

# The Rights of Irregular Migrants

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In the contemporary politics of immigration, few issues are more contentious than the question of how democratic states should respond to the presence of people who have settled without official authorization. Too often discussions of this topic go nowhere because the participants adopt radically different starting points and make no effort to understand the perspectives of those with whom they are supposedly engaging. At one extreme are those who frame the issue entirely as a matter of enforcing the law against people who refuse to respect it. From this perspective, states are morally entitled to control the entry of foreigners. The “illegal immigrants” have no standing in the community and no moral basis for making any claims that the state ought to respect. The only important goal of public policy in this area should be to ensure that the state’s immigration laws are obeyed. At the other extreme are those who frame the issue entirely in terms of the interests and claims of the migrants. The basic premise here is that the politico-economic system exploits and marginalizes hardworking contributors to the community who happen to lack official documentation. (Some would argue further that the migrants are denied the documentation precisely to make it easier to marginalize and exploit them.) From this perspective, the only morally legitimate policy goal is to find ways to reduce the vulnerability of the “undocumented” and to challenge their official exclusion from the political community. Given such radically opposed starting points, it is perhaps not surprising that the two sides often wind up talking past one another.

In this article I want to try a different approach. My goal is to be reflective rather than polemical, and to use an analytical approach to identify some of the key ethical issues in this area. I do not mean to suggest that I have no substantive point of view. I will argue for a position that recognizes that even people who

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have settled without official authorization deserve many legal rights. I will try, however, to give a fair hearing to arguments and considerations opposed to the position I defend, and I hope that the way in which I develop my analysis will be seen as a useful way of mapping out the moral issues even by those who disagree with my conclusions.

As one component of this approach, I am going to avoid the terms “illegal immigrants” and “undocumented workers,” because each of these terms presupposes too much about the normative conclusions we should reach. If we want to engage in a genuine inquiry, it is important not to prejudice the analysis by adopting terminology that implicitly endorses a particular line of argument. Of course, in this case, like many, there are no neutral terms. Nevertheless, some terms are more laden than others. “Illegal” is one heavily laden term, and “undocumented” is another. To minimize this problem I will use the terms “irregular” and “unauthorized” to describe the migrants and the migration under discussion, though I should acknowledge that there are objections to these terms as well.<sup>1</sup>

In this article I will focus on one central question: 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? Although I am asking questions about legal rights, this is a moral and philosophical inquiry, not a legal one.<sup>2</sup> I will refer occasionally to legal practices, but, at the most fundamental level, I am concerned with what legal rights irregular migrants ought to have, as a matter of democratic morality, not with what legal rights they do have as a matter of fact or ought to have as a matter of constitutional interpretation in a particular state or under international law. Keep in mind also that not all legal rights are grounded in moral rights, although some are. States create and modify legal rights for a variety of reasons, and part of the challenge this essay tries to address is to say whether the rationale behind a particular legal right makes it morally permissible for states to distinguish between irregular migrants and others in allocating that legal right.

In exploring this question, I will simply assume that the state is normally entitled to control entry and to deport migrants who are present without authorization. Some people (including me) have challenged this assumption.<sup>3</sup> So why adopt such a restrictive assumption in this article? I do so because I think it makes the overall argument more effective. As a matter of democratic dialogue, when people disagree about a range of issues, it can often be helpful to accept constraints on the topic under debate as a way of moving the argument forward.

Most people simply assume that the state has a moral right to control entry and to apprehend and deport irregular migrants. Call this the conventional view. Adopting the conventional view as an assumption makes it easier to get people to focus on less widely discussed questions about the legal rights of migrants. It also makes it harder for critics of the view that I defend here—that irregular migrants are morally entitled to a wide array of legal rights—to dismiss this position as a by-product of liberal views on amnesty and open borders. Some critics may take this approach anyway, but the structure of my argument does not depend in any way on views about these wider issues. As for those who want to challenge the conventional assumption, my analysis should still be helpful, at least in terms of the positive moral claims of irregular migrants. If irregular migrants are morally entitled to certain legal rights even under the conventional view of the state's right to control entry and deport irregular migrants, their entitlements will be as strong or stronger under a less restrictive view.

