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Justice for irregular migrants, refugees and temporary workers:

Some issues for Carens

Draft only

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1. Introduction

The *Ethics of Immigration* is a wonderfully comprehensive and insightful journey through all the major contemporary ethical issues concerning immigration. Through this outstandingly well-crafted work, Carens builds a compelling case for many important positions on how we should treat migrants. It deserves to be widely read not only by academics, but also by those who make policy concerning migration.

Carens uses an interesting method for deriving robust conclusions both for the world we live in today and one that might approximate more justice in the future. In the first part of the book, Carens holds steady the conventional assumptions that states have the right to determine their own policies about issues related to immigration. This allows him to explore the normative conclusions that would follow given entrenched assumptions about our current world. In the last part of the book he allows those assumptions to be examined and thereby makes some powerful arguments about the deep injustices that exist with a world divided into sovereign states.

Carens begins by considering how those who have already arrived should be treated by the state in which they reside. By examining the case for why citizenship should be granted at birth to the children of citizens, he shows that the same arguments apply to the children of immigrants who have settled in a state. The investigation continues with issues such as what accommodations host country citizens should make to migrants' different ways of life, how legal permanent residents' rights should resemble or differ from the rights of citizens, how temporary workers and irregular migrants should be treated, and the permissible criteria that may be used in admission decisions.

Carens grounds many of his positions in an account of the moral significance of social membership. Here it is important to appreciate that his arguments do not rely

on cosmopolitan premises. Rather and to the contrary, his arguments rely on there being an important distinction between those who are members and those who are not. Long-term membership in a society creates deep forms of connection that foster belonging to that society. This creates moral entitlements to legal membership rights. So as a matter of democratic morality, the legal status of irregular migrants (also described as illegal or undocumented migrants) ought to change. Carens also makes the case for irregular migrants entitlement to various social and administrative rights such as the right to obtain a driver's license. Carens makes a good case that denying them such rights serves little useful purpose. He also explores the rights children of irregular migrants should have and I explore this case in more detail below.

Of course, even if people are legally entitled to certain rights, that does not mean they will actually be able to exercise those rights. Since irregular migrants are highly concerned about authorities noticing them, they often do not pursue legal protections and remedies to which they are entitled. Carens believes that there are ways to solve this problem, for instance by building a firewall between protecting general human rights and the enforcement of immigration law. In response to skepticism, Carens observes that we already have functional equivalents of firewalls operating in several domains. For instance, in the USA, police may not permissibly use evidence in a criminal case when this has been collected in ways that violate constitutional rights. This significantly restricts how police may gather evidence. A similar rule might apply to immigration contexts. Immigration authorities might have to show how they came to know of an irregular migrant's status. If the information was gained in the process of protecting irregular migrants' human rights, it would be deemed inadmissible and migrants would be entitled to regularize their status.

In Part II of the book, Carens sets out an intriguing case for open borders, showing how it follows from commitments to freedom and equality, especially equality of opportunity. Freedom of movement, including the freedom to cross borders, should be regarded as a human right. He makes a good case for the existence of degrees of freedom and outlines various institutional ways in which freedom of movement can be well recognized, at least to a much greater extent than it currently is in our world, and which would also improve states' accountability to those excluded. Each of Carens' arguments is carefully constructed, beginning with a case for the position followed by a thorough canvassing of central objections and rebuttals to

these. Nevertheless, I believe there are some tensions in his arguments that could do with more analysis. I aim to present some of these here.

2. Some important tensions with arguments for the right to education for children of irregular migrants and those concerning admission.

We begin to see these tensions by examining the case for the rights children of irregular migrants should have to a free public education. Carens outlines some deep moral reasons why they ought to be granted such rights. Children are a special class of vulnerable persons who are not responsible for their unauthorized entry. He makes a case that the interest in education is “so fundamental” (p. 136).

“In the modern world, it is simply not possible for most children to flourish (or even to function) without receiving a basic education. A basic education is therefore a fundamental need, and it is a need that must be met by the society in which the child lives. ... If she is living inside a state’s territory, that state must provide her with an education that will enable her to function later in life, regardless of whether she is legally entitled to live there” (p. 136).

