
case *demands* amnesty according to the justification/application dynamic, though it seems as likely a candidate as any other case. All I want to emphasize, for now, is that Jennifer’s story and its connection to the DREAM Act could require the application of norms other than those demanding deportation. Of course, this application would require actual discourse between affected parties. An author thoroughly detached from the situation, such as myself, cannot substitute conjecture for real dialogue and hope to remain true to the procedural nature of discourse ethics.

The purpose of this chapter has been to outline the aspects of discourse ethics that are most relevant to my project. This included a discussion of discourse ethics in concrete contexts, made possible by our three case studies. I am not merely concerned with theoretical discussion. I want to explore how we can realize these principles in practice. Given the demands of a discourse ethical approach, and the current political climate regarding undocumented immigration, some may claim that discourse theory fails to provide an actionable solution. That is to say, moral demands for undocumented inclusion in deliberation and process rules defining acceptable discursive procedures place a burden which is too demanding on society. They are either unable or unwilling to listen to a discursive approach. While there are numerous practical problems which stand in the way of perfectly realizing a discursive solution to the problem of undocumented immigration, I will argue that we need not “perfectly realize” the model in order for it to be useful. In the chapter that follows, I will address these practical problems. I will dismiss some of these problems out of hand due to their failure to generate truly intractable points of disagreement between theory and practice. I will affirm other
practical problems in such a way as to enrich our ongoing account, which will mainly
take the form of drawing out the counterfactual nature of discourse ethics and Habermas’
two-track model of democracy. Following the next chapter, I will be able to begin the
search for any unique obligations a host nation owes to the undocumented.
CHAPTER THREE

PRACTICE

Now that I have described the basic tenets of discourse ethical theory, it is time to turn to more practical concerns. My focus on undocumented immigration, a real world problem, necessitates this shift in focus. Discourse ethics is a demanding theoretical device, and as such it runs into a number of issues when we attempt to articulate how we would actually use the theory. In this chapter, I have four primary goals. The first is to discuss the numerous problems with reaching a moral consensus through a discourse ethical approach. I will explain these specific problems with undocumented immigration in mind. After this discussion, I will show how Habermas’ theory survives these practical problems and provides us with a discursive standard which we can approximate if not perfectly implement. Next, I will discuss some more general objections to deliberative democratic approaches. Finally, I will answer these objections in an effort to further flesh out our understanding of a discourse ethical approach. Before I can begin, I must describe what a discourse ethical approach to the problem of undocumented immigration resembles. To this end I will briefly discuss the discursive pluralistic model which I develop in chapters 5 and 6, and then I will describe a discourse ethical model in very general terms in order to facilitate exploration of practical problems.
A Discursive Approach

I have already discussed, to some degree, the first aspect of the mechanism regarding amnesty for the undocumented. This is the aspect of pluralistic application. Following Habermas and Ingram, I believe the best approach to this particular problem involves recognition of conflicting norms. Do we reward the undocumented for breaking the law? Do we allow individuals to maintain an acceptable standard of living? When various norms conflict, one must examine the particulars of each case in order to determine which norm is the best fit. This determination becomes a part of application discourses, which follow along the general lines of a discourse ethical approach. Ideally all affected parties reach a consensus and then they apply the appropriate norm.¹ The important fact to remember in the case of undocumented migrants is that there will, by definition, always be competing norms. This conflict may be one sided on occasion, but a conflict no matter how large or small will still exist regarding the potential application of amnesty. Application discourses will have to choose between norms prohibiting individuals from profiting due to lawbreaking, and some other norm or set of norms which seem to justify amnesty. It is not clear to me that norms opposed to deportation will or should always win out. As I have already stated, I am not arguing for a universal amnesty. I do not believe that a discourse ethical approach implies universal amnesty, nor do I think that one can reach a universal amnesty without argumentation aimed at

¹ In reality this application takes the form of a judge synthesizing perspectives or a jury deliberating regarding the appropriate norm. I will discuss the role of adjudication in chapter 6.
founding a universal right to membership in any nation one chooses (or some other sort of similar right).² What we can attempt to accomplish is to fill out some of the relevant categories regarding the pluralistic application of amnesty as they relate to undocumented migrants in particular. The most important category, at least insofar as undocumented migrants are concerned, is what I will call rooted residency. It is a concept which I borrow in modified form from Carens, which I will discuss below.

The catalyst for Carens’ discussion of pluralistic amnesty is the issue of whether or not a nation has an unqualified right to deport undocumented migrants. In *The Case for Amnesty*, Carens recognizes that a state does have a *qualified* right to deport irregular migrants. However, that right weakens over time until a migrant’s right to membership in the community trumps the right to deport.³ The relevant category for Carens is the passage of time. While there are certain factors that could accelerate the process (such as family living in the nation), people who live in a community for an extended period of time sink roots in that community. They become, as Carens puts it, socially recognized members though not legally recognized members. They contribute to society, make a home, start families, etc. Over a period of time the roots of the irregular migrant sink deeper, and the state’s right to deport them is trumped by a moral claim not to be uprooted. As Carens puts it, “at some point a threshold is crossed, and irregular migrants

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² I discuss this issue in chapter 4.

acquire a moral claim to have their actual social membership legally recognized.”

This sort of claim on the part of the migrant is not immediate. It takes time, and Carens is quick to point out that any line drawn will have an element of arbitrariness to it. However we should still draw a line and set a date for the point where the migrant’s claim trumps the state’s claim.

I will refer to the distinguishing factor between undocumented and potential migrants as rooted residency, and it is this particular category that seems to be the most relevant regarding a pluralistic application of amnesty. Following Carens, I will claim that after a certain period of time undocumented migrants become sufficiently anchored in a community to make a legitimate claim for amnesty. I am only foreshadowing at this point. I will not discuss the particulars of this claim until the following chapters. At present this section serves only as a notice to the reader regarding the thrust of my work. I will now discuss the practical problems associated with a discourse ethical approach to undocumented immigration. This requires me to outline the general requirements of a discourse ethical mechanism regarding amnesty. Take note, this mechanism is not the same as the one outlined above. The mechanism I am about to discuss is my attempt to provide a bare-bones discursive model regarding amnesty. It will be general, and somewhat unhelpful on its own as a tool for addressing the issues facing the undocumented. In spite of this it will be helpful in outlining some of the practical obstacles a discourse theoretical model faces in this particular situation.

4 Ibid.
The general discourse ethical mechanism is fairly simple. The issue of amnesty is opened for discussion. Those who are affected by the application of norms (as qualified by Gould) associated with this potential amnesty are invited to participate in debate regarding the norms. Most importantly, this means that undocumented migrants would have to participate in discourse. Once the forum is set, and the participants arrive, debate regarding the norms would ensue. Once the parties have reached a consensus regarding the application of amnesty, each side (citizens and migrants) would have to honor their commitment given that it is the product of agreement between affected parties. Those who fall into categories requiring amnesty are allowed to stay permanently. Those who do not are either required to leave, or are given some form of a temporary permit to stay. As I said, this model is very general and not particularly helpful in outlining the specifics regarding a forum for this discourse. However, it is sufficient for our current purposes in that it will help me highlight some of the practical obstacles such a general model (and its likely derivatives) would face. One must be honest about the numerous difficulties in realizing the exacting demands of discourse theory. It is to these difficulties that I will now turn.

Practical Problems

The first major issue with a discourse ethical mechanism is the fact that it is not entirely clear how this discourse would take place. First of all, one needs to clarify who the participants in discourse will be. By this I do not mean deciding which groups will be involved. In this case I have posited undocumented migrants and citizens. What I mean by “participants” are the exact individuals who will participate in discussion, or rather the
precise number of individuals involved in discourse. Are we to expect that all undocumented migrants and all citizens will participate? Clearly this cannot be the case. Such a sizable group would likely be impossible to control. Voices would drown in a sea of millions of people. Chaos would likely ensue. Perhaps we should include all undocumented migrants and an equivalent number of citizens. This would trim down the number of participants by hundreds of millions in the United States. However it is still an unrealistic expectation given that the number of participants would likely exceed 30 million. How do you organize a debate with 30 million participants? To demand that all of those affected by the application of a norm participate in discourse is, in this case, far too taxing a requirement. There are ways to circumvent this issue, but to obey “the letter of the law” of discourse ethics in this case may be impossible. At a minimum it would be prohibitively difficult.

Taking a different approach, we could utilize the political structures currently in place to solve this issue. After all we currently accept representation as a legitimate means of governance, even though each individual does not have a direct say in how the government operates. However, restricting participants in discourse to currently elected legislative officials also clearly won’t do. These officials do not directly represent the undocumented population. Of course some elected officials seem to have the interests of undocumented immigrants in mind. In the United States senators Richard Durbin, Richard Lugar, and Charles Hagel are excellent examples given their support of the DREAM Act. However, not one of these individuals was elected as a result of undocumented immigrant votes (for obvious reasons). Migrants did not choose these
representatives. As a result these elected officials do not actually represent the undocumented (even if they virtually represent them).\textsuperscript{5} I will return to the issue of representation again in chapter 6, in an effort to show that actual undocumented migrants ought to take part in the representation of undocumented interests. Appointed surrogate decision makers are not sufficient. For now I will simply state that once again this approach does not solve the problem of determining the particular numbers or representatives involved in discourse.

Let us assume, for the sake of argument, that we find a suitable way in which to involve undocumented immigrants in discourse. While the specifics of this involvement are presently undefined, one thing is almost certain. In order to involve themselves in discourse undocumented migrants will have to enter the public sphere and engage in debate. The problem with this is involvement in discourse requires an undocumented migrant to expose his or herself to the public at large. Traditionally migrants avoid this sort of exposure due to the fact that they fear deportation. If we isolate an individual who has made it a point to avoid drawing attention to him or herself, and then ask them to engage in public discourse, it is unlikely that they will accept this request. Operating outside of the public eye is an undocumented migrant’s best defense against forced removal. If they are not seen, then authorities cannot deport them. A certain level of distrust in government agencies is understandable. As was evidenced in discussion

\textsuperscript{5} Some elected officials may come close to fulfilling the category of descriptive representation for undocumented immigrants, such as Rep. Luis Gutierrez. Given that Gutierrez is an American citizen of Puerto Rican descent, he cannot be said to fully represent undocumented immigrants in a descriptive sense. I discuss the issue of descriptive representation as compared to substantive representation in chapter 6.
regarding undocumented use of health resources, these migrants will go to great and
dangerous lengths to avoid exposing themselves to the rest of the population.6 They
might think “what if someone calls the police? What if this is a trick?” I am sure that not
all undocumented migrants would avoid the opportunity to engage in public discourse.
Some activists (e.g. Elvira Arellano) risk deportation in order for us to hear their
message. However, failing to recognize the suspicion and distrust a call to public
involvement would generate is a mistake. Even if we can solve the participant problem
mentioned above, it is unlikely that this will coax all of the required players out of hiding.
Fear is a powerful motivator.

There are four more preliminary concerns before we revisit the cases in an effort
to shed addition light on these practical obstacles. Let us begin with the implementation
of the outcome of discourse and the problem of self-interest. Again, for the sake of
argument, let us assume that we have solved the problem of who is permitted into
discourse. Furthermore, let us assume that undocumented migrants have entered the
public sphere in spite of their usual caution. Assuming they overcome these two hurdles,
the concerned parties reach a resolution regarding the terms of a graded amnesty. Let us
additionally assume that this agreement involves some sort of compromise. Those who
were formerly completely opposed to amnesty and those who were formerly completely
opposed to deportation reach an agreement that provides amnesty for some and requires

6 One potential way around this issue involves descriptive representation. If the public figures who attempt
to coax out the undocumented are descriptively similar to them (e.g. formerly undocumented, children of
undocumented), then this connection may result in a build up of trust. In turn, the trust will lead to public
involvement.
others to return to their country of origin. Are we to believe that there are undocumented individuals involved in this discourse who would willingly concede the fact that the state ought to deport them, especially in light of the great risk they likely took to enter the nation? Can we imagine that some undocumented participants might say “I agree that undocumented groups A and B can stay, for reason C; however, given that I belong to undocumented group Z, I accept that I must exit the country I took great pains to enter”? Perhaps some undocumented migrants would accept the limitations on amnesty, but it is more likely that they (like many people) are motivated by self-interest. Many of those undocumented immigrants who are not included would likely ignore deportation orders. They would may return underground and refuse to leave. To be clear, I am not saying that every decision people make is motivated by self-interest. As a species we make sacrifices quite frequently: for loved ones, for revolution, and so on. I am also not saying that people are never justified in acting out of self-interest. All I am saying is that as a result of self-interest it is unlikely that a graded amnesty would reach a true consensus, and even with a partial consensus those who are not included would likely ignore the new guidelines.  

The next problem with the implementation of the discursive model stems from a commonly held belief regarding border sovereignty and a nation’s control over

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7 Self-interest is, of course, disallowed as justification in a discourse ethical setting. Parties engaged in deliberation must present their arguments in such a way as to achieve consensus, that is, reasons must be presented as mutually acceptable. This forces participants to articulate self-interest in terms of mutual interest. I am simply pointing out that there is something naïve about assuming all undocumented immigrants who do not meet standards for amnesty will willingly remove themselves from a host nation following open discourse. Given that I believe the relevant discourses play out mostly in application settings (e.g. the courtroom as I discuss in chapter 6), this objection is less of a concern than it first appears.
immigration. While we will revisit this problem as Carens presents it at the end of this work, I would like to say a few words of my own. In order for a discourse ethical model to even get off the ground in the case of undocumented immigration, one has to accept that undocumented migrants ought to participate in the process of working out immigration norms which affect them. This claim is largely unproblematic from a theoretical perspective. The migrants are affected by the outcome of discourse and as such should have the opportunity to participate. From a practical perspective, the acceptance of this participation is much less certain. Generally speaking, most citizens in any given nation believe that their state has sweeping authority regarding who to admit and who to expel as far as foreigners are concerned. Perhaps this authority is limited by certain obligations to persecuted refugees, but the specifics of immigration policy are left in the hands of the government and the voting population alone. Many would claim that those who lack membership have no business participating in this sort of debate. The outcome may affect them, and it may affect them negatively. In spite of this, the sovereignty of the nation trumps migrant claims to participation. Once again, this is a practical obstacle which stands in the way of implementing a discursive solution to the problem of undocumented immigration. I do not endorse this position, but I believe most would agree that it reflects popular sentiment. Immigration policies are created and
enforced by a government and its recognized members. “Outsiders” have no place in this commonly held view. ⁸

The following preliminary obstacle is closely related to the preceding one. The current public debate regarding immigration reform in the United States provides an excellent example of this particular obstacle. Current efforts to find solutions to the problem of undocumented immigration are often the target of partisan objection. Conservative elements often object to proposed amnesty, believing that the vast majority of undocumented migrants (i.e. those who enter for economic reasons) are undeserving of forgiveness for their crime. ⁹ They say we should reserve amnesty for those in extreme circumstances, such as those fleeing persecution. But your average undocumented migrant is simply looking for a better life from an economic perspective. They are breaking the law to accomplish this goal. To put this obstacle bluntly, there are many individuals who will object on principle to any system which offers forgiveness to the vast majority of undocumented migrants. These individuals claim that if you enter illegally then you ought to be deported. This view is often justified by portraying undocumented migrants as a social burden, or by asserting deportation is simply “sending them back where they belong.” The conservative objector may firmly believe that there is

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⁸ I am drawing from a point Joseph Carens makes in his article *Realistic and Idealistic Approaches to the Ethics of Immigration*. In this article, Carens asserts that we must accept the notion of sovereign control over immigration procedures as a practical reality. Whether we agree with it or not is another point. From a discursive perspective, it is easy to criticize the notion that individuals affected by the application of a norm (e.g. immigrants) have no say regarding the application.

no harm done by sending someone back “home.” From a practical perspective it is likely that certain citizens involved in the discursive process would refuse to accept amnesty in any form. From a theoretical perspective we could simply exclude these individuals from argument, given that they are not motivated by achieving rational consensus. In practice, these objectors are not so easily silenced.

The last preliminary concern I will discuss concerns power distribution in the discursive model. You will recall that rules of discourse require us to forgo coercion in favor of the motivating power of reason, and to engage one another as equals. If we are truly motivated by the better argument, then one’s social standing should not matter. It is irrelevant whether one is rich or poor, a member of a majority or minority group, a citizen or an alien, and so on. In short one’s political, social, and economic power does not come into play. From a practical perspective, this clearly is not the case. Increased wealth often translates into increased political influence. Economic power translates into political power. The difference in political “pull” between members of a nation is staggering. That being said, even the poorest citizen has some power that they can exercise in the public sphere. Undocumented migrants, on the other hand, are by and large powerless. They lack political representation, live under the constant threat of deportation, are manipulated by unscrupulous employers, and so on. Of course some organizations do exist which attempt to empower the undocumented. Members of a nation may cast their vote for candidates sympathetic to the undocumented. However the migrants themselves do not have the leverage held by the voting population, and they do not have the financial power of interest groups or lobbyists. In our reality where power plays an important role
in being heard, undocumented migrants find themselves at a massive disadvantage. The probability of these migrants landing on an even playing field is slim at best and non-existent at worst.

If we return to our case studies, these practical problems in implementing a discursive model become more concrete. The problems associated with facilitating a discursive solution (first and second obstacles) hound each case. How are we to facilitate discussion between all of the temporary workers in Israel and all Israeli citizens in a way that is faithful to a discursive model? Where will debate take place in the U.S. regarding access to limited health resources and the implementation of the DREAM Act? Who specifically will participate? The seventh obstacle regarding power distribution affects each case as well. The Israeli temporary workers, the immigrants seeking dialysis treatment, and individuals like Jennifer Abreu find themselves at a profound disadvantage when it comes to the ability to access and utilize the political power necessary for participation in debate. However each particular case helps to highlight certain obstacles more clearly than the other cases. Israel’s preference regarding Jewish immigrants exemplifies the commonly held view that a sovereign nation has a monopoly on determining admittance policies. The healthcare case makes the undocumented fear of the public sphere concrete, both in regards to ACEP’s position and the fact that some

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10 I address this issue in chapter 6 when I discuss the benefits of actual representation over virtual representation.

11 In chapter 5 I will explain that even Benhabib believes that a nation may assign preference based on ethnicity, so long as they do no exclude immigrants based on ethnicity.
migrants will wait until it is a life or death situation to seek treatment. Opposition to
the DREAM Act exemplifies the aversion to amnesty given the way that senators such as
Scott Brown (R-MA) speak of those who would qualify as undeserving of a path to
membership based upon a general opposition to “illegal immigration”.12 While I could
spend more time focusing on the way these practical obstacles are shown through the
cases, I will move on towards a discursive response to these issues.

As illustrated by these seven preliminary objections to a discourse ethical
approach, it may be that discourse ethics is too unrealistic in its optimistic support of
conflict resolution through the mutual transformation of interests. From a theoretical
perspective, discourse ethics seems sound. Those raised in traditions which espouse
equality and freedom of communication are undoubtedly drawn to the theory. In spite of
the lack of prescriptive content, there is much that is attractive about the discursive
approach to morality. It is inclusive, protects the participation rights of the
disenfranchised, eliminates coercion in public debate, and so on. Unfortunately it is
evident that the discourse ethical approach handed to us by Habermas is difficult, if not
impossible, to fully implement in reality.13 I am not referring to the often cited objection
regarding the requirement of complete self-transparency. Rather I am referring to the
numerous practical difficulties regarding who is and who is not included in debate, how
seemingly incompatible interests can be satisfactorily compromised, and whether rational


13 As we will see, this point is unproblematic due to the counterfactual nature of discourse ethics.
consensus can be a dominant motive in discourse. Discourse ethics is idealistic in the sense that its complete implementation would require some sort of utopian world where partisanship and power politics didn’t come into play, where all people are rationally motivated, and where society in general lives up to the often cited commitment to equality. If we refer to the Kantian dictum “ought implies can”, then it may be the case that we can retrieve no “ought” from discourse ethics. If we can’t expect to realize the tenets of discourse ethics in reality, then why should we bother attempting to utilize this approach in order to address a concrete problem? Is discourse ethics simply a pleasant theoretical exercise, or can it provide us with useful content regarding the issue of undocumented immigration?

In an effort to respond to these practical obstacles, I will address three points made by Habermas. Each of these points provide, in sometimes overlapping ways, answers to the objections from above. Not only will I speak to each obstacle, but I will also address the general objection regarding “bad” idealism. Let me be clear. While I will speak to each obstacle, this does not mean that I will reject each obstacle as irrelevant or surpassed. Some of them are simply realities which we must accept. Of course, we can accept these obstacles as current political realities and still attempt to work around them. This will be part of Habermas’ contribution in what follows. After I have discussed these points, I will move on to some more general objections against deliberative political models. For now, I will begin with Habermas’ account of the counterfactual principles of discourse and the institutionalization of deliberation.
Counterfactual Institutionalization

It is incorrect to assume that Habermas ignores the practical difficulties which prohibit a perfect realization of discourse ethics. Principles of discourse, such as the commitments to avoid deception and coercion, are assumed counterfactually. Habermas posits these principles acknowledging that people don’t actually live up to these exacting standards at all times. Given that individuals often have motivations other than the search for truth, Habermas states the following:

Discourses take place in particular social contexts and are subject to the limitations of time and space. Their participants are not Kant’s intelligible characters but real human beings driven by other motives in addition to the one permitted motive of the search for truth. Topics and contributions have to be organized. The opening, adjournment, and resumption of discussions must be arranged. Because of all these factors, institutional measures are needed to sufficiently neutralize empirical limitations and avoidable internal and external interference so that the idealized conditions always already presupposed by participants in argumentation can at least be adequately approximated.14

There are several points we should note from this passage. The first is Habermas’ recognition that participants in discourse will not be idealized seekers of truth, but real individuals with many hidden motivations. These motivations will often take the form of self-interest in disguise. The second point is that discourse requires institutionalization. Given that we are not “Kant’s intelligible characters”, we can’t spontaneously come together as individuals affected by the same norms and deliberate according to the exacting standards of discourse ethics. By setting up a formal structure, akin to parliamentary procedure, we can at least attempt to approximate the discourse ethical

14 Jürgen Habermas. Moral Consciousness and Communicative Action. Pg. 92.
standard. I will revisit the institutionalization of discourse in reference to Habermas’ two-track model of democracy. Finally, I would emphasize the phrase “attempt to approximate the discourse ethical standard.” Habermas recognizes that even after argumentation is institutionalized it will not realize the ideal conditions of discourse. Nevertheless, some structures can get closer to realizing the standard than others. Institutions which come close to the standard should be praised, and those which fall well short should be improved. The discursive standard can serve as a critical tool aimed at improving the formal structures which govern public discourse.

Habermas’ contribution provides responses to three of the practical objections in particular, though to some extent it touches on all of them. This is due to the way in which the counterfactual nature of the principles of discourse addresses the general issue of “bad” idealism. For a theory to be idealistic in a negative sense, I take it that a requirement is the failure to account for practicalities which prevent the realization or approximation of the theory. Habermas does not make this mistake, and acknowledges that people often refuse to follow the principles of discourse. This acknowledgment includes the requirement to institutionalize principles of discourse in an effort to approximate the standard as best as we can. At no point does Habermas blindly claim that the principles of discourse are easily accepted and applied in reality.

In addition, the institutionalization of discourse is partly aimed at ameliorating the problems associated with self-interest. In the case of undocumented migrants who refuse to abide by norms which violate self-interest, formal procedures which direct discourse could attempt to ensure compliance with outcomes. More importantly, these procedures
would likely force the undocumented to present their case in a manner which is reasonable to all concerned parties. Self-interest may still underlie the argumentation, but the case made by the undocumented would have to move beyond simple self-interest in order to reach a broader audience.

Finally, the discussion of institutionalized discourse may speak to the undocumented fear of exposure. Given that formalized procedures aim to remove internal and external interference with discourse, it may be the case the undocumented would be allowed to enter the public sphere without the threat of deportation. The threat certainly interferes with any discourse which includes the undocumented. In fact we could interpret the threat of deportation as a form of coercion, which violates the principles of discourse. Such an interpretation would necessitate institutional protections for the undocumented. It goes without saying that these sorts of protections are not fully realized at present, in the United States at least. This may simply be another way in which our current system falls short of the discursive standard. It is an example of how our approximation is not close enough.

*Bargaining*

Another important qualifier Habermas provides is his account of bargaining. It would be naïve to think that complete rational consensus can be achieved on every issue. Habermas must account for how agents reach agreement in these circumstances in order for his discussion of deliberative democracy to be relevant. Fortunately, he does. Habermas makes a place for bargaining when rational consensus cannot be achieved, but it is widely accepted that some form of actionable agreement is better than no agreement
Bargaining allows competing groups, who otherwise could not reach a shared conclusion, to come to an agreement. This agreement occurs for different reasons for both parties, as opposed to shared agreement based upon the acceptance of the better argument. For example, two political groups may disagree on how to deal with the issue of undocumented immigration. One bloc vehemently opposes integration, and seeks universal deportation on the grounds that these individuals entered the country illegally. The other bloc desires universal amnesty and citizenship for the undocumented migrants, based upon cosmopolitan ideals and sympathy for dire economic circumstances. Both blocs decide that some agreement is better than no agreement, in spite of the fact that they cannot reach rational consensus. Through bargaining, they settle on a guest worker program of some sort, which can lead to citizenship following a period of naturalization. The first bloc accepts this because it forces the undocumented migrants to naturalize, and keeps them from immediately benefiting from illegal action. The second bloc accepts this solution because it allows for a path to citizenship, even if it is a long one. Notice that this agreement is strategic, driven by the power each bloc holds rather than by rationally motivated consensus.

Have we sacrificed Habermas’ principle of democracy on the alter of achieving agreement? Can the process of bargaining ever do justice to discourse ethics? The answer is yes, in spite of the fact that bargaining is a less than ideal method of attaining

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15 Jürgen Habermas. *Between Facts and Norms*. Pg. 166, 196.

16 Ibid.

17 I am not advocating for this solution, rather I present this case merely as an example.
agreement. The discourse principle is still respected, provided that each group involved in the bargaining process is given “an equal opportunity for pressure, that is, an equal opportunity to influence one another during the actual bargaining, so that all affected interests can come into play and have equal chances of prevailing”. ¹⁸ One can imagine a situation where two parties, who have an equal stake in the outcome of a bargaining process, hold wildly different levels of power. Perhaps one bloc is wealthy, and another poor. Perhaps one bloc is more educated, and another less so. Perhaps one bloc is employed, the other unemployed. Whatever the disparity, if this disparity translates to an imbalance in the bargaining process, the indirect application of the discourse principle is violated and the agreement is illegitimate. A solution is only upheld if all parties who have an equal stake have an equal say. Of course, Habermas may be trading one fiction for another here, in that his account of non-ideal discursive decision making is itself too ideal. Nevertheless Habermas’ acceptance of bargaining is a concession to the political reality that rational consensus through discourse is not always possible.

The discussion of bargaining speaks to two of the practical obstacles, though it does so in different ways. The first obstacle is the aversion to amnesty by some conservative elements. You will recall that there are some individuals who are adamantly opposed to any amnesty based on the fact that the migrants in question entered the nation illegally. Attempting to argue with them in an attempt to reach a consensus may prove

¹⁸ Jürgen Habermas. Between Facts and Norms. Pg. 167, 197.
futile. In such instances, Habermas claims that we can resort to bargaining if both parties believe some agreement on the issue is better than none. The current immigration debate in the United States serves as an example of bargaining. The conservative group seeks to enhance border security, while the more liberal minded group is attempting to address the issue of membership for the undocumented. The two parties, in theory, could reach a compromise where border security is tightened if some the undocumented are provided a path to recognized membership.¹⁹ Complete agreement regarding the reasons for an actionable decision is not always necessary according to Habermas. Different parties can have different reasons for reaching the same conclusion. So long as all parties have the equal opportunity and ability to apply leverage in the negotiating process, bargaining can stay true to discursive standards.

Of course we know that regarding undocumented immigrants, there is a substantial gap in power between migrants and those opposed to amnesty. Bargaining is not necessarily a solution to the immigration problem due to this large gap. What leverage can the undocumented really gain in a negotiating process, given that many will reject the notion that the migrants belong in the process in the first place? If they are allowed to participate, what can they hold over the heads of conservatives? The opposing side seems to hold all of the cards. One way around this problem is to find groups who

¹⁹ I say “in theory” because this example also demonstrates how some groups can reneg on the bargain. In this case, border security has tightened but a path to membership is in limbo. In May of 2011 Barack Obama openly mocked the reluctance of the Republican party, saying that they would probably demand the creation of a moat filled with alligators along the Mexican border. See “Obama Mocks GOP, Jokes They Want Border Moat.” CBS News. http://www.cbsnews.com/stories/2011/05/10/politics/main20061559.shtml. Accessed 5/11/2011.
can apply pressure to conservative elements, and have these groups speak on behalf of the undocumented. This is complicated by the fact that this group potentially lacks actual members of the undocumented community. The migrants who are most affected by norms regarding immigration policy would not actually have a voice, even if they would have a virtual one. The “all affected interests” requirement for legitimate bargaining would be absent. If we also take the disparity in power into account, it is probable that bargaining in this case will not meet Habermas’ requirement for legitimacy. This is not to say that the power-gap objection is fatal. It is an acknowledgment of the fact that the power-gap objection complicates both discursive and bargaining efforts. This is simply a case where our institutions have not done a good job of approximating discursive standards. As we move closer to these standards, it is possible that our institutions will find a way to eliminate the power gap and foster equality. Of course I cannot simply take a “wait and see” position and dismiss the power-gap objection. It is a part of our political reality which we must take into account.

