

Being Heard: Voice and Recognition for Undocumented Migrants in the U.S.

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Abstract

Undocumented migrants in the U.S. highlight issues of voice, recognition, and representation. Within the existing liberal framework, undocumented migrants are defined in terms of how they stand in relation to the state. As a result, reciprocity and recognition are strained by non-citizen status. If an individual is not recognized within the system of citizen's rights, they are not heard and often not seen. Deliberative democracy is similarly limited in this situation as those that identify themselves as undocumented risk arrest; thus undermining equal access to deliberation and the chance to be heard. I argue that the situation requires us to move beyond the limitations of rights claiming and ethical theories of obligation toward creating a new conception of citizenship with its corollary protections. An understanding of citizenship as a shared common life can be expanded upon to derive a performance-based conception of citizenship that relies on shared experiences and communal obligations. While theories of cosmopolitanism have attempted to address this issue by raising citizenship to a global level, I argue that if we lower our gaze and focus on the local communities in front of us, there is a possibility of genuine recognition, reciprocity among group members, and a voice for all that have a shared fate with that group, regardless of whether an individual group member is a properly-documented, rights-bearing citizen in the liberal schema.

Introduction

Undocumented migrants in the U.S. raise interesting questions regarding political legitimacy, obligation, and citizenship. If they are truly members of their communities, should they have a voice in the laws and policies that impact their lives? Should their interests be considered - especially in light of exploitation by employers, the possibility of detention and the threat of deportation? Granting a voice to those who entered the nation illegally is not without complications and raises concerns about the sovereignty of the pre-existing political community. Central to democratic legitimacy and individual autonomy is the ability to know who is author of the laws to which we submit. The fear is that porous borders can change the membership of the political community and therefore alter the “we” that makes up popular sovereignty; leaving existing citizens subject to a new and extended sovereign to which they did not consent. I submit that the role of consent is flawed, the “we” has already changed, and a substantial amount of people in the United States are bound by laws that they have no say in creating. Furthermore, without status or standing, they have no hope of being heard or represented in the future.

What I would like to suggest is that we owe a certain moral and political obligation to those individuals who have been living in and contributing to their communities, regardless of whether they initially arrived without documents. This is not a theory about migration or borders. The exploitation and abuse that occur during border crossings require a different set of protections than I discuss here. This is an argument about the migrants themselves who have been living “illegally” within our communities for a sustained amount of time. They have common interests and a shared fate with the rest of the community but are differentiated due to a lack of documents. In making this argument, I call for a shift in the way we conceptualize political obligation and the corollary rights and duties of citizenship.

I believe that migrant nations such as the United States, where substantial segments of the population have lived here for years without documents, have reached a point where there is a need to reconceptualize traditional notions of what makes a citizen. I hope to flip the way we think about state-granted citizenship. If we work backwards, we can identify activities that satisfy civic duties and obligations and then create corresponding rights. Citizenship brings with it protections and status as well as certain obligations. If an individual is meeting her obligations as a citizen, performing as a citizen, should she not have a voice in the laws that are supposedly authored by us all? I believe a performance-based conception of citizenship more accurately reflects our current situation and recognizes obligations we have to those living among us.

Why we might owe more than we currently think

It is often argued that we do not owe anything to those individuals that chose to come here especially if, in doing so, they violated our federal laws. However, the legal status of migrants is not constant but varies with political regimes and policy changes. That is, a once accepted circular flow of people and products among mutually advantaged communities becomes “illegal” under a new policy regime. Immigration policies over the last several decades have increasingly criminalized behavior that was once accepted, even encouraged. There is a long history of U.S. companies recruiting labor from other countries, specifically Mexico. The only thing temporary about guest workers is the individual worker. The need and systematic recruitment of “temporary” workers is constant and has remained in effect regardless of changing legality.

One of the most notable legal recruitments was the Bracero program that resulted from an agreement between the U.S. and Mexican government. It was heavily criticized for the

American government's failure to protect workers, and avoid such workplace abuses as low wages, inadequate housing, and workplace safety. However, when it ended, companies continued to recruit undocumented workers. Fernandez-Kelly and Massey observe the shifts in legal status of otherwise unchanged practices. They explain that "after 1965 the United States shifted from a de jure guest worker program based on the circulation of braceros to a de facto guest worker program based on the circulation of undocumented labor" (Fernandez-Kelly and Massey, 107). Merav Lichtenstein similarly recounts the consistent use of temporary labor by U.S. companies. Lichtenstein notes that in the last 10 years, United States employers recruited about 1.5 million immigrant workers, but only allowed visas for one-third of those recruited (Lichtenstein, 703). The remaining two-third are still employed, but are deemed "illegal" under existing policy.

