Irregular Migration, Historical Injustice and the Right to Exclude

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Abstract
This paper makes the case for amnesty of irregular migrants by reflecting on the conditions under which a wrong that is done in the past can be considered superseded. It explores the relation between historical injustice and irregular migration and suggests that we should hold states to the same stringent standards of compliance with just norms that they apply to the assessment of the moral conduct of individual migrants. It concludes that those standards ought to orient migrants and citizens' moral assessment of how their states handle questions of irregular migration and to inform political initiatives compatible with these moral assessments.

We did not cross the border, the border crossed us.
(Mexican saying)

1.

Suppose that at some point in the past a gang of Mafiosi managed to fence off a chunk of land and through sheer violence and oppression convinced everyone around that it had acquired legitimate property. Does a group of this sort have the right to exclude newcomers who want to have access to the same land? And what, if anything, justifies their descendants' right to exclude given the tainted origins of first acquisition?

While the answer to the first question is likely to be uncontroversially negative, one way to respond to the second one is to invoke the supersession of prior injustice. With the passage of time, one might say, a change in circumstances progressively mitigates the initial injustice, if certain conditions about supersession hold. A claim that was established through wrongdoing in the past could then be considered justified going forward.

Theories of supersession are often invoked to discuss the rights of irregular migrants to naturalise in states in which they reside as a result of some prior wrongdoing. The alleged wrongdoing may take a number of forms, from unauthorised boundary crossing, to entering with false passports, to overstaying visas. Of course, those

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implicated in these actions often have good reasons for committing them, and we may find additional resources to question categorising these actions as wrongdoing. But I want that to be the conclusion rather than the opening assumption of the paper. Let us agree, at least *ex hypothesi*, that irregular migrants commit a wrong in settling without official permission. What could justify granting them amnesty and a right to stay, regardless of that initial wrong?

To answer the question, the literature on amnesty in immigration invokes theories of supersession. Irregular migrants, it is often said, might acquire a right to stay in host states, provided certain conditions about supersession hold: a sufficient period of time has elapsed, no new wrongdoing has occurred and the claims have not in the meantime been contested (Shachar, 2009, pp. 185–189; see also Waldron, 1992; Bosniak, 2016).

The purpose of this paper is to explore the justification and implications of theories of supersession for states' rights to exclude irregular migrants in light of their own tainted history of territorial jurisdiction. In the first part of the paper, I look at some prominent criticisms of supersession theory applied to the case of irregular migration. I suggest that if the criticism of supersession theories leads to rejecting irregular migrants' right to stay, it also fails to justify the rights of states to exclude. The same critique of supersession that is often endorsed to reject clams to amnesty by irregular migrants can be deployed to reject the jurisdictional right of states and their related right to exclude.

In the second part of the paper I ask whether supersession theories can justify both the right of states to exclude and the rights of irregular immigrants to stay. A supersession trilemma then emerges. If the theory of supersession is sufficient to justify the rights of irregular migrants to stay, it is sufficient to justify the states' right to exclude too. But if states have a right to exclude, they can decide on which terms to accept or turn down illegal immigrants. That would mean that immigrants don't have a right to stay. But if they don't have a right to stay, why does the theory of supersession favour states' right to exclude and not the immigrants' right to stay? It looks as if either we should abandon arguments from supersession altogether, or that we have to find a way of reconciling how it applies to irregular migrants and to the right of states to exclude.

In the final part of the paper I explore what that reconciliation might look like. I suggest that we should hold states to the same stringent standards of compliance with just norms that *they* apply to the assessment of the moral conduct of individual migrants. I further argue that those standards ought to orient migrants and citizens'

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moral assessment of how their states handle questions of irregular migration and to inform political initiatives compatible with these moral assessments. This has important implications not just for how to think about irregular migration (e.g. with regard to practices of deportation, amnesty and naturalisation) but also on what kind of measures, if any, are acceptable to prevent irregular migration, and what role the theme of migration should play in theories of global justice more generally. I conclude the paper by sketching some of these implications.

2.