Two-Track Model of Democracy

I will now move to Habermas’ third contribution. In an effort to address the first two obstacles concerning participants in discourse, it is important to examine Habermas’ two-track model of democracy. As I have already discussed, the implementation of a discourse theoretic model in the real world is a difficult one. In the case of undocumented immigrants it could potentially require the involvement of millions of people. Finding a forum and attempting to regulate such a large group, where every agent is allowed to introduce and question any assertion, seems nearly impossible. Simply relying on elected
officials also doesn’t seem to do justice in the case of the undocumented, since they are not represented by elected officials. The two-track model of democracy provides some help in sorting out these problems, or at the very least sheds some light on how Habermas deals with the tension between the formal democratic process and decentralized public will formation.

Habermas distinguishes between institutionalized (strong) and informal (weak) public spheres. The later is an open network which lacks rigid structure or firm procedures for operation. It is pluralistic, in that consists of “overlapping, subcultural publics having fluid temporal, social and substantive boundaries.”

In short, it is a largely unregulated source of will formation which operates within the framework of established constitutional rights. Information flows through the informal public sphere, which in turn develops a variety of concerned associations and expresses opinions regarding the problems of the day. Habermas refers to this informal sphere as wild and anarchic. On the one hand, the informal sphere’s wild character is more vulnerable to repression from “unequally distributed social power, structural violence, and systematically distorted communication.” But this unchained characteristic of the informal public sphere has advantages. Communication is unrestricted, unlike in the formal public sphere. The informal public sphere excels at uncovering new problem situations facing the various members of society. In short the informal public sphere is

21 Jürgen Habermas. Between Facts and Norms. Pg. 308.
free, inclusive, unorganized, and critical. I will return to this last point momentarily, after a brief example of the informal public sphere.

The chaotic nature of the informal public sphere can easily be seen in the environment of a protest. Individuals organize into a loose association and express a critical attitude towards some problem or another. The protesting group is free, inclusive (in most cases), and wild in the way which Habermas describes. The protesting group also, in some cases, demonstrates the reason why informal public spheres cannot operate on their own. Often enough, though not always, protests are aimed at expressing “no.” They often have the feel of individuals who have had enough of a certain situation (discrimination, manipulation, impiety, etc.) and simply won’t take it lying down anymore. This is the critical nature of the informal sphere. It identifies problems and critiques them. It says “no.” What the informal sphere is not geared towards is the selection of particular problems to solve, and the way in which positive steps should be made to solve them. This is why the informal public sphere requires its complement, the institutional or strong public sphere.

It would be a mistake to say that the informal public sphere has complete control over the institutional public sphere, though Habermas does claim that the former does more than merely legitimate the later. Informal discourses provide direction for institutional discourses, or in Habermas’ words, weak discourses “more or less program” strong discourses.\(^\text{22}\) What is institutional discourse, and how does it differ from informal

\(^{22}\) Jürgen Habermas. *Between Facts and Norms*. Pg. 300.
discourse? For one, it is more structured. Informal discourse is characterized as wild and anarchic by Habermas, while institutional discourse takes the form of parliamentary procedure. It is not the placards and loudspeakers of a protest which best exemplify institutional discourse, but the marble halls of a capitol building. Admittedly, this shackles institutional discourse to an extent. Strong discourse relies on the critical nature of weak discourse to point it in the right direction. Nevertheless, only these institutional discourses are capable of generating action. As Habermas states, “it is a subsystem for collectively binding decisions.” The goal of strong discourses is to sort through the various problems that weak discourses present, and reach a consensus regarding decisions to deal with these problems. Once again, informal discourses point institutional discourses in certain directions. It is up to institutional discourse to reach consensus, make a decision, and finally act on the problems it is presented.

Reflecting back on the practical problem of implementing discourse, this two-track model of democracy helps to shed light on how implementation is possible. Rather than bringing all concerned parties together into an organized debate, informal discourse allows both sides to express their grievances regarding the issue of undocumented immigration. Information flows through the public, and the public organizes in order to highlight the prevalent problems. These informal discourses then seek to direct the institutional parliamentary discourses. Institutional discourses choose which problems to solve and then they act. Regarding undocumented immigration, informal discourse takes

23 Ibid.
the form of protesters, interest groups advocating for undocumented amnesty such as La Familia Latina Unida, and interest groups aimed at enforcing recognized immigration policy such as the Center for Immigration Studies. The concerned groups highlight the various problems regarding immigration policy and enforcement, which “programs” action organized by parliamentary procedure. Everyone doesn’t have to show up to deliberate, so long as Habermas’ two-track model works in this particular situation.

The problem in this case is that at first glance the two-track model does not clearly address the issue of undocumented immigrants. As has so often been the case, the major sticking point concerns the “limbo” status of the undocumented in regards to membership in the community. According to Habermas, a prerequisite for an operational weak public sphere is citizenship rights:

The informal public sphere must, for its part, enjoy the support of a societal basis in which equal rights of citizenship have become socially effective. Only in an egalitarian public of citizens that has emerged from the confines of class and thrown off the millennia-old shackles of social stratification and exploitation can the potential of an unleashed culturalism fully develop— a potential that no doubt abounds just as much in conflicts as in meaning-generating forms of life.  

A nation such as the United States does, on paper at least, satisfy these criteria. We have attempted to construct an egalitarian society of free and equal citizens, and as such a weak public sphere can operate and direct the decision making procedure of institutional discourse. But this is informal discourse for citizens. The question remains whether or not non-members are able to “program” institutional discourse at all, and whether they should be able to do so. The later question hinges on whether or not undocumented

24 Jürgen Habermas. *Between Facts and Norms*. Pg. 308.
migrants have a claim to political participation. Such a claim is of central importance to this work, and I will flesh out a response to it in the chapters to come. The former question seems to be more of a factual concern, to which I can provide a brief response.

I do not believe it is accurate to say that undocumented migrants have no “pull” in weak discourse. As a matter of fact, there are undocumented migrants who participate in some of the public activities associated with this track of the two-track model. But does this participation translate to directing institutional discourses? To answer this question conservatively, I believe that they at least influence institutional discourse indirectly. Certain groups of citizens are profoundly concerned about the well being of undocumented migrants. These may be concerned family members, citizen-activists, members with a similar cultural or national background, etc. While those who participate in institutional discourse can choose to ignore the prodding of non-citizens, it is more difficult to ignore the prodding of citizens who are looking out for these non-citizens. The “programming” of non-citizens can be indirect, in that it must pass through the mediating channel of current citizens. If current citizens are unconcerned, then the non-citizens would lose the capacity to influence institutional discourse.

To summarize, the two-track model of democracy provides a response to the two participation obstacles. Rather than gathering all affected parties for one massive discursive event, a web of weak discourses aims to program the institutional discourses necessary for an actionable decision. While representatives of the undocumented do not populate these institutional channels, this does not mean that undocumented migrants have no meaningful involvement in the discursive process. Their interests are at least
virtually represented in informal discourses. If we take protests as an example of weak discourse, then we cannot deny that the undocumented are quite involved.

Habermas’ discussion of the institutionalizing of discursive standards, bargaining, and the two-track model of democracy speaks to most of the practical obstacles. The power-gap and fear objections linger. It is clear from Habermas’ discussion that they represent the failure to adequately approximate discursive standards, and the failure to actualize conditions for legitimate bargaining. Of course these obstacles only demonstrate shortcomings if we accept that the undocumented should be involved in the legislation of norms which affect them. This brings us back to the one obstacle I have not addressed: the issue of state sovereignty. If we accept the widely held view that a nation has a largely unqualified right to control its borders, then the power-gap and fear objections are not failures. The undocumented simply have no place in the participatory process. As such we shouldn’t eliminate the power-gap or work against elements which coercively exclude migrants from the deliberative process. Habermas claims that from a legal perspective the migrants have no claim to participate. Benhabib states that from a moral perspective we should not exclude the undocumented, but from a legal perspective claims to participation are murky. It is my goal to address this issue in detail, given that any legitimate claim to undocumented migrant participation hinges on more than a purely moral perspective. One must address this participatory “Janus Face” as a whole. I will put

25 I discuss practical problems associated with application discourses in the courtroom, and Habermas’ response, in chapter 6.
this task off until the final two chapters regarding rooted residency and pluralism, at which point I will address the moral/legal problem in detail.

*General Objections to Deliberative Democracy*

Up to this point, my discussion has focused on practical obstacles that stand in the way of preventing the implementation of a discourse ethical solution to the issue of undocumented immigration. I have either addressed these issues in an effort to dismiss them, or in an effort to enrich our discussion by highlighting potential discursive shortcomings in our political reality. These are not the only sorts of objections I will address in this chapter. In what follows I will discuss several articles which, in general, argue against the deliberative democratic ideal. While these articles are not directed at Habermas, they are certainly relevant given his support of deliberative democracy. As far as my project is concerned, they are relevant due to the fact that I am interested in how we should treat the inclusion of undocumented migrants from a moral and legal perspective. Lest I make my work too easy, I want to spend some time exploring those authors who find discursive political models lacking. Once again, I will not attempt to outright reject each position taken by each author. While some arguments are not particularly compelling, many help to flesh out important aspects of politics aside from deliberation. I will begin with the work of Stanley Fish.

In his article *Mutual Respect as a Device of Exclusion*, Stanley Fish attempts to challenge purely procedural approaches to political problems. Fish points out that the goal of most political theorists is to move from “Big P” Politics, or the “clash between fundamentally incompatible vision and agendas”, to “small p” politics, or “the adjustment
through procedural rules of small differences within a field from which the larger substantive differences have been banished.” The general thrust of this move is to go beyond deeply entrenched belief structures, and into a more reasonable approach which prizes discursive procedure as the means for resolving disagreement between competing parties. Fish’s objection is that the determination of difference between procedure and substance is itself a substantive determination. Certain individuals with certain sets of values will engineer a procedure for political problem solving. This procedure, consciously or not, stacks the deck in the engineer’s favor. Those who disagree may cry foul and claim that the deck is stacked against them from the beginning. Some examples could include fundamentalist Christians who argue from a literalist interpretation of the Bible, or individuals arguing in favor of discrimination. In these and other cases, the engineers simply respond that the malcontents are being “unreasonable” or “malicious”, and in turn attempt to dismiss them from the procedure all together. Procedure is substantive in that it conforms to liberal values. These are values which everyone does not accept. Deliberative procedure is little more than a process of “self congratulation” according to Fish. Liberals create the rules of the game to conform to their beliefs, and then engage in an elaborate back-patting process once these biased rules produce a particular result.

I will focus on the issue of racism in what follows, or perhaps more appropriately, the discrimination against discriminators. There are several potential responses to Fish’s

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criticism. The first of these concerns what Fish believes is a simple dismissal of, for example, discriminatory strands of argumentation. Categorizing the dismissal of discrimination as flippant does not reflect the character of the rejection. The rejection, presumably, is founded in principles of universal human equality. While it is the case that racists may reject these principles, we cannot take this rejection seriously if it lacks sufficient evidence for wider acceptance. “Reasonable people”, if they act in good faith, hold themselves to this same standard. For example, a racist may argue that Hispanic undocumented migrants should not be allowed to participate in discourse regarding policies of amnesty and exclusion. If pressed to provide justification for this exclusion, the racist would respond that Hispanics are inferior to other races, and therefore do not deserve any form of equal treatment. One of the “reasonable people” Fish mentions would likely respond that this discrimination is unfounded. As fellow human beings, Hispanic individuals are entitled to the same respect and dignity as every other person. The color of their skin, country of origin, or other arbitrary traits give us no justification for excluding them from arguments which profoundly affect them. They are people. Granted they may look different from “us” in certain ways, but they are people just the same. If the racist cannot provide further justification for exclusion based upon race, (which I presume he or she could not), then the racist’s argument fails. Demanding that an individual justify their position, and rejecting the position if they fail to do so, is not

27 It is obvious that this claim is false, and no one holds this view in academic literature on the subject of immigration. I am merely exploring Fish’s point regarding disallowing racist argumentation.
discriminatory. It is simply following basic rules of argumentation which direct a search for truth between parties in discourse.

This may seem question begging to someone like Fish, or at the very least an example of crafty liberal engineers stacking the discursive deck in their favor. Another potential response is that the principles of discourse must be justified retroactively. You may recall Benhabib’s discussion on this topic. Certain principles of mutual respect and equality must be in place before open discourse even gets off the ground. For Benhabib we cannot begin the discursive process if we assert that only certain individuals (of a certain race, religion, etc.) are allowed to participate in that discourse. However, equality is not axiomatic according to Benhabib. Once a discursive system is in place, we must then turn back to principles of mutual respect and equality in order to determine if they are discursively justifiable. Benhabib asserts that this helps us avoid “bad circularity”, given that the foundational principles are subject to scrutiny. In other words, while discourse requires the uncritical positing of general notions of equality, these general principles must be subject to scrutiny and extensive argumentation after discourse begins. If we accept this as true, then Fish stands refuted. The principle of equality is not merely a liberal argumentative trick, but is a justified prerequisite for discourse. Fish may simply respond that scrutinizing foundational principles through the lens of their derivatives does not yield a satisfactory result. The deck is still stacked against those excluded from deliberation.

Perhaps the best way for Habermas to sidestep Fish’s criticism is to point to process rules of discourse. These rules allow any rational subject who is able to speak and
act to take part in discourse. In addition, every individual may introduce any assertion and question any assertion introduced. Fish claims that individuals such as racists and fundamentalists are discriminated against as a result of the deliberative system. However, these process rules say otherwise. Everyone can participate in the process of deliberation, and they may introduce whatever assertions they wish. Assertions which violate the process rules of discourse will, of course, be rejected. The white supremacist who seeks to exclude the Hispanic migrant based upon the migrant’s race will not succeed. However, this is less a form of discrimination against the discriminator and more an example of the same sort of protection afforded to the white supremacist. The same rules which protect one party protect the other. I can no more attempt to exclude a white supremacist from debate that he or she can exclude a Latino participant. Once again, we are all subject the same rules and same protections.

Ian Shapiro raises a number of issues regarding political deliberation in his response to Amy Guttmann and Denis Thompson’s book *Democracy and Disagreement*, one of which is particularly applicable to our discussion. While Shapiro directs his objections at Guttmann and Thompson, I believe we can apply the objections to any political model which relies heavily on deliberation for achieving consensus. The problem Shapiro addresses concerns an underlying assumption that discourse, if it follows certain rules, will reach rational consensus. This is not necessarily the case. In fact, there are cases where two parties with different interests enter into discourse only to discover that the differences between them are greater than they first believed. Imagine
an estranged married couple who seek counseling to save their failing marriage. It may well be the case that the problems the couple faces are greater than they first believed. If this occurs, then discourse results in the failure to reach consensus (or reconciliation) rather than the opposite. In short we should not assume that any problem can be solved with enough “good” deliberation, or even that it reduces disagreement. Sometimes discourse may bring to light new and intractable differences between conflicting parties.

This particular point seems to be less of an objection and more of an astute observation. In the process of open discourse it is quite possible that differences between two groups will come to light which were previously unknown. If these parties have not engaged in direct communication before, it is quite likely that this will occur. Insofar as the discursive approach I utilize is concerned, this is not exactly a problem. In reality we have to accept that not every discourse will result in agreement. This is more likely regarding certain hot button issues like amnesty for the undocumented. All Shapiro’s assertion demonstrates is that two parties engaged in discourse will not always leave seeing eye-to-eye, or even leave in less disagreement than when they first engaged one another. It does not demonstrate that the discursive model is a failure, unless one believes that “good” discourse always results in agreement. I do not make this claim, and in fact I am grateful for Shapiro’s sobering influence. While we should keep this insight in mind, it should not dissuade us completely from deliberation regarding the justification and

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application of norms. It should dissuade us from putting all our faith in this model to provide a resolution in every circumstance.

William Simon challenges deliberative democracy on three basic grounds. I will address two of these challenges. The first is the mobilization problem. In many cases, discourse itself is not sufficient to motivate political participation. Simon mentions a cathartic style of engagement, where individuals unify as a result of fear or empathy. This unification is strengthened through the articulation of shared experiences and confrontation with opposing groups. Simon mentions Martin Luther King Jr. as a champion not of deliberation, but of mobilization. He was able to rally and motivate the African American population to force liberals to make good on their promises, instead of engaging opposing groups in open discourse. Finally Simon points out that while motivating people to engage politically and reaching consensus are often complementary, they are also often in tension. The very act of mobilizing a group to participate often highlights and increases conflict between opposing parties. These conflicts are at times more likely to play out in terms of protest and counter-protest, instead of in terms of debate. While this tension isn’t anything new according to Simon, it is unwise to overvalue the consensus component.

The second limitation concerns engaging with opponents who take a position in bad faith, either in that they are plainly dishonest or that they are simply un-open to

reflection regarding a particular issue.\textsuperscript{30} Engaging with such individuals, according to Simon, is at best a waste of time and at worst a vehicle for the demagogue or liar to present themselves as more reasonable than they actually are. Simon utilizes the welfare debate as an example of this trend. As a matter of fact, disagreement between liberals and conservatives on the issue is not as great as it appears. Hardly any liberals champion a universal welfare system which provides for those fully capable of providing a decent life for themselves. Hardly any conservatives advocate denying welfare to those who cannot provide for themselves through no fault of their own. Good faith disagreement regarding the issue should focus on where to draw lines regarding who is included and excluded, and how much those who are included receive. Instead what we often encounter is a conservative argument that liberals advocate for universal welfare, a claim which they do not hold. The liberals, in turn, attempt to refute this bad faith claim. They are in effect falling into the conservative trap by engaging in discourse, due to the fact that they lend credence to the conservative argument by taking it as a serious point of debate.

Neither of Simon’s objections is fatal. First, the motivation deficit mentioned by Simon is easily solved when one examines the role of informal discourses in the democratic system. The weak public sphere receives information and spontaneously forms associations which criticize certain realities. This criticism directs institutional discourses aimed at action. Simon provides an example of weak discourse when he mentions Martin Luther King Jr. King organized groups and motivated them to protest

the injustices of the day. He organized protests and provided a forum for the criticism of segregation. This critical discourse, by Simon’s admission, forced liberal legislators to make good on their commitments to equality. To put the situation in Habermasian terms, informal discourse programmed institutional action. Motivation is a part of discourse, and Habermas’ deliberative model answers Simon’s concern.

Regarding bad faith, it seems to me that there is no way around the fact that some individuals engaged in discourse are going to act in a deceitful manner in order to further their own agenda. While we can do our best to avoid engaging with these sorts of individuals, it will never be enough to prevent this sort of occurrence in every instance. We live in a world which requires a certain degree of skepticism in order to prevent others from taking advantage of our naiveté. As I have said many times before, this realistic observation does not disallow appeals to the counterfactual discursive standard. Not only that, but it also does not undermine attempts to engage in deliberation with other concerned parties in order to achieve consensus. We don’t need to be held hostage by snakes in the grass. We simply need to be as mindful of them as possible. If they engage in diversionary tactics, such as claiming all liberals engage in “class warfare”, then the best we can do is prove them wrong and out them as agents acting in bad faith.

While this work has already addressed some of Michael Walzer’s contributions to the field of immigration studies, I will now focus on a briefer discussion regarding the place of deliberation in politics. At the beginning of his article Deliberation, and What Else, Walzer tables the discussion of whether or not deliberation is a component of the political process as we know it. Assuming that it is, he begins to outline an extremely
large number of other important and non-deliberative components. Some of these components such as the organization and mobilization of party participants have already been discussed. Other components, such as corruption and lobbying, have a distinctly anti-deliberative character and are unfortunately entrenched characteristics of the political system. The list, while non-exhaustive, is extensive. I will not list all of the other components here, though I will list three components that at first appear to be important components of deliberative governance. However, the way in which Walzer describes these political functions is distinctly non-deliberative.

The first of these is political education. Walzer does not have in mind the sort of basic education which introduces students to the political process, major figures, parties, and branches of government. Walzer is referring to political education in the sense of educating members of a political party in the party doctrine. In other words the party is attempting to educate members regarding the content of party goals and the means to advance them. It is indoctrination, in the sense that the party is attempting to persuade members to support and advance a doctrine. While proponents of deliberative democracy would likely decry this sort of action as non-discursive, it is (for better or worse) an important part of the political process. The second component is debate. While debate may conjure images of skilled participants engaged in discourse, Walzer claims this is not the case. The goal of deliberation between opposing parties is to reach agreement. The


goal of debate is to win. It is a competition between two verbal athletes, one which is a mainstay of campaigning circuits and media outlets. Strategies include twisting facts to suit one’s own interests and engaging in “smear” tactics to discredit one’s opponent. As Walzer states, “the others are rivals, not fellow participants; they are already committed, not persuadable.” Finally, Walzer discusses the political component of voting. A deliberative voting process, Walzer asserts, would aim at determining the relevant qualifying criteria for a candidate and deliberating on which candidate best fits this criteria. The actual voting process is not like this. Many different people may vote for the same candidate for vastly different reasons. For example, one person may have voted for George Bush because of his hawkish nature, while another may vote for him based upon shared Christian values. While we may want voters to weigh all available evidence before they vote, they certainly don’t have to and are not barred from participation if they abstain from diligent research. More to the point, they are not barred from voting if they choose a candidate for non-deliberative reasons. Walzer claims that most people vote based upon deliberatively disallowed evidence, such as personal interest, passion, or ideology. In short the process of voting is profoundly non-deliberative.

After going through his non-exhaustive list, Walzer finally asks if there is an independent place for deliberation in the political system. It turns out that the title of his article, *Deliberation and What Else*, is misleading. Deliberation is not an independent

component according to Walzer, at least if we take deliberation as it is in the test case of a jury. In this test case, a group of individuals begin discussion in an attempt to reach the single right outcome for a case. The political arena does not reflect this commitment. Even those who agree on a particular course of action may disagree regarding the reasons to take the action, the way to implement the action, the timeframe for implementation, etc.35 Permanent settlements are rare in the political arena, and different ideologues may hope to reopen debate when the prospect of victory seems more likely. Disagreements between the Right and the Left persist, and will persist, into the foreseeable future. Politics is, for Walzer, “the endless return to these disagreements and conflicts, the struggle to manage and contain them, and, at the same time, to win whatever temporary victories are available.”36 We must also keep in mind that the way to win these arguments is to educate, organize, and mobilize more people than the opposing side. Better arguments do not win the day. More supporters win the day.

Finally, Walzer believes that deliberation is unable to address the prevalence of inequality in society. Political history, for Walzer, is the tale of creation and consolidation of wealthy ruling classes.37 Once consolidated, these classes attempt to secure their position against outside threats. The only way to shake up these hierarchies, according to Walzer, is organization and mobilization against them. Political history becomes a tale of

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36 Ibid.

the consolidation and dissolution of established ruling classes. Walzer sees no way to replace this struggle with a deliberative process. Not only would it be difficult to decide upon participants and relevant evidence, but disillusioned citizens could always claim that they are shackled to a rule set designed by the powers-that-be.\textsuperscript{38} All of this is not to say that Walzer denies the place, even the important place, of deliberation in politics. He simply does not believe it is an independent place. “Deliberation’s proper place is dependent on other activities that it doesn’t constitute or control; we make room for it, and should do that, in the larger space that we provide for more properly political activities.”\textsuperscript{39} We should introduce rational reflection into political education, debate, voting, etc. There are many ways to make our political activities more deliberative. Deliberation itself simply isn’t a political activity.

In the end, Walzer appears to mute many of his original criticisms. His concern regarding non-deliberative political activities and his rejection of deliberation as an independent political activity are rooted in what he sees as the current political reality. At the same time he admits that deliberation should permeate most, if not all, political activities. What’s more, it should permeate them to a very high degree. Walzer’s acknowledgement even affects the claim that it is more votes and not better arguments that win the day in politics. If deliberation and rational decision making begin to seriously impact the voting process, “more supporters” most likely translates into “better

\textsuperscript{38} Ibid.

\textsuperscript{39} Michael Walzer. “Deliberation, and What Else?” Deliberative Politics. Pg. 68.
arguments.” Walzer’s concern regarding the lack of deliberation in politics and non-deliberative political activities does not put a nail in discourse theory’s coffin. I will not belabor this point. Instead, I will turn to Walzer’s concern regarding motivation and the dissolution and reconstruction of unjust hierarchies.

I acknowledge that Walzer is not directly pursuing Habermas in his article, and as such he should not be expected to directly address Habermas’ political theory. Insofar as Walzer’s claim regarding class struggle is concerned, I am not convinced that a proponent of deliberative democracy must completely replace this conflict with deliberation. Returning to Habermas’ two-track model of discourse, we could say that as information flows through the population about a particular injustice, groups will emerge which begin to critique the status quo. Organization and motivation can go hand in hand with this strand of discourse, even though informal discourse cannot effectively produce action on its own. Of course this requires those engaged in the critical process to have equal citizenship rights, which historically is often not the case. But we do not need to choose between struggle and deliberation. They can operate together.

The clearest example which puts Walzer’s concern to rest comes from Habermas’ discussion of informal discourse. Recall that the weak public sphere is more attuned to identifying problem situations than the more formal political structures. Habermas mentions the “great issues of the last decades” as examples of how the weak public sphere brings issues to light. The nuclear arms race, third world poverty, increasing immigration, women’s rights, and the like are all problems which Walzer would likely claim cannot be solved through deliberation. They could only be solved through struggle.
Here is where Walzer’s “jury analogy” breaks down. A discursive model does not always take the form of the impartial jury, debating in an isolated setting. Returning to the great issues mentioned above, Habermas says the following,

Hardly any of these topics were initially brought up by exponents of the state apparatus, large organizations, or functional systems. Instead, they were broached by intellectuals, concerned citizens, radical professionals, self proclaimed ‘advocates’ and the like. Moving in from this outermost periphery, such issues force their way into newspapers and interested associations, clubs, professional organizations, academies, and universities. They find forums, citizens’ initiatives, and other platforms before they catalyze the growth of new social movements and sub cultures. The later can in turn dramatize contributions, presenting them so effectively that the mass media take up the matter. Only through their controversial presentation in the media do such topics reach the larger public and subsequently gain a place on the ‘public agenda’.40

The critical nature of weak discourses takes the form of organization, motivation, and struggle in certain instances. By bringing these issues out of the periphery and into the public eye, informal discourse seeks to shake up an established system of social injustice. While it is true that the formal sphere still holds the reigns on action, these critical enterprises can result in the placement of new, radical figures within the decision making apparatus. Struggle, organization, and motivation are not opposed to deliberative models of democracy. They are a part them.

This chapter had, at its outset, four goals. The first was to discuss the numerous problems with reaching a moral consensus through a discourse ethical approach. I explained these specific problems with undocumented immigration in mind. After this discussion, I showed how Habermas’ theory survives these practical problems and

40 Jürgen Habermas. *Between Facts and Norms*. Pg. 381.
provides us with a discursive standard which we can approximate, if not perfectly implement. Next, I discussed some more general objections to deliberative democratic approaches. Finally, I answered these objections in an effort to further flesh out our understanding of what a discourse ethical approach would resemble. I want to reiterate that the purpose of this chapter was not merely to answer objections against a deliberative solution to the problem of undocumented immigration. These problems demonstrated that a true moral consensus is not always achievable, and in its place we are often left with some form of legal compromise. Through our encounters with the practical problems and general objections, our understanding of discourse ethics has been enriched. I have shown the ways in which Habermas responds to the accusations of “bad” idealism, and how these responses take into account the problems of approximating a discursive standard in the real world. I will revisit these responses, in particular the two-track model of democracy, in chapter 6. For now we will move on to the issue of human rights, in an effort to determine whether or not we can locate a unique rights-based claim that undocumented migrants could make.
CHAPTER FOUR
HUMAN RIGHTS

It is time to focus on the issue of human rights as it pertains to immigration, particularly undocumented immigration. Given that my focus is on undocumented immigrants and any unique duties a host nation may owe them, it should not come as a surprise that I am narrowing our search. Do they have a right to stay? Do others have a right to deport them? These are the questions which will drive our discussion in this chapter. A human rights claim is an extremely strong claim. To say one has a right to something is to say one is entitled to it, and others are either required to not interfere in an individual’s fulfillment of that right or they are required to assist the individual in fulfilling that right. In liberal democracies, things such as political participation and the right to face your accusers in court are not privileges (at least in principle). These two examples, and others, are guaranteed in ways that something such as a driver’s license is not. If we can find a unique right/duty relationship for undocumented immigrants, than we will have found a powerful tool as it relates to undocumented amnesty. However, it is my view that no such unique right/duty relationship exists.