The state prepares the child to live in the society it governs. “To refuse to educate a child in the modern world is to condemn that child to a life of very limited possibilities. Even if it is the parents who are responsible for the child’s presence, the state has a responsibility to see that the actions of parents cause no extreme harm (physical or otherwise) to children within its jurisdiction” (p. 137). In response to concerns about cost, Carens points out that a group of uneducated and marginalized children who become adults in that society create substantial costs for that society as well, though his concern is with justice rather than such prudential considerations.

I find Carens’ general arguments on this issue quite compelling, but then wonder why they do not have force when we turn our attention to what seems to be parallel cases for the issue of admissions. A bit of background is necessary before we can locate the tension. In a general discussion considering which criteria are permissible for selecting or excluding would-be immigrants Carens turns his attention to the issue of brain drain and entertains the question of whether the interests of, or

effects on, those left behind in the country of origin should be taken into account in our deliberations about whether or not to admit a particular high skill migrant. He raises the issue of the relevance of exactly what those consequences are, whether they are on balance negative or positive, and that there is a debate about those empirical issues. (There is indeed an important debate here about what all the relevant issues are. While migrants may no longer be available to provide services, taxes, or make other important direct contributions to their countries of origin, they often send remittances or assist home countries from their host countries through developing human capital, new technologies, or trading opportunities.)¹ In the face of this, Carens wisely adopts a strategy of tracing the “moral logic” of the different claims, considering the situation both if the consequences are positive and if they turn out to be negative. If the consequences are positive, he believes the brain drain objection loses force. But what if those left behind are demonstrably harmed by high rates of migration by their most talented and skilled? He says that within the conventional assumptions perspective (that is, where we accept that states have full discretion over whom they may admit on to their territory) “I see no basis for asserting an obligation on rich states to adopt immigration policies that do not harm poor ones” (p. 185). He argues that though this approach may be ungenerous it is not unjust.

I find this position puzzling, especially in light of his compelling previous case of how to treat the children of irregular migrants residing in our communities. Let me explain. In many low-income countries that experience high net migration of skilled workers there is considerable evidence available that this has profoundly negative effects for those left behind.² The health and educational sectors have been particularly scrutinized and in many countries (especially in sub-Saharan Africa) there is significant evidence that these outflows -- sometimes facilitated and encouraged by recruitment agencies within liberal democracies -- contribute to important adverse health and educational opportunities and outcomes. Since Carens’ previous case focused on the fundamental interest we have in basic education, let us narrow the case to just this good for which he makes the case so well. We have, as he argues, a fundamental interest in receiving a basic education and this interest is so important that it is accurately describable as a human right that states have an obligation to see fulfilled.

In admitting those from extremely vulnerable and needy communities, states at the very least cross over a threshold of moral culpability for exacerbating dire

neediness, if the charge of failing to respect basic human rights is not appropriate. I would argue that the stronger charge is accurate and, more to the point, using Carens' own logic, the stronger claim can indeed be made to stick. In many cases, admitting teachers from communities that experience dire shortages would be condemning those who remain to having their fundamental interest in education thwarted and, on Carens' account, would lead to the failure to respect a basic human right because of the fundamental nature of the interest. There are stringent international norms that prohibit practices that would fail to respect basic human rights. So the ammunition that Carens seeks seems to me readily available from within his own arguments. We may not permissibly admit those educators whose presence is necessary for providing basic levels of education back in countries of origin.

Recall from the previous argument about the rights of irregular migrants' children that even if it is the parents who are responsible for the child's presence within the state "the state has a responsibility to see that the actions of parents cause no extreme harm (physical or otherwise) to children within its jurisdiction" (p. 137). But parallel reasoning applies here. Even if the state considering a teacher's admission is not responsible for the chronic shortage, it has a similar duty to ensure that the state's actions "cause no extreme harm". The admission decision is entirely within their power and jurisdiction, and to allow the teacher to migrate would be just as morally culpable as failing to educate the child of an irregular migrant within the state's community. If the argument applies within the state it relevantly applies also to admission decisions that are equally under our control.

So it seems to me there is an inconsistency about what we are obligated to do in the face of respecting very basic human rights. If it is so important that we should provide this good to people in our communities surely it is inconsistent not to recognize the status of this good when making other decisions within our control. It is surely at the very least impermissible to allow active recruitment of educators away from those communities suffering dire shortages when granting recruits admission facilitates exactly such harms. There seems to me at least a tension in Carens' views here that should be identified and addressed.