NAFTA has only further complicated the issue by allowing for the free movement of products, but not of labor. Instead of granting U.S. treaty partners special status, visa quotas under NAFTA were kept the same for Canadians and Mexicans wishing to come to the United States. The number of permanent resident visas available to Mexicans is the same for individuals coming from Nepal or Botswana, leading some scholars to conclude "[m]aintaining a quota of twenty thousand visas per year for a nation to which the United States is so closely bound by history, geography, and free trade is unrealistically low, bringing about waiting periods that surpass ten years, creating frustration among qualified applicants, and making it all but certain that illegal migration will continue" (Fernandez-Kelly and Massey, 115). The situation is further exacerbated by policies surrounding NAFTA (such as the privatization of Mexican farms) that have led to greater poverty among Mexican citizens.

Daniel Tichenor provides a historical-institutional analysis of changing immigration policy regimes. One surprising finding was that moves to restrict immigration have occurred during times of economic prosperity as well as recessions. Therefore, there is more to restrictionist agendas than pocketbook voting or concerns for the U.S. labor force. Tichenor acknowledges that existing theories do not answer these puzzles. He laments, “[i]f the outcomes of periodic national battles over immigration control were of marginal importance, then our theoretical shortcomings in this area would be of little consequence. But immigration policy choices involve not only the peopling of a nation, but also the framing of a citizenry with shared understandings of what liberal democracy and nationhood demand” (Tichenor, 45). It is these latter concerns that I attempt to address.

There has been a call to bring current flows of migrant labor into the open through the creation of a temporary visa program that would permit individuals to enter, live, work and be accounted for in the United States. However, others have raised concerns that this would create a permanent class of sub-citizens. Unfortunately, what remains is a class of non-citizens that are left even more vulnerable and open to exploitation. I believe some form of civilly recognized rights are necessary as moral obligations have fallen short when it comes to granting respect, consideration, and recognition to undocumented migrants in the United States.

Voice and Recognition

The lack of voice is a crucial factor in our failure to recognize undocumented migrants in the United States. The linkage between being heard and being recognized has been explored by deliberative democratic theorists, who have pointed to issues of access to - and power differentials within - arenas of public discourse (Benhabib 1996, Button & Mattson 1999, and

Young 2001). Critics have noted the problems of privileging rational debate over other forms of communication, the impact of social economic status and levels of education on the ability – as well as the confidence - to take part in deliberations, and the exclusion of certain topics as agenda setters limit the subject matter. However, even with the acknowledgment of power asymmetries and the proposed correctives, these theories fall short of providing an inclusive and safe space for democratic discourse. The limitations of such theories are especially stark when extended to a population that is vulnerable to deportation once they speak openly. In this situation, their vulnerability is directly linked to their recognition; the moment they give voice to their true identity and interests, they have opened themselves up to legal sanctions. Further protections are necessary before such an open discourse can occur. In the case of undocumented migrants, having the protections and status that some level of citizenship would impart would go a long way in mitigating these concerns. Without such protections, deliberative theorists have very little to say to migrants about being heard.

If some form of citizenship is the best (if not only) way for an individual to be recognized, heard and author the laws to which she submits, it is necessary to further explore the basis for inclusion into - and exclusion from - this category. As with most concepts, there is a danger of believing that the current situation is somehow natural; that is, it has been and always will be this way. As discussed above, the history of immigration policy in the United States reflects an ever-changing idea about migration and migrants. An individual is “illegal” because current policy has deemed them so. This can and has changed through the years depending on politics, business interests, and public opinion.

Evelyn Nakano Glenn explores the impact of race and gender on American constructions of citizenship. In her larger argument, she distinguishes formal citizenship (embodied in law and

policy) from substantive citizenship (the ability to exercise rights of citizenship), noting that a lack of social rights and/or lack of recognition from local government or the public can harm the latter.

