Migrants and Work-related Rights

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Professor Carens is concerned with finding a way to move beyond the intensely politicized and apparently irreconcilable positions that characterize much of the discussion on the rights of “irregular migrants.” These migrants tend to be cast either as victims or as villains: victims of unjust immigration laws and exploitative employers, or abusers who “play” the system to their advantage. In order to overcome this dichotomous approach, Carens begins by accepting the premise that states have a right to control entry into their territories, and goes on to explore whether, this being the case, it is morally acceptable to deny certain types of rights to this particular group of residents.

While this approach is useful for his discussion of human rights, it is somewhat more problematic when Carens turns his attention to work-related rights. For it becomes clear that he is in fact not only allowing that the state has a right to control entry (and, by extension, removal) of noncitizens, but also that the state has the right to set differential terms of access to labor markets for citizens and noncitizens after they have entered its territory. But the right of states to distinguish between citizens and noncitizens in this way is not a necessary concomitant of entry controls. It is conceivable, for example, that all those who have been given permission to enter be given a time-limited entry and residence permit giving free access to the labor market. Currently, conditions of entry for certain groups of visa holders can be linked to personal characteristics: for example, au pair visa holders in the United Kingdom must be between certain ages, unmarried with no dependents, and can only be of certain listed nationalities. This, Carens has allowed. However, states may also require that, having entered the country, an au pair, to continue the example, cannot earn more than a stipulated amount per week, must live as “part of a family,” and cannot work other than in a private household. The legality of this visa holder’s residence depends on compliance with certain conditions. This is a step beyond controlling entry, and it has important implications for Carens’s argument.
First, it complicates the apparently easy distinction between “regular” and “irregular” migrants. While “irregular” migrants tend to be envisioned as illegal entrants or overstayers—that is, people who are residing illegally—in law those who breach conditions of entry are also irregular and subject to removal. These conditions of entry are particularly complex and onerous when it comes to employment. In the United Kingdom, an au pair whose visa is valid but who is paid more than the suggested rate and student visa holders who work more than 20 hours a week during term time (whether 20.5 or 40 hours) are technically “irregular.” In practice, significant numbers of people fall within these legal gray areas. The decision as to who is subject to enforcement action in this group (who “counts” as irregular) is a political one. If irregularity has simply to do with means of entry and with overstaying, the definitions are clearer (though still open to problems); but if it also has to do with breaking conditions of entry, there is a real difficulty in identifying who really constitutes this group of “irregular migrants.”

This has implications for Carens’s argument, for his central question is: In what ways should the legal rights of irregular migrants resemble or differ from the legal rights of migrants who have settled with the permission of the state? This begs the crucial and related question that he touches on but does not explore: In what ways should the legal rights of irregular migrants resemble or differ from the legal rights of visa holders—that is, migrants legally constructed as temporarily residing in a state? (The migrants themselves, of course, may have intentions to permanently reside, but that is not of relevance here.) At first sight this seems a more obvious point of comparison. Visa holders, like irregular migrants, are constructed as temporary. For those who are legally resident in a territory there is generally a crude hierarchy of labor-related rights, with those who are visa holders having lesser rights than permanent residents and citizens. The work-related rights of permanent residents in most states do not in theory differ significantly from those of citizens, though there are exceptions. In Bahrain, for example, under 2006 legislation only citizens were covered by the state’s minimum wage in the private sector. Within states with a liberal democratic tradition it would be regarded as morally problematic to differentiate in this way between citizens and permanent residents. To have a permanent group who are not socially and politically integrated and who are systematically discriminated against is simply not compatible with a society that values equality. However, there are significant differences between the work-related rights of
visa holders, on the one hand, and those of permanent residents and citizens, on the other. Visa holders are often not constructed as juridical equals, which, when it comes to contracts and the selling of labor power, is of prime importance.5

