

# The Elusive Rights of an Invisible Population

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This is a rich and stimulating piece, which—characteristically of Joseph Carens’s work—challenges us to rethink certain suppositions about appropriate responses to migration. Of particular interest is Carens’s suggestion for a so-called firewall protecting irregular migrants’ basic rights. This suggestion, which I would like to term the “dualist” position, requires the state to guarantee certain rights of unauthorized migrants while at the same time retaining its prerogative to deny such migrants legal residency. While I find this *prima facie* a compelling idea, I will suggest that it creates serious problems of coherence and feasibility for the legal and political systems of host countries. I shall also question whether it is ethically tenable on liberal universalist grounds. The key problem for the dualist position, I shall argue, is the basic contradiction between guaranteeing access to rights while denying a right to be present to access such rights.

Carens’s approach is based on a recognition of the discrepancy between states’ claims to decide who lives and works in their territory and the widespread infringement of this prerogative in practice. It is worth reflecting briefly on how this contradiction arises. The persistence of unauthorized residence and employment reflects the contradiction between the generally inclusive social and economic systems characteristic of modern welfare states on the one hand, and the politically exclusionary nature of nation-states on the other.<sup>1</sup> Thus, most of the social and economic spheres relevant to welfare are quite accessible to migrants, whether their stay is authorized or not. The labor market operates according to a logic that selects workers based on their skills and price. Similarly, public health, education, and welfare institutions adopt criteria of inclusion based on the life stage or needs of individuals, usually only reluctantly imposing restrictions based on nationality, ethnicity, or legal status.<sup>2</sup> The facility with which immigrants can

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and do participate in these systems helps explain the scale and persistence of international migration, despite state attempts to restrict it.

At the same time, though, states retain the prerogative of excluding unwanted immigrants from access to their territory, and from the various services and goods associated with state membership. This prerogative reflects a historically evolved compact between states and citizens: the state mobilizes loyalty and compliance through guaranteeing its citizens privileged access to certain political rights and socioeconomic goods. Even though states are not always able to guarantee this privileged access in practice, their legitimacy remains contingent on (at least symbolic) attempts to do so. They need to maintain at least a rhetorical commitment to restricting unwanted immigration, defining those who infringe these rules as “illegal,” and subjecting them to controls, sanctions, and deportation. It is hardly thinkable that a state could publicly renounce this aspiration and retain legitimacy.

This implies that in order to continue to benefit from the possibility of inclusion in social systems, immigrants must make themselves invisible to the state, effectively renouncing claims to a legal personality. Illegal migrants forgo access to legal recourse for guaranteeing their rights or providing redress in cases of damages to their person or property. And, of course, the more states attempt to combat illegal migration through reinforcing controls and stepping up sanctions, the greater the pressure on migrants to ensure their own invisibility to the state. At the same time, this increases the vulnerability of illegal migrants to exploitation at the hands of other actors: those violating terms of contracts, denying them access to services, or causing them harm. These actors, typically employers, landlords, or smugglers, are able to abuse migrants’ legal invisibility, and thus benefit from any measures that drive migrants further underground. The upshot is a particularly vicious circle of state enforcement and exploitation.

Carens’s proposed solution is to create a firewall around certain rights, so that unauthorized migrants are able to avail themselves of legal remedy without jeopardizing their inclusion in relevant systems, or indeed their continued illegal residence. Thus, for example, they should be able to enforce rights to a fair wage or adequate working conditions and have recourse to legal remedy for theft or injury, but without their illegal activities (that is, employment and residence) becoming the object of state observation or control.

This creates a series of legal and political anomalies. Let us consider the legal question first. Could a state formally commit itself to respecting the rights of

those whose presence it does not authorize? To be sure, states are obliged to recognize that those illegally present have access to certain rights—for example, those granted under international law.<sup>3</sup> The problem arises when unauthorized residents invoke these rights within domestic legal systems. While the domestic legal system may be obliged to uphold these rights, this does not imply that the rights holder is absolved of infringements linked to unauthorized stay. This creates two types of paradoxes.

First, given that the individual has *de facto* been present (albeit illegally), she is entitled *retroactively* to remedy for any previous violation of her rights. However, this does not imply that the legal system tolerates the continuation of the person's unauthorized residence. And since future rights are contingent on her continued residence in the country, then the legal system can hardly agree to upholding her rights in the future. The plaintiff has rights by virtue of being present; but she has no right to *be* present.<sup>4</sup>

Second, the situation is further complicated by a set of empirical conditions—namely, the linkages between different parts of the legal system. Modern states have a fairly high degree of integration between the legal institutions adjudicating claims at different regional levels and across different areas of law. Such linkages imply both consistent application of legal norms and—increasingly—the centralization of data on individual cases. This creates a higher probability that an individual's legal infringements will become visible across systems. Once such illegality has been observed by the state, it must (at least in principle) mark the end of that illegal status. Either the state adjusts the individual's status (regularization), or it recognizes the individual as liable for prosecution for infringement of immigration rules (detention, deportation, or exceptional leave to remain, implying a regularization of status). Taken together, these two points imply that any legal remedy for a violation of rights must be considered as a retroactive compensatory measure, which marks the end of the person's illegal status. The state cannot coherently embrace a commitment to carry on ensuring the welfare of someone whose presence it does not permit.

It seems to me that the only possible way around this would be to introduce some form of legal pluralism, in either a strong or a weak version. The strong version would imply the coexistence of a series of relatively autonomous legal institutions, empowered to develop and implement their own norms. For example, separate tribunals could be granted relative independence in adjudicating employment rights, family law, or disputes over property/tenancy arrangements.