Citizenship is not just a matter of formal legal status; it is a matter of belonging, including recognition by other members of the community. Formal law and legal rulings create a structure that legitimates the granting or denial of recognition. However, the maintenance of boundaries relies on 'enforcement' not only by designated officials but also by so-called members of the public (Glenn, 52).

The role of local government and the public in granting or withholding recognition is informative. It also speaks to the need for a different definition of bounded political community than the nation-state.

In the same way that scholars have questioned constructions of citizenship, others have questioned the myths surrounding the creation and sustenance of the nation-state, including whether it is both nation and state. Anthony Marx questions the accounts that suggest nations arose as a social process of solidarity; thus a natural, cohesive, and voluntary political community.

The result has been described by Benedict Anderson as an 'imagined community,' by Homi Bhabha as a common 'narration,' by Deutsch as 'communication,' and by Habermas as solidarity and legitimation based on a consensus made possible by common language. These arguments share with the liberal tradition the assumption that early social/national cohesion requires no institutional action; there is no state action necessary to encourage the process of community cohesion or loyalty (Marx, 15).

Marx claims that, for such cohesive communities to coincide with political boundaries, there must be a political process to create nation-state (political) communities. That is, such social groupings cannot magically correspond with political institutions unless there was a political process at play. Cohesive political communities – with shared interests and fates – exist within nation-states as well as across state lines. This suggests that we must look elsewhere for a reason

to claim the nation-state as exceptional and deserving of our moral and political obligations more so than smaller or differently-drawn communities. It is helpful to re-examine existing theories of citizenship in order to explore this issue and the relationship between political communities and their members.

Theories of Citizenship

Migration patterns, transnational identities and transborder relationships have led to the questioning of previously held conceptions of the nation-state and the corollary granting of state citizenship. Nation-state borders and individual identities based on singular citizenship are increasingly seen as constructed fictions. Many theorists question the Westphalian notion of citizenship in which loyalty to one territorially based nation-state is seen as exclusive, necessary and sufficient. However, this questioning tends to either lead to a cosmopolitan vision of global citizenship or a group identity-based notion of differentiated citizenship. I believe both fail to address the concerns raised by individuals living “illegally” within a national polity. Modern liberalism remains the hegemonic theory of both state and citizen in the United States. Yet modern liberalism, understood here as a rights-based theory of justice, fails to extend moral commitments to undocumented migrants living in our communities. Conversely, ethical theories of moral obligation fail to provide the level of legal protection granted by liberal citizenship. Thus, while flawed, the liberal model of citizenship still provides an important base to this discussion.

The Liberal Model of Citizenship

Liberal theory, while multi-faceted and contested, broadly claims that individuals are free and equal beings and bearers of fundamental rights that cannot be infringed upon by the state.

Liberal citizenship is largely rights-based with the state envisioned as a neutral arbiter and guarantor of individual rights. In both liberal theory and liberal democracies, recognition occurs by and through the state. The result is that those not granted citizen status are treated as if they do not exist. When operating within a rights-based framework, proponents for the rights of non-citizens tend to frame their arguments in terms of human rights, but with limited success. Claims to human rights can be an effective form of moral persuasion but, as with all rights claiming, require a guarantor. Barring such an international power, claims of individual rights revert to claims against the nation-state. Because so much of liberal theory is based on the individual *qua* citizen, it is unable to accommodate the reality of non-citizens living within our communities.

There have been many criticisms of liberal theory, especially the formulation of the individual as an atomistic rights-bearer with no ties, obligations or pre-existing conditions. These critiques have exposed the limits of liberalism in confronting gender inequalities and domestic hierarchies (Okin 1987, Pateman 1988, and Young 1990) as well as racial hierarchies (Mills 1999 and Pateman and Mills 2007); failing to take account of both the effects and benefits of the community within which the individual rights-bearer exists (Etzioni 1996a and 1996b, Glendon 1991, MacIntyre 1990, Sandel 1982, 1984 and 1996, Walzer 1990); and the related criticism of not recognizing cultural membership as a “primary good” (Kymlicka 1989 and 1995, Taylor 1994). Those that lack citizenship status are yet another group that modern liberalism has rendered invisible.