One final preliminary remark. Most of the readers of this journal are American, and the United States is probably the country where the issue of irregular migration is most pressing and politically salient. Nevertheless, other democratic states face comparable issues, and I intend the arguments developed here to apply not only to the United States but also to Canada and to all democratic states in Europe.

## BASIC HUMAN RIGHTS

At first blush it may appear puzzling to suggest that irregular migrants should have any legal rights. Since they are violating the state's law by settling and working without authorization, why should the state be obliged to grant them any legal rights at all? A moment's reflection, however, makes us aware that irregular migrants are entitled to at least some legal rights.<sup>4</sup> Unlike medieval regimes, modern democratic states do not make criminals into outlaws—people entirely outside the pale of the law's protection.<sup>5</sup> Moreover, as we will see in a moment, democratic states themselves do not normally regard irregular migrants as criminals.

There is a wide range of legal rights that people ought to possess (and normally do possess) simply by virtue of being within the jurisdiction of the state, whether they have permission to be there or not and whether they are obeying the laws or not. We can lump these rights under the heading of *basic human rights*. These rights are possessed not only by citizens and legal residents but also

by tourists and temporary visitors. Irregular migrants are entitled to them as well. The right to security of one's person and property is a good example. After all, the police are supposed to protect even irregular migrants from being robbed or killed. People do not forfeit their right to be secure in their persons and their possessions simply by virtue of being present without authorization. The right to a fair trial is another example. If irregular migrants are accused of a crime, they have the same rights as any other criminal defendant.

This last fact has implications for the way we view irregular migrants. In popular political rhetoric, irregular migrants are routinely described as lawbreakers and criminals because of their violation of immigration laws. For the most part, however, liberal democratic states treat violations of immigration laws quite differently from violations of criminal laws. One can see this by comparing the procedural protections afforded irregular migrants when they are accused of some criminal offense and the procedural protections provided them with respect to immigration matters. Most liberal democratic states treat their own immigration rules as administrative matters, and thus usually provide much weaker procedural safeguards for those accused of violating immigration rules than they do for defendants in criminal trials. This is not because the status of the accused as irregular migrants entitles them to fewer protections. As just noted, when irregular migrants are defendants in ordinary criminal trials, they receive the same panoply of protections as criminal defendants who are citizens or legal residents (access to legal counsel, at state expense if necessary; rights of appeal; rules of evidence; and so on). Different liberal democratic states have somewhat different procedural practices, but each state has one set of practices for all defendants, regardless of immigration status. To do otherwise would violate our most basic notions of the rule of law, due process, and a fair trial. In the rare cases when immigration offenses are treated as crimes with criminal penalties attached, those accused normally acquire the usual set of rights provided criminal defendants. Again, that is simply required by our understanding of the rule of law. Providing fewer protections to those accused of immigration violations is justified on the grounds that the alleged violations are not criminal offenses, and detention and deportation are not criminal penalties. While this distinction can be abused (and clearly was in the United States in the wake of 9/11), it makes sense in principle. However, it entails the corresponding notion that the violators of immigration laws are not criminals; and this fact provides one reason (among many) for rejecting attempts to label irregular migrants as criminal.

In addition to legal rights, such as those mentioned above, there are other basic human rights that states are morally obliged to provide to everyone within their jurisdiction, even if they are present only as temporary visitors. Irregular migrants are entitled to these rights as well. Emergency medical care is one familiar example. If an irregular migrant is struck by a car or has a heart attack, that person has a right to receive lifesaving medical treatment. Similarly, irregular migrants are entitled to such basic freedoms as freedom of religion and freedom of speech. So far as I know, even the harshest critics of unauthorized immigration do not openly challenge this principle.

The fact that irregular migrants are entitled to basic human rights shows that liberal democratic norms and standards limit the means that may be used to achieve immigration control, even though these limitations make it more difficult to pursue the goal of immigration control. From the perspective of control, every legal right granted to irregular migrants, including protection of their basic human rights, increases the incentives for them to come and to stay. Nevertheless, that incentive effect is not a sufficient justification to deny them basic human rights.