Let me start with a clarification and a reminder. The clarification is that when I speak about claims and rights, I mean moral claims and moral rights, not legal ones. States do all sorts of things as a matter of legal practice. They are within their right to do so in so far as that right is grounded on legal recognition backed up by the coercive use of force. But the international order may well be made up of many 'impostor' states who, much like the 'impostor' property-owners in Rousseau's *Discourses on inequality*, find people simple enough to believe their claim 'this is mine' and 'to forget that the fruits of the earth belong to all and the earth to no one' (Rousseau, 1997, p. 161). So, rather than taking the claims of states at face value, the task of political theory is to scrutinise that legal order and ask what its moral foundation might be.

The reminder concerns my use of the terms 'right to jurisdiction' and 'right to exclude'. Modern states, it is often said, are territorial agents. The right to jurisdiction is typically understood as a justified claim to make law within the particular territory a state occupies. The right to exclude is typically understood as a justified claim to control the movement of people and to establish the terms under which outsiders are permitted to enter and exit. Both are prerogatives of modern states as we know them, and both are the result of how sovereignty emerged and was consolidated.

But the history of how states came to bundle up these claims matters. And the history, as most would readily acknowledge, is not a happy one. Few would contest today that, as a matter of fact, the shaping of modern sovereignty involved the evolution of an international order in which projects of domestic repression and international colonization were pivotal to the development of state prerogatives, including the right to jurisdiction and the right to control the movement of people. Modern sovereignty was historically

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established against the background of thoroughly immoral and unjustified practices involving the colonization of distant others and the exploitation and/or displacement of internal dissident minorities for purposes of self-enrichment (Keal, 2003; Anaya, 2004; Pagden, 2007). Historically, the modern state was analogous to the gang of Mafiosi who manages to fence off a part of land and through the use of violence and oppression convinces everyone around that they have acquired legitimate claims to rule.

The tainted origins of territorial sovereignty are obvious if we focus on at least two dimensions. First, many states that now claim and enforce the right to exclude, states like the USA, Australia and Canada, emerged as a result of colonial settlement in areas occupied by indigenous groups, and through the unilateral coercion and establishment of institutions and forms of rule that violated fair terms of association with members of such groups. Secondly, the territorial boundaries of many modern states were consolidated in a period of accumulation of wealth that involved a massive appropriation of labour and resources from oppressed minorities within and from the purchase and sale of slaves and other valuable resources outside (Ypi, 2013).

3.

All this is, of course, well-known. But while few would doubt that modern states really were like gangs of Mafiosi, many would object that this is no longer the case. Some might insist that we are now dealing not with the perpetrators but with their descendants, many of which include members of groups that were previously oppressed, whether within the territory or outside. What if anything can ground a claim to supersession of that initial injustice? What could justify the right to make laws in a particular territory and to keep others from claiming the same right?

Given the unjust past, that question now needs to be further qualified in light of our argument about the tainted origins of first acquisition. To justify the claim of wrongful occupants, we could appeal to theories of supersession. Think about the analogy with squatting. A squatter acquires a right to stay in a building that was initially wrongfully occupied provided a sufficient period of time has lapsed, nobody claims the occupied property and the squatter has established strong relevant ties to it in the meantime. Some authors have suggested that as a squatter can appeal to some version of supersession theory to turn a wrong into a right, wrongful occupants of

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land (or territory, in this case) might establish a right to that land after a sufficient period of time has elapsed, provided that the property has not been contested. As one author puts it, 'there must be a point in time when the authorities are stopped by their own inaction; in other words, the unauthorised entrants ought to gain immunity from deportation and removal, in addition to being offered an eventual route to legalising their status' (Shachar, 2009, pp. 185–87).

But when invoked in that context, critics of irregular migration tend to express reservations. They argue, for example, that the theory of supersession only works if it combines a claim to continuous enjoyment of access to land by the current illegitimate occupier with indifference from others whose rights are violated by such wrongful and unilateral acts. The latter, they emphasise, is clearly not the case in contemporary cases of conflicts over irregular migration since citizens of host states are very obviously worried about the impact of irregular migrations in their societies. Therefore, a version of supersession theory is insufficient to provide irregular migrants with a justification of the right to stay (Miller, 2016, pp. 122-23).