Without citizenship status, an individual is not able to make rights claims or to be recognized. It is as if they do not exist – although there is an acknowledgement that they are part of our society. Public discourse surrounding the issue of amnesty reveals this tension. On one side, there is an attempt to recognize those who have invested in the United States: working,

parenting, and being engaged in their communities. But these discussions reveal the underlying belief that the only answer possible in the liberal state is through citizenship. An individual cannot be recognized without bearing citizen's rights. The phrase consistently used in tandem with a "path to citizenship" is "coming out of the shadows" – as if these individuals do not exist prior to political recognition. Liberal theory – and the resulting liberal state - is constructed in such a way that we are unable to recognize humans living and working in our communities because they do not bear the stamp and voice of a citizen.

Rights claiming only works if you have someone to whom you can make your claims. The undocumented migrant who has truly settled within a community has given up the ability to make claims against her home state, but has not been granted the right to make claims against the receiving nation in which she now resides. In her daily life, she is not a citizen of any state. This conclusion is countered by theorists of cosmopolitanism with the claim that we are all citizens of the world. This is an especially attractive notion given the current condition of state-centered citizenship within a somewhat arbitrary set of nation-states.

Cosmopolitanism: Citizens of the World

There are different shades of cosmopolitanism, but with a similar call to go beyond nation-state borders and reconceptualize our obligations and connections within a global framework. The cosmopolitan claim that an individual can be a citizen of the world potentially allows for broader recognition and acceptance and greater opportunity for mobility. If you are a citizen of the world you should be welcome anywhere, thus allowing for the mobility necessary to find employment and reunite with family. It also extends political notions of justice. Seyla Benhabib discusses the shift from national and international justice, predicated on positive laws and treaties, to cosmopolitan norms of justice that "accrue to individuals as moral and legal

persons in a worldwide civil society” (Benhabib 2006, 16). Such global rights adhere to the individual regardless of the nation-state in which the individual resides.

While a lovely ideal, cosmopolitanism has been criticized for a reliance on purportedly universalistic notions of human rights, impracticality, and an unacknowledged reliance on state structures. The underlying principle of cosmopolitanism is that each individual deserves equal consideration, respect and basic human rights (e.g., see Gaige 2008, Heater 2002, and Kingsbury 2007). However, human rights lack any sort of credible guarantor and this lack of global governance similarly undermines the practicality of calls to global citizenship. Benhabib acknowledges this dilemma when she writes: “Cosmopolitan right trumps positive law, although there is no higher sovereign authority that is authorized to enforce it” (Benhabib 2006, 26). Thus, a state is necessary to protect even those rights deemed universal. At the least, the notion of global citizenship faces major institutional obstacles – not least of which is an implicit reliance on the nation-state. Those who claim to be citizens of the world still have a state-issued passport that allows them to act out this claim.

Conversely, cosmopolitanism is accused of threatening state sovereignty. Nation-states have boundaries and, while increasingly porous, they still represent a specific polis and community of members. As one scholar concludes, “[t]o say that no human is illegal is to call into question the entire architecture of sovereignty” (Nyers 2003, 1089). This does not just speak to the state’s decision of whom to include and exclude, but also to the legitimated authority that rests in the body of the citizenry. Benhabib notes this problem.

Such conflicts render starkly visible the ‘paradox of democratic legitimacy,’ namely, the necessary and inevitable limitation of democratic forms of representation and accountability in terms of the formal distinction between members and nonmembers. This is the core tension, even if not contradiction, between democratic self-determination and the norms of cosmopolitan justice. (Benhabib 2006, 17)

However, as Benhabib points out, this is problematic when the very nature of such membership norms leads to the excluded not being party to the discussions regarding the rules of their exclusion. Once again, we find ourselves facing the issue of recognition and voice. Given this situation, she suggests what she calls a ‘jurisgenerative process’ in which the public reconstitutes itself through discussions of inclusion and exclusion and democratic iterations in which voice is extended to those that are publicly present regardless of their status. While a hopeful vision, this is reminiscent of the asymmetries in deliberative democracy in which the excluded require an emissary to voice their claims.

In her discussion of the tension between democratic legitimacy and cosmopolitan norms, Benhabib concludes that “[p]olitical actors need bounded communities – whether they be cities, regions, states or transnational institutions – within which they can establish mechanisms of representation, accountability, participation and deliberation” (Ibid, 169). In this understanding, a bounded political community may be necessary for democratic legitimacy and self-determination, but that community is not synonymous with the nation-state. If we are not reliant on the nation-state for granting political status, a new set of issues (and opportunities) arise. If members of the community are to be autonomous authors of their own laws, we must have good and weighty reasons to justify the exclusion of any of those voices. Documents granted (or not) by the larger nation-state may not be a necessary or sufficient condition for inclusion or exclusion.