This chapter is structured as follows. First I will briefly revisit our discussions of Walzer, Carens, and Benhabib in order to provide some background regarding a potential rights claim for undocumented immigrants. Given that these accounts provide no clear
answer regarding a rights-based duty for the undocumented, I will shift our discussion to three accounts of rights which could provide the basis for such a duty. The first of these accounts is Georg Lohmann’s discussion of the Universal Declaration of Human Rights, perhaps the most well known human rights document in recent history. The second of these accounts comes from James Griffin’s discussion of welfare rights, where he potentially opens the door for an undocumented rights claim based upon need (e.g. the migrant came from a destitute nation). The third account comes from Habermas’ discussion of the foundational rights, and the potential undocumented rights claim regarding access to political participation. For reasons that will become clear in what follows, I will claim that all three of these accounts fail to provide a unique rights-based duty owed to undocumented immigrants. This is not to say that rights-based duties do not exist, it is simply the case that these duties are not unique to undocumented immigrants. More specifically, undocumented immigrants share these rights claims with immigrants in general.

**Walzer, Carens, and Benhabib**

Beginning with Walzer, one can assume from his prioritization of communal self-determination and his insistence on sovereign border control that undocumented migrants would not have a right to amnesty and citizenship. If White Australia can keep those of different ethnicities from entering their nation, it stands to reason that they can expel those who entered clandestinely. This must be qualified in the following ways. Walzer does argue that guest workers, who receive permission to enter a nation, ought to be
given a path to political membership. They are participants in the nation’s economy and legal system, so according to Walzer, they have a claim to political membership as well. They can deny this claim, of course, and return home. Nevertheless, the offer must be made. But guest workers are not undocumented migrants. The former enters a nation through official channels, while the later does not. Another qualification concerns refugee status. Part of Walzer’s argument regarding asylum is that it is worse to expel a refugee in one’s country than to deny them entrance. It is worse to kick them out than it is to lock the door. If we apply this comparison to undocumented immigrants, then one could claim that deporting a migrant is worse than denying them admittance. In spite of these qualifications, I stand by the assertion that clear evidence for a right to amnesty and membership for the undocumented does not exist in Walzer’s account. Walzer may not explicitly deny such a right, but his description of border sovereignty and the power of the state to distribute membership lend themselves to such an interpretation.

Carens does have such an account. In *The Case for Amnesty*, Carens recognizes that a state does have a qualified right to deport irregular migrants. However, that right weakens over time until it is trumped by a migrant’s right to membership in the community. The relevant category for Carens is the passage of time. While there are

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1 Michael Walzer. *Spheres of Justice*. Pg. 60.

2 It isn’t entirely unreasonable to conclude that Walzer would be more amicable to certain groups of undocumented immigrants, particularly those who have lived in a nation for an extended period of time. Given that undocumented migrants are not refugees fleeing persecution, nor are they explicitly invited into a nation, it is simply the case that Walzer’s qualifications fail to map directly onto the undocumented.

certain factors that could accelerate the process, such as family living in the nation, people who live in a community for an extended period of time sink roots in that community. They become, as Carens puts it, socially recognized members though not legally recognized members. They contribute to society, make a home, start families, etc. Over a period of time, as the roots of the irregular migrant sink deeper, the right of the state to deport them is trumped by a moral claim not to be uprooted. As Carens puts it, “at some point a threshold is crossed, and irregular migrants acquire a moral claim to have their actual social membership legally recognized.”\(^4\) This sort of claim on the part of the migrant is not immediate. It takes time, and Carens is quick to point out that any line drawn will have an element of arbitrariness to it. However, a line should still be drawn and a date set for the point where the migrant’s claim trumps the state’s claim.

Neither of the accounts mentioned above provide a robust description of human rights. In both instances, rights seem to act as moral trumps. For Walzer, the right of the guest worker to membership in a community would trump efforts to expel the worker or to deny them membership in perpetuity. For Carens, the right of the state to deport irregular migrants trumps the migrants’ claim to stay up to a certain point. After the required period of time passes, the relationship is reversed. Benhabib and Habermas provide more robust definitions of rights, particularly basic rights, which will help to drive us towards some resolution regarding a right to amnesty or path to citizenship. I

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\(^4\) Ibid.
will forgo discussing Habermas’ account until the end of this chapter, and turn to Benhabib at present.

Benhabib’s discussion of basic rights was covered in the introduction. To review, she states that discursive rights claims take the following form: “I (as a citizen) can justify to you with good grounds that you and I should respect each others’ reciprocal claims to act in certain ways and not to act in others, and to enjoy certain resources and services.” This entails pre-discursive rights regarding respect for autonomy and the right to freely communicate, which are then justified discursively after the fact. What does this mean for undocumented migrants? This means that denying amnesty is still possible in some (for now undetermined) circumstances. It is simply the case that this denial cannot result from a denial of communicative freedom. If I, a citizen, can justify to you, an irregular immigrant, that you should return to your country of origin, and this justification follows discursive norms, then you would have no rights claim to amnesty. However, denying an irregular migrant any voice in the process is a clear moral rights violation according to this model. If the immigrant has no voice, and as such cannot present his or her own arguments for amnesty, then the basic discursive rights of the immigrant have been violated. It is worth noting that the rights violation is, in this case, moral. Benhabib puts off answering the question of whether denying non-citizens’ communicative freedom amounts to a legal rights violation. Given that she upholds the moral/legal

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6 This follows from Habermas’ legal/moral distinction as discussed in the Theory chapter.
distinction from Habermas, this means that the moral right to communicative freedom is not adequately enforced. It would be a mistake to leave our discussion of Benhabib here. Perhaps her greatest contribution to the discussion of a human right to immigrate comes from an examination of the supposed asymmetrical relationship between immigration and emigration.

The tradition in political philosophy holds that there is an asymmetrical relationship regarding immigration and emigration, insofar as rights are concerned. Kant is perhaps the first to bring this asymmetry to light. For Kant, the state cannot hold its citizen’s “hostage”, so to speak, if they wish to emigrate. They are not a national resource, and should be allowed to leave a nation if they no longer desire affiliation with that nation. However, this right to leave is not met with a reciprocal right to enter somewhere else. Unless turning someone away would result in the individual’s death, Kant is quite clear that a nation may exclude whoever is wants. There is a right to emigrate, but no right to immigrate. Walzer holds the same position. Given that he compares state admittance policies to a club, Walzer believes anyone can leave the “club” if they no longer wish to be members. To hold them back replaces free association with coercion. There is not reciprocal right to join another “club” however. The state still can admit or exclude anyone they wish, including those who wish to emigrate. Once again,

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7 This is not to say that undocumented migrants completely lack a voice in a country such as the United States. Undocumented immigrants do participate in application discourses during courtroom appearances, and they do participate in informal discourses by way of protests. I will discuss these in detail at the end of this work.
the right to emigrate is not complemented by a right to immigrate. In both cases, the asymmetry is maintained.

Benhabib challenges the common acceptance of this asymmetry. According to Benhabib, the virtue of a liberal democratic admittance policy concerns hearing those on the outside who seek admittance. We must not ignore them. We should hear their story.8 Of course, this does not mean that the borders need to be completely open. We can set certain guidelines regarding admittance, so long as those guidelines meet criteria regarding non-discrimination and are in accordance with human rights claims. A claim to enter is met by an obligation to examine the claim, if not automatically permit entry. For Benhabib, a right to exit is complemented by a right to entry. Perhaps it is not a right to enter anywhere, but at the very least it is a right to enter somewhere. This right to immigrate is grounded in the basic right to liberty, just as the right to emigrate is grounded.

Benhabib claims that Kant and Walzer cannot maintain this asymmetry for two reasons. The first is that one cannot leave a nation without landing on someone else’s sovereign territory.9 As a matter of fact, a right to emigrate requires a right to immigrate. This is a purely pragmatic consideration, one which calls into question the aptness of Walzer’s club analogy. In order to leave the club, one must leave the clubhouse. If leaving the clubhouse requires one to enter another clubhouse, then it is a practical

8 Seyla Benhabib. The Claims of Culture. Pg. 171.

9 Seyla Benhabib. The Claims of Culture. Pg. 172.
necessity to compliment a right to exit with a right to entry. If one cannot enter another nation, then they cannot leave their own. This right to entry does not entail a right to membership. Only entry is under consideration. The second reason that asymmetry cannot hold is a result of reversing moral perspectives. A right to go means that strangers will come. If we have a right to leave, then we must recognize that we are potential strangers in another’s land, and if we were strangers we would want to be allowed into that land.\textsuperscript{10} This is a reciprocal moral claim. We, as potential strangers with a right to leave, would want a right to admittance. If we reverse the perspective, we must recognize the claims of actual strangers. For Benhabib, asymmetry stands refuted.

As was mentioned above, Benhabib does not believe that a right to entrance entails a right to membership. The state is still allowed to create criteria for membership, processes to be fulfilled, and so on. Admittance does mean that one has the right to know how one can become a member, or has a right to know why they cannot be a member. Regulations must be transparent, and given Benhabib’s use of discourse ethics, presumably they must be the product of agreement between concerned parties. Those who are denied membership have a right to appeal the decision, and pursue legal action in order to plead their case. The burden of proof is on the liberal democracy, to demonstrate that border control policies and policies regarding membership are in accordance with human rights norms. Discrimination based upon ethnic, religious, and similar grounds is disallowed. Likewise, examination processes regarding membership must be in line with

\footnotesize{\textsuperscript{10} Seyla Benhabib. \textit{The Claims of Culture}. Pg. 173.}
human rights norms regarding respect for individual dignity. It is not the case that a state’s prerogative to control membership gives them a blank check regarding examination and enforcement procedures.

While Benhabib does take a definitive stance on a reciprocal right to immigrate, this stance does not answer all relevant questions regarding a right to immigrate. Perhaps the largest gray area, which Benhabib mentions herself, is that it is a right to immigrate “somewhere”, but not anywhere in particular. Take Abreu as an example. During deportation proceedings, she claims that she possesses the human right to emigrate. Abreu expresses the intention to exercise this right and renounces her status as a Brazilian. In addition, she claims, this right to emigrate entails a complementary right to immigrate. She expresses interest in officially immigrating to the United States, and claims that to deny this request would be a violation of a universal human rights claim. It seems to me that this is an appropriate application of Benhabib’s argument, and one could imagine that this argument could persuade the deporting nation. She has to immigrate somewhere, so why not here? Of course this argument could have a very different, and still legitimate, conclusion.

Suppose that the relevant deporting authority hears Abreu’s plea, and even recognizes that she has a human right to immigrate. The authority may respond as follows. While Abreu does have the right to emigrate and immigrate, she does not have a right to immigrate anywhere she chooses. The rights claim is a claim made against other nations in general, not a single nation in particular. This is similar to the sorts of claims an asylum seeker can make. The deporting authority may have an obligation to assist
Abreu in finding another nation, but even this is questionable. It may be that this obligation falls on Brazil, given that it is her country of origin. Finally, the authority may add that since Abreu is in the United States illegally, this works against her claim to stay. She has violated established entrance procedures (albeit as a minor), which the deporting authority could hold against her in the process of choosing whether or not the United States should be the particular nation to honor her rights claim. In short, so long as the United States hears Abreu’s plea and refuses to send her back into a dangerous situation, the nation can refuse to honor the claim to immigrate. Insofar as undocumented migrants are concerned, the host nation is less likely to honor the rights claim based upon the violation of established entrance procedures. “If you wanted in”, they would say, “you should have asked first.” In spite of this, Benhabib’s claim is a well articulated response to the age old asymmetry between emigration and immigration. It simply needs an added element specifying upon whom responsibility falls for honoring the immigration component. I will attempt to articulate such a response further along in this chapter by referencing the work of James Griffin regarding welfare rights.

To sum up the review of Walzer, Carens, and Benhabib, we receive diverse and problematic answers from each author. Walzer likely denies such a right, given that he allows a nation sweeping authority in relation to membership allocation. Carens accepts a right to membership for the undocumented, but only after an as yet undetermined and arbitrary period of time has elapsed. Benhabib also seems to favor such a right. At a minimum she claims that the undocumented have a moral rights claim to participate in establishing immigration policy. Her account is problematic in that this moral right has
no complementary legal right, and her discussion of a right to immigrate does not place responsibility for accepting an immigrant on any particular nation. For now I want to move beyond the works we have discussed and focus on three different accounts of human rights. The first of these is Georg Lohmann’s discussion of human rights as they appear in the UDHR. The second is James Griffin’s discussion of the foundation of human rights and the necessity of a right to welfare. After I have covered these authors, I will return to Habermas.

_Lohmann and the UDHR_

While Lohmann provides a rich and detailed account of weight assigned in human rights conflicts, I am referencing his work for a different purpose. I am particularly interested in his somewhat brief discussion and division of the rights set out in what is the most famous modern document on the subject. I refer of course to the Universal Declaration of Human Rights which surfaced following the end of World War 2 (1948). Following Lohmann’s discussion, I intend to apply his division to the case of undocumented immigration to see if we can discover any particular duties to the undocumented. More appropriately, I intend to highlight what is at stake when we discuss the application of human rights to the issue of undocumented immigration.

The rights contained in the UDHR are subjective according to Lohmann, in that they apply to groups of individuals. They are also complex, in that they contain both a
moral dimension and a legal dimension. While he is not necessarily in full agreement with Habermas, it seems Lohmann has a description of the “double nature” of rights which is similar to the description provided by Habermas. Moral concepts related to egalitarianism and universal application provide the backbone of rights in general. However, these moral rights are in a sense “weak” according to Lohmann. They are culture transcending rights, but one can only appeal to them for support in a weak sense regarding internal moral sanctions such as public indignation. In other words, if a nation violates a purely moral right, then the public may become outraged at a perceived violation of culture transcending universal morality. However, if the right lacks a legal component then this indignation does not require some form of punitive retribution. Only when the moral right is translated into a legal right does it gain this power. Of course, as Lohmann points out, legal rights are dependent on the actions of particular legislators in the transformation of moral dictum into law.

When human rights are transformed into law they become subjective, fundamental rights. The rights are both negative and positive, vertical (between an individual and the state) and horizontal (between citizen and citizen). These rights are limited by the legal system in which they are institutionalized. Of course it is possible to expand the boundaries of legally realized rights through international agreements and pacts. Lohmann cites the European Constitution of the EU as an example of such transnational agreements. These developments are welcome. Previously, the legal aspect of

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human rights would not allow for international enforcement of heinous violations. There simply was no legal mechanism for one nation to take action against another. Now, these transnational agreements allow for organizations such as the International Criminal Court to pursue violators across national boundaries. In other words it moves us closer to a global human rights regime. While Lohmann is pleased with these developments, he is cognizant of the fact that international constitutionalization of law is an open and controversial project.\textsuperscript{12} One example Lohmann mentions is the fact that organizations such as the International Criminal Court are not universally recognized. Individuals such as Omar al-Bashir can be brought up on charges for the violation of human rights, but if the nation the offender resides in refuses to recognize the jurisdiction of the Court, then enforcement is not possible.

Moral human rights are transformed into recognized legal rights through the acceptance of the public sphere, a product of public will formation.\textsuperscript{13} These sorts of public decisions are motivated primarily by historical accounts of gross violations of human dignity, or by what the public perceives to be an impending emergency in the field of human rights. The process begins with circulation through a “weak” unregulated deliberative process spread across both the national and international level. Following this unregulated discourse (and inspired by it), the rights are solidified through a “strong”


\textsuperscript{13} Ibid.
deliberative process in the institutionalized structures of national and international governing bodies.

Lohmann asserts that there are three basic categories of human rights and divides them in the following way:

In substance, the human rights can be divided into three groups. The first group is the individual freedoms. They are traditionally a defense of the citizen against violence by the state, but are also designed as a defense against their restricted liberty by other people (among others, the following articles of the UDHR: 1 & 2: equal rights and freedoms; 3: Right to life; 4: slavery prohibition; 5: Prohibition of torture; 12: Protection of privacy; 13: free domicile and freedom to emigrate; 14: asylum; 16: free marriage; 17: Right to property; 18, 19 and 20: religion, expression and assembly).

The second distinguishable group is legal and political rights. They protect and allow individual participation in judicial procedures (fundamental judicial rights) as well as the political and social freedom of expression and opinion-forming (among others, the following articles of the UDHR: 6, 7, 8, 9, 10 and 11: Equal protection; 15: law on nationality; 18, 19 and 20: religion, freedom of expression and freedom of assembly; 21: political participation and voting rights; 28: Right to the corresponding international order of human rights.)

Finally, there are social rights. All will be offered equal and adequate living conditions for social support (among others, the following articles of the UDHR: 22: Right to social security; 23: the right to work; 24: Right to recreation, leisure and holidays; 25: Right to living, shelter, health care etc.; 26: Right to education; 27: Right to participation in cultural life).14

In short, rights are divided into rights protecting individual freedom, rights ensuring involvement and protection in the legal process, and social rights to adequate living conditions.

Insofar as undocumented migrants are concerned, one could attempt to claim that they are victims of rights violations on all three fronts. They are denied freedom of privacy and freedom of expression, as is evidenced by the arrest of Elvira Arellano as she attended a rally in support of uniting families with undocumented members. One could claim that the United States is violating Abreu’s legal and political rights by denying her the right to change her nationality (article 15). By denying welfare benefits to the undocumented, one could claim that the United States stands in violation of article 25.\textsuperscript{15} In short, a nation such as the United States potentially violates the rights to individual freedom, legal and political rights, and social rights of the undocumented.

Of course these assertions are quite problematic. Many of the rights mentioned in the UDHR are not recognized for non-citizens in any given society. While everyone may expect the protection of article 5 (prevention of torture), it is widely accepted that only recognized members of a state may enjoy participate in the electoral process. Article 21 explicitly states that “everyone has the right to take part in the government of his country, directly or through freely chosen representatives” (emphasis added).\textsuperscript{16} The right to work (article 23) is also widely recognized as belonging solely to recognized members in any given state. For us to extend any of these withheld rights, Lohmann’s account would require the moral content to gain the force of law through the public sphere. Perhaps this

\textsuperscript{15} This is not to say that the United States does deny all forms of social services to undocumented immigrants. Perhaps the clearest example of this the fact that the undocumented children are not denied an education. See Plyler v. Doe, 457 U.S. 202 (1982).

will happen one day soon, in response to some indignity or to some looming crisis regarding the treatment of the undocumented. But in nations such as the United States, this extension of rights does not have legal teeth. A direct application of all three categories of rights in the case of the undocumented is by no means guaranteed given Lohmann’s account. Whether they should be extended or not is another matter, which I will discuss in connection with Griffin’s work.

The two articles of note that Lohmann mentions from the UDHR are article 13 and article 15. Article 13 contains two separate rights, the later being the right to emigrate. The former is as follows: “Everyone has the right to freedom of movement and residence within the borders of each state.”\(^\text{17}\) This right is clearly denied to the undocumented, and it is also one that most nations likely do not accept. The second article, 15, states “no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality” (emphasis added).\(^\text{18}\) There are two ways to interpret this article. The first and likely more commonly accepted interpretation is that no country of origin can deny an individual the right to change their nationality. A dictatorship which refuses to allow its citizens to change their nationality violates this right, as I believe most would readily accept. A stronger interpretation places a duty not only on the country of origin but also on the receiving nation. That is, if the United States denies a Korean immigrant the right to become a recognized national of the U.S., then they have violated

\(^{17}\text{Ibid.}\)

\(^{18}\text{Ibid.}\)
the immigrant’s right. No nations accept this strong interpretation. Even if they did, this acceptance would not provide a human rights basis for particular duties to undocumented migrants. This is due to the fact that a nation such as the United States would have to apply this right to potential and undocumented immigrants alike. I will say much more about this fact in relation to Habermas.

Up to this point, our discussion of human rights and amnesty for the undocumented has mostly highlighted the absence or under-determined nature of such a right. In some accounts, such as Walzer’s, it is not clear as to whether such a right exists at all. For others, such as Benhabib and the UDHR, the right is not fully articulated regarding the party responsible for honoring the right. In what follows, I want to focus on an account of human rights which appears to make a case for amnesty based on welfare rights. This discussion comes from the work of James Griffin. I will focus on his general account of human rights as protecting human agency before describing the application of welfare rights to undocumented amnesty.

*Griffin and Subsistence Rights*

Regarding the philosophical discussion of human rights, Griffin distinguishes between two general approaches. The first, and more common, approach is the systematic approach.\(^{19}\) This approach develops a general overarching moral theory (e.g. Kantian deontology, Mill’s Utilitarianism), and from this overarching theory it deduces a theory of moral, legal, and human rights. This is a top-down theory, beginning with the

construction of a moral system and ending with the articulation of particular rights. The second approach is the piecemeal approach. In this approach one begins with the historical notion of human rights as it developed over time, and from this notion one determines how rights fit into an ethical system. This determination, in turn, further fleshes out the notion of human rights. This is a bottom-up approach, where one begins with human rights as a historical product, postulates an ethical system in accordance with these rights, and further develops the historical rights through an understanding of this ethical system.

Griffin prefers the piecemeal approach to the systematic for two reasons. The first is that he views all current attempts to simply define the term “rights” from these universal systems as failures. He invokes Wittgenstein’s argument regarding the impossibility of verbal definition of many terms in pursuit of this claim. Full explanation of the term is harried by its numerous different uses in society. Griffin is unquestionably correct that many are fast and loose with the usage of the term “right” or “rights.” A full, coherent definition beyond historical usage is doubtful by this account. The second reason Griffin prefers the piecemeal approach is that, in his view, a systematic approach is not necessary for a discussion of rights. If we are able to nail down an appropriately determinate sense for the term, then why do we need a systematic approach? Of course a degree of indeterminateness will continue to haunt a piecemeal discussion, but if we can isolate certain important features of human rights with a

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reasonable degree of certainty (something Griffin thinks we can do), then this is sufficient for Griffin. Indeterminateness coming from a long history of use is inevitable, and attempts to neatly capture the term via a systematic approach are doomed to fail.

While Griffin spends a great deal of time tracking the human rights tradition through the Enlightenment, he asserts that this line does not lead us to any necessary substantive account of human rights. The best candidate for a substantive account, for Griffin, follows from this claim:

Human life is different from the life of other animals. We human beings have a conception of ourselves and our past and our future. We reflect and assess. We form pictures of what a good life would be—often, it is true, only on a small scale, but occasionally also on a large scale. And we try to realize these pictures. This is what we mean by a distinctively human existence—distinctive so far as we know.21

According to Griffin, human rights are best understood as protections of our human standing or “personhood.”22 At this point there is nothing particularly unique about Griffin’s account. Anyone who has studied the animal rights debate between thinkers such as Carl Cohen and Edwin Hettinger will recognize this sort of claim. Humans are normative agents, members of a moral community who can make and act upon life plans. The category of rights applies to us and us alone. In order to understand what these rights should protect, Griffin divides our notion of personhood (or agency) into three categories or stages. These are autonomy, liberty, and minimal provision. I will discuss each in turn,


beginning with autonomy and liberty. I will pay particularly close attention to minimal provision, given its importance to discussion of welfare rights.

The first stage of our normative agency is the ability to form a conception of a worthwhile life. When we exercise our judgment and choose values that we wish to follow, we are exercising our autonomy. While it is true that we can have our life plans and convictions instilled within us from outside sources (e.g. society, parents), they are not as valuable as those which we come to of our own volition. Central to Griffin’s account of personhood is the ability to choose a good life, the ability to be an autonomous normative agent. The component which compliments the ability to choose a good life is, of course, the freedom to pursue it. This is liberty. One can imagine examples where I am free to choose a good life, but not free to pursue it. This is the fulfillment of autonomy and the denial of liberty. Or perhaps one could find themselves in a situation where they are free to pursue a life that they have not freely chosen. This is liberty without autonomy. In any case, for Griffin it is important to keep these two aspects divided. I will need to say more about Griffin’s account of liberty before we move on.

One could infer from the above discussion that liberty rights guarantee the realization of the good life I have determined through the exercise of my autonomy. If this were the case, then liberty rights would be unrealistically demanding. For example, I would have a right to a tenure-track position at a university, my nephew would have a right to become an astronaut, and so on. Griffin solves this problem by claiming liberty

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rights protect only the *pursuit* of a good life, not its realization.\(^{24}\) In other words, if one is constrained from pursuing a good life (physically, through “paucity of options”, etc.), then one’s liberty has been violated. Providing equal opportunity for the realization of one’s goals is also not required. Some limits may be physical. It is possible that my nephew does not possess the physical requirements to endure the rigors of space. There is not anything a government is required to do as a result. Likewise, the government is not responsible for creating more tenure-track jobs in philosophy, simply because I want one. As Griffin states, “the aim of making every conception of a worthwhile life that might crop up equally realizable is as impossible for governments to bring off as it would be economically damaging for them to do so.”\(^{25}\) If I live in a society with an ample range of options, I can choose others. I can value other sorts of lives, and find enjoyment in other places. I am not free to achieve the specific life I first choose, even if it is the one I want the most. I am free to pursue a good life for myself, and this requires the ability to pursue alternate options.\(^{26}\) It may be that my nephew has to become a firefighter instead, but so long as it falls within his conception of a good life and he is allowed to pursue it, rights to autonomy and liberty are fulfilled.

I will now provide a skeletal definition of the “minimal provision” right mentioned by Griffin. A richer discussion regarding his account of welfare rights will


\(^{26}\) James Griffin. *On Human Rights*. Pg. 163.
come later, when I discuss the implications of Griffin’s account for the undocumented. Griffin’s “intuitive account” for minimal provision is as follows. We attach high value to our personhood, in particular to our ability to choose a good life and pursue it.\textsuperscript{27} Human rights aim not only to protect our life, but also a particular form of that life.\textsuperscript{28} Given that human rights aim to protect our lives, they must contain a minimal material provision. They must, as Griffin puts it, “ensure the wherewithal to keep our body and soul together.” Once again, human rights protect both life itself and a particular form of life, namely the life of a normative agent. As such bare subsistence is not enough. We must not only live. We must live a certain way. Minimal provision includes more than just the means to continue life. It is more than mere sustenance. An existence which is characterized as merely continuing bodily function is not the life of a normative agent. We need more. A minimal provision right also includes the right to education, a qualified right to leisure, a right to expression, and so on.\textsuperscript{29} Griffin accepts the fact that the conditions for normative agency are not entirely clear. They lie somewhere between the wealthy and the impoverished, but this is not a particularly helpful claim. What his minimal provision does give us is the grounds for a human rights claim to more than just bare necessities. There is overlap between distributive justice and human rights in this

\textsuperscript{27} James Griffin. \textit{On Human Rights}. Pg. 179.

\textsuperscript{28} James Griffin. \textit{On Human Rights}. Pg. 180.

\textsuperscript{29} I say “qualified” based upon Griffin’s stance on UDHR article 24. Griffin at times asserts that a “right to leisure” is not widely accepted as a human right, and is not required in order to live the life of a normative agent. While he is not entirely consistent on this issue, I believe he would have to accept that one’s conception of a good life doesn’t involve the total deprivation of leisure. As such it is required, in some modified form.
case, though they are not congruent. Before we move on to an analysis of welfare rights and undocumented immigration, I would like to say more about the overlap between various threads of morality and rights.

Griffin quite rightly makes the following observation. There is a thread of thought that we must make every important component of morality into a right.\(^{30}\) In particular, Griffin believes that this thread attempts to shelter the domains of justice and fairness underneath the protective umbrella of human rights. This should not be surprising. If rights act as guarantors, protectors which guard against violation, then it stands to reason that we would want particularly important moral concepts such as justice and fairness to fall under this protection. Perhaps this will help ensure the realization of justice and fairness in a world lacking both. As tempting as this may be, Griffin disallows such a move. This is not to say that the realms of rights, justice, and fairness are entirely separate. There are some forms of distributive justice, for example, which fall into the category of human rights. However these forms of distributive justice are not concerned with complete or even close equality, but only with providing enough goods to each person in order to protect their agency (i.e. minimal provision). Beyond this level, one cannot make a rights claim based on distributive justice. Regarding fairness, Griffin claims that some forms of unfair action violate rights as well. Respecting the rights of men but not women is an example of a rights violation based on unfair treatment.\(^{31}\) Since

\(^{30}\) James Griffin. *On Human Rights*. Pg. 43.

the relevant category for protection of rights is normative agency, and since women possess this as surely as men do, discriminating against women is both unfair and a rights violation. However, if I sneak on a bus for free while you paid, or if I cheat at cards (Griffin’s examples) I act unfairly without violating your rights. Justice, fairness, and rights may overlap. They simply are not congruent. As Griffin states, “it is a great, now common, mistake to think that, because we see rights as especially important in morality, we must make everything especially important in morality into a right.”