Let me return to my initial concern in light of this objection. Take the case of a country like the USA, or like Australia or like Canada, who all claim the right to deport irregular immigrants. These are all countries of irregular (or unauthorised) immigrants whose current claim to exclude is grounded (like that of the Mafia) on the violence, exploitation and displacement of indigenous people. If the theory of supersession does not give illegal immigrants a right to settle in the territory they occupy even after some lapse of time, it also does not justify the territorial rights of states whose claims to jurisdiction and the related right to exclude is built on an analogous (and in fact much worse) form of unilateral occupation of territory.

One could argue here that the 'ongoing contestation' clause matters. In the case of irregular migrants, unless there has been an amnesty, their legal residence is still contested. But in the case of states, their territorial rights can no longer be considered up for grabs, since the states' holding on to illegitimately acquired property can no longer be considered contested once they have been recognised by most other states.

But it is not clear here that the only recognition that matters is that of other states. Recall that I am concerned with the moral right to exclude, not the legal recognition of that right. To say that the right of states to exclude is recognised by other states is the same as saying that the claims of the Mafiosi are recognised by other Mafiosi. Surely what matters is not the Mafia itself but its victims. And surely what matters in the case of places like Australia and

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Canada is not just what other states think and argue but also what members of indigenous groups whose lives and practices were disrupted by colonialism, think and argue. And if we turn to them, it is not clear that the moral authority of their state's right to jurisdiction is entirely uncontested, as the next pages go on to illustrate.

4.

One argument that critics of supersession claims often emphasise in the case of irregular migrants is the relevance of social membership ties. The argument from social membership ties is that the bonds that migrants develop to a host society over time justify their right to stay even if the modalities of access were unauthorised to begin with. As one prominent scholar puts it, since 'social membership does not depend on official permission', the 'moral right of the state to apprehend and deport irregular migrants erodes with the passage of time' (Carens, 2009).

But that argument has also been challenged. As one critic puts it, the social membership argument 'creates a strong presumption' in favour of allowing irregular immigrants to stay but it is one that 'can be legitimately set against the other goals that immigration policy is intended to achieve' (Miller, 2016, p. 124). Yet if we apply that very same argument to the descendants of the Mafiosi and their alleged right to exclude, we would say that although with the passing of time they have acquired a presumption to stay and claim a right to jurisdiction where they are, such presumption would also have to be set against 'the other goals that immigration policy is intended to achieve'. Therefore, if the argument from social membership ties can be criticised as inconclusive to authorise the right to stay of irregular migrants, it is also inconclusive to establish a right to jurisdiction in the case of the citizens of liberal democracies whose right to exclude we fail to problematise.

5.

One objection to the story I have told so far is that the disanalogies between the case of recent irregular immigrants and that of the descendants of the Mafiosi might weaken my case. But in so far as there are disanalogies, I think they support rather than undermine the overall argument. One important disanalogy concerns the role played by the amount of time that stands between the original

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wrong and the point in which the demands of supersession are triggered. Surely, someone might say, it is a long time since white settlers abused aboriginal people in Australia but people overstay their visas all the time in current circumstances.

Yet, it is hard to be convinced that timescale should matter more than what one does in the time that has passed. Surely what really matters is not how much time has passed but whether the agents who are responsible for wrongdoing have in the meantime rectified the wrongs they are responsible for. In the case of amnesty for recent irregular migrants it matters for example that, except for the original wrongdoing, migrants can show a history of compliance with the norms of the host community, and that the initial offence involving breaking the law has not been repeated. But the same cannot be said for colonising states. Their body of laws and their public attitudes more often than not reinforce the norms of the colonial past rather than departing from them. The history of interactions with indigenous communities in Australia and Canada illustrates that often the same colonial arrogance that pervaded relations in the past characterises the way in which demands by these groups are met in the present too. As, Luke Pearson, the founder of @Indigenous X, an online platform for sharing the perspectives of indigenous communities in Australia put it, 'Do you really think that we are upset over what happened "200 years" ago, or what started 200 years ago? […] Remote Aboriginal communities in Western Australia are facing forced dispossession of their land right now. Aboriginal children are locked up or removed from their families every single day, as they have been for generations. […] You cannot get over a "colonial" past that is still being implemented today'.[1]