I would like to suggest that a performance-based citizenship is a way of creating a political body that more accurately reflects communities in the United States and recognizes the obligations and duties that are carried out by those we currently exclude from consideration. Rights-based citizenship can be described as a vertical relationship between sovereign and

subject, whereas a republican form of citizenship reflects a more horizontal relationship among citizens. In this latter formulation, the focus is on one's duties to one's fellow citizens through such activities as civic engagement and military service. This more duty-based framework, adopted by civic republicans and communitarians, offers an alternative to liberal theories of citizenship and provides another way of justifying the special status of citizen.

Civic republicanism/ Communitarianism

Civic republicanism attempts to tap the essence of citizenship. Proponents envision a much more internalized, core emotional attachment to the state than the neutral and reasoned connection between a citizen and the liberal state apparatus. Civic republicans respond to the anemic, supposedly neutral ties of liberal citizenship with a much more robust version of commitment and belonging. The connection between civic republicanism and communitarianism is the underlying idea that membership in a community (be that national, local, ethnic, religious or associational) is a source of one's identity – not something that can be bracketed – and leads to a stronger connection and deeper loyalty among group members. However, civic republicanism properly understood is still crucially linked to the nation-state. For this reason, it is not possible to transcend nationally-granted citizenship.

Communitarians move away from the vision of the state as community. Instead, they focus on those voluntary allegiances that occur at a smaller level of association. The benefit of thinking about citizenship on a more local level is that the members of a smaller community know each other on a larger range of characteristics, facets and offerings than just the material documents that grant the magic power of recognition in the liberal universe. This ground-level recognition allows community policing in terms of who is committing crimes; that is, the community is able to determine which individuals are committing illegal acts, not who *is*

“illegal.” However, there is still the issue of who is counted as a member of the community. If the community has the power to accept you, they can also opt to exclude you for not disinterested reasons. Ruth Lister describes the Janus nature of citizenship as simultaneously a mechanism of inclusion and exclusion (Lister 4). Nira Yuval –Davis similarly argues that “[c]onstructing boundaries according to various inclusionary and exclusionary criteria... is one of the main arenas of struggle concerning citizenship that remain completely outside the agenda of the Marshallian theories of citizenship” (Yuval-Davis 61). I believe the horizontal duty-focused nature of communitarian citizenship provides the key to this issue of whom to include. If an individual is fulfilling her duties, performing as a citizen, she should be allowed the reciprocal right to take part in the political decision-making of her community. In the case of undocumented migrants, their status currently disallows them from inclusion in the political community. In order to alter their citizenship status, we must reconceptualize citizenship as a duty-focused, performance-based social membership.

Performance-based Citizenship

Several theorists have examined the more socially constituted understandings of citizenship; that is, the difference between being a citizen and acting as a citizen. Isin and Wood claim that citizenship “can be described as *both* a set of practices (cultural, symbolic and economic) and a bundle of rights and duties (civil, political and social) that define an individual’s membership in a polity” (Isin and Wood 4). They use this distinction between practice and status as a way of creating a balance between the particular (group identity) and the universal (nation-state identity). However, this reliance on group identity presumes a coherent, perhaps

even insular, group – not differently situated (in terms of legal status) individuals within a geographic community.

Similar to Isin and Wood’s argument, Kumar and Silver make a distinction between state and social citizenship.

In our view, the value of citizenship in a liberal state has two distinct facets. The first is that of standing in a certain relationship vis-à-vis the state. That standing entitles one to benefits just as it subjects one to duties that are and remain exclusively within the authority of the state to confer and in the purview of the state to demand. The second is that of standing, together with others, in a community of citizens united in a shared form of life (Kumar and Silver, 71).

The authors use this distinction as a way of shedding light on the exclusion that occurs in their second understanding of citizenship (e.g. homosexuality in the military). I want to use this second understanding of citizenship, as standing together in a shared form of life, to reassess or augment the first understanding of a status derived in relation to the state. The notion of citizenship as a shared common life can be expanded upon to derive a performance-based conception of citizenship. Once this is in place, equal treatment and consideration is required among those individuals that share the common life and fate of the community.