### *The Firewall Argument*

The fact that people are legally entitled to certain rights does not mean that they actually are able to make use of those rights. It is a familiar point that irregular migrants are so worried about coming to the attention of the authorities that they are often reluctant to pursue legal protections and remedies to which they are entitled, even when their most basic human rights are at stake. This creates a serious normative problem for democratic states. It makes no moral sense to provide people with purely formal legal rights under conditions that make it impossible for them to exercise those rights effectively.

What is to be done? There is at least a partial solution to this problem. States can and should build a firewall between immigration law enforcement on the one hand and the protection of basic human rights on the other. We ought to establish as a firm legal principle that no information gathered by those responsible for protecting and realizing basic human rights can be used for immigration enforcement purposes. We ought to guarantee that people will be able to pursue their basic rights without exposing themselves to apprehension and deportation. For example, if irregular migrants are victims of a crime or witnesses to one, they should be able to go to the police, report the crime, and serve as

witnesses without fear that this will increase the chances of their being apprehended and deported. If they need emergency health care, they should be able to seek help without worrying that the hospital will disclose their identity to those responsible for enforcing immigration laws.

In North America and Europe some cities with large numbers of irregular migrants have adopted policies of this sort, sometimes formally and more often informally. The local authorities have taken this approach in part out of a concern for the basic human interests of the migrants themselves and in part out of a concern for the wider public benefits of securing the cooperation of irregular migrants for certain purposes—as, for example, when the police want irregular migrants who have information about a crime to come forward and testify, or when public health officials want to reduce the spread of contagious diseases by getting irregular migrants to participate in vaccination programs. Without this sort of firewall between immigration enforcement and legal rights, irregular migrants enjoy the protection of their basic rights in name only.

Some jurisdictions have moved in the opposite direction. Instead of building a firewall between immigration enforcement and other state activities, they seek to establish a policy of administrative linkage, requiring ordinary police officers or hospital officials to report any contacts with irregular migrants to immigration authorities. This has the effect of taking away with one hand what was granted with the other, reducing the legal protections of the basic human rights of irregular migrants to a nominal entitlement stripped of any substantive effect. This seems an especially pernicious approach when used in connection with basic human rights because the interests at stake are so fundamental. In the rest of this essay, I will consider whether the arguments for a firewall and against linkage are as strong when less fundamental interests are at stake.

## CHILDREN'S RIGHTS

Within the general category of “irregular migrants,” children constitute a group with special claims. For one thing, they are a particularly vulnerable subcategory of human beings, one standing in need of special protection, as is reflected, for example, in the existence of a special international covenant on the Rights of the Child. For another, they are not responsible for their unauthorized presence within the state, since it is their parents who have brought them in. This means that the state is even more morally constrained in dealing with irregular migrants

who are children than it is in dealing with irregular migrants who are adults. What is more, irregular migrant children are morally entitled to certain legal rights that are not granted to adults, the most important of which is the right to a free public education. The U.S. Supreme Court recognized this right in the famous case of *Plyler v. Doe* in 1982, and most other democratic states have established some comparable right. Indeed, the language of rights understates the importance of education because, unlike most rights, education is not optional. In every democratic state, primary education (and often secondary education as well) is compulsory for all legally resident children. This legal requirement simply recognizes the vital importance that education plays in shaping the future of the children and of the society in which they live.

Of course, not everyone agrees that the right to a free public education should apply to children who are irregular migrants. Opponents pose several interrelated objections to this policy. One obvious objection is that, according to the immigration laws, these children are not supposed to be part of the future of the society in which they are currently living. If they and their parents are apprehended, they can be (and sometimes will be) deported. Providing such children with a free public education does more than anything else to enable irregular migrants to sink deep social roots into the society to which they have moved, and it makes any subsequent expulsion that much harder on the children. Moreover, granting irregular migrant children a right to a free public education creates strong incentives for irregular migrants to try to arrange for their children to join them. In the absence of such an option, the critics contend, it is plausible to suppose that more irregular migrants would leave their children at home, and also that more of the migrants themselves would eventually return to their countries of origin. In addition, granting irregular migrant children a right to a free public education imposes a substantial financial cost on the receiving society against its expressed will (as reflected in the immigration laws). The right to a free public education, one might argue, is not like the basic human rights discussed in the previous section because it is not a right enjoyed by all human beings who find themselves within the territorial jurisdiction of a state. Someone who comes as a tourist or temporary visitor is not automatically entitled to put her children in a public school during the period of her visit, so why should an irregular migrant have such a right? Finally, from the opponents' perspective, the innocence of the children is not decisive. While the children are not morally responsible for their presence, their parents are, and children often suffer from

the bad decisions of their parents. That is a regrettable but inevitable consequence of the institution of the family itself. The bottom line is that parents should not bring their children into a state where they are not legally entitled to reside. If they do, it is their fault, not the state's, if the children do not receive an education.