Irregular migrants can usually prove that the alleged wrong of unauthorised crossing of boundaries or the wrong involved in overstaying visas (even *if* one considers these to be wrongs) is limited to these individual instances. But the colonial wrongs of the past are continuously reiterated and pervade the norms of formerly colonising states even in our days. Bygones are by no means bygones.

A second objection concerns the identity of those on whose behalf the theory of supersession is invoked. In the case of migrants, those who have committed the wrong and those who claim the right to stay are the same people. In the case of states those who have committed the wrong and those who claim the right to exclude are different.

[1] https://www.theguardian.com/australia-news/commentisfree/2016/apr/02/dont-tell-me-to-get-over-a-colonialism-that-is-still-being-implemented-today.

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If the perpetrators are long dead and gone, the wrong fades over time. But in the case of migration, wrongdoers are still alive and the analogy seems to break down.

To answer this objection, it pays to think more about the agent on behalf of whom the claim to exclude is being made. The state is an artificial agent; its identity is a legal one. In the absence of revolution, the state preserves its identity just as any corporate agent does, through the replication of rules, practices and regulations applied by various officials. That such officials are individual people with finite lives makes no difference to the social positions they occupy, and to the rules they are asked to enact. It is only when the state's laws, practices, and regulations take a radically different form that the identity of the state as an artificial agent is fundamentally altered. The identity of the state is not explained with reference to the identity of the people that enact its rules, but with reference to the identity of the fundamental social institutions that shape its legal profile over time.

This is where colonial history becomes relevant. The corporate identity of the most powerful states is the direct result of their colonial past. There have been no revolutions in the international legal order: the effect of decolonisation has been to consolidate imperial legacies rather than undermine them.[2] Both the way in which liberal Western states currently police their boundaries, and the way in which they make decisions on who to admit and who to exclude is shaped by their contribution to colonial projects and by the way in which the movement of people has been regulated following processes of decolonisation (for an insightful history see Torpey, 2000). While it is true that in the case of states, the identity of citizens at any given point in time is different, the claim to exclude is made on behalf of a corporate agent whose legal personality is maintained over time. That the individual identity of citizens is different, matters very little when different citizens are responsible for complying with the same exclusionary laws.

Another disanalogy that a critic might invoke is that in the case of recent immigrants, the cost of exclusion is deportation and deportation, however nasty, implies that immigrants have another place to return to. But in the case of citizens of formerly colonising states there would be no other place to settle and no deportation is at stake. In response two points can be made. The first is that even

[2] For the most recent evidence on the reproduction of the contemporary legal order, see the excellent discussion in Parfitt (2019). See also the essays in Bell (ed., 2019).

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though citizens of host states have nowhere to move into, the most advantaged among them have ample scope of levelling down to make available some of their land and resources to newcomers. Secondly, notice that deportation is only the visible expression of what is thought to be a prior wrong, namely the fact that irregular migrants take advantage of the benefits of a host community whilst not being entitled to do so. Deportation is the price to pay when you have no right to stay, and no justified claim to join a particular territorial group in making specific political rules, in this case rules about who is in and who is out. But this is also true if we focus on the case of the descendants of formerly colonising states, since the challenge we are mounting is precisely that the forms of political association they find themselves involved in do not have the moral legitimacy that they claim they do when it comes to shaping the precise boundaries of who is in and who is out. The conclusion to draw is that regardless of whether deportation is available, the right to make political rules with regard to the boundaries of a self-governing political body in the case of citizens of formerly colonial states can be challenged in the same way it is challenged in the case of irregular migrants and for much the same (moral) reasons.