The first question, then, is whether the rights of irregular workers should be different from those of visa holders, and then how they should resemble or differ from those of permanent residents and citizens. The crucial restriction on visa holders is the right to leave one’s employer and to work for another employer (in any sector) without interference or sanction by the state. The right to leave an employer and to work for whom one wishes is regarded as a defining element of what constitutes “free” labor for citizens,6 and is, as Carens puts it in his paper, one of the “normal rules about conditions of work.” However, it is considered perfectly acceptable for states to require of legally resident work visa holders that they cannot leave a named employer without sanction by the state. They may thereby forfeit the right to remain in the state, possibly incur pecuniary sanctions, and, should they work for another employer, be subject to imprisonment, since working illegally, in contrast with overstaying, is a criminal offense.7

The freedom to work for whom one wants has been the subject of long historical struggle, and freedom of labor is felt to be a defining feature of modern democracies.8 It therefore cannot be assumed that it is morally acceptable to deny legally resident noncitizens the freedom to leave an employer. Carens has argued elsewhere that “temporary migrants” should enjoy broadly similar rights to permanent residents, including the right to leave an employer and to change sectors.9 But this must be an explicit part of the argument with reference to irregular migrants in order to preempt the question of whether it is morally right that irregular migrants should enjoy “better” rights than visa holders, and the extent to which visa holders should be able to “sign away” rights in return for security, particularly those as basic to our understanding of contracts as the right to change employers.

This issue of portability as a key right for all migrant workers is necessary for Carens’s “firewall” argument. Restrictions on employment significantly increase the power of employers over migrant labor when combined with migrants’ dependence on employers for visa renewal, and this combination has consequences for legally resident migrant workers’ access to rights. For while it is true that irregular migrants may be deported with very limited process, many of those who are legally residing on permits must also leave should their employer not require
their services anymore, or even should their earnings increase by too much.\textsuperscript{10} This has been demonstrated to prove a problem in access to rights, as migrants on visas are often concerned that their employers won’t support their applications for visa renewal should they challenge their employers in any way, join a trade union, or even appear unenthusiastic.\textsuperscript{11} Thus, it is in practice not only irregular migrants who are unable to challenge violations of labor laws and standards but also those working legally.

In this respect a firewall between immigration controls and employment protection is not sufficient, but must be combined with the right of migrants to change employers. For example, should an employer be shut down as a result of the complaint of a legal migrant, thereby resulting in the migrant’s having to return to his or her country of origin, this may be as much a disincentive to complain as fear of deportation is for an irregular migrant. Without portability of visas even the employment rights of legally resident migrants risk being purely formal. Moreover, without this addition to the firewall, one risks undermining one of the main rationales for immigration controls: If immigration controls are important as a mechanism for protecting citizens’ access to labor markets, then any additional means of control that they offer employers over their labor force risks making migrants (whatever their legal status) more desirable than citizens to employers. Migrants must be as mobile as citizens if employers are not to derive additional and unfair advantage from their labor.\textsuperscript{12}

This suggests that it is important to make explicit those labor-related rights that should be recognized for all migrants \textit{irrespective of immigration status} (that is, for irregular migrants, for visa holders, and for settled migrants). It implies that the moral point of comparison should be the ways in which work-related rights of irregular or visa-holding migrants resemble or differ from those of settled migrants or citizens. If the distinction is thus characterized, “employer sanctions” seem less helpful, as in fact they do not help visa holders to access labor rights for the reasons outlined above, and risk drawing both temporary and irregular migrants into “colluding” with an employer. Rather, one must turn to the implementation of standard employment protections, access to collective bargaining, and the right to change employers as means for ensuring that irregular and temporary migrants can access labor-related rights.
NOTES
1 I have used the term “visa holder” as a general designation for all noncitizens, including tourists, who are legally resident but have currently some limitation on their stay. I include within this definition noncitizens whose permits include the possibility of applying for permanent residence but who do not yet have it, as well as those who are viewed as purely temporary residents and/or workers.
4 Thanks to Middle Eastern Studies M.Phil. student Mumtaz Lalani of St. Antony’s College, Oxford, for drawing this to my attention.