I want to pause here to highlight Griffin’s point. I have dedicated this chapter to the discussion of human rights to see if one can locate a right to amnesty in the available literature. So far our search has not yielded conclusive results. One should keep in mind that even if we can find no solid ground on which to build an amnesty rights claim for the undocumented, this does not mean that discussion on the topic is exhausted. Human rights are but one particular group of concepts in the wide field of moral theory. I will grant that they are an exceptionally important group of concepts, but they are certainly not the only group, and they are not even necessarily the most important group. As I have already alluded to, I will show that even if we can ground a human right to amnesty for the undocumented, this ground does not adequately distinguish any unique duties to undocumented immigrants. Human rights alone will not do, but of course human rights are not our only morally relevant concepts.

32 James Griffin. On Human Rights. Pg. 43.
Given that the different fields of morality are not congruent, there can be conflicts between them. Of particular importance insofar as I am concerned are autonomy-welfare conflicts. Autonomy-welfare conflicts are fairly straightforward and generally take the form of weighing a loss of autonomy against the prevention or amelioration of suffering. Griffin provides the following example. A nation which we consider a neighbor is stricken by a period of extreme drought. Starvation begins to set in, and our neighbor is unable to provide for its people.33 Before providing aid our government would normally hold a referendum, consulting with citizens and respecting our autonomy. However, given the extreme nature of this emergency, the government announces that there is no time for a referendum and aid is sent. In this case, the suffering which is alleviated is great while the violation of citizens’ autonomy is small. Though Griffin does not give us any specific measuring stick, he does claim that at some point great suffering can justify the violation of autonomy.

I want to focus on the issue of undocumented immigration and the conflicts mentioned above. Autonomy-welfare conflicts are something of an odd case, particularly concerning Griffin’s minimal provision standard. To revisit one of our cases, let us suppose that the children deported from Israel are sent back to a nation in a state of great instability (e.g. Libya). Perhaps the children will return to a home where their basic needs cannot be met, and they will live under the threat of armed violence. We should also assume, in the case of this example, that to allow these children to stay goes against

33 James Griffin. On Human Rights. Pg. 64.
the freely chosen composition of the Israeli state. In other words, the people of Israel stand behind this deportation. I do not know if this last point is true, but for the sake of this example we’ll assume that it is. The conflict in this case is not solely a conflict between the autonomy of the Israeli people (a right) and the well being of the children (welfare). It is a conflict between the autonomy of the Israeli people (a right) and the minimal standard for these children to grow and exercise future agency (a right). Autonomy-welfare conflicts are conflicts between two types of rights. In this case if we use Griffin’s standard of weighing the impact of the violation, a clear solution does not present itself. While the suffering of the children would be great, it may not warrant violating the will of the people. To complete our discussion of Griffin, I will now focus on his account of welfare rights.

Perhaps the most pertinent part of Griffin’s discussion, insofar as the undocumented are concerned, is his discussion of welfare rights in connection to the minimal provision standard. Applied to the undocumented, the basic thrust of a welfare right is that if a nation deports a destitute migrant back to a land which cannot provide the aid they need (e.g. food, water, medical attention, etc.), then the deporting nation is violating a right to welfare if the deporting nation can meet the needs of said immigrant. I feel that mentioning welfare right claims is particularly relevant given the fact that many undocumented migrants are economic migrants: individuals who leave their home due to intolerable economic circumstances in search of a better life for themselves or their family. Often their situations are so desperate that they are willing to undertake great risks in order to gain entrance into a more affluent nation. For example, in May of 2011
Mexican police in Chiapas discovered two trucks containing 513 undocumented migrants heading towards the United States.\textsuperscript{34} While the majority of the migrants were of Latin American descent, some came from as far away as China, India, and Nepal. The police found passengers clinging to nets in the trailers with little space, little air, and no water. While it is highly unlikely that all 513 passengers knew how they would be transported, this case highlights the plight faced by those who seek to enter a nation clandestinely. What if a more affluent nation has the ability to assist them? Can the undocumented migrants make a claim to welfare rights? Griffin attempts to provide us with an answer.

Griffin claims that welfare rights fall under the positive, rather than negative, rights category.\textsuperscript{35} That is, they are rights based on something owed to the individual rather than rights based on non-interference.\textsuperscript{36} Whether or not we should classify welfare rights as human rights is a question Griffin leaves open at first. They are certainly legal rights in many nations, where government mandate presumably preserves a minimum standard of living. But are they universal human rights according to Griffin? Remember that Griffin understands human rights as protecting one’s standing as a human being. As

\begin{itemize}
\item \textsuperscript{35} James Griffin. “Welfare Rights.” \textit{The Journal of Ethics}. Pg. 28.
\item \textsuperscript{36} Upon closer examination, it is not entirely clear that subsistence rights are purely positive rights. In some circumstances they will take the form of negative rights, such as a right to access a resource (e.g. water) without outside interference. Thomas Pogge makes a similar claim when he argues that western capitalist interference results in a number of global subsistence problems. See Thomas Pogge. \textit{World Poverty and Human Rights}.
\end{itemize}
humans, we are members of a moral community. We are able to determine the contents of a “good life” and attempt to actualize these contents in the real world.\textsuperscript{37} All individuals capable of exercising this agency are protected by human rights.\textsuperscript{38} Depending on how one interprets these protections, welfare rights may or may not be included. Some liberal interpretations restrict human rights to negative rights, or rights of non-interference (e.g. a right to autonomy). Agency is protected by preventing others from actively hindering my autonomy. We already know that Griffin finds this description insufficient. In a manner similar to Habermas, Griffin claims that one can also have their agency impeded through the suffering of extreme deprivation. Without the necessary minimum standard, one cannot exercise free choice. A “minimum material provision”, or a welfare right, must supplement traditional negative rights to non-interference. Human welfare rights allow us to realize our agency, while preserving the necessary precondition for this agency: life itself.

A human right to welfare is, of course, problematic. Human rights are universal. They apply to all of humanity as a claim each human can make against all humans. Common interpretations of welfare rights do not fall into this category. Most often, individuals can only make welfare rights claims to nations in which they are a citizen.


\textsuperscript{38} This qualification excludes the mentally handicapped and children, an exclusion which may not sit well with many. Keep in mind that a lack of human rights does not entail a lack of a duty to protect these individuals.
They are claims made against one’s own government. These would be particular legal, rather than universal, rights. Some thinkers such as Carl Wellman reject the notion that welfare rights are universal on two grounds. The first is that the demand placed upon each agent by every other agent will result in a demand which we cannot meet, in that each individual will constantly make demands on every other individual, and in turn each individual will constantly have demands made of them by every other individual. One cannot make a legitimate claim against another for something which they cannot give (“ought implies can”), and a human right to welfare stretches moral agents too thin. The second involves duplication. If an individual makes a universal welfare claim, then every individual and organization (public or private) has a duty to fulfill this positive right. Such an act would result in numerous organizations and individuals tripping over one another in order to fulfill welfare rights. Duplication would run amok. As such, Wellman claims one should properly assign welfare rights to a single entity capable of fulfilling them in order to avoid duplication. This entity is the government of the citizen, and welfare rights therefore become particular legal, rather than universal human, rights.

Griffin responds to these two objections with a single argument. He begins with the uncontroversial premise that we should help those in distress when the benefit they receive is great and the cost to us is small. This argument is similar to Singer’s argument in *Famine, Affluence, and Morality*. One can think of the often used drowning child example, where I would have a duty to save a drowning child if the only cost to me is

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getting my clothes wet. Griffin claims that the duty to save the child is a claim the child could make to all of humanity. The reason why it falls on me in particular is that I happen to be the most ready to aid.\textsuperscript{40} I am there, others are not, and as such I must help. We can therefore assign responsibility to aid by one’s ability to perform the aiding act.

Turning the example back to welfare rights, Griffin sidesteps the issue of duplication by claiming that the claimant demands aid from the entity most capable of providing aid, be it a national government or other entity. The drowning child doesn’t demand everyone save him or her, just the person closest and most capable. This also solves the problem of stretching moral agents too thin. It is not a claim of all of humanity made against all of humanity, it is a claim made by the needy against those most able to help. If an entity is stretched too thin, then the claim shifts to another entity.\textsuperscript{41} Regarding nations, this implies that a country ought to meet welfare needs so far as the country is capable.\textsuperscript{42} We can ask no more of them than this.

Griffin’s understanding of rights in general differs from Habermas’. However, he provides a compelling account regarding welfare/subsistence rights. To apply the account to the case of undocumented immigrants, those who flee dire economic circumstances could make a welfare rights claim against the receiving nation. This is due to the fact that

\textsuperscript{40} James Griffin. “Welfare Rights.” \textit{The Journal of Ethics}. Pg. 32.

\textsuperscript{41} This is in line with Jeremy Waldron’s “waves of duty.” According to Waldron, a duty which we derive from a right is backed up by a wave of other duties which root it firmly in the political landscape. In this case, a right to welfare generates a duty to provide for the individual. If this duty is denied by the nation which is supposed to uphold the duty, then the right generates “remedial duties” which radiate outside of the original nation. See Waldron’s discussion of torture for an analogous example. Jeremy Waldron. “Rights in Conflict.” \textit{Ethics}. Vol. 9, No. 3 (Apr., 1989), pg. 503-519.

\textsuperscript{42} James Griffin. “Welfare Rights.” \textit{The Journal of Ethics}. Pg. 35.
the fulfillment of basic needs is a universal human right, something which we must provide to all members of the human community. Up to this point, Griffin’s welfare right seems to provide the most compelling basis for a right to amnesty. Of course it does not imply a universal amnesty, perhaps not even a wide amnesty. Those migrants who would return to environments where the minimum standard provision is violated are the only one’s protected (as asylum seekers). If one could return to a nation where no such violation occurs, the right to amnesty vanishes. This is not a universal amnesty, but a heavily qualified amnesty. In spite of this, it appears we have found a potential ground for a human right to amnesty for certain segments of the undocumented population.

I must point out that this right does not distinguish any special duties to undocumented migrants. In fact, it doesn’t specify any special duties to migrants in general. The requirements for fulfillment of welfare rights are proximity and ability. Nothing in these rights applies to migrants alone. For example, it may be the case that the nation most capable of aiding Zimbabwe is South Africa. If this is the case, then the South African government can fulfill its obligation by merely sending supplies to the impoverished individuals in Zimbabwe. There is no special obligation to take migrants in, so long as the migrants are provided for in their native land. Even if there was a special obligation to provide for the migrants, it would not be the case that this obligation only applies to an undocumented migrant already in the receiving nation. I will discuss the lack of a special obligation in general following an examination of Habermas’ foundational rights.
So far we have covered a great deal of ground regarding human rights in general, and the potential application of human rights to the issue of undocumented immigration. Unfortunately we do not have much to show for this search in the way of a widespread ground for undocumented amnesty. Not only has the most clear ground for amnesty proven to be extremely limited (welfare rights), but it appears that this right does not articulate duties to the undocumented specifically. This is not a deficiency, of course. Welfare rights simply do not speak to the specific goal of my project regarding particular duties to the undocumented. In a final effort to ground amnesty, I will return to Habermas. His discussion of the foundational rights will provide us with another potential ground for amnesty in addition to welfare rights. In the end, however, this will not move us beyond the problems associated with Griffin’s minimal provision standard.

*Habermas and the Foundational Rights*

Our previous discussion of Habermas’ foundational rights seems to be a possible candidate for justifying amnesty and the inclusion of undocumented immigrants into policy discourse. After all, these rights aim to provide the necessary environment for the inhabitants of a nation to participate in a deliberative democratic order, and if we can claim that denying undocumented migrants these foundational rights is a basic rights violation, then the issue of amnesty becomes an open and shut case. This is due to the fact that the primary thrust of these rights provides individuals with political membership and protects the communicative freedom of members. Certainly undocumented migrants are not members now, but perhaps denying these territorial residents citizenship rights amounts to a basic rights violation. In addition one could claim that as territorial
residents, undocumented migrants ought to receive participatory privileges based upon foundational rights to representation of interests in the legislative process, the right to fair adjudication of grievances, and so on. If one accepts that denial of citizenship rights and denial of actual representation in legislative matters are rights violations, then the case for amnesty is strengthened immensely. However, a simple appeal to these rights runs afoul of a limitation on an appeal to the legal rights claim regarding participatory rights.

While it is the case that one should have their foundational rights respected, there is no demand that the state respect these rights for those who are not members of the nation. I would claim that the right to have one’s grievances fairly adjudicated is an exception to this rule. Even those foreigners accused of crimes have their day in court, generally have access to fair representation, and are judged according to the same laws as a citizen if these laws are applicable. However, the claim that a nation should not violate one’s basic right to representation in legislation does not imply that one has a right to representation in legislation anywhere in the world. Rights to citizenship and representation should be fulfilled, but if they are fulfilled in one’s home nation then there is no reason to believe that the new host nation has an obligation to fulfill the foundational rights. For example, the United States government has set in place a system which recognizes my citizenship, allows me to participate in elections, and so on. If I

43 I say “actual” given that undocumented immigrants do enjoy a degree of virtual representation in countries such as the United States. In the chapters that follow, I will explore in detail the problem of whether or not this virtual representation is legitimate.
sneak across the border to Canada, and the Canadian government refuses to grant me citizenship rights and representational rights, I cannot claim that the Canadian government has violated my foundational rights. If I want these rights fulfilled I simply need to return to the United States, and the fact that I refuse to do so does not place a special obligation on the part of the Canadian government. Of course, there may be exceptions to this rule. If someone is coming from a nation which denies these foundational rights, a nation with a history of flagrant corruption or oppression, then it may well be the case that to deport these individuals is to indirectly violate the foundational rights package. It is indirect in that the deporting nation is not violating a right itself, but is knowingly sending the deportee back to a land where a right will be violated. Refugee refoulment is an analogous rights violation. Note that it may be the case that the nation of origin could have a democratic system supported by citizenship rights, and still violate foundational rights by failing to provide the support structures citizens require to access these rights (i.e. the 5th foundational right). Impoverished democracies would be the most likely to fit this particular description. To summarize, it is not the case that a receiving nation must fulfill an undocumented immigrant’s foundational rights, if that immigrant can fulfill those rights in their country of origin. They have the right to have participatory right fulfilled somewhere, not anywhere.

Using Habermas’ foundational rights to justify amnesty works in the same way as using Griffin’s welfare rights. If an undocumented migrant is denied the right in his or her home country, and this right can be fulfilled by the receiving nation, then the nation should do so. They are the most capable entity in terms of ability and proximity.
Applying Habermas extends the rights beyond simple welfare rights and into the realm of rights to participate in the legislative process. Once again, it may be the case that the section of undocumented migrants who can apply for amnesty on these grounds is quite small. Many undocumented migrants could return home to a nation where rights to participation in legislation are honored. Abreu likely fits into the category of those who do not qualify for amnesty on these grounds, as would many of the migrant dialysis patients. In other words, this is not a sweeping or monumental conclusion. It is extremely restricted. But it is a conclusion nonetheless. The question that remains is as follows. Does our application of the foundational rights provide particular duties to the undocumented? Or, like Griffin, does this application only supply us with the more general duties which are not my focus? In what follows I will answer the later question affirmatively.

In the end I doubt that a rights based approach, as described by Habermas and anchored in the foundational rights, will provide us with an answer regarding these special duties. While there are issues with rights based approaches in general, I have just mentioned a possible way to circumvent these concerns and allow for the undocumented migrant to make a rights-based claim to amnesty. These are cases which involve sending an undocumented migrant back into a nation which would violate the foundational rights, or in Griffin’s case, welfare rights. Even if one accepts this claim (which is not certain), a rights-based claim does not assist us in delineating special duties for undocumented immigrants. The reason for this, as I have already touched on, is reasonably straightforward. The act of granting amnesty based upon an indirect rights violation is
justified in the same way as granting membership to prospective migrants based upon an indirect rights violation. If the justification is the same, namely the desire to avoid an indirect rights violation, then a rights based approach does not adequately distinguish between a duty to an undocumented migrant and a duty to a potential migrant.

As an example, consider the right to participate in legislation discussed by Habermas. Two migrants who are from a nation where the right is violated both aspire to enter a more democratic nation, where that right could be fulfilled. One migrant (migrant A) enters the democratic nation without official permission, the other (migrant B), attempts to obtain entrance through official channels. If migrant A is caught and deported, the democratic nation is indirectly violating the right to participate in legislation by sending the migrant back to the rights-violating nation. Likewise, if migrant B is denied entrance and sent back to the country of origin, the democratic nation is indirectly violating the right to participate in legislation by sending the migrant back to the rights-violating nation. In both cases, the democratic nation presumably has the ability to ensure such a rights violation does not occur by allowing entrance and a path to membership. However, in both cases the migrant is returned to their original situation. This similarity would apply to any rights violation faced by an undocumented migrant or a potential migrant, be it a right to political membership, a right to education, or a right to subsistence.

I want to clearly state that I am not dismissing rights claims of these sorts all together. In fact, there may be a compelling case for accepting these sorts of claims, just as we ought to accept the rights claims of persecuted refugees. The problem of refugee
refoulement, and the frequently ignored mandate regarding asylum, is a result of an indirect rights violation. Some thinkers, such as Carens, have used this justification for asylum in an effort to broaden the category of refugees to include economic migrants who face immense hardship and starvation. This depends on the recognition of subsistence rights of course, but one can at least understand why a nation presumably built upon rights ought to protect individuals from torture and starvation. If a nation knows that an individual will be tortured or will starve if they are returned to their country of origin, and that receiving nation sends the person back anyway, then clearly something very wrong has occurred. Likewise, a receiving nation which denies entry or amnesty to those who live or lived under repressive regimes may be accused of committing an indecent act.

I am not arguing for a universal right to amnesty. I claim that human rights do not distinguish between prospective and undocumented migrants, and as such are not particularly useful in talking about the later as a unique group. Following Griffin, we should not believe that the discussion of rights is the only, or even the most, important part of moral theory. While I have asserted that a universal right to amnesty cannot be grounded in such a way as to delineate special duties to the undocumented, this does not mean that there are no morally significant differences left for discussion. Even without a rights claim, it is undeniable that some undocumented migrants (such as Abreu) become members of the communities in which they live. They participate in local functions, make friends and a home, and often take part in the betterment of their community. Following Carens, one could say that they become social members of a community, if not officially
recognized political members. This is an important distinguishing characteristic.

Certain groups of undocumented migrants have sunk roots in the nation they clandestinely entered. They have made homes and contributed to the community at large. Certain groups have not yet done so, and as such cannot claim to be social members of the community in which they find themselves. Not all undocumented migrants are social members of a community, but many are, and this category is worth recognizing. Yet in spite of this social membership, they are denied political membership and often deported when caught.

**Moving Forward**

Given that my interest concerns particular duties to the undocumented, it is simply the case that I will not pursue the path of indirect rights violations beyond this point. The work associated with developing such an approach is appropriate for a different project. By way of foreshadowing I will have to return the distinction between undocumented migrants and potential migrants to answer a particular objection. This objection will challenge the division I propose between undocumented and potential migrants, in particular regarding the special recognition I attribute to the former category. I will address this concern in due time. By way of foreshadowing I will discuss the particular mechanism I propose to address the concerns of the undocumented. While I will spell out the details of this mechanism at length in the proceeding chapter, I will take a moment to briefly outline this mechanism to serve as forewarning for the reader.

I have already discussed, to some degree, the first aspect of the mechanism regarding amnesty for the undocumented. This is the aspect of pluralistic application.
Following Habermas and Ingram, I believe that the best approach to this particular situation involves recognition of conflicting norms. Do we reward the undocumented for breaking the law? Do we allow individuals to live a life free of the constant danger of deportation? When various norms conflict, one must examine the particulars of each case in order to determine which norm best suits the case. This determination becomes a part of application discourses which follow along the general lines of a discourse ethical approach. Ideally, all affected parties reach a consensus and then they apply the appropriate norm. The important fact to remember in the case of undocumented migrants is that there will, by definition, always be a conflict between norms. This conflict may be one sided on occasion, but a conflict no matter how large or small will still exist regarding the potential application of amnesty. In every case, application discourses will have to choose between norms prohibiting individuals from profiting due to lawbreaking, and some other norm or set of norms which seem to justify amnesty. It is not clear to me that norms opposed to deportation will or should always win out. As I have already stated, I am not arguing for a universal amnesty. I do not believe that a discourse ethical approach implies universal amnesty, nor do I think that one can reach a universal amnesty without argumentation aimed at founding a universal right to membership in any nation one chooses, or some other sort of similar right. What we can attempt to accomplish is to fill out some of the relevant categories regarding the pluralistic application of amnesty as they relate to undocumented migrants in particular. The most important category, at least insofar as undocumented migrants are concerned, is what I
will call rooted residency. It is a concept which I borrow in modified form from
Carens, which I will discuss below.

The catalyst for Carens’ discussion of pluralistic amnesty, and the relevant
categories for distributing this amnesty, is the issue of whether or not a nation has an
unqualified right to deport undocumented migrants. In *The Case for Amnesty*, Carens
recognizes that a state does have a qualified right to deport irregular migrants. However,
that right weakens over time until a migrant’s right to membership in the community
trumps the right to deport.\textsuperscript{44} The relevant category for Carens is the passage of time.
While there are certain factors that could accelerate the process (such as family living in
the nation) people who live in a community for an extended period of time sink roots in
that community. They become, as Carens puts it, socially recognized members though
not legally recognized members. They contribute to society, make a home, start families,
etc. Over a period of time, as the roots of the irregular migrant sink deeper, the right of
the state to deport them is trumped by a moral claim not to be uprooted. As Carens puts
it, “at some point a threshold is crossed, and irregular migrants acquire a moral claim to
have their actual social membership legally recognized.”\textsuperscript{45} This sort of claim on the part
of the migrant is not immediate. It takes time, and Carens is quick to point out that any
line drawn will contain an element of arbitrariness. However, we should still draw a line
and set a date for the point where the migrant’s claim trumps the state’s claim.


\textsuperscript{45} Ibid.
I will refer to the distinguishing factor between undocumented and potential migrants as rooted residency, and it is this particular category that seems to be the most relevant insofar as a pluralistic application of amnesty is concerned. Following Carens, I will claim that after a certain period of time undocumented migrants become sufficiently anchored within a community to make a legitimate claim for membership. I am only foreshadowing at this point. I will not discuss the particulars of this claim until the next chapter. However, this approach will face a powerful objection. If I take it upon myself to outline the importance of rooted residency, am I thereby monologically positing the relevant category for amnesty? If I am, then my approach violates the principles of discourse ethics and contradicts my own claims regarding the importance of this theory. While I will address this objection in detail, I will state the following. I am not attempting to isolate the only relevant categories regarding the application of amnesty. I am merely attempting to demonstrate the attachments undocumented migrants make in a community, the pain generated by destroying these attachments, and the highly probable relevance regarding a discursive application of amnesty. I am not circumventing discourse by arguing any of these points.
CHAPTER FIVE
ROOTED RESIDENCY

If human rights alone will not provide us with particular duties to the undocumented, where should we turn? Answering this question is the purpose of this chapter. First, I claim that unique duties to the undocumented must be anchored in those characteristics that distinguish them from potential migrants. I will then attempt to demonstrate that duties to the undocumented are based on the notion that they should be protected from a particular type of harm, namely the harm of being uprooted. In an effort to explore this point fully, I will discuss the ways in which undocumented migrants are attached and invested in the communities they live in. I will call this attachment “rooted residency.” I will leave a full discussion of pluralism for the next chapter, after I have addressed some objections regarding my usage of rooted residency as a unique category for duties to the undocumented. This category is graded, in that some undocumented immigrants are more rooted than others. The degree to which an undocumented immigrant is rooted is proportional to the level of harm caused by deportation. Before we can make sense of this claim, I have to explain what rooted residency is and where it comes from.

I need to take time at this point to outline what are, to my understanding, the most obvious differences between undocumented and potential migrants. I would like to say a
The first two differences I discuss are differences that apply to all undocumented migrants. These differences constitute the very nature of what it means to be an undocumented migrant as compared to a potential migrant. From these two differences, I will derive considerations which do not apply to the entire undocumented community in the same manner or to the same degree. These considerations apply most appropriately to certain segments of the undocumented population. Furthermore, I want to make one point clear from the outset. While I am attempting to outline particular duties to the undocumented, I am not claiming that these duties are of a higher order than duties to potential migrants. I am not trying to create a hierarchy between potential and undocumented immigrants. I am simply attempting to discuss distinctions. I will begin with the two distinctions that apply across the entire spectrum of the undocumented population.

**Distinguishing Factors**

The first distinguishing factor is that undocumented migrants have bypassed or otherwise violated recognized methods of entry into or stay within a nation. Of course potential migrants can visit a nation without gaining membership. Mere location within a nation without a path to membership is not the relevant consideration in this case. A potential migrant enters a nation with the knowledge of the state. An undocumented migrant does not. At this point we are not discussing the reason for entering, nor are we discussing intended length of stay. It may be that the undocumented migrant simply wishes to work for a few months in order to gain additional income. Perhaps they wish to settle permanently. These issues are not my concern at present. It is also worth noting that
an undocumented migrant can enter a nation legally and still, at some point, become undocumented. Generally individuals who overstay work or student visas fall into this category. They were allowed to enter, but with the expectation that they would leave after a set period of time. If this period elapses and they stay, those who have overstayed their officially recognized allotment of time fall into the same category as those who clandestinely crossed the border. This is perhaps the most basic distinction between an undocumented and a potential migrant: bypassing recognized methods of entry and stay. I will now build upon this point.

Given the fact that undocumented migrants have violated established rules regarding entry and stay, they all live under the constant threat of forced removal from the nation where they are staying. Some nations may tack on additional forms of punitive action in addition to deportation. Repeat offenders face jail time when caught in the United States, for example. This danger exists across the whole spectrum of the undocumented. Potential migrants who are within a new nation do not face this problem so long as they do not exceed their official length of stay or violate conditions of entry (i.e. so long as they do not become undocumented). The danger of deportation is a constant danger faced by the undocumented. It is woven into the fabric of their existence so long as they stay in the host nation. It dictates their movement, their involvement in society, their ability to appeal for protection, etc. In most cases, it forces them to live life out of the public eye. This presents numerous dangers of its own, as is evidenced by our case study regarding undocumented migrants and the general reluctance to seek medical attention.
These surface level differences tell a story, one which we have briefly discussed in the context of justification and application in Habermas. Any principle which we appeal to in order to aid the undocumented runs afoul of a principle anchored in a defining characteristic of the undocumented, namely the illegality of entry and stay. Building a case for special duties which may result in amnesty cannot rest upon this first distinguishing characteristic. If we look solely at the issue of illegal entry, then a principle supporting deportation seems to win out in every case. Instead, one would need to build upon the second distinguishing characteristic, namely the danger which is constitutive of undocumented existence. Some may claim that this danger is freely chosen and deserved. Simply by entering another nation illegally the undocumented have selected to face this danger, which is deserved based upon failure to comply with official entry methods. As I will argue in the pages to come, I do not believe that this is the case. I will repeat the point I made above given its importance. If we are to anchor any particular duties to the undocumented, these duties will have to reference back to the danger they face on a day to day basis.

The question we should ask, as I see it, is whether or not an existence characterized as perpetually threatened is justified. There are certain cases where we would argue that it is. A fugitive on the run is perhaps the best example. An individual who has committed a heinous act (e.g. premeditated murder), and who escapes immediate justice by fleeing, lives in a state of perpetual danger. Police forces may finally catch up to him or her, and force the criminal to pay for his or her wrongdoing. In this case, we should claim that such an individual is deserving of living in a state of perpetual danger.
Is this the case with undocumented migrants as well? I believe it is not. First of all, crossing a border illegally or overstaying a work visa is not what any reasonable person would call a heinous act. It may be an act motivated by self interest, but an act motivated by self interest is not by definition heinous. An undocumented migrant’s entrance and residence in a nation does not contain an element of malicious intent. But clearly I cannot arbitrarily set the bar of forgiveness for violation of law at anything below a heinous act. Many legal violations fall beneath such a level, and the task of sorting through each crime and corresponding forgiveness is so far beyond the scope of my project that it does not warrant the extensive exploration it would require. One point I need to address concerns the claim that undocumented immigration is necessarily harmful to the native population. If this is the case, then one could make the claim that undocumented migrants should live under the constant threat of danger. This is due to the fact that their very presence is necessarily harmful to the native population. This harm, coupled with the illegality of entry and residence, could trump amnesty claims. I believe this claim regarding harm is irretrievably flawed.