These arguments have some force, but I believe that ultimately they are outweighed by the moral reasons for granting irregular migrant children a free public education. The decisive factor here is the well-being of the children. In addition, I will argue that the effects on the receiving society also weigh in favor of establishing such a legal right, but I regard this as only a supplementary consideration.

The right to a free public education should be regarded as a basic human right, much like emergency medical care. It is something that the state is morally obliged to provide to all children residing within its jurisdiction, regardless of their immigration status. 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 one that must normally be met by the society in which the child lives. Where the child lives is a matter of fact. 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. It is true that this creates tensions. In educating the child in its own school system, the state is preparing the child to live in the society that it governs, not in the society that the child's parents came from. That is one reason why, as I have argued elsewhere, children should have a right to live in the society in which they are raised, regardless of the legal status of their parents.<sup>6</sup> It is not a reason for refusing to educate them at all. Nor is the possibility that they will be forced to leave with their parents if the family is apprehended and deported such a reason. For one thing, this may not happen; for another, even if they do leave, voluntarily or otherwise, the basic education they receive will stand them in much better stead than no education at all.

To refuse to educate a child in the modern world is to condemn that child to a life of very limited possibilities. Even if we grant for the sake of this argument that it is the parents' fault that the child has come, the state has a residual responsibility to see that the actions of parents cause no extreme harm (physical or otherwise) to children within its jurisdiction. The state cannot escape its responsibility by blaming the parents and saying the child would not have suffered this harm if they had not come in the first place, because it is the state, not the



parents, that controls access to the school system and has the option to admit or exclude the child.

The right to education does differ in certain ways from the basic human rights discussed in the first section, which apply even to tourists and short-term visitors, but that is precisely because the passage of time matters with respect to education in a way that is different from other rights. What matters is not whether a child is in school every day that school is in session, but whether she is receiving an education during the school year. Tourists do not put their children in school, but parents who are visiting abroad for six months or a year almost always do so (and are normally able to put them in the public schools). Irregular migrant children belong in school, not merely because they are physically present in the territory, but because they are living in the society. Their current residence, authorized or not, is the place where they must be educated.

Finally, it is true that providing a free public education to children who are irregular migrants imposes a cost upon the receiving state and that the availability of such an education increases the incentives for irregular migrants to bring their families with them or to encourage their families to join them later. On the other hand, both claims may be exaggerated. Estimates of the net costs of public schooling for the children of irregular migrants vary widely when one takes into account the taxes paid by the migrants.<sup>7</sup> Moreover, calculating only the costs of providing such an education ignores the predictable and much more substantial costs to society of creating a group of uneducated, marginalized children who will grow to adulthood in the society. Even the Supreme Court minority in *Plyler* recognized the folly of failing to provide such children with an education as a matter of social policy, despite their arguing that there was no duty to provide this education, as a matter of constitutional law. Last, it is an empirical question how much the availability of free public education affects incentives for irregular migrants to come and settle as family units.<sup>8</sup> The most important point, however, is the one made in the previous section: every human right that is recognized as a legal right to which irregular migrants are entitled can be seen as a cost to the receiving state and as an incentive to more irregular migration. If the costs and incentives are indeed substantial, this might provide reasons for pursuing more aggressively morally permissible policies for reducing unauthorized migration. Nonetheless, it is not a good reason for denying a fundamental human right.

As with basic human rights, the right to a free public education can be effective only if there is a firewall between the provision of educational services and

the enforcement of immigration laws. If school officials are required or even permitted to pass information about the irregular status of pupils (or their parents) to immigration officials, or if immigration officials can visit schools to examine records, to interrogate students, or to look for parents suspected of immigration violations, irregular migrant parents will be very reluctant to send their children to school and the children will not really have access to the right to which they are ostensibly entitled. Those who would say that irregular migrant children should have a legal right to education but that state authorities should be able to use information related to education in connection with immigration enforcement efforts are not really serious about their acknowledgment of the children's right to education. Such a position uses the formal legal right as a veneer to disguise and legitimate a policy of denying education to irregular migrant children, a policy that it would be embarrassing to defend openly.