I believe Carens should be more torn about these kinds of conflicts than he seems to be because it brings into focus two important issues that occupy a prominent place in his work: the importance of respecting freedom and responding appropriately to inequality of opportunity, especially that presented by dire neediness. I believe

what he should have said in response to this tension is that these cases raise a fundamental conflict about how to weigh the importance of individual freedom and how to recognize claims in virtue of extreme neediness. I think the most consistent answer he might give, considering his entire body of work, is probably that in such cases the individual's freedom to migrate should take priority over the recognizably important harm of exacerbating extreme neediness. Perhaps he might add that this constitutes a tragic choice the scope of which we should try to limit by redoubling efforts to work on the unjust background situation that gives rise to it. At any rate, I hope he will address such tensions in future work.

3. Refugees

The appeal to the importance of responding to extreme neediness plays an important role in other parts of Carens' book, including in the chapter on refugees. The chapter starts with a look back at the extreme neediness of Jewish refugees fleeing Nazi Germany. The right response here was to admit those fleeing Nazi persecution and this view serves as one shared considered judgment on our moral compass. Note for instance this passage in which dire neediness is supposed to carry special weight:

“A second source of the duty to admit refugees is humanitarian concern. We have a duty to admit refugees simply because they have an urgent need for a safe place to live and we are in a position to provide it. .. [different sources] converge here on a sense of obligation to help people in dire need. When I advanced my claims at the outset about our obligations to Jewish refugees, I was appealing intuitively to this overlapping consensus, to a shared sense, with many different foundations, that we ought to have opened our doors to these refugees” (p. 195).

Carens suggests using this question as a test: “Whatever principle or approaches we propose, we should always ask ourselves at some point, ‘What would this have meant if we had applied it to Jews fleeing Hitler?’” (p. 194). His view is that “no answer will be acceptable if, when applied to the past, it would lead to the conclusion that it was justifiable to deny safe haven to Jews trying to escape the Nazis” (p. 194). This approach gives us a good minimum standard that is widely shared, again a “fixed

point on our moral compass” (p. 194). Of course, using such a test is going to generate a position that requires admitting many more immigrants than we currently do. Carens recognizes that his views in this chapter are radically at odds with current world practice.

But Carens does not seem to appreciate that they have implications for his own view. Carens’ account of who is eligible for refugee status aligns largely with conventional views on the topic: “To deserve refugee status a person must be facing a serious threat to her fundamental interests, not simply the risks faced in ordinary life in a society that normally protects people’s basic human rights” (p. 200). We could use Carens’ own argument to show that those denied basic education because of what appears to be his nonchalant attitude to brain drain would thereby be facing a serious threat to fundamental interests that would warrant admission as a refugee. When these two positions are juxtaposed, the argument for permissibly ignoring brain drain concerns looks even weaker.

Indeed, when we cause people to become refugees we have stronger obligations to assist them, especially by admitting them to our territory (p. 195). So, it would seem that certain victims of brain drain would, if we accept Carens’ position, have strong claims to admission in virtue of their serious threats to what Carens himself identifies as fundamental interests. Carens’ position on admission in the case of worrisome high skill migration would create refugees that the state would be obligated to admit, according to his own views about refugees. A further tension in Carens’ views needs attention.

4. Temporary workers

What rights should temporary workers have? In a familiar move repeated throughout the book, Carens explores this question by investigating whether the rights of temporary workers should be similar to or different from the rights of citizens and residents. In considering this question we might distinguish among different kinds of employment-related membership rights. There are rights associated with working conditions, such as health and safety regulations or laws regarding paid holidays, overtime, or minimum wages. Other kinds of rights might involve rights to participate in compulsory pension plans or unemployment compensation. We will focus here on what Carens includes in the first category of rights, namely those

governing working conditions more directly. For this category, he argues that it is not morally acceptable for a democratic state to have one set of conditions governing temporary workers with another set governing permanent workers. If, for instance, conditions are deemed unsafe for permanent workers “it makes no sense to say” (p. 115) that such conditions are acceptable for temporary workers.

Some might object that temporary workers are often willing to work under worse conditions. Carens believes this is besides the point. Such rules protect citizens and residents as well. States regulate working conditions for several important reasons such as protecting workers from exploitation, imprudence, lack of foresight, or dangers about which they may be unaware. Furthermore, if different employers have a reason to prefer foreigners who will work under worse conditions, this would create competition between domestic and foreign workers. In addition, Carens maintains that it would undermine democratic values as people come to see that some are treated less than equally.