The argument regarding necessary harm succeeds only if we accept the fact that undocumented immigration is a zero sum game. It is absolutely a mistake to assume that this is the case regarding immigration, in particular undocumented immigration. It is often portrayed this way in the media of course. Interest groups with a decidedly anti-undocumented slant often describe undocumented immigration as a scourge which is
lowering the quality of life for citizens, or damaging valuable aspects of culture.\(^1\) They take jobs from natives and drive down the wage ceiling, so we are told. Some of the more radical groups go so far as to describe the undocumented as parasites, feeding off a nation and giving nothing in return. I will not address the most radical points of view. Often these perspectives are tied up in overtly racist arguments regarding the preservation of European culture in the face of an invading foreign element. But this does not mean that all arguments regarding the zero sum game are racist. It would be fallacious for me to make such an outrageous claim. There is a legitimate concern that the undocumented take jobs away from citizens. What’s more they use up limited resources that some say ought to be reserved for citizens (e.g. healthcare). Every one that comes in takes something of value from those who are already here. The more that come in, the more harm to the native population. The more who are expelled, the more the native population benefits.

The most obvious problem with this position, to my understanding, is that it fails to take into account the ways that undocumented migrants can contribute positively to a nation. Their presence does not need to be viewed as culturally threatening. The undocumented can help to enrich existing culture. They can become involved in community activities. They can, in short, contribute to society in practically every way that a native resident can. There is nothing magical about the undocumented that prohibits them from contributing to the communities in which they live. Just like every

\(^1\) Organizations include Americans for Legal Immigration, the Minutemen, the Federation for American Immigration Reform, the Center for Immigration Studies, and NumbersUSA.
person, they are capable of adding or subtracting value from the lives of those around them. Abreu is a perfect example of this, as is Arellano. From an economic perspective, research exists which portrays an increased immigrant population as having a positive impact on job creation. According to the *Kauffman Index of Entrepreneurial Activity*, immigrants in the United States were more than twice as likely to start a new business (.62% immigrant against .28% citizen).\(^2\) This increased likelihood existed across the entire spectrum of industries. In other words, given that immigrants are more likely to start their own business, they are also more likely than citizens to create jobs. Of course this does not conclusively demonstrate that granting amnesty to the undocumented would result in massive job growth through entrepreneurial activity. What it does show is that statistically immigrants do have a positive economic impact in many cases. Please note that I am not arguing for amnesty based upon the Kauffman figures. I am simply arguing against the zero sum game claims of some individuals who believe that undocumented immigration and amnesty takes away important goods from citizens. Granting amnesty to the undocumented does not necessarily harm the native population. It may in fact help. I won’t belabor this point any further.

Another concern regarding the zero sum game is the use of limited resources. Often enough you will hear radical organizations describe the undocumented in parasitic terms as a result of resource use. Despite manipulation by extremists, this is not a

baseless concern. While the undocumented are no longer eligible for welfare benefits in the United States (for example), they do fall under the protection of EMTALA and are eligible for emergency medical care. I have discussed this at great length in regards to the case study concerning dialysis treatment. That case study is a perfect example of the limited resources problem. There are a few things I would like to say regarding this cost before I move on from discussing the zero sum game back to discussing the justification of an existence characterized by perpetual danger. First of all, one cannot deny that the undocumented use healthcare resources. Even though many love to think that these resources are limitless, they are not. With that said, it does not appear to be the case in most instances that undocumented migrants cross the border solely to receive free medical treatment. They come to a nation for other reasons, and in the course of time develop ailments that require attention. Diaz Ruiz is a perfect example of this. He was an agricultural worker from Idaho whose kidneys failed him as he was returning to Mexico.³ As such, he stopped for emergency treatment in Nevada. When asked what would happen if he did not receive treatment, he stated the obvious. He would die. Individuals such as Ruiz don’t come to take resources from natives. They come to work. Any increase in population, citizen or otherwise, will put an increased strain on limited resources. This is an unavoidable fact. It would, in my view, be a mistake to make judgments regarding the undocumented solely based on the strain they place on the healthcare system. In fact it

may be a reason to extend certain entitlement programs to the undocumented, such as Medicaid and Medicare, which could cut down on the use of hospital resources by allowing for less costly non-emergency preventative treatment. As we’ll see, the fact that undocumented immigrants contribute tax dollars to countries such as the United States only adds credence to the call for access to social programs. I have said enough. The undocumented can contribute in so many ways, as I will continue to discuss further along, that no one can simply characterize undocumented migrants as a drain on society. Put plainly, I see no reason to claim that undocumented immigration is part of a zero sum game.

In spite of the fact that undocumented immigrants do not commit any heinous or necessarily harmful acts by virtue of the laws they violate, the fact remains that they do violate the law. I would argue that one helpful way to look at the potential application of amnesty is to examine this violation alongside something akin to mitigating factors. I have alluded to this elsewhere, and Carens’ discussion of amnesty also implicitly makes such an appeal. When examining the cases of undocumented immigrants, one comes to the conclusion that different cases possess different background factors regarding the motivation for legal violation. There is a large and diverse spectrum of cases. Some cases may involve individuals who overstayed a visa because they had started a family. Perhaps the undocumented migrant in another case crossed the border due to extreme economic hardship. Perhaps the undocumented migrant came across the border at a young age and has built a life in this nation while knowing little of their country of origin. Whatever the case, there are undeniably certain factors which ought to give us pause for thought when
we consider deportation, of living under the constant threat of forced removal. These mitigating factors will not exist in all cases, but they will exist in some. They act as counterclaims against the initial legal violation.

This focus on mitigating factors forces us, as citizens, to ask the following question. What do the undocumented migrants have to lose? Sometimes the answer to this question may be nothing, or perhaps very little. Sometimes the answer is everything, or quite a lot. This isn’t a particularly unique observation by any means, nor is it particularly helpful in its present form. Taken in conjunction with our earlier claims regarding the unique characteristics of undocumented immigrants as compared to potential immigrants, we now have a starting point for a more in depth discussion of a discursive pluralism. I assert that the answer to the question of whether undocumented immigrants deserve to live under constant threat is at a minimum not in all cases. This is modest starting point, but it is a starting point nonetheless.

My answer, in all its modesty, is not surprising. As I have mentioned numerous times throughout the course of this work, I believe that Habermas’ justification-application dynamic is an excellent tool for sorting out the conflicting norms associated with amnesty. At the risk of repeating myself, I want to reflect back on a claim I made earlier regarding conflicting norms. In the course of discussing a pluralistic application of amnesty, I claimed that application discourses will always run into a conflict. This a conflict between norms prohibiting individuals from profiting due to lawbreaking and some other norm or set of norms which seem to justify amnesty. I believe now we are able to isolate the basic nature of the conflict regarding application discourses and the
undocumented. While the conflict may take a number of forms depending on which principles are best suited for discussion, I assert that the conflict which lies at the core of the debate will likely remain the same. It is a conflict anchored in the defining characteristics of the undocumented, a conflict between illegal entry and constant danger. There may be many aggravating or mitigating features of the particular case, but in the end we make a choice between two paths. Do we punish the undocumented individual for illegal entry, or do we bring them into the fold and out of the danger which defines their existence? The conflict is between norms prohibiting benefit from lawbreaking, and norms which impose a duty to alleviate suffering. I will soon discuss some of the factors which I believe we should take into account in this debate. Before I do, I must address a nagging concern.

At this point, it seems that I am about to offer monological justifications for amnesty. If this is the case, then I have violated the terms of my own project. The foundation of discourse ethics, my preferred approach in this case, is that norm construction and application requires actual discourse. If I take a monological approach I may still act as a deontologist, in the vein of Kant or Rawls. But I am certainly not staying true to the tenants of discourse ethics as Habermas articulates them. I disagree with this assertion for several reasons. The first is that I am not attempting to articulate the exact terms of an amnesty as it should apply for all. You will find no universal standard for accepting the undocumented in my work. As I will argue, part of this process requires citizens and the undocumented to engage with one another regarding the terms of amnesty. All I want to do is provide some potential reasons in support of granting
amnesty. Participants must work the details out in any one of many possible forums. These environments include the courtroom, the legislative chamber, the executive office, and perhaps most importantly the public arena of weak discourses. Second, it is a mistake to assume that a discourse ethical approach is simply an appeal to empty formalism. As much as some authors may resist it, it seems to me that there is a significant substantive component to a discourse ethical approach. Benhabib discusses this briefly regarding the non-discursive acceptance of equality and respect for autonomy. Without this substantive content discourse cannot get off the ground, though we must circle back to these principles later on with a more critical eye. Pablo Gilabert argues that discourse ethics is a means to express principles of solidarity, equality, and freedom in our everyday lives. In any case, it is a mistake to equate all uses of discourse ethics with pure procedure. Third and finally, earlier I claimed that a question we should ask regarding the threat of deportation is as follows. What does the individual undocumented migrant have to lose? This question highlights one of the basic tenants of discourse ethics, if not explicitly. Anyone who is affected by a norm must have the opportunity to participate in debate regarding the creation and application of the norm. When I ask “what do they have to lose”, I am asking “how are they affected?” Taking the concerns of

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4 It is worth noting that, in the United States at least, undocumented migrants do possess rights which facilitate engagement with the state. A right to a fair trial is perhaps the clearest example.


6 Once again, I would qualify the term “affected” in a manner similar to Gould. That is to say, when an individual is affected in a way that is manifestly harmful, they should be allowed to participate in discourse.
the undocumented will not be enough. It is not enough to ask the question and attempt
to concoct a reasonable, if artificial, response. It is a question we must ask those affected.
It is a question we must ask the undocumented. For now I simply want to point out that I
have not abandoned discourse ethics, nor do I intend to in the pages to come. I will now
discuss some of the factors which I believe deserve consideration in application
discourses concerning amnesty.

Rooted Residents and Economic Refugees

The first factor is economic refugee status. The term “economic refugee” refers to
those individuals who flee from a country of origin due to intolerable economic
conditions. It is not simply that they are looking for a better life. The economic refugee
looks for a life which supplies a minimally satisfactory standard of living. I discussed this
category briefly early on in reference to subsistence rights as articulated by Habermas
and Griffin. Just as a persecuted refugee is forced to flee a nation for fear of harm, so too
an economic refugee flees a nation in order to escape harmful material conditions. While
numerous thinkers recognize this as a legitimate category of refugees (e.g. Carens,
Habermas), it is not an internationally recognized category. They cannot claim asylum
based upon deprivation. As such, many resort to desperate measures in order to escape
their circumstances. Often this takes the form of undocumented immigration. It seems
clear to me that when we ask the question “what do they have to lose”, part of the answer
we receive will address what sort of place to which we are returning the immigrant. This
sort of consideration is focused on where the immigrant will go, and not where they are.
Of the considerations I discuss, it is the only one which will have such a focus.
The influx of Zimbabwean migrants into South Africa is an excellent example of undocumented immigrants who would fall into the category of economic refugees. As of January 2011, there were an estimated 1.5 million Zimbabweans who had entered South Africa clandestinely. While there had always been a flow across the border, this flow increased greatly following the economic collapse in Zimbabwe. Before a December 2010 moratorium on deportations was extended until March 2011, South Africa was deporting about 10,000 Zimbabweans a month. While the economy in Zimbabwe is beginning to “turn the corner” so to speak, for quite some time the nation had exceptionally high levels of unemployment and runaway inflation issues. People were not able to support themselves, and as such some decided that they would look for a better life elsewhere. By deporting them, South Africa was sending the Zimbabweans back into a nation where they were likely to face severe economic hardship. If we ask “what do they have to lose” in this case, the answer is quite a lot. This loss is a relevant consideration when one considers the case of the particular undocumented migrant, given the potential severity of this loss.

I have two comments to make regarding this consideration before I move on to the other relevant factors in the debate concerning the application of amnesty. The first concerns the limited scope of the category. I have mentioned this point in relation to human rights, but it bears repeating. In many cases, an undocumented migrant crosses into a new nation to make a better life for themselves in an economic sense. They are

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leaving a market in favor of a better one. If the economy which an undocumented migrant flees is able to support them, then they do not fall into the category of economic refugee. The standard is higher than simply leaving less favorable conditions for more favorable conditions. While the loss is still worthy of consideration, it is not of the same order as the loss experienced by an economic refugee. An economic refugee cannot support themselves and has been forced to look for opportunity elsewhere. As I have already claimed, given this qualification the category of economic refugees is likely quite small in most cases. The probable size does not negate its relevance in any case, and it is not the only relevant factor I consider.

The second comment is that I am not making a subsistence rights-based claim, in spite of the fact that I have previously summarized one of the more compelling arguments in favor of such a right. I am attempting to use the status of economic refugee as a mitigating factor when we discuss potential punitive action for illegal entry and residence. This attempt illustrates the point that undocumented immigrants can be affected in manifestly harmful ways by the application of norms associated with deportation, and as such they can make a justified claim to participate in the discursive process which leads to that application. Does this mean I am dismissing subsistence rights? No it does not. As I stated, there are compelling reasons to accept these rights. However, I am attempting to narrow my focus onto the issue of undocumented migrants. I have already made my case regarding the avoidance of human rights language. To be an economic refugee is to be in an extremely desperate situation. Often this results in illegal entry into a more affluent nation. Such a motive for illegal entry is germane to our
discussion, *as a motive or mitigating factor*. It seems like an acceptable part of application discourses, whether one acknowledges a right to subsistence or not. I will now move on to the other factors.

The previous consideration focused on where the migrant would go if they are deported. While this is a relevant concern, my primary focus is on where the migrant currently resides and what sort of life the migrant lives in that location. These factors, taken together, will constitute the category of rooted residency I have previously discussed. It is this category which I will claim is unique to undocumented immigrants. Just as before, my goal is to demonstrate that the application of norms associated with deportation can affect undocumented immigrants in severely harmful ways. By noting this fact one can appeal to discourse ethics in an attempt to involve undocumented immigrants in this application process. The first and most basic of the factors which comprise rooted residency is time. More specifically time spent within a nation. Carens discussed this factor at length in his article regarding amnesty for the undocumented. It was one of the primary qualifiers for Reagan’s amnesty in 1986, and it is one of the requirements for amnesty under the proposed DREAM Act. Carens believes that time spent within a nation is the primary measuring stick of granting amnesty, and that over time a nation’s right to deport an undocumented immigrant weakens until it is trumped by a claim for amnesty. I want to reiterate that Carens believes any specific date we chose will contain an element of arbitrariness. This is a point which I will expound upon in a way which Carens does not, in particular how a discourse ethical approach improves his position. But why is time such a widely recognized factor in this particular debate?
The reason is this. Time spent in a nation is an easy thing to measure as compared to less calculable attachments. While we can struggle with how deeply one is involved in their community, or how attached they are to family, five years is five years. There isn’t any need to analyze the elapsed timeframe beyond this simple recognition. Of course the time an undocumented immigrant has spent in a nation is not a relevant consideration if one examines time in a vacuum. In other words, one cannot simply point to time spent and leave it at that. Time is used as a general indicator of other things which we take to be important in an individual’s life. We assume that an individual who has lived in a nation for ten years has made more attachments than someone who has lived in a nation for ten days, to simplify the example. The person who has lived in a nation for years has presumably made a home for themselves and created a rich tapestry of attachments and commitments that are typical of any resident. Someone who has been in a nation for days presumably has not had time to make these attachments, and therefore they have less of an interest in staying (we assume). Instead of measuring these attachments, a cumbersome task, we simply look at the date of entry and compare it to the current date. If it crosses a line, we assume sufficient attachments exist to warrant consideration as a mitigating factor. If not, we don’t. Time in and of itself is close to meaningless. It is merely a measuring device to estimate other important attachments.

Another relevant factor addresses the interpersonal connections an undocumented migrant possesses in the new nation. Take the deported Israeli children as an example. While these children were quite young, they attended Israeli schools for the entirety of their educational history. They likely made friends as everyone does. They grew
accustomed to a certain group, to a certain teacher, and so on. In short, over time they became attached to the people surrounding them. Abreu, with her numerous extracurricular activities, likely became quite attached to a large circle of individuals. Of course this attachment is not unique to minors. Any person who lives and works in an area for an extended period of time will begin to form different types of attachments to those around them. These may be work friends, acquaintances at the market, or neighbors. These connections become a part of the life we live, and a very valuable part at that. Anyone who has moved from one place to another can tell you of the pain involved when close ties are severed. Of course the degree of pain associated with detachment is relative to the importance of the attachment for the individual. To move from one place to another is hard enough. Being forced to cut these ties against your will is harder.8

While the connections we make with strangers are quite important, they pale in comparison to the connections within a family (in most cases). For the undocumented, it is often the case that these connections pre-date entry into a new nation. Families may have moved apart from one another for whatever reason. Over time some members may reunite with others. Perhaps a daughter and son-in-law gained citizenship across the

8 There are other ways in which individuals are forced to cut ties to a particular location. For example, a citizen may be forced to move across the country because they lost their job. While this sort of economic coercion is harmful, I would claim that it is significantly different than the sort of legal coercion undocumented immigrants face. Economic coercion is theoretically undertaken due to the fact that it will result in some sort of improvement. One takes a job in another place because they cannot find work where they are. It is an opportunity, as unsavory as it may be. Legal coercion is not an opportunity, it is a demand placed on the individual by the state. There is no promise of improvement associated with cutting ties in this way.
border, and a mother wishes to join them. I do not need to provide an extended
analysis of the importance of family. Most people develop connections with parents,
siblings, and extended family which are valued more than other sorts of interpersonal
connections. One can also enter a new nation and create a family for themselves. A
person can cross a border, fall in love, and have a child. Again, the value of this sort of
connection should be clear to all. I said earlier that it is hard to sever ties with friends and
acquaintances. It can be agonizing to move away from close family. From brothers,
sisters, and parents. From spouses and children. Our family connections are extremely
valuable to us. As children, we are shaped in significant ways by our family. As adults,
they are often the people to whom we are closest. If the possibility exists that one may be
forced away from family, it is an extremely terrifying prospect indeed.

What I have attempted to show is that, as social beings, we create numerous sorts
of interpersonal attachments. These attachments shape us and give our lives additional
meaning. They are extremely and almost universally valuable. To uproot someone from
these attachments can be a substantially damaging enterprise. The sense of place formed
through interpersonal relations is shattered by force. It is replaced by uncertainty. Of
course we can form new attachments to some extent, just as the child who moved can
follow parental advice to make new friends. However, some of these attachments are
irreplaceable. You only have one family after all. Breaking families apart is a matter that

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9 I say “almost” given the fact that some individuals seek to live a life detached from others (e.g. hermits),
or they do not value the attachments they make in any meaningful way (e.g. sociopaths). These groups are
certainly in the minority.
warrants serious consideration given the importance of these connections. Organizations such as La Familia Latina Unida lobby to protect these bonds in the face of forced removal. What’s more, there are some undocumented migrants who may have spent a substantial portion of their formative years in a host nation. While their home country is technically elsewhere, they may not have lived in that nation long enough to form lasting attachments. Deporting someone who immigrated at the age of 40 is one thing. Deporting someone who immigrated at the age of 5 is something else. To deport the later is to destroy the only interpersonal relations the immigrant knows, based upon the simple fact that any significant connections were presumably formed within the host nation.10

Interpersonal connections are difficult to measure, as I mentioned earlier. I want to note that I am not proposing some solid measuring rubric by which we can determine the exact nature and extent of all attachments in order to weigh deportation decisions. Not only would this be a futile enterprise (in my view), it would attempt to establish a monological standard for decisions regarding deportation and amnesty. All I am doing is pointing out one factor among many which bear consideration when we discuss the interests of undocumented migrants. In spite of the fact that creating a clear measuring rubric is practically impossible, it does not mean that we are unable to grasp the value of interpersonal attachments in general. It also does not mean that we are unable to classify some deportations as more harmful than others based upon known connections. A

10 The fact that exile or deprivation of citizenship is generally considered an inhumane form of punishment speaks to the importance of these connections.
migrant with no family may experience less harm than a migrant with 3 children, for example. Some cases may not be so clean, but we can still respect the value and importance interpersonal connections represent. Again, when we ask the question “what do they have to lose” in this case, the answer may be “quite a lot.”

The final factor I will discuss concerns the contributions made by undocumented migrants. Contributions in a community are the “value added” component which is frequently lost in public debate regarding immigration reform. I have already disputed the claim that undocumented immigrants simply take from the community and give nothing back. What I want to do now is attempt to provide some concrete context for what I mean by “contribution.” The importance of contributions does not simply lie at the level of entitlement claims. That is, it isn’t simply the fact that an undocumented migrant may be entitled to amnesty based upon the various positive effects of contribution. These contributions also deepen existing attachments to a community, and forcibly destroying these attachments is harmful. I will discuss this fact in greater detail shortly. To simplify matters, I will divide these contributions into two categories: economic and non-economic. I do not believe that these categories are hierarchized. Economic contributions are not necessarily of more value than non-economic contributions, and vice versa. Typically, critics of undocumented amnesty focus solely on economic contributions, or the lack thereof. I will focus my efforts on demonstrating how the undocumented population does contribute economically in a positive way, while receiving little in return. Non-economic contributions, while less publicly discussed, are equally important. These sorts of contributions are numerous and diverse, so I do not attempt to provide a
comprehensive list. Finally, I will discuss how contributing to a community fosters attachment to that community.

Regarding economic contributions, one of the most obvious indicators is employment. According to the Pew Hispanic Center, of the 11.2 million undocumented migrants in the United States in 2010, 8 million were members of the workforce.\textsuperscript{11} Undocumented immigrants represented 5.2% of the United States labor force in 2010. Diaz Ruiz, the undocumented immigrant who required dialysis treatment, worked in agriculture in Idaho. Organizations such as the Immigration Policy Center cite textile manufacturing, construction, and electronic equipment fabrication as industries which are particularly immigrant heavy sectors. Whatever the job, the vast majority of undocumented immigrants come to a new nation to work. Perhaps the jobs are too scarce in their country of origin, or the pay below a minimally acceptable level. Whatever the reason, many come to a new land in order to work and contribute to society in whatever way this work allows.

A common misconception is that the undocumented pay no taxes and receive state benefits. They take from the state without giving back, so we hear. In fact, the opposite is true. While it is undeniable that many undocumented immigrants are paid “under the table” as a result of their status, the 2005 \textit{Economic Report of the President} indicated that at least half of all undocumented immigrants pay income taxes.\textsuperscript{12} Just like everyone else,

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\textsuperscript{12} Though they will often use fraudulent social security numbers to do so.
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the undocumented also pay sales taxes on any purchases made. Property taxes, even for those who rent, are also paid. In total, the estimated taxes paid by the undocumented in 2010 reached over $11 billion in the United States. By and large the undocumented add value to the economy as workers, consumers, and taxpayers. One should keep in mind that while the undocumented contribute taxes to the state, they are ineligible for almost all entitlement programs. Medicare and Medicaid are denied to them. They receive no social security benefits. Misinformation on this topic led the Congressional Research Service to reiterate the fact that undocumented immigrants are not eligible for welfare benefits. They pay their taxes, and for the most part have nothing to show for it. Perhaps the University Medical Center in Las Vegas should ask the state of Nevada to cover the $2 million a month in emergency dialysis treatment for the undocumented. After all, Nevada did collect over an estimated $133 million in tax revenue from families headed by undocumented immigrants.

Furthermore there is some evidence to support the claim that comprehensive immigration reform, including a path to citizenship for the undocumented, would have an extremely positive economic effect. Using a computable general equilibrium model based upon the 1986 Immigration Reform and Control Act, Dr. Raul Hinjosa-Ojeda found that

reform would increase the United States GDP by $1.5 trillion over the next 10 years.\(^{14}\) The increase in undocumented personal income would create enough spending to support between 750,000 and 900,000 jobs. Hinjosa-Ojeda also concludes that in addition to raising the yearly income for newly legalized workers, comprehensive immigration reform would raise the wage floor for all workers (native and immigrant). On the other hand, mass deportations would result in a $2.6 trillion loss in GDP over 10 years. This does not include the cost of the mass deportation itself, estimated between $206 and $230 billion. While many of the undocumented already offer positive economic contributions, a path the citizenship for the undocumented appears to be beneficial to all parties involved (in the United States).

We should not take such a one-sided approach to undocumented contribution. We should not operate under the assumption that economic value is the only source of value, or even that it is the most important source of value. I absolutely reject such claims. The importance of pointing out these economic contributions is twofold. The first is that so much of the debate regarding undocumented immigration (and many other issues for that matter) focuses almost exclusively on the question of economic value. This is a favorite go-to approach for those categorically opposed to immigration reform in particular. While the information I presented does not close the debate, it does highlight the ways in which the undocumented positively contribute to the society in which they live. It

challenges those who oppose reform due to economic reasons on their own terms.

Second, when one is monetarily invested in a community, they have a vested interest in that community. It builds attachment. An apt if somewhat crass analogy would be an individual who buys a car in great need of repair. By investing one’s resources in the car, they become more and more attached to it. One could say the same for an undocumented migrant who has invested their resources in a particular nation. Of course economic contributions are just one among many ways in which the undocumented can contribute. We should not reduce the value an individual adds to dollars and cents. I will now attempt to address some of these other contributions below.

Non-economic contributions can take many forms. As I said above, I will not provide a comprehensive list of these contributions. I will simply highlight some candidates in order to provide the reader with a general idea of what I mean by “non-economic contribution.” One of the most obvious forms of this type of contribution is performing various service functions which benefit the community at large.\(^{15}\) Serving as a volunteer at a charitable organization which feeds the homeless is an example of such a service function. The individual performing the task is attempting to improve the lives of those around them. Note that this task is not performed for some sort of economic benefit. It is presumably performed out of a sense of responsibility to give back to the community. The varieties of service functions are numerous. Homeless shelters, tutoring

\(^{15}\) Statistics regarding how many undocumented immigrants participate in service functions are unavailable in the United States. This does not mean the category is an empty set, it simply means that we do not know the size of the category for certain. This should not surprise us, given how difficult it is to track the undocumented population.
organizations, cultural exchange centers, environmental projects: the list goes on.

This is but one way that undocumented immigrants can work to improve the lives of those within their community. It is but one form of contribution.

Related to service functions are advocacy functions. While these are similar to service functions in that they aim to improve the lives of members in the community, these activities aim to raise public awareness about a particular problem in order to enact change. They are examples of what Habermas calls informal discourses, and undocumented involvement in these informal discourses is often the primary means of participation in the public sphere. The causes which an individual can advocate for are as numerous as the various service functions. One organization that I have mentioned previously is La Familia Latina Unida, which raises awareness regarding families split apart by deportation. Perhaps one advocates for education reform in a disadvantaged area. Or one could raise awareness regarding the plight of individuals who lack health insurance. Maybe issues regarding the unjust distribution of environmental burdens serve as the focal point for protest. Whatever the issue may be, advocacy functions aim at improving the community by highlighting these problems and demanding change. It may be the case that these problems are directly related to the undocumented (as with La Familia Latina Unida), or it may not. These are legitimate contributions to the community in which the undocumented live, and they should be recognized as such.

16 In addition, undocumented involvement in these advocacy functions serves as a means for the undocumented to gain descriptive representation. I will discuss the issue of actual and virtual representation in the following chapter.
Jennifer Abreu is something of a poster child for these sorts of contributions. From a service perspective, she served as a language tutor and was the leader of a youth community organization. She volunteered her time to improve the lives of her peers through education. From an advocacy perspective, Abreu’s involvement with TeenBoard aimed at exposing injustices associated with human trafficking and the use of child soldiers in armed conflict. Her ultimate goal is to become a journalist in order to highlight social justice issues and galvanize public action. As I have said before, you would be hard pressed to find a young adult who has put and plans to put as much back into her community. It is undeniable that these sorts of investments are of value to the community in which Abreu lives, in addition to the fact that she is attempting to motivate her neighbors to take action regarding global issues of social justice. It isn’t enough to simply talk about how much Abreu contributed or took from an economic perspective. This is a one sided account which ignores the very important, and very real, contributions individuals like Abreu make to those around them.

Other sorts of non-economic contributions could include cultural diversification, general neighborly acts, etc.\(^\text{17}\) Just as it is nearly impossible to create a measuring rubric for interpersonal relations, so to it is nearly impossible to create a measuring rubric for these sorts of contributions. We can certainly identify if an undocumented migrant did service work, advocated for change, and so on. Other, more general contributions (e.g.

\(^{17}\) This assumes that one views cultural diversification as a good thing, as an enriching of existing cultures through interaction and free exchange. The likes of Henry Sedgwick would argue that diversification only creates division within a community by destroying a pre-existing cohesion.
neighborly acts) will resist this sort of identification. I am not attempting to claim that if a person performs X number of hours of community service and is kind to their neighbors as demonstrated by some form of testimony that they should be granted amnesty. All I am attempting to point out is that these sorts of contributions help to tell the story of individual undocumented immigrants and the ways in which they can benefit the communities in which they live. Even though the zero sum myth is alive and well, the undocumented can and do aid the societies of various host nations.