## WORK-RELATED RIGHTS

What other legal rights should irregular migrants possess? Irregular migrants normally come in order to work, so let's start with rights related to employment. Citizens and migrants who are legally admitted to work, even those admitted for a limited period, normally enjoy a wide range of legal rights in relation to their participation in the economy. In the first instance, they are entitled to be paid for their work at whatever rate was agreed upon. In addition, every liberal democratic state sets minimum standards with respect to working conditions (for example, maximum hours, minimum wages, health and safety regulations, the right to join a union and engage in collective bargaining). Finally, every liberal democratic state has work-related social programs, such as compulsory pension plans and public insurance programs, that protect against employment-related injury and unemployment. The precise content of the work-related rights varies from one state to another, and some states distinguish among different types of work (for example, agricultural versus industrial) or different categories of workers (for example, youth) in setting their minimum standards or establishing eligibility for programs. In general, however, legal permanent residents enjoy the same work-related legal rights as citizens, and those with temporary work permits enjoy most of the same legal rights.<sup>9</sup> The question for this article is whether irregular migrants should enjoy these legal rights.

The answer to this question is much more contested than the answer to whether irregular migrants should enjoy basic human rights. As with the issue of granting children a right to a free public education, many people are skeptical of granting irregular migrants work-related rights. For some, such a policy is wrong because it increases the incentives for irregular migrants to come in the first place, and it does so much more directly than protecting their basic human rights, since it increases the benefits of working without authorization.<sup>10</sup> More important, granting irregular migrants work-related legal rights seems to directly undercut the state's claim to control the terms of entry in a way that granting basic human rights does not. After all, the state claims that it is morally entitled to admit foreigners as tourists and temporary visitors without the right to work (and we are accepting that claim for purposes of this essay). If those foreigners are nevertheless able to enjoy work-related legal rights when they ignore this prescription, doesn't that strike at the very heart of the state's claim, reducing it to something purely formal? Doesn't it reward people for violating the immigration laws? From this perspective, granting work-related legal rights to irregular migrants is wrong both in terms of its consequences as a policy and in terms of the principle of supporting the rule of law. This is a powerful line of argument, but, as with the argument against giving children a right to a free public education, I will contend that it is ultimately outweighed—and decisively so—by other considerations of principle and policy.

### *Earnings*

Consider first the question of whether irregular migrants should have a legal right to be paid for the work they perform. This is obviously a right that all those working with official authorization normally enjoy. Some would argue that irregular migrants should not have this right. One long-standing principle in some jurisdictions is that the state will not enforce contracts that are against public policy—for example, a contract that includes a provision requiring discrimination on the basis of race or religion. Similarly, the state will not enforce a contract emerging from legally prohibited activities, such as drug dealing or killing someone for pay. No one imagines that the absence of this legal right makes drug dealing and contract killing less likely. The rule is adopted not for its consequences but to express a principle. On this analogy, some think that the state should refuse to enforce contracts between irregular migrants and their employers as a matter of principle, because the migrants are not authorized to work in

the first place. What is against public policy is their employment itself, not the specific tasks they perform. And indeed, in some jurisdictions irregular migrants are not legally entitled to their pay, presumably for just this reason, although in the United States they are.<sup>11</sup>