In the horizontal structuring of citizenship, there is a call for recognition and reciprocity from other community members (as opposed to recognition from the state in vertical models of citizenship). Adrian Oldfield views citizens as autonomous agents, but calls attention to the fact that each individual citizens stands in a relationship of mutual dependence with other citizens (Oldfield 1990, 41). This relationship of interdependence is masked in the situation of undocumented migrants. The citizens of the United States depend on the labor and taxes paid by migrants, but the legal vulnerability of the migrants gives the appearance that they are wholly dependent on the mercy of native citizens. This undermines the recognition of on-going

relationships in which the ties of interdependence continue to strengthen. As people continue to live and work in a community, they become more deeply imbricated with that community.

In recent years, Joseph Carens has mitigated his original stance regarding open borders, acknowledging that the nation-state has some rights to restrict entry into the political community. However, Carens believes that at some point the state's claims are outweighed by a migrant's moral claim to have her social membership legally recognized (Carens 2009). He acknowledges that any benchmark is arbitrary, but argues that residing in a country for five years seems like a defensible statute of limitations. The focus on time lapsed encourages an unproductive discussion about how long is long enough and masks the underlying justification for such a proposal. An individual might have a moral claim, not because she managed to elude detection for five years, but because she has woven herself into the fabric of her society and entered into the reciprocal relationship of mutual dependence among fellow citizens.

There is a need for institutional creativity in order to recognize a form of citizenship that is not based on documents. If we are to accept a broader vision of citizenship, in which being a good citizen of your community warrants some level of recognition and reciprocity, we need to create a procedure that will allow for individuals to be recognized via community involvement. In order to derive such a broader understanding of citizenship, one must take into account what duties are associated with full and equal membership in that community. That is, if we are to move backwards from duties and obligations to rights and protections, we must identify those that are fulfilling their civic duties in order to extend to them performance-based citizenship. Is it enough to pay taxes? Must you be an active member in the civil society of your community? The underlying question is what we expect from each other as members of a bounded community who are jointly responsible for legitimating the authority of the laws.

T.H. Marshall acknowledged that citizen duties are not as obvious or precise as citizen rights. While paying taxes and military service are clear duties, he added that other duties “are included in the general obligation to live the life of a good citizen, giving such service as one can to promote the welfare of the community” (Marshall 1959, 78). Such vague general obligations are something that would have to be determined through participatory means. While I have already voiced my concerns about truly open deliberation and participatory discourse, I must add a further concern about the activities and identities valued. We need a consistent metric of what we value in good citizens so we do not include only those characteristics society can use or exploit. Discussions surrounding the DREAM Act speak to these concerns as well as parallel some of my larger argument.

Proponents of the DREAM Act justify granting conditional permanent residency (starting the path to citizenship) to those individuals who agree to attend college or join the military. The argument is threefold. First, the United States will benefit by granting status to those who will either be productive members of society (at least educated ones) or are willing to do the very civic duty of fighting for the country. In both cases, the focus is on the actions of the individual; that is, what they will contribute to the state. Secondly, the individuals that would be eligible to benefit from the DREAM Act are those that have lived in the United States for at least five years. This echoes intuitions that a person who has lived here for a certain amount of time is already part of our community. The third portion of the argument is that the beneficiaries in question were brought to this country by their parents; thus removing blame for the illegal act.

There are two aspects of these justifications that I find problematic. First, that the actions required are above and beyond normal measures of civic engagement. This is especially true for those who may not want to take part in secondary education and must, therefore, join the military

in order to qualify. We are asking them to sacrifice their lives in order to start the process of recognition. Secondly, the need to see the individual as blameless leads to the incrimination of the parents who, assumedly, have also lived in the United States at least 5 years. I believe that the parents' contribution to the community should be acknowledged as well.

If an individual contributes to society - works, pays taxes, performs as a citizen – what are the corresponding rights granted by that community? Under liberal theories of citizenship, there are none. I think this is a mistake and that our moral obligations reach further than rights recognized within existing political theories of justice. I believe it is important to retain the protections granted by citizenship as our mere moral obligations have proven to be insufficient for the humane treatment of undocumented individuals in the United States. Calls to human rights and global citizenship have proven to be too distant a concept to help on the ground. A concept of performance-based citizenship more accurately reflects real life and more readily provides protections than the superordinate structures of the nation-state or the United Nations. There is no question that democratic legitimacy requires a set membership. What is in question is what metric is used to determine who is included in that membership: documents or the carrying out of duties and obligations.