Earlier I mentioned the attachment formed by the investment of personal resources in relation to repairing an old car. If one sinks enough time and resources into something, they inevitably become attached to it. This is not only true of one’s material investments. When one volunteers their time in order to improve something, it follows that they will have a vested interest in whatever was improved. If you spend countless hours repairing a broken down car, you will feel more connected to that car than if you had simply purchased it in working order. My point is this. By contributing to the communities in which they live, undocumented migrants become attached to these communities. It isn’t the case that contributions are one sided. It is not only the community which benefits, but also the undocumented contributor. Investing energy and resources into a community gives one a sense of place. It is their home, they helped build it, they helped improve it, they helped repair it. These contributions help the community, and they help the undocumented gain a sense of belonging. Just as forcibly removing someone from a host country can shatter interpersonal relationships, so too can it shatter a sense of belonging and dignity which comes from contributing to a community.
Previously I mentioned that I was dividing the four categories of considerations into two groups. The first group focused on what will happen to an undocumented immigrant when they return to their country of origin. The factor that fell into this category was economic refugee status. The second group concentrates on what the undocumented migrant will lose within the host nation if they are deported. This group contains the factors of time, interpersonal attachments, and contributions to the community. One category is outwardly focused, the other inwardly focused. Taken together, the inwardly focused category is what I have previously referred to as rootedness or rooted residency. It is a multifaceted category which captures an undocumented migrant’s attachment to the host nation. While I believe my discussion of the components which constitute the category of rootedness provides a satisfactory picture of the category, I am open to the fact that other factors may be absent. The three factors I discuss seem to be, by far, the most relevant considerations when discussing rootedness. Also, it is clear that some migrants will be more rooted than others. Those who have spent very little time and made very few connections in a host nation likely have less to lose upon deportation than those who have spent a great deal of time in a host nation and made many connections. One problem which I must now address in regard to the category of rootedness concerns an objection regarding my desire to focus on undocumented migrants. Isn’t it the case, some would claim, that this category of rootedness applies to potential migrants just as well as undocumented migrants? To an extent the answer is yes. However, rootedness when applied to the undocumented takes a
different form than that which applies to other categories of migrants. I will begin with the objection.

*Objection*

I have claimed that the distinguishing characteristic between undocumented immigrants and potential immigrants is the fact that the undocumented are rooted residents in a community, while potential migrants are not. As such particular duties to the undocumented should come out of this rootedness, instead of from widely applicable approaches such as appeals to human rights. The crucial qualifier is “particular.” As I have stated many times I do not reject human rights claims as a means to appeal for amnesty. The pluralism I have briefly outlined and will soon discuss in detail depends heavily upon whether or not one accepts the category of rootedness as both relevant in the sense that it should count as evidence which counters the illegality of entrance, and also in the sense that one must accept rooted residency as a category peculiar to the undocumented. The objection that rootedness is not unique to undocumented migrants but also applies to potential migrants is particularly vexing. I will attempt to describe the objection below, and respond to it.

While I do not provide a conclusively complete list of the categories which contribute to one’s being rooted in a community, I have listed what I believe to be the most important of them. These include time spent in a community, ties made to friends and family, contributions made to a community through economic involvement, and contributions made through social and charitable involvement. The degree to which one realizes these categories in their lives represents the degree to which they are rooted in a
community. An objection against my position results from this claim. Isn’t it the case that certain potential migrants fulfill these categories in a manner similar to even the most rooted undocumented migrants?¹⁸ Many potential migrants have family and friends on the other side of the border. They may visit these friends and family enough to become acquainted with those in the community. The potential migrant may volunteer to help out in that community in whatever way they can. In short, they may not live in the community, but they may be a regular face, a frequent visitor. Is this migrant rooted? If we answer in the affirmative, then rootedness is not a category which distinguishes undocumented migrants from potential migrants. Before I address this, I will provide a fictional example to help clarify what a possibly rooted potential migrant resembles.

Imagine a 70-year-old Turkish man. He has a son and a daughter, his only living immediate family, who both live in Germany. Both of his children have children of their own, making him a grandfather. The 70 year old man divides his time evenly between Turkey and Germany. In fact, his desire is to move to Germany one day to be closer to family. Due to his frequent visits, he is well known in his son’s and daughter’s respective neighborhoods. A handy-man by trade, he is always willing to assist neighbors with household problems. He frequently spends his time watching his own grandchildren, and the community members will often allow the 70 year old man to watch their own children when they must. The grandfather participates in school functions and serves as a Turkish language tutor at a local community center. In short, this man seems to meet most, if not

¹⁸ I am indebted to Dr. Jennifer Parks for introducing this objection, and for the framework of the example associated with the objection. Any mistakes in its presentation are my own.
all, relevant categories associated with being rooted in a community. Is he a rooted member of the community? Does rootedness fail to capture unique duties to the undocumented?

The first comment I would make is to reiterate that separating different groups of migrants across multiple categories is a messy enterprise at best. If we focus on the differences between undocumented migrants and potential migrants, there are some clear differences which I have already discussed. The most obvious concerns the issue of legality. A potential migrant is seeking to enter a nation legally, or has not yet engaged in clandestine entry. They have not transgressed established immigration procedures. Undocumented migrants have violated these procedures. Also, undocumented migrants live in a constant state of danger associated with discovery and deportation. A potential migrant, one visiting a potential new home perhaps, does not share this fear. They are viewed by enforcement bodies as visitors, not intruders. Aside from these very clear differences, there may be a great deal of overlap between the groups. Both groups potentially have family in the new nation, both groups may face economic hardships in their country of origin, and they both may be well known by a particular community in the new nation. Significantly, both groups may have legitimate claims regarding close ties to a new nation. Family and friends and not unique to undocumented migrants, nor are some of the other aspects which add depth to the concept of rootedness. In other words, it is wrong to claim that every aspect of being rooted in a community belongs to the undocumented alone. I would also claim that this does not have to be the case in order to discuss particular duties to undocumented migrants in relation to rooted residency.
There is one important characteristic of rootedness in a community which is particular to the undocumented. The undocumented are rooted in the additional sense that they have chosen to make a particular place a home. Having family at that home, contributing to the community around that home, and spending time in that home are all extremely important components of truly “making a home.” But the component that binds the categories of rooted residency together for the undocumented involves the simple commitment to plant oneself in a new community. A potential migrant may visit a particular location, and desire to make that location a home. They may have friends, family, and other attachments to that location. But in the end the potential migrant has not transplanted themselves from their country of origin to the new location. An undocumented migrant who builds a rich web of attachments often does so with the understanding that they are not going back to their country of origin any time soon, or at all. Some have “taken the plunge”, so to speak, and committed themselves to living in a certain area whether they are recognized or not. Others, like Abreu, may have come across the border and grown up in the host nation. The home they know is not their country of origin. It is the host nation. As I have said before, Abreu’s home is not in Brazil. It is in Kentucky. A potential migrant could not say the same, it seems to me. Another part of this commitment to making a home instead of visiting a potential home is a practical concern. While a potential migrant is free to move back and forth across the

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19 Of course not all undocumented immigrants fall into this sort of category. Those who do not most likely could not appeal to rooted residency in order to justify amnesty.
border due to the fact that they hold a visitor status, an undocumented migrant is far more restricted in movement possibilities.\footnote{This assumes a nation with somewhat tightened border security, such as the contemporary United States. Nations which have largely porous borders would not pose as great a movement risk for the undocumented.} They are viewed as intruders, not visitors. Exit and re-entry from the host nation carries the risk of discovery, and as our case study regarding dialysis patients demonstrated, many are reluctant to risk crossing the border even to receive medical treatment. They simply worked too hard to get “here” to risk going back over the border. So “here” becomes home. In short, while some potential migrants do form deep bonds with a community and show some signs of being rooted in that community, they remain visitors. They have the ability to come and go as they please, even if they have a desire to stay permanently. The undocumented are rooted in the sense that they are territorial residents. Through choice, fate, or necessity they have created a space for themselves which is more than that of a visitor. A deeply rooted undocumented migrant has truly made a home.

The issue with this claim, of course, is that I seem to be rewarding people for breaking the law. The status of resident is obtained by violating established immigration policies, policies which potential migrants honor. I need to make one thing clear. I am not attempting to claim that undocumented migrants who are rooted as residents deserve to be given preference over those with similar or greater connections who are on the outside looking in. I am simply stating that to transplant oneself, to make that commitment and to become a permanent part of the community, is what separates the fact that one has connection in a community from the fact that one is a rooted resident in a community. It
isn’t simply hopping across the border and making a commitment to stay, just as it isn’t simply having family and friends in a particular area. It is a combination of both of these factors. Again, I stress that this doesn’t give preference to the undocumented over potential migrants. It simply is a factor which distinguishes them. My project is not aimed at hierarchizing obligation to potential migrants over undocumented migrants, or vice versa. It is simply aimed at discussing relevant differences.

I have reached the end of my discussion regarding the source of particular duties to undocumented migrants. To summarize, particular duties to undocumented migrants are anchored in the state of danger which is a part of their existence in a host nation. In certain circumstances, it may be the case that the host nation should act to remove this danger based upon a number of factors. These factors include economic refugee status, time spent in a nation, attachments made while in a nation, and contributions made to a community. The final three form the basis for what I will now call rooted residency, as distinguished from the attachments made by potential migrants. Given the unique nature of undocumented attachments and the ways in which they contribute to the community, one can make the case that a duty to alleviate the state of danger should (in some cases) win out over a duty to prevent individuals from benefiting as a result of law breaking. This leaves the question open regarding how we should decide which of these duties win out. Aside from the fact that it would violate the principles of discourse ethics, providing a single comprehensive template for all situations would be an exceptionally messy enterprise. Determining the level of abstract attachments and contributions is difficult enough. Selecting a level which could serve as a threshold for amnesty would be more
difficult still. I need to focus on how such a decision could be made, whether or not a comprehensive template is feasible, and if it is not then what sort of model should take its place. This is the focus of the next chapter.
CHAPTER SIX

THE APPLICATION OF AMNESTY

While we have located the source of particular duties owed to undocumented immigrants in the form of rooted residency, we have not yet discussed how this category relates to the application of amnesty. It is the purpose of this chapter to remedy this problem. As I have mentioned several times, I believe that the category of rooted residency points to a pluralistic application of amnesty. I begin this chapter by discussing Carens’ own pluralistic approach. I find his approach helpful in some ways, though I claim it is problematic in that it does not adequately account for how a threshold is chosen regarding granting amnesty. After I discuss this shortcoming in Carens’ argument, I will provide my own account in support of the discursive application of amnesty. In the process of my argument, I will claim that this discursive process ought to include actual undocumented immigrants. That is, undocumented immigrants should represent undocumented interests. Virtual representation is not enough. Looking at the United States, I will end this chapter by discussing the ways in which undocumented immigrants participate in informal discourses and application discourses. These methods of participation are flawed in their present form, and I propose alterations which would bring them closer to a discourse ethical standard.
Carens and Line Drawing

I have already discussed one approach to the issue of undocumented amnesty, namely Carens’ proposal concerning time spent in a nation. Over time an undocumented immigrant’s right to stay within a nation trumps the state’s right to deport. He uses the somewhat extreme example of an 80-year-old undocumented woman who had lived in Scotland for 70 years. Deporting her makes no sense, according to Carens. The vast majority of her time was spent in Scotland, her roots were in Scotland, and when the state tried to deport her the public was justifiably outraged. She was one of them, so the citizens said. They were right of course. Her membership was a result of the fact that the elderly woman had lived in the land long enough to form the same attachments as any naturalized citizen (save some attachments associated with voting perhaps). Of course Carens doesn’t think that the bar needs to be set that high. An undocumented immigrant does not need to live in a nation for 70 years before the state loses the right to deport. So where do we draw the line? Carens waffles on this difficult question, and for good reason. While he thinks that ten years may be a good standard, there are some factors which could speed up the process. I imagine he has the sorts of attachments I discussed earlier in mind, given his discussion of how we form the deepest sorts of attachments in the place where we live. Regarding the threshold, he states the following:

Identifying a specific moment after which irregular migrants have a legal right to remain inevitably involves an element of arbitrariness. No one can pretend that choosing five years rather than four or six involves any question of fundamental principle. It is more a matter of the social psychology of coordination, given the need to settle on one point within a range. But if one asks why five years rather than one or fifteen, it is easier to make the case that one is too short and fifteen
too long, given common understandings of the ways in which people settle into the societies where they live.¹

Carens has run into the line drawing problem. Determining actual thresholds can be a difficult process given that there is often no solid justification for choices between small increments. It is easy to say one year is too short, and fifteen years is too long. It is harder to say that five years should be the threshold instead of four, or six. Unfortunately, Carens fails to provide a framework for making this sort of decision. To say there is no “fundamental principle” to which we can appeal simply means that there is no moral theory which explicitly states X number of years is the threshold, rather than X-1 or X+1. There is no absolute, monological justification for finding the ground between two extremes. But can’t we create a more general framework for addressing this problem?

While I agree that any line drawn will contain an element of arbitrariness, we need to provide some insight as to how this line should be drawn in order to maximize fairness in application. Carens does an excellent job of discussing what some of the relevant considerations are. My own discussion builds off of some of the points he made. Where Carens fails is in his discussion (or lack thereof) of arbitrariness. It is clear that Carens does not use to term arbitrary in its everyday sense. We shouldn’t simply decide, on a whim, that 63 years or 9 months is the appropriate amount of time an undocumented person must spend within a nation. Carens’ implication is that there are extremes which we should reject as too long or too short, and in the vast gray area we need to decide upon

a limit where the state’s right to deport vanishes. So the line drawing is not completely arbitrary. There are some basic limits regarding where we can draw the line. Clearly Carens’ use of the word “arbitrary” can be misleading. The line isn’t arbitrary in the full sense by any means, but there is a great sense of ambiguity regarding how the line is drawn. Are we to believe that any line is good as another in the large gray area between these two extremes? I don’t think so, nor do I think Carens thinks so. It may be that there is no single right answer, but some lines will be more appropriate than others. If this is the case, how are we to decide which are more appropriate? Do we simply take a middle ground? Is there some procedure which could facilitate fair outcomes? Just because there is no “fundamental principle” does not mean there can be no fundamental approach. While Carens does an excellent job making a case for amnesty, he fails to provide a framework for applying the graded amnesty he advocates. The process is uncertain.

A potential solution to Carens’ ambiguity regarding a framework is to examine another proposed framework for resolving line drawing problems. We could then plug the hole in Carens’ article and move forward. One of the more prominent philosophers to address the subject of line drawing, and provide a framework for resolving the issue of arbitrariness, is Joel Feinberg. While his discussion focuses on issues associated with bad Samaritan laws, it is possible to examine the key elements of his framework regarding line drawing and attempt to apply this framework to the case of undocumented immigration. In the end I will assert that Feinberg’s account does not do a wholly adequate job of clarifying the ambiguity in Carens’ argument, and that we must look elsewhere if we are to find a suitable framework for application in this case.
Feinberg’s discussion of line drawing is an offshoot of a broader discussion regarding the enforcement of bad Samaritan laws. The line-drawing problem primarily concerns the work of Lord Macaulay. In an attempt to articulate the content of bad Samaritan laws in general, Macaulay asks under what circumstances should our failures to act be punished when these failures correspond to harms caused by positive action. For example, should I be punished if I watch someone drown in bathtub in the same way as if I had held them under water myself? Macaulay rejects both extremes, claiming that while we should not be punished for every omission, there must be some omissions for which we should be punished. In the end he takes a stance immunizing Samaritans, “those persons in a position to help others in distress to whom they stand in no ‘special relations.” The way in which Macaulay expounds upon this claim is to identify cases that clearly ought to be punished and cases that clearly ought not to be punished. From these cases we can discover the principle which differentiates them. In short, Macaulay determines that omissions should be punished as positive actions only when these omissions were contrary to the law. Omissions are criminal if they breach some legal duty or another, even if that duty is enforced by non-criminal rules such as a nurse’s duty to care for a patient. There must be some sort of special relationship between the victim and the perpetrator, such as a relationship between nurse and patient or between jailor

2 Joel Feinberg. *Harm to Others*. Pg. 151.

3 Ibid.

4 Joel Feinberg. *Harm to Others*. Pg. 152.
and prisoner (both examples from Macaulay). Other examples could include master-servant, lifeguard-swimmer, vendor-purchaser, and so on. If the perpetrator is a stranger to the victim, then they are not guilty due to the fact that no prior duties or agreements existed between them.

Macaulay is not entirely satisfied with the way in which he draws the line in this case. He claims that any line drawn will include some cases we think it should not include, and exclude certain cases we think it should not exclude. However, Macaulay believes drawing the line in such a way as to punish anyone who omits to save an endangered person, unless doing so would pose a significant risk to the stranger, is objectionable for two reasons. The first is that it would force some individuals to suffer a great inconvenience in order to save the life of a stranger. Macaulay’s example is that of a surgeon in Calcutta who must travel to Meerut in order to perform a life-saving operation. According to the aforementioned criteria, the surgeon is compelled to travel to Meerut regardless of the inconvenience. On the other hand, this criterion can be too lax and fail to punish those who would deserve to be punished. These are people who have duties to provide aid even in the face of danger. For example, a lifeguard who refuses to rescue a swimmer in dangerous water should be held responsible for murder according to Macaulay. It is the lifeguard’s duty to save others even in the face of danger. However, if

5 Ibid.
we accept the qualification regarding “significant risk”, then we could not hold the lifeguard responsible even though they have violated their duty.

In an effort to improve this position, Feinberg proposes that we abandon precise conditions regarding punishment for omissions in favor of looser criteria regarding unreasonable danger, loss, or inconvenience to the rescuing individual. Macaulay would, of course, reject this imprecise criteria in favor of more exacting standards. Doing so confronts us with a problem, namely the dilemma of precise criteria. However we formulate these criteria, intuitively they will seem too exacting in some circumstances and too lenient in others. Macaulay accepts this criticism as we have seen, and believes that it is better to draw the line forbidding Samaritan liability than to open the door for ever more exacting demands of the Samaritan. Should a person travel 10 feet to save someone from drowning? If they should travel 10, then shouldn’t they travel 15? Macaulay’s claim is that punishing Samaritans puts us on a slippery slope to where we would have to punish anyone who had any capability of saving a victim. The line of reasoning is as follows:

The difference between two steps and one is so insignificant morally that it would be inconsistent to charge a bad Samaritan with murder for failing to take one step, while letting another off for failing to take two. But the difference between two steps and three is equally insignificant, so it would be unreasonable to draw the line of duty at two steps. Similarly insignificant is the difference between three steps and four, or between twenty nine and thirty, or between 999 and 1,000. So

7 Joel Feinberg. Harm to Others. Pg. 154.

8 Joel Feinberg. Harm to Others. Pg. 155.
there will be no place to draw the line, the argument goes, that will not mark an arbitrary difference between those made liable and those exempted.  

In other words, each attempt to draw the line regarding “unreasonable harm, loss, or inconvenience” forces us to extend the line just a bit further, then just a bit further still, until it encompasses all omissions.

Feinberg rejects this claim. While it may be the case that there is no significant difference between one step and two, surely there is a significant difference between one step and a 2 mile run. There is, in other words, still a distinction between clearly good and clearly bad Samaritans. So, according to Feinberg, it is possible to take a somewhat cautious approach regarding line drawing and bad Samaritan laws. There are certain cases where there is clearly no risk of harm or inconvenience to the Samaritan, and in those cases failure to act should be punished. On the other hand, there are clear cases where the risk is great, and these individuals should not be punished for their omissions. To improve on this general account, Feinberg proposes three categories associated with reasonable and unreasonable harm. The first category contains those for whom there is clearly no unreasonable risk, cost, or inconvenience in acting as a Samaritan. The second category includes those who could act as Samaritans, but only at a clear exposure to unreasonable risk, cost, or inconvenience. The third category is “everything in the vast no-man’s land of uncertain cases between these two extremes.” For Feinberg, we

9 Ibid.
10 Joel Feinberg. Harm to Others. Pg. 157.
11 Joel Feinberg. Harm to Others. Pg. 156.
should punish those as liable in the first category, but avoid punishing those in the second and third categories. This conservative approach has two advantages over Macaulay’s proposal.\footnote{Ibid.} First, it assigns criminal responsibility for some very clear bad Samaritan cases which Macaulay cannot account for. For example, the state could punish me if I did not reach into a bath tub to save a drowning child. Second, it avoids making the absurd claim that just because there is no morally significant difference between two adjacent points on scale, then there is also no difference between two widely separated points. Feinberg’s solution is to remain relatively vague regarding the cases of unreasonable risk and allow juries to apply the standards related to harm, cost, and inconvenience.

I take it that Carens’ discussion regarding a graded amnesty is similar to Feinberg’s discussion of bad Samaritan laws. There appear to be clear cases where it would be unjust for a state to deport an undocumented migrant. Carens’ example of the 80 year old woman who had lived in Scotland “illegally” for 70 years is a good example. There are also clear cases where an individual does not deserve amnesty. Such cases could include a human trafficker who has lived in a nation for a month. These cases correspond to Feinberg’s categories of clear lack of danger and clear presence of danger in relation to bad Samaritan laws. Once again, we are confronted by the “vast no-man’s land” of cases in the middle. The significant majority of cases regarding undocumented immigration will lie somewhere in between the Scottish woman and the human trafficker.
Should we follow Feinberg’s lead, and permit only those who clearly deserve amnesty to stay?

Before I answer this question, I would like to make a methodological comment. While Feinberg is not an explicit proponent of discourse ethics, I presume that Feinberg’s contribution does contain a deliberative element. Concerned parties would have to come to some sort of agreement regarding what counts as a clear example in favor of amnesty or deportation. It is not necessarily a function of making snap judgments, though Feinberg’s point certainly does lend itself to such an interpretation. One can imagine a jury deliberating in regards to a verdict, legislators working out the specifics of a bill, or protestors demanding the release of an undocumented migrant as examples of discourse regarding line drawing.\textsuperscript{13} Once again, this is not to say that Feinberg’s conclusion is necessarily discursive. In particular, the fact that Feinberg removes the “vast no man’s land” from further deliberation violates rules regarding the ability to introduce assertions into argument. I would simply reiterate that the conclusion from Feinberg’s line drawing problem still potentially contains a deliberative element. I will now evaluate the adequacy of Feinberg’s conclusion regarding undocumented immigrant amnesty.

There are some problems with applying Feinberg’s conclusion to the case of undocumented immigrant amnesty. These problems are a result of Feinberg’s exclusion of the “vast no man’s land” in between the two extremes on our scale. First, applying

\textsuperscript{13} The example of jury deliberation requires a bit of imagination, given that legal statutes provide fairly cut-and-dry solutions based upon one’s legal residency status. Also keep in mind that according to Habermas protest movements are examples of weak discourse, in spite of the fact that they do not resemble organized discourse between parties aimed at an actionable solution.
Feinberg’s conclusion in the case of undocumented immigration may violate the spirit of what Feinberg is attempting to accomplish. In his work on line drawing, Feinberg avoids punishing those who operate in the “no man’s land” due to the fact that he wishes to protect them from potentially repressive bad Samaritan laws. It is a restriction he puts in place to deal with a potential objection by the likes of Lord Macaulay. Restricting amnesty to those who clearly deserve it, and excluding those who don’t, is not a protective measure. It is a punitive measure, aimed at restricting amnesty to the smallest acceptable level. It is not clear that this is how we should operate, in addition to the fact that excluding the no-man’s land in regards to amnesty runs contrary to Feinberg’s line of reasoning.

Cutting the line the other way does more justice to Feinberg’s original point, though I believe it is still too simplistic. When I say cutting the line the other way, I mean granting amnesty to those who clearly deserve it and to those in “no man’s land.” Only those who clearly do not deserve amnesty would be deported. While this may stay true to the spirit of Feinberg’s conclusion, to protect those in “no man’s land” from harm, it oversimplifies the application of amnesty. One would need to supplement any line (a useful legal tool no doubt) with some account of mitigating and aggravating factors which could nudge a migrant from one side of the line to the other. There will be hard cases which challenge our ability to choose between conflicting norms. The answer to these hard cases should not involve either a blanket amnesty or a blanket deportation for fear of setting the wrong precedent. In the end we must accept that we do not know how the line should cut in advance. The cautious approach of Feinberg may work well for bad
Samaritan laws, but it does not mesh neatly with cases regarding the application of amnesty. Given these facts I believe we can conclude that while Carens’ discussion of line drawing is similar to Feinberg’s at first glance, it is not the case that Feinberg’s account fills the gap in Carens’ argument regarding how line drawing should take place. The ambiguity remains due to the complications associated with applying Feinberg’s thought to the issue of undocumented immigration. I must discuss one more important issue regarding Carens’ account before I can begin to discuss a discursive pluralistic approach to amnesty.

One of the more substantial problems with the ambiguous use of “arbitrary” is that we don’t know who is doing the drawing. Who draws the line? Who creates the threshold? Carens is notably silent on this issue. Perhaps he is silent due to the fact that he believes established democratic processes in some nations are capable of solving this problem. In other words, he is silent because he answers the questions asked above with “whoever the recognized decision makers are.” While this is the most likely answer, it is not satisfactory given Carens’ own account. An extremely important part of Carens’ argument is that at some point individuals cross a threshold where their social membership needs to be officially recognized. They need to shift from unrecognized social members to recognized legal members. For Carens, those who have lived in a host nation long enough deserve to engage in actions like policy shaping and political advocacy. They deserve to be part of the decision making process in general. If he believes this is true, then it is unlikely that we can accept current political institutions as the sole legitimate participants in threshold setting. If the undocumented as rooted
residents should be involved in the creation of law, then it is reasonable to conclude that they should be involved in the line drawing process. Current political institutions disallow such involvement, at least directly. Undocumented immigrants can protest in an attempt to draw attention to their plight and hopefully use this attention to leverage a fair deal, but they cannot participate directly. They cannot vote, they cannot hold office, and so on. To say “their social membership must be officially recognized”, and to claim that it is unjust to deny them this recognition, calls into question a line drawn without real participation by the undocumented. Once again, Carens is silent on this issue.

The lack of framework and the lack of discussion regarding legitimate participants in decision making are two weak points in an otherwise exceptional article. I agree with Carens that drawing a single, universal line which appeals to some fundamental principle is a fool’s errand. It may be that such a line is drawn at the end of a decision making process, but to claim that it is the only correct demarcation is a claim we should reject. In my view, the best way to fill in the blanks regarding the drawing of the line is to address the two deficiencies in Carens’ otherwise stellar argument. If we can posit a proper framework for drawing the line, which includes justification for who should be included in the decision making process, then we can allow the line to draw itself. That is to say, we philosophers can accept the fact that lines may be different from place to place, people to people, nation to nation. So long as the basic framework is fair, and it is followed, then we have good reason to hope for a fair outcome. We don’t have to wring our hands over 4 or 5 years, or 10 or 11. Those involved can make these decisions for themselves.
A Discursive Solution

I argue that a discourse ethical framework, as outlined by Habermas and articulated by Benhabib and Ingram, is best suited for filling in the gaps in Carens’ argument. The core of this framework is Habermas’ justification/application dynamic. This dynamic is representative of what can be called discursive pluralism, a means of applying different norms in different contexts without sacrificing the integrity of a unified framework. First, I will briefly revisit Habermas’ justification/application dynamic. After this summary, I will provide a general description of how this dynamic applies to the undocumented. I will then discuss how the four factors, particularly rooted residency, relate to this framework and how they validate a potential application of amnesty. I will then revisit the case studies in order to show how this dynamic would operate. Most importantly, I will show how discursive pluralism provides justification for the inclusion of the undocumented in the line drawing process. Following this discussion, I will need to revisit the legal/moral divide in an effort to show that there are ways in which undocumented immigrants can actually participate in the current legal climate of a nation like the United States. Let us begin with Habermas.

Moral reasoning for Habermas is divided into two stages, justification and application. The first stage, justification, requires us to determine whether or not we can justify the rightness of a particular norm in a broadly defined generalized manner.14 An example of such a general norm would be “it is wrong to allow an individual to benefit

14 Jürgen Habermas. Justification and Application. Pg. 13.
from law breaking.”¹⁵ The norm, in this general form, must be legitimated discursively. However, this general norm can run into conflict with other general norms in particular, rather than general, situations.¹⁶ For example, it might conflict with a norm which claims “it is wrong to force a parent either abandon their child or force the child to live in extreme poverty.” One can imagine a particular example, such as the deportation of an undocumented migrant/parent, where these two general norms would conflict. The solution is to move to the second phase of moral reasoning, called application discourses. In this stage, those affected by the application of the norm enter into discourse regarding which of the two norms is most appropriate given the particular situation. Both cannot be applied since they conflict with one another in the particular situation, so the most appropriate one given the situation is chosen instead. Once the application discourse is complete, we must backtrack in order to determine whether a norm such as “it is wrong to allow an individual to benefit from law breaking, unless it forces a parent to either abandon their child or force the child to live in extreme poverty” can be justified according to more generalizable interests. Note that each stage is discursive. Justification discourses are followed by application discourses, which are followed by justification discourses.

The general framework I have in mind follows along these lines, primarily due to the fact that it is capable of dealing with scenarios in which widely accepted norms

¹⁵ This example is introduced by David Ingram.