This approach to unauthorized migration is fundamentally misguided. No one really thinks that the work that irregular migrants normally do is morally wrong in the way that criminal activities or racial and religious discrimination are morally wrong, so long as irregular migrants are engaged in work that is legal and productive in itself and only their immigration status is at stake. This is clearly the case for the vast majority of irregular migrants. Of course, some irregular migrants, like some citizens, engage in criminal activities, but ordinary criminal laws already cover them. Indeed, one of the things that is most objectionable about denying irregular migrants a legal right to their pay is precisely the way in which it links unauthorized migration for employment with criminal activity, conceptually and legally. This ignores the social reality. The work that irregular migrants do is often dirty, difficult, and dangerous, but it is honest work. The money that they receive in compensation is not a form of ill-gotten gain; they have earned it with the sweat of their brows. It is morally wrong for the state to announce that employers are free to extract that work and then withhold the promised pay. Of course, that often happens in practice, but it is not a practice that the state should endorse, even implicitly, which is the effect of denying irregular migrants a legal right to remuneration for their work. As noted above in the discussion of basic human rights, the state's right to apprehend and deport migrants does not affect its obligation to protect them against being robbed while within its jurisdiction. If a state refuses to grant irregular migrants a legal right to their pay, it effectively abandons this responsibility to prevent them from being robbed. If the right to receive pay for work performed is seen as a basic human right, it follows that the firewall argument should apply to this right as well. If an employer seeks to deny workers pay that they have earned, the workers should be able to pursue legal remedies to recover that pay without exposing themselves to the immigration authorities.

### *Working Conditions*

What about the array of rights associated with the state's regulation of the conditions of work? It is well known that irregular migrants often work under conditions that do not meet the state's standards, even in states (such as the

United States) with the weakest standards. That is why irregular migrants are so often described as marginalized and exploited. But before considering the question of whether something *can* be done to change this, we have to consider the question of whether something *ought* to be done. Again, I want to focus first on the question of principle. Are irregular migrants morally entitled to the protections that these policies regarding working conditions are supposed to provide?

To my mind, the answer is clearly “yes.”<sup>12</sup> Every contemporary democratic state sets limits to the way that the market functions within its jurisdiction. While globalization has made it harder for any particular state to regulate internal market conditions, all democratic states establish some limits to acceptable working conditions. These limits reflect a particular democracy’s conception of the minimum standards under which economic activity should be conducted within its borders. Thus, these standards should apply to all workers—irregular migrants as well as those authorized to work.

The content of the minimum standards regulating working conditions varies considerably among democratic states. In general, the United States regulates the conditions of work much less than, say, Norway and Sweden. Most other democratic states fall somewhere in between. How states should regulate working conditions (if at all) is an important question for any version of democratic theory that seeks to provide a substantive account of economic justice. Nevertheless, I will say nothing here about the merits of alternative positions, because I want to keep the focus on the comparison between irregular migrants and those present with authorization. Thus, the important question for my purposes is not what health and safety standards should be, but whether it is morally acceptable to have a policy that stipulates that the normal rules about conditions of work (whatever those rules are in a particular state) do not apply to irregular migrants.<sup>13</sup>

Some might argue that these standards are intended only for those who are members of the community—citizens and perhaps permanent residents. One important response to that point is that irregular migrants are members of the community in many ways. They live within the society, they pay taxes, they participate in community life in various ways. But the decisive consideration is that they are members of the domestic workforce, and the purpose of the rules and regulations is to set minimum acceptable conditions for work within the jurisdiction of a particular democratic community. It is one thing to enforce immigration rules; it would be quite another to deliberately subject irregular migrants

to substandard conditions of work. However the state regulates working conditions for those working with authorization, it should regulate them in the same way for those working without authorization.

So far I have been focusing on arguments about what fairness toward irregular migrants themselves requires with respect to working conditions, but there is another important consideration in favor of granting irregular migrants the same legal entitlements as others—namely, that the state’s capacity to secure these minimum standards for its own citizens and for immigrants legally authorized to work is contingent in part upon its capacity to secure the same standards for irregular migrants. These rules impose costs on employers, giving them an incentive to evade the standards, even with respect to citizens and legal resident workers. If the laws are properly designed, however, and, in particular, if workers are protected against reprisals from employers for reporting violations of the rules, it becomes easier to enforce them. If the standards do not apply to irregular migrants, then those who employ irregular migrants will not have to worry about the sanctions for violating normal workplace standards. Of course, they will still have to worry about the penalties for hiring irregular migrants, if there are any, but these sorts of laws are much easier to evade because the workers themselves have no incentive to report violations, as they do in the case of laws regulating working conditions. Consequently, denying irregular migrants the rights regarding working conditions that citizens and legal residents enjoy makes it more difficult to maintain these rights for citizens and legal residents.