One might object here that the force of my argument is limited because it only shows that there is something wrong with the right to exclude as practiced by former colonial states but does not extend beyond them. It is limited because it does not challenge the right to exclude as such, and it does not protect all irregular migrants from the abuses of all states (including those with no colonial history). This is undoubtedly true. But while I remain open to alternative ways of challenging the right to exclude, my analogy captures the most problematic examples of exclusion, in the majority of liberal democratic states, indeed it targets precisely those states who are at the forefront of current exclusionary policies with regard to irregular migration. It targets states built on settler societies who have consolidated their institutions on the basis of the exclusion of indigenous populations (think about the USA, Australia or Canada). But it also targets former colonial states whose wealth and institutions have emerged partly as a result of the exploitation of labour and resources in other parts of the world (like the UK, France or the Netherlands). Wherever we look in contemporary liberal democracies, the states adopting the harshest exclusionary practices and setting the standards of hostile immigration policy when it comes to irregular migration are also those carrying the heaviest colonial debt. This debt is still outstanding and makes current generations of citizens of many wealthy liberal democracies look much like the

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descendants of the Mafia in the example with which I started. While other states can and should also be held into account (perhaps on different grounds) the tainted link between the claim to jurisdiction and the right to exclude in the cases I have examined is an important source of moral critique. This critique ought to shape how citizens of liberal states think about who they are, and in what terms they engage with the problem of irregular migration.

6.

Let me consider now a more general criticism to the argument presented so far. If the right to jurisdiction of former colonising states can be challenged when it comes to issues of amnesty in migration, what about other laws? Does the tainted history of states' jurisdiction mean that everything any given state does or purports to do, every claim it makes on those subjected to its authority loses its force? To answer this question, it is important to return to the distinction between a legal and a moral claim to rule with which we started. My critique of many liberal states' treatment of immigrants is a moral critique, and the point of such critique is not to challenge all aspects of law-making but to scrutinise its moral foundation with a view to informing political judgment on its most problematic aspects. Not all areas of law are a contentious political issue, and colonial history may or may not be relevant even to those that are. Traffic laws, for example, are only mildly controversial and the history of how they emerged may or may not be relevant to their current moral assessment. If it is, as with cases of segregation of particular groups, then it should inform debate in that policy domain too. More generally, it seems plausible to say that there may be prudential or moral justifications for particular laws and policies that are compatible with denying moral standing to the institution that makes those laws and policies. If an apartheid state makes laws that prohibit murder, it is a good idea to respect those laws, however unjustified many, perhaps most, of its other laws are (see on this last aspect also Simmons, 2001, pp.155–57).

But let me return to the case of political debates around irregular migration that is the focus of this paper. The history of how states came to enforce the right to exclude, and against whom, is – as I tried to show – crucial to the current assessment of their moral authority when it comes to the enforcement of border controls. That history ought to feature much more prominently in our assessment of the claims of irregular migrants and in debates surrounding

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amnesty in immigration. Instead, in the current debate historical considerations only matter when we assess the biographies of individual migrants and when we appeal to supersession theory to reflect on the potential case for mitigating the wrong of, say, unauthorised boundary crossing or unlawful visa overstay. The point of the comparison with colonial injustice is to orient our judgment when setting out relevant criteria for deciding around issues of amnesty. Some may find supersession theory a controversial point to start with. But let us assume, as many seem to do, that it is a plausible way of seeking philosophical orientation when answering pressing contemporary questions. Consistency requires that we extend the comparison beyond the case of individual migrants to the case of agents on whose behalf assessments of compliance or noncompliance are made. Therefore either we should be much more concessive when assessing the case for amnesty in immigration or uphold strict standards but direct them to a more radical critique of the states' moral claim to exclude. The former colonial state, as we know it, can either defend a moral right to jurisdiction or a moral right to exclude, but it cannot defend both.

7.