¹⁶ Jürgen Habermas. Justification and Application. Pg. 13
conflict with one another. Any framework which we attempt to use must be able to deal with the fundamental opposition associated with amnesty/deportation for the undocumented. Do we stop someone from benefiting from lawbreaking, or do we work to alleviate the dangers faced by a vulnerable population? The norm we choose depends on the facts surrounding the individual case. In this way, the framework is pluralistic. A “one size fits all” solution is not proposed. Not only does such an approach fail to grasp the subtle nuances of each case, but it also undermines a norm which is supposedly universally justified (whichever norm that may be). Instead we select which justified norm ought to be applied in this case, while still affirming the validity of the conflicting justified norm in other cases. In short, the justification/application dynamic allows us to take the necessary pluralistic approach to the conflict which lies at the heart of amnesty for the undocumented.

How do we come to a decision regarding the application of a norm to the particular case? As was stated above, justification/application dynamics are discursive by nature. The primary dictum that all affected parties must be allowed to participate in non-coercive discourse directs the pluralistic application of conflicting norms. Not only that, but as Benhabib stresses, it is important that each participant in discourse attempts to see the conflict from the other side, so to speak. We must put ourselves in the position of other participants in order to truly say that we would accept the outcome of discourse if we were, in fact, in their position. An example will help to demonstrate the point. There is a debate currently underway in certain parts of Africa regarding the hunting and consumption of bushmeat. Bushmeat, which refers to any form of wildlife that is
captured in the wild, is for some a significant source of the vital proteins we as humans require. There are some who rely on this meat to survive. However, hunters are indiscriminate in their hunting practices. Anything they can catch, they eat. This includes threatened and endangered species. In one case a new species (the Walter’s Duiker) was discovered, for the first time, in a bushmeat market. So, we encounter a conflict. On the one hand, it seems we should honor norms associated with subsistence. In this case, we should respect and encourage those Africans who rely on bushmeat to continue engaging in hunts to feed themselves. On the other hand we have norms associated with sustainability. These norms would object to the hunting practices given their widespread nature and devastating environmental effects. A discourse begins between affected parties, those who rely heavily on bushmeat and those most negatively affected by the environmental effects. During this non-coercive discourse both sides attempt to place themselves in the position of the other in an effort to show, both to themselves and to the opposing side, that their conclusion is the mutually acceptable one. Ideally both affected parties agree to apply one of the two conflicting norms in this case, and either continue or cease hunting as a result of the norm selection. The justification/application dynamic operates in such a way regarding any example of norm conflict.

An important question which I will address shortly concerns the issue of who is involved in discourse. For now, I encourage the reader to operate with a moral, rather than legal, point of view. The moral view dictates that all affected parties must be

17 It is worth noting that in this case the “opposing sides” will likely all be drawn from the same group.
involved in these discourses. Officially recognized membership in a nation is not a relevant concern. Of course from a legal perspective this is not the case. As I have mentioned before, the issue of legality as opposed to morality will prove to be a major stumbling block in the involvement of all affected parties in application discourses regarding amnesty. For now it will be easiest to restrict ourselves to the moral point of view in order to provide a basic description of the framework for discursive pluralistic amnesty. The issue of legality can wait for now, but I must confront it head on in order to avoid objections based upon a “one sided” view of the situation.

Undocumented immigrants are profoundly affected by the application of norms regarding amnesty and deportation. This is obvious. One could claim that they are the most affected group regarding application, but this is not an argument I need to make. All of the previous discussion regarding attachments and rooted residency demonstrates that while all undocumented migrants are affected by these discourses, some are affected more profoundly. The application of norms favoring amnesty or deportation can mean the difference between a secure, rich existence and having one’s life plans torn apart. As a result of these claims, it is clear that from a moral perspective undocumented immigrants ought to be involved in discourses regarding the application of norms associated with amnesty and deportation. Citizens in a nation are affected as well, and they have a place in the discussion. But theirs is not the only place. One could go so far as to claim that undocumented migrants have greater reason to be involved in these discourses than citizens. So far as I can tell there is no reason to make this claim at present. As long as we recognize that undocumented migrants ought to participate in this application discourse
(from a moral perspective), then there is sufficient ground for me to move this framework forward.

Let me summarize the framework as I have presented it up to this point. The foundation of the framework is Habermas’ justification/application dynamic. Universal norms are justified through discursive processes, and then applied to particular cases through application discourses. This dynamic is particularly useful insofar as undocumented migrants are concerned, given the fact that it helps us to sort through the conflicting norms which are at the heart of the amnesty/deportation discussion. It is a discursive model, which means that all parties affected by the outcome of discourse are allowed to freely participate in discourse. In the case of undocumented immigration, this means that undocumented migrants ought to participate in the application discourses regarding any potential pluralistic amnesty. This participation is complicated, due to the fact that they are not officially recognized members of the host nation where such a debate takes place. However, from a moral point of view this lack of official recognition is irrelevant. The relevant indicator which allows participation in discourse is being affected by the outcome of discourse. Undocumented migrants are profoundly affected, and as such should be allowed to participate.

*Line Drawing Revisited*

We can now begin to fill in some of the blanks regarding how a discursive line drawing process would work. The line serves as a clear and established means to determine which norms we should apply in the particular instance. For example, let’s say that citizens and undocumented migrants come to an agreement regarding where a
threshold should be set. We’ll follow Carens and say that both sides agree that time should serve as the measuring device, and 5 years is an appropriate amount of time to cross the threshold. When we are confronted with the dilemma of conflicting norms associated with an undocumented immigrant, the powers that be simply need to look to the line and determine which norm to apply in the case. If you cross the threshold, it is a norm associated with alleviating danger. If you don’t it is a norm associated with preventing individuals from benefiting from lawbreaking. This model echoes the sentiment of Carens, that at some point undocumented migrants cross a threshold and deserve to have their social membership officially recognized. It resolves the tension between norms with an easy to utilize line. However, it isn’t necessarily the case that such a simplistic model is the best option.

Carens proposes drawing a line based upon the time an undocumented migrant spends within a nation. The reasons for this seem clear enough to me, and I have even discussed them briefly in relation to the mitigating factor of time. Time itself is close to meaningless as a relevant consideration regarding the application of amnesty. The usefulness of time is that it is a general indicator of the degree to which an undocumented immigrant has created a web of attachments in a host nation. The longer someone stays the more likely they are to be deeply rooted in a community, or so we assume. Time is also a clear standard of measurement, especially when it is compared to the way in which most attachments resist quantification. Carens’ reasoning behind positing a single line based upon time is likely as follows. In order to find a solution to the amnesty question, we must present a proposal which maintains an air of practicality. A practical proposal is
desirable due to the fact that it is more likely to gain widespread acceptance, and thus is more likely to be adopted by the relevant decision makers. Trying to create such a line based on attachments alone is not practical, even though these attachments are an extremely relevant (if not the most relevant) consideration. The best alternative is to create a model which uses time as a measuring device. Time is easily measured, and is often an indicator of important attachments. A time-based line is simply the easiest model, and I assume this is why Carens believes that threshold setting should reference time spent in a nation as the determinant. But this does not mean that it is not the best way to apply amnesty.

The problem with taking a solely time-based approach is it ignores the fact that while time may be a good general indicator of attachments, it is by no means a precise indicator. Undocumented migrants who have lived in a nation for one year may have formed more meaningful attachments than migrants who have lived in a nation for five. Perhaps the individual who has lived in the host nation for one year has a family and deep community commitments, and the other migrant does not. It is not difficult to imagine such a case, and as such we encounter a problem. I have asserted that the reason time is a widely accepted measuring tool is because it is an easy way to approximate the degree to which an undocumented migrant is attached to a particular community. It is easier than attempting to measure the actual attachments. The problem is that it is precisely these attachments which are the most relevant considerations. If we focus solely on the issue of time spent in a nation, then we may neglect extremely deep attachments made by undocumented migrants who have not crossed the time-based line. If it is the attachments
that are truly relevant, shouldn’t we alter Carens’ position in order to respect that which is truly valuable to the undocumented immigrant, and valuable to the community as well?

In answering this question, I want to reiterate that I am not attempting to monologically posit a universal framework for addressing the issue of undocumented immigration. I am staying true to my earlier claim that (from a moral perspective) the issue of applying amnesty is to be the product of actual dialogue between citizens of a host nation and undocumented migrants. What I am attempting to do now is merely show what sorts of considerations are likely to be considered as relevant when amnesty is applied. These are not the only acceptable considerations, and it may be the case that a fair discursive process could take a completely different path. I personally believe it is unlikely that a fair discursive process would dismiss all of the considerations I will discuss, but I must be open to the possibility. I cannot predict the outcome of discourse before dialogue actually begins. In any case, keep in mind that I am merely discussing likely relevant considerations in an attempt to enrich Carens’ time-based threshold.

Before I begin discussing the other relevant considerations, or rather revisiting them, I should say that I am not completely dismissing the usefulness of time spent within a nation as a measuring tool. As I have said many times, it is a good general indicator of attachments made within a nation. Given that these attachments may be hard to qualify, we can still keep a time-based system as a way to sort out conflicts which involve migrants who do not have sufficiently measurable attachments. Perhaps we can imagine a conflict where loosely measurable attachments cannot provide a clear answer regarding application. In these cases perhaps it would be most prudent to simply measure
time spent within a host nation in order to provide an answer based upon estimation.

Time is still relevant, it simply isn’t the sole relevant or even most relevant consideration. Time is an estimation, a useful generalization which does not always accurately represent that which it is tasked with representing. In fact, it may be the case that some relevant considerations regarding the application of amnesty are not anchored in a time-based system at all. I will now focus on the relevant considerations.

It should come as no surprise that the relevant considerations I propose are those that I discussed earlier. These considerations are the outwardly-focused economic refugee status and the inwardly-focused collection of considerations which comprise rooted residency. The first of these considerations, economic refugee status, is not only unique in that it focuses on the nation of origin rather than time spent in the host nation. It is also unique in that it is a consideration which is not captured by the category of time. The amount of time one spends in a host nation has absolutely no effect on whether or not one has fled dire economic circumstances. This is yet another example of how a solely time-based threshold would fail to capture all considerations which affect the undocumented. Economic refugees are profoundly affected by the outcomes of discourse regarding application of amnesty. The potential negative impact of deportation is catastrophic, and a host nation has the power to avoid such a negative impact by allowing the undocumented migrant to stay. Should it be so in all cases? I cannot say. I agree with Carens and Habermas that we should include economic refugees under the recognized umbrella of refugee protection. If we engage with undocumented migrants who are also refugees, and truly attempt to adopt their perspective, it will almost undoubtedly become
apparent that we must take this concern into consideration. We simply need to call on our own experiences, imagine ourselves in their position, and attempt to develop a sense of empathy with the economic refugee. I do not need to provide a precise weighting system in order to claim that a consideration is relevant, and if we truly adopt the perspective of the other, it is undeniable that economic refugee status is a relevant consideration regarding the application of amnesty. Again, a purely time-based threshold fails to capture what is obviously an important component of some undocumented migrants’ existences.

I have already discussed the category of rooted residency in great detail, so there is no need to rehash all of its components here. Through interpersonal relations and various contributions, undocumented migrants can become extremely attached to a community in a host nation. It can become their home. In discourse when citizens adopt the perspective of the other, the citizens would see how important these attachments are to some members of the undocumented community. Taking these attachments away affects the migrants quite negatively. Securing them affects them quite positively. While a time based threshold attempts to capture these attachments, it does so imprecisely. While creating a precise measuring tool for more abstract attachments is difficult, we can still acknowledge the importance of these attachments and attempt to identify them when we can. Just because it can be difficult does not mean it is impossible, nor does it mean that it is an enterprise we should avoid pursuing. Qualitative analysis is possible: through personal testimony, through the testimony of family and friends, and so on. If we citizens
truly hope to empathize with the undocumented, it seems worthwhile to tackle this difficulty head on. At least if we are to hold true to a discursive framework.

The considerations I have discussed help us to refocus the framework. I will summarize it as follows. While time is still a factor worthy of consideration, it should not be the sole factor considered in application discourses relating to the undocumented. To do so fails to adequately capture the numerous attachments and concerns which profoundly affect undocumented immigrants. Given that I propose a discursive framework, these attachments and concerns should be included in discourses relating to undocumented amnesty and deportation. It is simply a matter of staying true to the spirit of discourse ethics, which seeks to include all those affected by the application of a norm in the process of applying said norm. These various considerations come together to form a tapestry of concerns which answers the question “how are these undocumented migrants affected by the application of this or that norm?” The system is still pluralistic. Some migrants may expect amnesty based on the ways they are affected as demonstrated by the categories. Others may not. What’s more, this pluralism is much more difficult to spell out in clear terms. It is not like Carens’ pluralism, where we set the line at 5 years. By taking more relevant considerations into account, clear line drawing becomes harder. This is not necessarily bad, though it is more difficult. We would likely have to abandon the notion of creating a single measuring tool for applying amnesty. Instead, we would have to rely on a looser standard which attempts to sort through concerns relevant to the undocumented and weighs them against considerations which add credence to the prohibition of benefit from lawbreaking. Such a system resembles a jury much more than
a legislative body. For now, I would like to pause and revisit our case studies in order to highlight the various ways which each shows the relevance of the categories I discussed.

**Revisiting the Cases**

Regarding the case of the deported children, it is of course impossible to directly include them in a discursive process. They are children who have not reached the point in their personal development where they could be considered rational agents, given that they were around 5 at the time of deportation. This case raises other questions. First, how long had the children been in Israel? Had they lived there for most of their lives, all of their lives, or a very short period of time? It seems to harder to justify the assertion that someone “doesn’t belong” in a nation when that individual has spent the majority of their (albeit short) life in that very nation. If the children came up through a school system, developed social skills and made friends, it stands to reason that they would be harmed by forcibly removing these attachments. These attachments may not be as great as other migrants’, but they exist nonetheless. Second, where did Israel send the children back to? Presumably they were sent back to family, but where? If their parents were temporary workers seeking economic relief, it is possible that the children would be sent back to a disadvantaged area. Depending on the level of hardship, we could say that Israel is deporting very young economic refugees. Such an act would only compound existing harm to the children in question. Of course, all of these claims regarding harm depend on

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18 I say “directly” because one could include them under Habermas’ counterfactual principle of consent. There are certain circumstances where simulated dialogues are necessary, for example regarding genetic testing and augmentation of the unborn. In our situation, one could attempt to provide hypothetical arguments for the children, but these arguments would lack the authenticity of real dialogue. See David Ingram. *Habermas: Introduction and Analysis*. Pg. 145.
the specifics of the case. It is unlikely that each one of the hundreds deported would fit both, or even one category. The diversity in the cases requires a pluralistic approach, where we take into account the various ways in which the children are impacted by deportation.

The case regarding dialysis treatment is slightly more complex than the others. First of all we have the issue of providing emergency care for undocumented migrants. In addition, there is the problem of legislation aimed at forcing emergency physicians to report undocumented immigrants. This case isn’t focused on the issue of amnesty for the undocumented. It is focused on the issue of providing social services for the undocumented and protecting them from deportation while they seek these services.

Protecting them from deportation is something which organizations such as ACEP have already supported. Doctors do not want to take on the additional role of immigration enforcers, and they do not want to drive potentially contagious migrants away from treatment. Providing emergency medical service to those in need should not depend on any of the categories I have discussed. The amount of time one has spent in a community, the number of contributions made, and so on, do not affect the legally recognized responsibilities of the medical community in a country such as the United States. If someone comes to a hospital in need, they should receive treatment. The alternative, as Diaz Ruiz pointed out, is people dying from treatable illnesses. Access to social programs, such as Medicaid, is something which participants in debate could attach to rooted residency. The more one contributes, the greater one’s claim to receive benefits becomes. This is especially the case considering that undocumented immigrants pay taxes
and receive very little in return in the way of government services. As I have already pointed out, the medical costs for dialysis treatment in Nevada are dwarfed by the amount of tax revenue undocumented migrants generate for the state. One could claim that undocumented migrants are being robbed, though this language may be too strong for some. The more a migrant contributes, the more it seems they have a reasonable justification for receipt of social services.

The DREAM Act case, and our discussion of Abreu, is perhaps the clearest of the three examples insofar as the relevant categories are concerned. The DREAM Act is a two-track model for amnesty which does not focus solely on time, though time spent in a nation still has pride of place. This model also puts an emphasis on benefiting the community, either through the pursuit of a college education or through military service. If the undocumented migrant spends a sufficient amount of time in a nation, and makes contributions to that nation, then they are allowed to stay. This is a clear demonstration of a pluralistic application of amnesty. Abreu’s case is one which I have discussed numerous times in relation to pluralism and the category of rooted residency. Each time I have discussed Abreu I have attempted to highlight the numerous ways in which she exemplifies the collection of categories known as rooted residency. She has lived in the U.S. for a long time, and formed deep attachments both through interpersonal relations and through community contribution. If we attempt to adopt the perspective of Abreu it seems clear that these attachments warrant our consideration, or to put it another way, it is clear that norms granting amnesty or commanding deportation profoundly affect individuals like Abreu. From a discursive perspective, this means that we ought to
include individuals such as Abreu in the decision making process. How this involvement should take place will direct the remainder of this chapter.

While a discourse ethical approach allows for the involvement of undocumented persons in discourse from a moral point of view, from a legal perspective this involvement is much less certain. Involvement in the process of creating legitimate law is something which is reserved for recognized members of the state, and undocumented migrants do not fall into this category. While it may be tempting to simply rest the case, content in the knowledge that undocumented involvement is required from a moral perspective, such a course is ill advised. If the moral imperative is to actually take hold in the real world, it requires a legal counterpart. So how can we hope to include undocumented migrants in the process of legal discourse, given that their membership in a nation is unrecognized? One potential solution is virtual representation. Rather than allowing undocumented immigrants to participate in discourse, virtual representation requires recognized members to act as proxies and represent undocumented interests. U.S. Senator Richard Durbin seems to be a good example of this form of representation. He is not an undocumented immigrant, yet he represents undocumented interests in his support of the DREAM Act. Virtual representation is advantageous in that it solves the moral/legal problem. We are able to create enforceable standards through a legitimate legal process, while still attempting to do justice to the interests of non-members. However, virtual representation is not without its own problems. In an effort to sort out these problems, I will focus on the work of Lani Guinier and Carol Swain.
In Support of Actual Involvement

While Lani Guinier’s work focuses on African American voting interests and representation, her general critique of virtual representation will help to flesh out problems as they relate to undocumented immigrants. Guinier’s primary point is that under certain very specific circumstances virtual representation is acceptable. The thrust behind her point is as follows. Virtual representation’s legitimacy depends on whether or not the unrepresented group’s interests are fungible with the interests of those who are actually represented.19 If the two groups have mutual interests, then it follows that virtual representation does justice to the interests of the unrepresented. The victories for actually represented individuals bleed over to the other group. However if the interests of both groups are not interchangeable, then virtual representation is illegitimate. Surely there may be some sympathetic representatives, but in the end Guinier claims that we cannot count on these legislators to dependably represent minorities in spite of their constituents. The key word here is “dependably.” Of course representatives can act to aid oppressed minority groups they do not actually represent. It is simply the case that, unless the interests between both groups are interchangeable, the sympathetic representative will inevitably bend to the will of those he or she actually represents. Virtual representation is, in this case, not representation at all.

Carol Swain’s discussion, also about African American representation, is somewhat more sympathetic to the representation of minority interests by non-minority

19 Lani Guinier. The Tyranny of the Majority. Pg. 37.
members. Swain identifies two sorts of representation which relate to our discussion. These are descriptive representation and substantive representation. The former is simply representation of a particular group by a member of that group. A Latino represents a Latino constituency, or in our case an undocumented migrant represents an undocumented constituency. While descriptive representation is valuable in that it can offer a point of pride for an oppressed minority group, it is not a necessary or sufficient condition for adequate representation. For Swain the most important sort of representation is substantive, where an elected official is actually in tune with the interests of his or her constituency. Substantive representation is determined by examining an official’s voting record, and comparing that record with the interests of constituents. Swain is quick to point out that race is not a decisive factor regarding substantive representation. Whites can represent Latinos and Latinos can represent whites. In fact, there is no guarantee that descriptive representatives are substantive representatives. Latino representatives may vote against what are widely considered to be Latino interests, for example. The question remains, can citizens represent the undocumented, or is such a form of representation substantively unreliable at best?

In answering this question, the first avenue of inquiry concerns whether or not the interests of undocumented immigrants are interchangeable with the interests of citizens as a whole or groups of citizens in particular. If these interests are interchangeable, then

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20 Carol Swain. *Black Faces, Black Interests*. Pg. 5.

virtual representation is legitimate according to the demands of Guinier. If we are to sum up undocumented interests, our description is as follows. Undocumented immigrants are concerned with finding a way to become officially recognized members of the state. They want to shrug off their outlaw status and become legitimate citizens. They want to be more than merely unofficial social members of the community. I grant that there are other interests that we could mention regarding the undocumented, and in fact I have discussed these interests in detail. Some undocumented immigrants have an interest in preserving family unity, others have an interest in staying with the community in which they have invested so much of themselves. These concerns, and most likely all others, will point back to the one foundational interest that ties amnesty-seeking undocumented immigrants together. Official recognition of membership is the bedrock of undocumented interests.

Given this fact, it is clear that the interests of the undocumented are not interchangeable with the interests of citizens as a whole. Citizens are, by definition, officially recognized members of a state. They certainly have an interest in continuing to be recognized as such, but citizens do not have an interest in gaining this recognition. They already have it. The interests of citizens as a whole may not be at odds with undocumented migrants, but the interests of the two groups are not fungible. So, virtual representation fails Guinier’s test. This failure doesn’t mean that there is a complete lack of mutual interests between the two parties. Both citizens and the undocumented have interests associated with the preservation of family, with receiving social services for taxes paid, and so on. Guinier’s test is simply a very demanding test. Given that citizens
do not share the very foundation of undocumented immigrant interests, we cannot claim that citizen representation is a legitimate form of virtual representation in this case.

If we follow Swain and ask whether or not representatives stand for the concerns of the undocumented in a substantial sense, we get a somewhat more favorable answer. There are cases where elected officials have represented undocumented interests, in spite of the fact that these officials do not officially represent the undocumented. I have already discussed the supporters of the DREAM Act in great detail. U.S. legislators such as Richard Durbin and Mel Martinez are not actual representatives of the undocumented population, nor are they descriptive representatives. However, given that the DREAM Act addresses undocumented interests, these legislators are substantive representatives. Even Ronald Reagan, poster child for a party which is often unsympathetic and sometimes hostile towards the undocumented, acted as a substantive representative when he passed the Immigration Reform and Control Act in 1986. In short, there are contemporary examples of the substantive representation of undocumented interests, even if descriptive representation does not exist. Given that Swain gives pride of place to the former sort of representation, it seems that virtual representation has done some justice to the interests of the undocumented.

It is undeniable that, at times, elected representatives and concerned citizens have acted with undocumented interests in mind. This does not mean that virtual representation alone is an entirely acceptable solution to the problem of undocumented involvement in discourse from a legal perspective. First of all, as I have already noted, there is no guarantee that virtual representation will consistently stay true to the interests
of the undocumented. Using surrogate participants in discourse seems acceptable, if those participants have the same interests and are affected by norms in the same ways as the undocumented. Put bluntly, citizens do not satisfy this requirement. Even if the citizens are sympathetic to undocumented causes, they are not similarly affected by the application of norms associated with amnesty and deportation. As such virtual representation by citizens does not do justice to the demands of a discourse ethical approach. The only individuals who can represent undocumented interests are those who are similarly affected by the outcome of discourse. Not only would undocumented immigrants be more likely to trust undocumented advocates, but from the standpoint of a regular citizen this actual representation would also be more powerful. An actual undocumented immigrant, and their personal testimony, could cause a positive emotional response from citizens and lead to a more compelling case. Actual undocumented representation has a humanizing effect on the problem of undocumented immigration. For these reasons, I assert that the undocumented must represent the undocumented. It seems we are back where we began. From a moral perspective, undocumented immigrants ought to be involved in discourse regarding the application of amnesty. From a legal perspective, the lack of officially recognized membership in a community prevents such involvement. Virtual representation provides no clear way out of this problem. What are we to do?

22 While Habermas doesn’t support these sorts of rhetorical devices, we can look elsewhere in the field of discourse ethics for support. William Rehg, for example, believes that appeals to the speaker’s character and appeals to audience emotions are sometimes required for a responsible judgment in discourse. See William Rehg. *Cogent Science in Context*. Pg. 141.
Perhaps we shouldn’t slip so deeply into pessimism, lest we forget the lessons from our discussion of practical obstacles to a discourse theoretical model. If the legal standard we set is the full realization of discursive participation on the part of the undocumented, then we will fall well short of this standard in the current political climate of all nations (and the United States in particular). They are not recognized members of any given society, by definition. They do not possess full participation rights in the process of legislation. But once again, we shouldn’t be too pessimistic. In many nations, undocumented immigrants do possess some means of participating in the legislative process and the application of law in the particular case. Specifically, these are the means of public protest and the right to participation in courtroom proceedings. Are these means ideal? No they are not. In their current form they do not adequately realize the moral demands of discourse ethics. I will now discuss these means, as they exist in their current form. Following this discussion, I will propose modest changes which should be both legally acceptable in the current political climate, and also would bring these means closer in line with the moral demands of discourse ethics. I will begin with public protest.

You may recall our previous discussion regarding Habermas’ two-track model of discourse. While formal, “strong” discourses are required to implement and act upon matters of public concern, the formal discourses of capitol buildings are fed by the

\[\text{23 Contemporary examples of public protest, such as the September protest in North Carolina, are generally directed in support of the DREAM Act. While deportation proceedings are currently frozen for non-criminals, the United States is still actively targeting undocumented immigrants with criminal records. For example, in September 2011 Operation Cross Check resulted in the arrest of over 2900 undocumented immigrants. These individuals will find their way to a courtroom for probable deportation or a prison sentence.}\]
informal discourses of the public. People protest, they stand up, and they highlight the problems of the day in the hopes that they can galvanize the public to demand action. Weak discourses are critical and somewhat chaotic. While they cannot create plans of action on their own, they direct those formal discourses which can act. If we focus our attention on the United States, it is clear that undocumented immigrants are involved in these weak discourses, even if they cannot be directly involved in formal discourse. They declared “No Human is Illegal” during the 2003 Immigrant Worker Freedom Ride in Queens, New York. They chanted “Undocumented, and Unafraid” on September 6, 2011 in North Carolina. These migrants risk everything they have in a host nation by standing up and demanding that those in positions of power take action regarding the nebulous legal status which forces them to hide. In this way, the undocumented do participate in the discursive process. Through weak discourse, they attempt to expose their plight to the public in the hopes that this will generate sufficient support to direct formal discourses. This is not to say that actual undocumented participation in weak discourses adequately satisfies the demands of discourse ethics.

The problem is this. Undocumented migrants risk deportation by exposing themselves to the public. If they stand up and exclaim “I am undocumented, and here are my grievances”, they have publicly identified themselves as violators of established immigration procedures. By attending these rallies, by participating in weak discourses, undocumented immigrants confess that they have broken the law. It should come as no surprise that participants in these rallies are subject to arrest and deportation as a result of their participation. Arellano is an excellent example of this risk. After seeking sanctuary
in Adalberto United Methodist Church in Chicago, she left for Los Angeles in 2007 to speak at a rally in support of the undocumented. This activist was arrested shortly afterwards, and eventually deported. For weak discourses to satisfy the demands of discourse ethics, they must be non-coercive. That is, those who participate ought not to fear punishment for mere participation. This moral demand is enshrined in the United States constitution as the right to assembly and peaceful protest. While the issue of applying this right to the undocumented is a thorny issue (given that they are not citizens), it is undeniable that by threatening the undocumented with deportation, these weak discourses do not meet the necessary standard required by discourse ethics. There is hope for change of course, and I will discuss this momentarily. First I must focus on the other means of undocumented discursive participation, namely that participation which we find in the courtroom.