Clearly, such arrangements would imply a quite radical reform of domestic legal systems, and challenge a deeply ingrained notion of the state as the apex of normative authority.<sup>5</sup> But leaving aside these (nontrivial) concerns, it is doubtful how helpful such decentralized arrangements would be for unauthorized migrants. As system-specific tribunals, their scope of competence would presumably be limited to the relevant area of law (employment, property, welfare, family, and so on). But one would expect a large proportion of deliberations in such areas to revolve around contractual breaches. This may prove to be of limited use for unauthorized migrants, given that their residence and employment status would render almost all such contracts invalid in the first place.

A second, weaker type of legal pluralism would simply imply less intensive communication between different parts of the legal system. On this model, there would be less centralization in terms of shared standards for interpreting norms, or exchange of information on individuals and decisions. The implication would be that states would be prepared to tolerate a high degree of deviation in the implementation of laws, and forgo attempts to integrate data and intelligence on infringements of migration rules. This option does not seem particularly promising, given the level of public pressure on most governments to demonstrate that they are in control of migration. It would also run counter to current trends in practices of surveillance, data collection, and integration. Nonetheless, this form of benign neglect might be the most viable option for promoting the well-being of migrants, even if it falls short of providing a robust legal guarantee of their rights.

These legal and political problems do not, of course, imply that Carens's ethical claims are unreasonable. Carens's argument that unauthorized migrants should be guaranteed certain rights certainly corresponds to liberal universalist tenets about rights and fairness. So what ought the moral response be where migrants are illegally present? Liberal thought can justify such rights, but, I would argue, not on the grounds favored by Carens.

Both the human rights and the fairness arguments invoked by Carens justify extending rights to long-term residents regardless of their legal status, but neither can justify restricting these rights to the rather limited list proposed by Carens. For example, if one accepts rights to education and health care on human rights grounds, it seems bizarre not to extend a right not to be deported, or a right to leave and reenter one's country of residence. Both of these rights seem more fundamental than the socioeconomic claims defended by Carens, but

both are clearly contingent on being granted legal status. Similarly, if one accepts a right to a pension or to have one's contractual agreements legally guaranteed on grounds of fairness, it would be odd to deny the conditions that would be crucial to enjoying these rights, such as a right of continued residence or employment. This echoes the legal argument flagged above—namely, the paradox of recognizing rights *qua* presence, while denying the right to be present.

There are also problems justifying limiting such rights to those already resident. If one accepts the human rights grounding of claims, why limit the scope of claimants to those who have managed to evade border controls, and not acknowledge similar duties to those suffering similar or worse conditions but who fail to reach the state's territory?<sup>6</sup>

The crux of the problem lies in Carens's acceptance of a highly problematic feature of international human rights provisions: the failure to recognize a basic right to enter and settle in a country in which one's access to basic human rights would be assured.<sup>7</sup> Without this mobility right, access to the various rights that are triggered by residence in a host country becomes entirely contingent on whether an individual has the resources and motivation to infringe migration rules and become an illegal resident. Once a person has managed this, then international and national legal provisions do indeed ensure that a series of rights kicks in. However, as I hope to have shown, in the absence of any right to be present, one is confronted with the two paradoxes mentioned above: namely, that rights can only be attributed retroactively (contingent on actual unauthorized presence); and that continued access to such rights can only be possible in the context of a pluralist or decentralized legal system.

In light of these points, I would suggest that a consistent liberal position would advocate filling this rights loophole by accepting a right to mobility, at least under certain conditions.<sup>8</sup> Or, if it is recognized that such a position is politically unfeasible, it should accept that states' prerogative to restrict migration creates a series of anomalies that appears irresolvable within a human rights framework. Under these conditions, the only viable option for promoting the welfare of unauthorized migrants seems to be to encourage states to pursue a policy of benign neglect. States should turn a blind eye to the problem, quietly tolerating the more inclusive practices of decentralized courts and of the social systems engaged in incorporating unauthorized migrants.

NOTES

- <sup>1</sup> This section draws on Michael Bommers, “Illegale Migration in der modernen Gesellschaft—Resultat und Problem der Migrationspolitik europäischer Nationalstaaten” (Osnabrück, unpublished).
- <sup>2</sup> Consider, for example, how public health services and schools tend to resist government attempts to deny access to services by rejected asylum seekers or irregular migrants.
- <sup>3</sup> For example, the right of children to education and health care (U.N. Convention on the Rights of the Child), or the right of employees to nondiscrimination, regardless of their legal status (EU Anti-Discrimination Directive).
- <sup>4</sup> This type of reasoning has been applied to cases where an individual was working under an illegal contract but was able to claim damages for discrimination at work. For example, in *Hewison v. Meridian Shipping PTE*, the claimant was awarded damages for previous discrimination; but the court ruled that no damages should be paid for possible future losses, since this would imply accepting the continuation of an invalid employment contract. See Simon Forshaw and Marcus Pilgerstorfer, “Illegally Formed Contracts of Employment and Equal Treatment at Work,” *Industrial Law Journal* 34, no. 2 (2005), pp. 158–77.
- <sup>5</sup> John Griffiths, “What Is Legal Pluralism?” *Journal of Legal Pluralism and Unofficial Law* 4 (1986), pp. 1–55.
- <sup>6</sup> Of course, there have been various attempts to justify such limitation on instrumental grounds. For an overview and critique, see Christina Boswell, *The Ethics of Refugee Policy* (Aldershot, UK: Ashgate, 2007).
- <sup>7</sup> Refugees do of course have what amounts to a right to enter (or at least not be expelled); see Article 33 of the Geneva Convention on the Status of Refugees.
- <sup>8</sup> Namely, where a person’s rights or needs will be better secured through moving—though consistently with the host country retaining the conditions necessary for preserving liberal institutions, and the equal distribution of rights. For a discussion, see Cécile Fabre, *Justice in a Changing World* (Cambridge: Polity, 2007).