Implications for Theories of Political Obligation

Calling for the recognition of citizenship to be a bottom-up process not only changes our conceptions of citizenship but also flips our understanding of political obligation. Instead of asking what we, as citizens, owe our state, I am asking what the state (or smaller political unit) owes to those who perform the role of citizen, regardless of documented status. This has implications for arguments about the role of voluntary consent as a legitimizing step in

submitting to state authority. By moving here and continuing to work and live in the United States, migrants have actively consented to the authority of the state in a way that most of us have not. Yet, the undocumented do not have a voice in the laws to which they submit. This situation highlights the disjunction between consent and autonomy in conceptions of political obligation.

T.H. Green defines political obligation “to include both the obligation of the subject towards the sovereign, of the citizen towards the state, and the obligations of individuals to each other as enforced by a political superior” (Green, 13). His stated purpose is “to discover the true ground or justification for obedience to law” (Ibid, 13). In all of these formulations, the focus is on the individual’s obligation to the state or community, not on the state or community’s obligation to the individual. Bhikhu Parekh notes the continued limitation of understandings of political obligation. He claims “[t]here is hardly a political theorist writing on the subject today who does not think that political obligation is about obeying the civil authority” (Parekh, 237). Related to this formulation of political obligation as obedience is the idea that our obligation is derived from the action of consenting to the state, therefore legitimating the state’s authority over us. Several theorists have noted the resulting paradox: we are involuntarily bound to the authority of the state because we supposedly voluntarily consented to that authority.

In *The Problem of Political Obligation*, Carole Pateman notes that “[i]t is frequently argued that even if citizens cannot, with any plausibility, be said to have promised or consented, they are, nevertheless, politically obligated in the liberal democratic state” (Pateman 1985, 3). This paradox has led philosophical anarchists to claim that if we follow the logic of consent, no government is legitimate (e.g., see Wolff 1998). There has also been an attempt, from Locke forward, to bolster up the notion of tacit consent, including the discussion of “consent-implying”

acts (e.g., see Simmons 1981). These acts are exactly the type of activities that undocumented migrants do, and yet they are not considered part of the larger nation. Furthermore, migrants are in the minority of people that have taken a proactive action to choose this state. Instead of seeing this as proof of their desire to be an active member of the polity, it is seen as a reason to exclude them from moral considerations. The act of migration signals a choice to give up citizenship rights granted by the sending community and the migrant has no right to make claims against the receiving state. In this situation, the active choice to live in the United States is not seen as a necessary step in legitimating political authority. Instead, it is viewed as consent to be punished by a system of which they cannot be a part and has the power to detain and deport them.

If we were to flip our understandings of political obligation and use it as a basis for citizenship, we are still left with the dilemma of decoupling citizenship from the nation-state, but not from other political communities or political obligations. Anna Stilz, in her attempt to save liberal citizenship from cosmopolitanism and nationalism, argues both for the necessity of some sort of bounded community as well as the need to disassociate democratic citizenship from nationality. She concludes that it is “shared intention that allows a democratic citizen to regard herself as a member of a political group engaged in a collective endeavor to which her compatriots also contribute” (Stilz, 24). This underlying notion of “we”-creating collective intention can form the basis of a new type of citizenship. Political engagement and obligation can generate corresponding rights and protections instead of – or in addition to - rights generating corresponding duties.

Conclusion

Current conceptions of the nation-state are being questioned from many angles. Undocumented migrants living within our communities pose a specific set of questions regarding

rights and obligations. Liberal theories of political justice and republican theories of the state fail to engage the question as both rely on the configuration of individual qua citizen. Cosmopolitan theories focus on the individual regardless of state status, but fail to provide an adequate guarantor of rights. I believe that a conception of citizenship that focuses on community engagement and performance can provide a potential space to reconceptualize citizenship within the nation-state. By focusing on human activities that we view as duties to the polity, we can work backwards and provide the corresponding rights and protections to individuals within our communities regardless of nation-state granted status. While still in need of practical procedures and institutions, performance-based citizenship better reflects reality within the United States and provides a more rigorous set of moral obligations than existing conceptions of citizenship.

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