In an effort to simplify our discussion, I will focus on the way in which the United States conducts removal proceedings for undocumented immigrants. The Department of Justice has a special branch which is dedicated to administering the immigration courts. This is the Executive Office for Immigration Review (EOIR). The EOIR is divided into two primary components. The first is the Office of the Chief Immigration Judge (OCIJ), which makes initial rulings regarding the removal of foreign born residents. The second


25 This is not to say that discourse ethics demands a blanket ban on arrests at rallies. Malicious violent crime, for example, does not deserve any sort of protected status.

is an appellate court called the Board of Immigration Appeals (BIA). Both prosecutor and defendant may opt to appeal a decision handed down by the OCIJ, and during the process the defendant is granted a stay of removal. The Department of Justice describes the removal proceedings as follows. Proceedings begin when the Department of Homeland Security (DHS) charges an undocumented immigrant with violating immigration law. The case is referred to the EOIR for adjudication. The DHS prosecutes the case, while the immigrant defends themselves. Unlike in citizen courts where an attorney is provided to the defendant whether or not they are able to pay, there are no public defenders in removal proceedings. More precisely, the government will not pay for the immigrant’s defense. If the immigrant is unable to afford representation, the EOIR will provide the immigrant with a list of free legal representation sources in the area (if they are available). In general, the immigration judge schedules an individual hearing where both sides present their case. The DHS argues for removal, while the immigrant has one of two options. The first is to argue that the immigrant is not removable in the first place (e.g. they are a lawful resident). This option is the less used of the two. The second is to argue that the immigrant is removable, but that they meet certain criteria which provide relief from removal. The immigrant must present factual evidence of meeting these criteria. After hearing the facts, the judge makes a (generally oral) ruling on the case. The judge may either grant permanent or temporary relief of removal, or may order the immigrant to be removed by the DHS. These rulings are made on a case by case basis, and are subject to appeal from either party.
The most important question, for our purposes, is what are these criteria for relief from removal? The types of relief which apply in the cases of the undocumented mostly fall under the category of discretionary relief. The undocumented immigrant makes a case to the judge, and the judge uses their discretion regarding whether or not the case provides justification for relief. The most common form of relief from removal is voluntary removal, where an undocumented immigrant leaves the nation of their own volition rather than by DHS escort. This form does not concern us. For our purposes, the cancellation of removal is the most important. While the EOIR provides a list of criteria for the cancellation of removal, it is explicitly stated that these criteria are not exhaustive and are subject to change according to congressional action. For an undocumented immigrant these criteria are as follows:

(The undocumented person) has been continuously present for at least 10 years; has been a person of good moral character during that time; has not been convicted of an offense that would make him or her removable; and demonstrates that removal would result in exceptional and extremely unusual hardship to his or her immediate family members (limited to the alien’s spouse, parent, or child) who are either U.S. citizens or lawful permanent residents.

Cancellation of removal may be coupled with adjustment of status (to lawful permanent-resident) provided that an immigration visa is available at the time. Note the ill defined criteria of “exceptional and extremely unusual hardship” regarding lawfully residing

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28 Ibid.

family members. This is an excellent example of how the judge must interpret the information provided by the immigrant and decide whether to grant a stay on a case-by-case basis.

On the surface, this process appears to approximate the application discourses I described. Two parties present facts in support of the application of a particular norm in a given case, and a judge decides which norm best fits the situation. Either the immigrant is punished for violating immigration law, or they receive a reprieve based upon the harm caused by the forced removal of community attachments. Once again, however, there are a number of issues with this process which force us to accept that it does not do justice to the demands of a discourse ethical approach. The first problem concerns representation in court. As you will recall, the individual hearing pits a DHS prosecutor against an undocumented immigrant who is not provided with representation. In those cases where the undocumented immigrant is unable to secure representation, either due to financial hardship or a lack of pro bono options, then the result is a significant disparity in discourse. The prosecutor is an expert in immigration law who has presumably been in these individual hearings numerous times. This is routine for them. For an undocumented immigrant, the hearing is likely anything but routine. They may be unaware of options regarding cancellation of removal, and their ignorance of precedent may lead to plea deals where they accept that they are eligible for removal and are given the “privilege” of removing themselves rather than being deported. As anyone who has sat in a defendant’s chair can tell you, the legal process is extremely intimidating. Without representation in a land which may reject your claim to stay, this fear may be paralyzing. Such disparities in
knowledge of process and the introduction of a significant fear factor call removal proceedings into question from the beginning. What’s more, the reliance on a single judge to decide on a case-by-case basis may also pose an issue from a discursive perspective. While the presentation of evidence can take on a discursive character, the actual decision making process lacks the sort of deliberation which is indicative of a jury trial. While the judge has to provide an oral justification for the ruling, and a court of appeals does exist in the case of a grievance, there is still only one individual involved in the final decision made by the OCIJ.\textsuperscript{30} The decision is not discursive in the same sense that a criminal case involving a citizen is discursive. There is no trial by a jury of peers.\textsuperscript{31} There is no jury at all. There is only the judge’s discretion and the decision.

As I have shown, there are ways in which the undocumented participate in the creation and application of norms associated with amnesty and deportation. To say that the undocumented cannot participate from a legal perspective is false, if by this we mean that they cannot participate at all. Unfortunately these avenues of participation are deeply flawed, as shown in our examination from the United States perspective. Fortunately, these conduits for direct participation are not irretrievably flawed. It is my assertion that altering these avenues is possible in the current political environment, so that they may

\textsuperscript{30} These courts used to consist of a three judge panel. However, in the wake of 9/11 Attorney General John Ashcroft streamlined the process and cut the panel to a single judge. These single judge panels are more prone to error based upon the lack of critical dialogue, as was evidenced by the repatriation of the Sudanese persecuted refugee Nourain Niam in 2003. Upon his return he was severely beaten by Sudanese secret service agents. He has since regained admittance into the United States thanks to Judge Richard Posner overturning the verdict. See David Ingram. “Exceptional Justice? A Discourse Ethical Contribution to the Immigrant Question.” \textit{Critical Horizons}. Vol. 10, No. 1. Pg. 10-11.

\textsuperscript{31} Proposing a jury comprised in whole or in part by undocumented immigrants is not a realistic solution. This is not to say, however, that we are unable to locate citizens who at one point were undocumented.
more closely approximate the demands of a discourse ethical model. Following the changes I propose, these channels of participation will better allow undocumented migrants to actually represent undocumented interests. They may not be legislators, but they can direct legislation. They may not be judges, but their voice can be heard in a non-coercive and discursive environment. I will begin with participation in weak discourses.

The problem with participation in weak discourses was that the undocumented risk exposure and deportation by joining a protest. They come out as undocumented immigrants, or they have to avoid active participation altogether. The solution to this problem is as obvious as it is possible from a practical perspective. Impose a blanket ban on removal proceedings that originate from involvement in weak public discourse. Once again, I am not saying that all undocumented immigrants should be immune from arrest under any circumstances. Acts of malicious violence or looting should not be protected. What should be protected is the ability of undocumented immigrants to draw public attention to their plight in an effort to spur legislative action. Given the inability of undocumented immigrants to actually participate in the selection of elected officials, and the substantial harm they face in deportation, it is imperative that this one outlet of public discourse be preserved. I say that this blanket ban is practical in that there are contemporary examples of its implementation. For example, in September 2011 Immigrations and Customs Enforcement (ICE) decided that 10 undocumented
immigrants arrested for creating a disturbance would not face deportation.\textsuperscript{32} These undocumented individuals were participating in a rally supporting the DREAM Act. This incident not only exemplifies the possibility of protecting the undocumented when they attempt to represent themselves in the public sphere. It also demonstrates the power of weak discourse, and its ability to draw critical public attention to the plight of the undocumented. Janeen Hicks-Pierre said that the reason these individuals were released was that “ICE wanted no part of this PR nightmare.”\textsuperscript{33} Domenic Powell, co-founder of the North Carolina Dream Team, stated that “the (Obama administration’s policies) are not protecting (undocumented immigrants) from deportation; public pressure is protecting them.”\textsuperscript{34} If we protect the undocumented when they participate in rallies, the coercive drive to avoid participation disappears. Once this coercive drive disappears, we can say in good faith that undocumented participation in weak discourses meets the demands of discourse ethics. They can direct formal discourses through a critical public voice, one which has shown itself to be effective. They can actually represent themselves in the discursive process, and with the change I propose, they do not need to share the fate of Elvira Arellano.


\textsuperscript{33} Ibid.

\textsuperscript{34} Ibid. This statement is not entirely true, given that the 10 arrested individuals did not have criminal records. It still highlights the effect of public pressure on the application of norms.
The problems I mentioned in association with undocumented participation in the courtroom were the absence of assured representation and the reliance on a single discretionary decision maker. Once again both of these problems are fixable, though they may be more difficult than simply imposing a blanket ban on arrests leading to deportation at a protest. The solution to the first problem is obvious: provide guaranteed representation for the defendant. Hamstringing the undocumented at the start of removal proceedings all but guarantees that they will be unable to adequately represent their case to a judge. Assuring representation, even at cost to the government, does a great deal to level the playing field. So long as the defense attorney stays true to the commitment of representing his or her client’s interests, we can say that the undocumented immigrant is involved in the process of applying a norm. To be sure there are at least some cases which meet the requirement of legal representation. But this standard has to be assured in order for the proceedings to meet the standards of discourse ethics.

The more difficult problem to solve concerns the reliance on a single decision maker in the form of an immigration judge. The discretion of a single judge does not adequately approximate an application discourse, even if the process leading up to the decision might. The most obvious solution to this problem is to create a jury-based model for decision making. Impartial deliberation would replace the judge’s decision, making the process more discursive. The undocumented immigrant could present his or her case,

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35 If the attorney does not have adequately represent their client’s interests, either through negligence or through an unreasonably demanding case load, then guaranteed representation solves nothing. It may even add to existing problems, creating another voice demanding the acceptance of a plea deal of voluntary removal.
with the aid of adequate representation, and the jury could decide whether or not this case warranted a cancellation of removal order. The difficulty is this. I believe that in order for a jury based model to do justice to a discourse ethical standard, the jury would have to include actual representatives of undocumented interests. It would need to be a jury of one’s peers. Guinier’s standard for virtual representation shows us that the interests of citizens and undocumented immigrants are not fungible. Virtual representation by citizens is insufficient, and as such it seems that a citizen-based jury is insufficient as well.

In reference to the single judge system, it seems appropriate to mention Habermas’ discussion of adjudication concerning a judge’s proper function. According to Habermas, a judge’s proper function is to serve as a surrogate public sphere. The judge listens to argumentation put forth by both the prosecution and defense, and attempts to render a decision which is sensitive to public opinion.36 Examples such as the Niam deportation mentioned above indicate that the single immigration judge model fails in this task, assuming that the public is not in favor of repatriating individuals to be tortured. One possible solution, which would not necessarily require the introduction of a jury, would be to alter the nature of these courts in order to improve the chances of a ruling being in line with public sentiment. This would have to include the sentiment of undocumented immigrants as expressed in informal discourses. In general, taking necessary steps to increase oversight and allow for more critical engagement before a

36 Jürgen Habermas. Between Facts and Norms. Pg. 198-199.
ruling would be favorable. Increasing the panel back to three judges would add a necessary critical element to the courts, as would a demand for an extended written justification for the ruling. Decreasing the case load would allow the judges to spend sufficient time in rendering a decision. While these changes fall short of jury-based deliberation in the process of applying a norm, they certainly would go a long way to improving the streamlined one-judge system in place today.

Given that placing actual undocumented immigrants on a jury is not an even remotely possible solution, it is easy to once again slip into pessimism and admit defeat in the face of our current political climate. But we need not admit defeat, even though the following solution would be difficult to actualize and would surely be met with some public resistance. While we could not include the undocumented on a jury, we could include individuals who can closely relate to undocumented interests. The ideal candidate would be a citizen who had at one point been an undocumented immigrant. Less ideal candidates would be close relatives of undocumented immigrants (e.g. citizen children), and those who have engaged in the naturalization process first hand (e.g. recent immigrants in general). These perspectives can assist the jury in weighing the value of undocumented attachments and, provided that all truly attempt to reach rational consensus, decisions regarding removal can truly represent both the undocumented and the citizens of a host nation.

Following this discussion, two points stand out. The first is that by improving existing means of participation, we can say that undocumented immigrants are allowed to represent their own interests. Discourses regarding the application of amnesty are not left
solely in the hands of virtual representatives, and the improvements I propose eliminate elements of coercion and restriction that exist in weak discursive participation and removal proceedings. This actual representation supplements existing substantive (if virtual) representation in some countries. Though virtual representation may not be enough, it is certainly welcome to those who have a muffled political voice. The second point is that these means of participation are mutually reinforcing. We should not view them as operating apart from one another. Weak discourses attempt to direct legislative action regarding the condition of the undocumented. As demonstrated by DREAM Act rallies, these weak discourses attempt to (among other things) outline clear standards for the application of amnesty. If these standards are successful in directing legislation, then the work of weak discourses spills over into the application discourses of the courtroom. The undocumented immigrant (and their representation) can come armed with a clear set of justified norms aimed at the cancellation of removal proceedings. All parties involved can engage in an application discourse, which leaves less to the discretion of a single judge by eliminating such vague standards as extreme and exceptional harm to lawfully residing family. These application discourses apply the norms which weak discourses help to create, and on a case-by-case basis a pluralistic amnesty becomes possible. The category of rooted residency which I have discussed provides a probable basis for this amnesty, in that it recognizes the varying degrees of attachment held by members of the undocumented community. Varying degrees of attachment translates into varying degrees of harm caused by removal. This in turn could form the basis for the application of
amnesty in some cases. It is not an amnesty for all, but we can say that it is an amnesty which does justice to the demands of discourse ethics.\textsuperscript{37}

I conclude this chapter on a hopeful note. As I have argued, there is no substitution for actual involvement of undocumented persons in the application of amnesty. Virtual representation, while helpful, is insufficient. Undocumented persons should represent undocumented interests. It puts a human face on a growing problem, leading to increased undocumented support of discursive solutions and favorable emotional responses from citizens. While this sort of involvement is undoubtedly difficult to actualize, there is clear hope. Simply modifying the ways in which undocumented immigrants currently participate in discourse (in the United States) would bring us closer to a discourse ethical standard. Once we can see the faces of the undocumented in the public sphere and hear their stories, we as citizens will be more prone to adopting their perspective. We will see how attached some are to their homes, and how harmful it would be to forcibly remove these attachments. One would hope that the wheels of change would begin to turn, and that we as citizens would stand beside our undocumented neighbors in a spirit of solidarity. It is their home too, after all.

\textsuperscript{37} When I say “does justice to the demands of discourse ethics”, I do not mean that my proposal perfectly realizes a discursive model. Insofar as a truly discursive model is a counterfactual ideal, we can still critique the means of actual participation. In particular, we can lament the fact that undocumented immigrants are not involved in formal discourses, and that they cannot directly leverage votes for representation.
CHAPTER SEVEN

CONCLUSION

The purpose of my dissertation was to explore the unique challenges facing undocumented migrants, and the claims to amnesty they can make. I took a discourse theoretic approach to this issue, following in the footsteps of Jürgen Habermas and Seyla Benhabib, among others. My thesis consisted of the following claims. First, a rights-based approach to amnesty does not clearly distinguish between different types of immigrants (i.e. undocumented and potential immigrants). Second, the relevant distinguishing factor between undocumented and potential immigrants is what I refer to as rooted residency, a category which captures factors such as time spent in a nation, attachments made to a home, and contributions made in the community. Third, time spent in a nation, attachments made to a home, and contributions made in the community contribute value to the community and are of value to the undocumented. Fourth, forcibly removing these attachments causes great harm to the undocumented, which we must weigh against the illegality of entry. Fifth, this social membership calls for a pluralistic application of amnesty. Sixth, application discourses regarding this amnesty must include actual undocumented migrants, not simply virtual representatives. Finally nations must reform the ways in which undocumented migrants can participate in discourses, particularly regarding informal public discourses (e.g. protests) and application discourses in the courtroom.
Summary

The first of these claims was the centerpiece of chapter 4. Appeals to human rights (such as subsistence rights or political participation rights) generate claims which apply to both undocumented and potential immigrants. As such, they do not generate any duties which are unique to undocumented immigrants. One may respond that I should not leave human rights behind as a result of this fact. If they articulate duties to the undocumented they should be used, whether they are unique or not. This is true, but it is worth reiterating that I am not rejecting human rights-based claims. As I have said before, while many approaches admirably attempt to address the difficult topic of immigration as a whole, they often fail to adequately distinguish between duties to potential immigrants and duties to undocumented migrants already in a receiving nation. In particular, human rights-based approaches and communitarian approaches often do not carefully delineate special claims an undocumented migrant can make upon a host nation. My work is an effort to fill in this gap created by lumping immigrants into a single category, which I did through the category of rooted residency. Of course human rights claims can come into play when discourse takes place regarding the application of amnesty. The just aren’t particularly helpful in discussing special duties to undocumented persons.

The second, third, and fourth claims were primarily discussed in chapter 5 when I developed the category of rooted residency. What distinguishes an undocumented migrant from a potential migrant is the clandestine method of entry/stay and the fact that undocumented immigrants live under the constant threat of forced removal. These unique characteristics result in a conflict between norms justifying amnesty based upon a call to
remove the threat which haunts undocumented persons, and norms justifying deportation based upon the fact that undocumented persons break the law. A claim to amnesty, and involvement in discourse regarding the application of amnesty, results from the profound way in which deportation affects the undocumented. It is exceptionally harmful, not only if they would return to a nation where they could not support themselves, but also if they have made attachments and investments into a new home. These attachments and investments make up the category of rooted residency. The special claims made by undocumented individuals come into greater focus. The claim is one made for protection from harm, a harm which is proportional to the degree one is rooted in the host nation.

The final claims (five, six, and seven) are the subject of chapter 6. Given that not all undocumented migrants are rooted to the same degree, an appeal to this category necessitates a pluralistic amnesty. My discursive approach fills in some of the more substantial gaps in Carens’ argument, particular regarding how we set a threshold for amnesty and who is involved in setting the threshold. Given the harmful ways in which undocumented immigrants are affected by the outcome of threshold setting, they should be involved in the process of setting the threshold. This involvement should take the form of direct representation. Undocumented migrants should represent undocumented migrants. Virtual representation fails Guinier’s fungibility test, meaning that undocumented immigrants cannot count on virtual representatives to reliably represent their interests. Any virtual representation should be complemented by actual representation, which helps to unite undocumented persons and humanize the immigration debate for citizens. This actual involvement is possible in the political
climate of nations such as the United States. By making changes to the way undocumented migrants are protected during protests, and by reforming the application discourses which take place during deportation proceedings, it is possible for us to approximate a discursive standard regarding the actual participation of undocumented immigrants.

It seems appropriate to ask why I chose to take a discourse ethical approach to the issue of undocumented immigration, as compared to using some other ethical model. I believe that discourse ethics is best suited for this issue for two reasons. The first of these is that it cuts a middle path between the two prominent positions regarding immigration theory. These are the communitarian and liberal positions. The former holds that communal self determination and cohesion is of primary value when approaching the immigration question. As such, a nation can legitimately wield substantial power in the creation of admittance policies. The later asserts that immigration policy should focus on doing justice to individuals rather than preserving community identity. Immigration restrictions should be extremely limited, in particular those dealing with destitute migrants entering affluent nations. Habermas is quite explicit regarding the way in which a discourse ethical approach mediates the communitarian and liberal positions. It is communitarian, in that immigrants must adhere to the particular political-ethical interpretation of the constitution in order to gain citizenship. A system of rights is the foundation of a constitutional state. These rights are universal by nature, and are
complemented by this ethical-political self understanding of a particular nation.\footnote{Jürgen Habermas. \textit{Inclusion of the Other}. Pg. 227.} The ethical-political element reflects the will of a particular legal community, and cannot conflict with basic rights so long as the legislative body is oriented towards the actualization of these rights. However, immigrants need not completely abandon their previous culture, and they cannot be excluded on arbitrary grounds such as race or religion. Habermas’ approach is liberal/cosmopolitan, in that it requires those who formulate immigration policy to do so impartially. Since discourse ethics demands actual discourse between affected parties, this would require open dialogue between immigrants and citizens of the host nation. Communal conceptions of universal morality are respected, as is the discursive involvement of the individual seeking to improve his or her well being.

The second reason I chose to take a discourse ethical approach is that, in my view, it provides the strongest theoretical foundation for a pluralistic approach to the problem of undocumented immigration. Rather than relying on some monological line-drawing process, a discourse ethic tests proposed solutions by exposing them to the public sphere for critique and alteration. Not only does it justify deliberation as a means of solving the line-drawing problem, but it accounts for the application discourses which lie at the heart of a pluralistic amnesty. Conflicting norms maintain their justification through an application process which selects norms based on their appropriateness for the particular case. Finally, a discursive approach provides clear justification for the actual involvement
of undocumented immigrants. It is helpful for citizens to engage with undocumented immigrants in an effort to adopt their perspective, in that we can truly take the interests of other affected parties to heart when we make policy decisions. Discourse ethics pushes us outside of our sheer self-interest in an effort to create solutions which can be accepted by all concerned parties. This direct engagement with actual undocumented immigrants is invaluable if we wish to create immigration policy which approximates standards of social justice.

Next Steps

Given my arguments, what’s next? What sort of call to action can we derive from my work? Perhaps the best place to start is the reforms which I discuss in chapter 6. To a certain extent, the United States has carried out some of these reforms. For example, under President Obama a moratorium is in effect on deportation proceedings for non-criminal acts. Given that undocumented status is a civil violation (rather than criminal) on the federal level, unless a migrant has a criminal record they shouldn’t have to worry about deportation. In some U.S. states, such as Alabama, laws are in place that criminalize undocumented status. These laws effectively isolate undocumented migrants from the public sphere, and as such they should be removed. This is particularly


3 The Obama administration has challenged state laws such as these, on the grounds that the states are pre-empting federal law. Most recently Judge Sharon Lovelace Blackburn upheld the majority of Alabama’s changes, such as the criminalization of failing to carry proper immigration papers. See “Alabama Wins in Ruling on its Immigration Law.” New York Times. http://www.nytimes.com/2011/09/29/us/alabama-immigration-law-upheld.html. Accessed 10/3/2011.
important given that fact that informal discourse is the primary means of discursive participation for undocumented migrants. If they are kept out of the public sphere, it will be all too easy for citizens to ignore their plight and refuse to engage with them regarding the implementation of policy. All change would stagnate, which would only serve to further isolate the undocumented. In order to break this cycle, laws such as Alabama’s must be overturned. The reforms to courtroom procedure may be somewhat more difficult to implement, though returning to a pre-streamlined system with a three-judge-panel is a step in the right direction. Providing legal representation for those migrants unable to acquire their own is also a fairly easy fix, which would move us closer towards a discourse ethical standard regarding application discourses.

What about the cases? I would like to state, preemptively, that I can only guess as to how these issues would be solved. My guesses are in line with my argumentation, but this does not mean that I have the final word regarding how these cases should be resolved. In the end I cannot replace actual discourse with my own musings. Beginning with the Israeli case I believe my discussion of rooted residency points to the fact that the children should likely be allowed to stay. The children are young, they have grown up in Israel, and they know no other home. They are rooted in Israel, whether they have immigration papers or not. Given the substantial harm that the state could inflict on such children by destroying these connections, one can assume (counterfactually) that the children would attempt to argue for some form of amnesty. Regarding the healthcare case, I am not certain that undocumented immigrants would gain access to social programs such as Medicaid. They would need to participate in discourse regarding the
resolution of the problem, but they may be denied access. At a minimum, it seems clear to me that laws which aim to turn physicians into border enforcers need to be stopped. These practices are part of a large web of coercive structures which threaten the undocumented and drive them underground. Insofar as the DREAM Act is concerned, it should be clear from my writing that I believe this proposed legislation is largely in line with my own claims regarding a pluralistic amnesty (though I believe the act is too restrictive). Those who qualify under the DREAM Act are likely deeply rooted individuals who have lived in the United States for some time, and who are attached and invested in their communities. Offering them amnesty through the DREAM Act would be a victory for these rooted residents.

**Care Ethics**

My project has a fairly clear call to action, namely to improve and eventually expand upon the ways in which undocumented migrants can participate in public discourse regarding immigration policy. I will conclude my work by discussing a possible way one could build upon my project. You may notice that I frequently mention the issue of justice, and the implication that we may not behave justly when we deny undocumented migrants access to discourse. I articulate part of my project in terms of social justice, but using a justice-based model is not the only way to speak of duties to undocumented immigrants. One way in which my account could be enriched would be to
explore the issue of undocumented immigration from the perspective of care ethics. In what follows I will discuss what such an approach may resemble.

Eva Feder Kittay’s discussion of care ethics in *Love’s Labor* provides a basis for an examination of the immigration issue. The relevant material from Kittay’s work depends on a relationship between what she calls a dependency worker and a charge. A dependency worker is any individual who is engaged in caring for a dependent. The word “worker” does not imply that the individual is employed to care for the dependent. It is supposed to highlight that caring for a dependent is work. A charge is the dependent, an individual in the care of another. A mother/child relationship is an excellent example of this dependency worker/charge relationship. The primary focus of the dependency worker is the well-being and flourishing of the charge, of tending to the charge that is in a state of vulnerability. This tending to others in a state of vulnerability is what Kittay means by the word “care.”

Borrowing from Robert Goodin, Kittay begins to flesh out her ethics of care. The moral foundation for an ethic of care is what Goodin called the Vulnerability Model. On this model, “the moral basis of special relations between individuals arises from the

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4 Some, such as Carol Gilligan, believe that a justice-based ethic is distinct from and opposed to a care-based ethic. Principles of justice fail to take into account contextual caring for particular persons, according to Gilligan. Ingram challenges this claim when he states that the application phase of Habermas’ justification/application dynamic addresses how norms meet the actual needs of particular individuals in particular circumstances. See David Ingram. *Habermas: Introduction and Analysis*. Pg. 142.


vulnerability of one party to the actions of another.”7 The needs of another individual call out to us, and given that we are capable of attending to these needs, the vulnerability of the other forms the basis of a moral obligation. We must respond to the other in their vulnerability. It is worth noting that this model is relational. My moral obligation to a charge is dependent on my ability to help them and on the fact that they must be vulnerable to my actions. This is similar to Griffin’s argument regarding subsistence rights and proximity. My responsibility to the vulnerable individual depends on my proximity to them.

Kittay uses a maternal paradigm as a way to build upon the Vulnerability Model. This paradigm is anchored in what Kittay calls connection-based equality, a relational equality spawned from the fact that we are all some mother’s child.8 The analogy is one between a needy child and a mother who is capable of tending to those needs. While we do not need to treat one another exactly as a mother treats a needy child, we do need to recognize our connection to one another through “relations of care and dependency.”9 Kittay states the following in an effort to build upon this point:

Who stands in the position of the mother, who stands in the position of the child and what would be the analogue of maternal practice? The maternal paradigm is extended analogically to whatever situation we may be in where we need to be cared for—where our survival, our flourishing and our well-being as social

8 E.F. Kittay. Love’s Labor. Pg. 66.
9 Ibid.
creatures depends on the extension of another’s care, concern, and connection to us.\textsuperscript{10}

An ethics of care, as Kittay articulates it, takes the form of a relational ethic where those around us have a responsibility to care for our needs when we are in a state of vulnerability. But the individual as dependency worker is a mother’s child as well. They will have needs which must be tended to and they cannot be expected to sacrifice everything in the pursuit of caring for others.

How would this description map on to our discussion of undocumented immigration? One way to connect Kittay’s theory with undocumented immigration is to articulate duties to undocumented immigrants in terms of the maternal paradigm. If we extend this paradigm in any situation where someone needs to be cared for, then it is quite likely that we as citizens should utilize the maternal analogy when dealing with undocumented immigrants. If they did nothing else, the cases involving Abreu and the dialysis patients demonstrated that undocumented persons often find themselves in situations where their well-being depends on the extension of another’s care. That care may take the form of medical treatment, or perhaps advocating for legislation which allows an individual to stay where they made a home. Undocumented immigrants are profoundly vulnerable, as I have already discussed. They live under the threat of forced removal, and given the underground nature of their existence they are vulnerable to all sorts of manipulation at the hands of unscrupulous individuals. If one were to take a care ethics approach to the problem of undocumented immigration, this would likely involve a

\textsuperscript{10} E.F. Kittay. \textit{Love’s Labor}. Pg. 70.
discussion of the nature of undocumented vulnerability, the ways in which citizens can tend to these migrants, and the limits of our obligations to provide for the well-being of undocumented persons.

Kittay’s insight is quite valuable as a call to aid those in need. When we see undocumented immigrants at protests, when we hear about deportation proceedings, and when we read about the ways in which these migrants are abused we are forced to recognize that undocumented migrants are extremely vulnerable. We can hear their stories, and hopefully these stories can motivate us to aid the undocumented in their time of need. A care ethic is a relational ethic, and citizens cannot deny that the undocumented are vulnerable to their actions. As citizens we can help them by demanding reform and by demanding that the government recognize segments of the undocumented population for what they are: our neighbors. Undocumented immigrants need help in their time of need. A detailed discussion of care would help to flesh out the ways in which discourse ethics requires the empathetic adoption of the other’s perspective. What a discursive approach can provide is a forum for us to meet with undocumented persons, to hear them in their vulnerable state, to adopt their perspective, and to offer what aid we can. I stand by my earlier claims regarding the benefits of a discourse ethical approach to the problem of undocumented immigration. However, by combining elements of a discursive approach and a care ethical approach, we may be able to provide a more compelling call to aid. I will leave this potential modification for another time. For now, it is helpful to simply remember that there are ways for us to improve the lives of those who suffer around us. We should aim to do so, so far as we are able.
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