Suppose however that a critic bites the bullet at this point. Suppose, that critic argues, that supersession theory justifies *both* the right of states to exclude and the rights of irregular immigrants to stay. This would give rise to what we may call the supersession trilemma. If supersession theory is sufficient to justify the rights of irregular migrants to stay, it has sufficient plausibility to justify the states right to exclude too. But if the states have a right to exclude, they can decide on which terms to accept or exclude illegal immigrants. That would mean that immigrants do not after all have a right to stay – they depend on state regulation for that. Therefore it looks like supersession theory, the justification of the right to exclude and the rights of irregular immigrants to stay cannot all be maintained at the same time. Either we drop supersession theory, or we have to think of a way of reconciling its requirements with regard to the states' right to exclude and the immigrants' right to stay.

I think it would be unwise to drop supersession theory altogether. The origins of most claims to territory and property are tainted, the arguments they give rise to are contested. Thinking about the *current* use of land and resources in settling difficult disputes related to these claims seems like a reasonable way to proceed. But what the implication of supersession theory vis-à-vis the right to

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exclude shows is that there are important asymmetries to take into account when balancing the different claims.

One important implication of this point concerns the claim to indifference. Recall how supersession theories maintain that an agent may be entitled to keep certain goods that have been unjustly acquired, provided sufficient time has passed from the original wrong and provided that other people are indifferent to their current use. Migrants are not indifferent to the territorial rights of states. They are also not indifferent to the process through which such rights came to be established. Colonial history for them is not just history, it is one of the most important (often *the* most important) reasons that they are forced to migrate. As the Mexican saying goes: 'we did not cross the border, the border crossed us'. The migrants currently drowning in the Mediterranean or subjected to dehumanising treatment in detention camps in Libya all come from states that were former European colonies. They are a victim of European Union border enforcement practices, as well as of the asymmetrical, manipulative processes of negotiation between the EU and its former colonies and satellite states (Mezzadra and Neilson, 2013). The abusive colonial history of European states in the past is the premise of their predicament in the present.

Looking at it from the other perspective, current inhabitants of former colonial states are not indifferent to the fact that states should retain the right to exclude. They are also not equally responsible for their states' past wrongdoing. It would be wrong to ask domestic oppressed minorities or the more vulnerable citizens of these societies to bear the cost for the past and present failures of their ruling elites to endorse radical change. This is perhaps what motivates liberal defenders of states right to exclude to only frame debates on supersession as a debate about amnesty in immigration. This answer is insensitive to the injustices that cause irregular migration in the first place, and obliterates the power asymmetries that pervade both the political institutions of liberal states and the global international order that they contribute to shape. This is not how to do justice to immigrants, but it is also not how to do justice to the claims of vulnerable citizens in host states.

8.

The liberal solution to the supersession trilemma burdens immigrants disproportionately and lets liberal ruling elites off the hook. To reconcile the claims of migrants and those of the most vulnerable

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citizens of liberal states, we need to readjust our image of the contemporary liberal political community as one that acts in the interests of all its citizens. We ought to apply to states, the same criteria for supersession of injustice that they apply to individual immigrants. The first such criterion, recall, is the recognition of previous wrongdoing. The second, the analogue to individual good character, is evidence of compliance with norms of global justice. On this account, the justification of the states' right to exclude is conditional on the rectification of historical wrongs and the elimination of the structural injustices that turn migration into a problem in the first place. Once we apply to states the same criteria of rectification and compliance with the just norms of a global society of states as they apply to immigrants, we can address the supersession trilemma with a weak, permissive, justification of their territorial rights.

This theory has been discussed in greater detail elsewhere and it is not necessary to repeat the argument here (Ypi, 2014). What matters to this paper is acknowledging that the global order we currently have is continuous with that which led to the emergence of colonialism and the structural reproduction of exploitation and injustices of both domestic minorities and vulnerable groups and populations in other areas of the world. Until the political institutions of dominant Western states make a clean break with such past patterns of unjust accumulation and exploitation, their right to exclude should not trump irregular immigrants claim to stay. When I talk about a clean break with the past, I do not mean a mere change of leadership, or the support for policies tweaking the old system here and there. This is just what we have now. What I mean is a fundamental transformation of the corporate identity of the state, the abolition of the legal and political regimes that reproduce colonial dependence and replicate structural injustice, and their replacement with political institutions promoting social justice and radical democracy at every level, both domestic and international. While explaining how exactly all this would work takes us too far from the topic of this paper, here I want to end with just three implications of my approach for the question of irregular migration as it affects us here and now.