While I generally agree with Carens’ view that temporary workers should enjoy similar conditions of work to those of citizens, under certain circumstances such as those where there is already near full employment within the state, the view is less plausible. In particular and as one example, the situation can be quite different for small island states where features of demographics, population size, population distribution, employment levels, and labour shortages may mean that something that may look unjust in a highly crowded North American labour market does not look that way in other circumstances.

Consider cases such as the following. In New Zealand, due to the temporary nature of much agricultural work (such as picking ripe fruit) and its location (far from urban centres), few citizens are willing to take up such employment relative to the opportunities, as citizens often have the option of full-time work in desirable urban locations. However, many from neighbouring islands (such as Tonga and Vanuatu) are happy to take on temporary work under conditions that notably may involve long hours. So let us assume that contracts with these migrants include no paid holidays and overtime is standardly built into the contract so they are expected to work (say) 50 rather than 40 hours per week. (Also assume that the wage is far above minimum wage, so that is not the relevant factor. In fact, the wage may be \$25 per hour or even higher, which is quite far beyond minimum wage levels in New Zealand). Would such contracts be impermissible?

It is not clear to me that such contracts would violate our proper sense of fairness or democratic values. Farmers need the job done quickly or the crop will rot. From the Vanuatan workers' perspective they are in New Zealand to do a particular job, get it done quickly, and get back to their lives in their (rather paradisaical) home islands. And New Zealand workers are typically not interested in seasonal agricultural work, which often requires relocating from the popular urban centres. It is not obvious that these arrangements are unjust or unfair to anyone. From the migrant workers' perspective, the 50 hour working week for three month contracts might still involve less work than is typical for them in their countries of origin, but at much higher pay. No New Zealanders are competing for such jobs. Nor does it create some kind of underclass of people who are viewed as inferior, since agricultural work is generally well regarded in New Zealand which still has an important agricultural base to its economy.

Carens has confidence that market forces will sort out many issues such as this one: if the wages were high enough the jobs would attract citizens. While this may be true in theory, in practice that wage rate might have to be very high indeed to attract enough local workers, since the issues are not the price for labour *per se*, but rather the seasonal or temporary nature of the work and its location. The wages would have to be very markedly different from what they are now to overcome these two significant obstacles. This would probably mean local farmers could not afford to pay for fruit picking and stay in business, as they would need to bear much of the cost of the radical hike, especially in our globalized food markets where lower cost product can almost always be easily imported.

Perhaps Carens can accommodate these cases in at least two ways. First, he could say that his view is about what is normally the case, and that this kind of example is not a typical one. Second, he might say that some different conditions for some workers in certain sectors and circumstances may be permissible without falling victim to his concerns. So long as all seasonal workers in that particular industry are offered and receive similar contracts (with required overtime and no paid vacations), there is no injustice. The fact that citizens are not drawn to take up these offers is therefore no problem. But this latter response might be less than satisfactory since the arguments for why we need the uniform conditions in the first place may start to break down. Recall that he says that states regulate working conditions for several important reasons such as protecting workers from exploitation, imprudence, lack of

foresight, or dangers about which they may be unaware. Furthermore, if different employers have a reason to prefer foreigners who will work under worse conditions, this would create competition between domestic and foreign workers. In addition, Carens maintains that it would undermine democratic values as people come to see that some are treated less than equally. All these arguments would seem to be under threat once some sectors can ignore rights and protections that are guaranteed in others. For instance, if it is so important for workers to be able to enjoy substantial leisure and family time and to be protected from being coerced into working long hours that a maximum hour work week and paid holidays are specified by law, then once some sectors are not similarly protected, according to Carens' own arguments, over time some may come to be seen as working under conditions that render them less than equal to others. And so the very arguments Carens used in the first place as to why uniform conditions are required for all citizens would be undercut.

At any rate, I think there can be cases in which it is permissible to offer temporary workers different terms of employment to those that prevail for citizens, without these contracts undermining democratic values or being in other ways objectionable.

Endnotes

¹ For more on these huge issues see Gillian Brock and Michael Blake *Debating Brain Drain: May Governments Restrict Emigration?* (New York: Oxford University Press, 2015), especially Chapters 3 and 10.

² For some of this evidence see Brock and Blake *Debating Brain Drain*, Chapters 3 and 10.