The contradiction runs even deeper, however. A large part of the rationale for denying normal workplace protections to irregular migrants is that this will reduce the incentive for them to come in the first place. Ironically, this sort of policy tends to create a comparative advantage for employers who hire irregular migrants, thereby making it even more attractive for employers to hire them, and thus increasing demand. This line of argument applies just as fully if, as is often the case, irregular migrants enjoy these legal rights in principle but are unable to exercise them in practice. Irregular migrants are often unable to challenge violations of working conditions for fear that they will be reported to immigration officials by their employers as retaliation, or even by the authorities to whom they have complained. In some cases irregular migrants enjoy formal rights to workplace protections but not the legal remedies (such as back pay) that are available to citizens and legal residents. Again, their vulnerabilities make it cheaper for employers to hire them. Thus, policies intended to limit irregular

migration by restricting workplace rights seem likely to produce the opposite effect.

This leads us back to the firewall argument. The only way to secure effective workplace rights for irregular migrants is to establish a firm barrier between the enforcement of those rights and the enforcement of immigration law. For the reasons sketched above about the importance of granting irregular migrants normal workplace protections, such a firewall would also benefit citizens and migrants authorized to work by making it less likely that employers would be able to gain financial advantages by hiring irregular migrants at substandard wages and in substandard working conditions. Finally, and for the same reason, effective workplace rights for irregular migrants made possible by such a firewall will reduce the incentives for employers to hire irregular migrants.

I am not claiming that granting irregular migrants normal workplace rights and creating a firewall between the enforcement of those rights and the enforcement of immigration laws is a panacea or that such an approach will eliminate all incentives to hire irregular migrants. That depends on overall patterns of supply and demand within a given state, and those are affected by many factors. The workplace protections provided by law are minimum protections, and irregular migrants are much more likely to settle for such minimum protections than domestic workers with other options. Still, its overall effect seems likely to be less irregular migration rather than more.

#### *Work-related Social Programs*

Now consider social programs directly connected to employment. Such programs are usually designed as a sort of insurance protection against foreseeable difficulties that workers may face, such as injury, unemployment, or old age. These programs are normally constructed on the principle of reciprocity. Workers (and/or their employers) pay a tax tied to the program and later receive the program benefit (usually some sort of income support, but also payment for medical expenses in the case of injury or illness) if they meet the conditions.<sup>14</sup>

In practice, irregular migrants often work in the informal economy, where they are paid in cash and do not contribute to such programs. But many irregular migrants are part of the formal economy, especially in states where the linkage between the enforcement of immigration rules and other governmental activities is not very tight and where the supervision of documents for work is not strictly controlled. For example, many irregular migrants in the United

States manage to obtain a Social Security number and pay income taxes, Social Security taxes, and so on. If more states were to accept the arguments I have advanced about the desirability of a firewall between the enforcement of workplace protections and the enforcement of immigration law, even more irregular migrants might become part of the formal economy rather than remaining in the informal economy.

Should irregular migrants who participate in the formal economy be included in work-related social programs? Again, there are arguments on both sides. I think that the arguments for providing irregular migrants with the benefits of these programs vary from one program to another, but that they are weaker overall than the arguments for providing irregular migrants with other work-related rights.

There are three general arguments for including irregular migrants in these programs: fairness (as reciprocity), need, and systemic effects. The argument from reciprocity is that it is unfair to make workers pay into an insurance scheme if they are ineligible for its benefits. The argument from need is that irregular migrants face the same contingencies of injury, old age, and unemployment that make these programs desirable for authorized workers. The argument from systemic effects is that a failure to include irregular migrants in these programs makes it less expensive for employers to hire them and thus undermines the viability of such programs for citizens and migrants working with authorization.

What are the arguments for not including irregular migrants in these programs? Besides the usual arguments about their lack of authorization to work undermining their claims to work-related rights and the desirability of reducing incentives for irregular migration, two other considerations come into play. First, there is a countervailing systemic effects argument. These programs are quite different from the laws regulating working conditions because the cost to the employers (and the workers) can be separated from the distribution of the benefits. What matters for the comparative costs of irregular migrants and authorized workers is whether both categories pay into the programs, not whether both categories are eligible for benefits. If irregular migrants pay into the programs but are ineligible for the benefits, their presence does not place authorized workers at a competitive disadvantage and their contributions financially benefit authorized workers (or the wider society). Second, it seems easier to question whether the society in which the irregular migrants are working is really



as responsible for meeting their needs in the areas covered by these programs as for matters more closely connected to basic human rights.