One important implication is that until these changes are in place, there should be not only amnesty in immigration but also access to citizenship rights for irregular migrants. Both should be automatic and unconditional (De Schutter and Ypi, 2015). The second is that practices through which liberal states take advantage of the colonial past by outsourcing border control to third parties, or by involving client states in the enhancement of border controls (e.g. in the form of border walls) should be condemned as a matter of not just

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international but also domestic justice. A political community that has not settled accounts with its own problematic past cannot be considered internally just since the current shape of its political institutions is premised on the exploitation and domination of vulnerable minorities both within its borders and outside: the one cannot exist without the other. The third is that the creation and consolidation of detention camps within the territories of liberal state should be considered akin to political apartheid, and the states enforcing such policies should be the target of international condemnation, boycotts and civil disobedience campaigns as has been the case with apartheid regimes in the past.

Some of this reiterates ongoing calls of pro-immigration theorists and activists all over the world. But the justification is new and more radical. What motivates my argument is neither a prudential argument that explains how immigration is after all in the interest of host societies nor an abstract moral defence of the human right to freedom of movement. It is an argument that applies to states the same standards for supersession of injustice that they apply to individual immigrants, emphasising how domestic and international justice are interdependent. There is no real conflict between the demands of vulnerable citizens within liberal states and those of irregular immigrants. The same system that enables the exclusion of the latter shapes the conditions for the exploitation of the former. Powerful elites benefit from both kinds of exclusion and shape political institutions that give them discretion over how far to share these benefits and with whom. Historical and structural injustice mutually support each other, and the conditions for the supersession of the one, are the same as those that require the elimination of the other. Colonialism and immigration are entrenched. If we fail to explore the implications of that entrenchment for our assessment of justice and injustice, and of whether they belong to the present or to the past, all efforts to solve the conflicts to which they give rise will be short-lived and ill-directed.

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References

S. James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2004).

https://doi.org/10.1017/S1358246122000066 Published online by Cambridge University Press

Duncan Bell (ed.) *Empire, Race and Global Justice* (Cambridge: Cambridge University Press, 2019).
Linda Bosniak, 'Wrongs, Rights and Regularization', *Moral Philosophy and Politics*, 3, (2016) 187–222.
Joseph Carens, 'The case for amnesty', *Boston Review*, (2009).
Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge: Cambridge University Press, 2003).
Sandro Mezzadra and Brett Neilson, *Border as Method or the Multiplication of Labor* (Duke University Press, 2013).
David Miller, *Strangers in Our Midst* (Cambridge Harvard University Press, 2016).
Anthony Pagden, *Peoples and Empires, A Short History of European Migration, Exploration and Conquest from Greece to the Present* (Random House Publishing, 2007).
Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (Cambridge: Cambridge University Press, 2019).
Helder De Schutter and Lea Ypi, 'Mandatory Citizenship for Immigrants, *The British Journal of Political Science*, 45 (2015), 235–51.
Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality,* (Cambridge: Harvard University Press, 2009).
John Torpey, *The Invention of the Passport* (Cambridge: Cambridge University Press, 2000).
A.J. Simmons, *Justification and Legitimacy. Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001).
Jeremy Waldron, 'Superseding historic injustice', *Ethics*, 103 (1992), 4–28.
Lea Ypi, 'A Permissive Theory of Territorial Rights', *The European Journal of Philosophy*, 22 (2014), 288–312.
Lea Ypi, 'What's Wrong with Colonialism', *Philosophy and Public Affairs*, 41 (2013) 158–91.

https://doi.org/10.1017/S1358246122000066 Published online by Cambridge University Press