The relative strength of these arguments depends in part on the nature of the program. The strongest case for including irregular migrants in the benefits as well as the costs of a work-related social program involves programs that compensate workers injured on the job. In most states an employee's right to sue an employer for damages arising from a work-related injury or illness is much more limited than the right to pursue damages when harmed by someone else. The general justification for this is that some level of work-related injury and illness is unavoidable, and it makes more sense for both employers and employees to have a social insurance scheme of finance and compensation for this harm than to leave it to the vagaries of the legal process. The goal is to compensate for any health-related costs and lost income, and, in the case of permanent injuries, to provide an appropriate level of compensation for the harm suffered. (There are many debates about the adequacy of these arrangements in various states, but I leave those issues aside here.)

As always, there is a powerful reciprocity argument here. If workers have paid into this sort of compensatory scheme, they should be eligible to collect under it, regardless of their immigration status. But there is a supplementary argument about fairness with respect to the general right to receive compensation if one is harmed. Irregular migrants have the moral right to compensation for harm suffered from work-related activities and the same needs for health care and lost income as other workers. If the social program in question has removed or limited the rights of workers to pursue legal remedies (for example, through private legal action) that would otherwise be available to them (as is usually the case), then even irregular migrants should be entitled to the remedies that are available for this sort of workplace risk. As with other rights we have considered, the right to participate in this sort of program must be walled off from the enforcement of immigration law if the right is to be effective.

Now consider compulsory pension plans. Again, my focus is on those who are paying into these plans, not those in the informal economy. As always, it seems troubling to suggest that it is morally acceptable to require people to pay into a pension plan while leaving them ineligible for the benefits. What is the justification for extracting such a surplus from irregular migrants, who are normally among the least well off of those within the workforce? Some might argue, however, that making people pay into a pension plan for which they are ineligible is

an appropriate penalty for their violation of the immigration laws, a kind of unofficial fine. In the workers' compensation programs, the costs of exclusion from benefits fall only on the unlucky few who become sick or injured on the job, and the costs to these few individuals can be severe. By contrast, exclusion from the benefits of a compulsory public pension plan would fall upon all participating irregular migrants, and, in comparative terms, would impose only a modest cost per person.

I do not find this argument attractive. It seems more a pretext for a money grab than a real justification for differential treatment. On the other hand, I should acknowledge that this argument for treating payments as implicit fines is more plausible in the context of a pension plan than it would be in the context of a workers' compensation program in which someone has suffered an immediate harm and requires health care and income support. Another complication here is the importance of time. Unlike a workers' compensation scheme, pension benefits grow over time. I think that the plausibility of justifying a denial of pension benefits to someone who contributes over time diminishes as the years pass.

One final consideration with respect to public pension plans, such as Social Security in the United States and comparable programs in other states, is that they have usually included some element of redistribution within the community; that is, the recipients have typically received much more from the programs than they paid in, even allowing for imputed interest. (Whether this redistributive element will continue in the face of demographic changes is unclear.) One may argue that irregular migrants are not members of the community in the relevant sense. Again, time matters for this claim in ways that I explore elsewhere, but if one accepted the view that irregular migrants who only stayed for a few years were not entitled to the benefits of redistribution, that might set limits to their claims comparable to the limits on the claims of migrants who worked with authorization only for a relatively short period. As in the case of temporary workers, it is plausible to argue that it would be permissible to design some mechanism to ensure that irregular migrants could eventually access only the contributions that they and their employers made (with appropriate interest), as opposed to the full amount that they would receive under a redistributive arrangement.<sup>15</sup>

Finally, what about income support for workers who lose their jobs? In my view, the inclusion of irregular migrants in unemployment compensation programs is the most difficult case to defend. On the one hand, there are still

arguments for inclusion based on reciprocity and need. There is something unfair about taking money from people for an insurance program for which they are ineligible. On the other hand, we are working on the premise that the state is not acting wrongly in denying these migrants legal access to the labor market. Consequently, it seems particularly hard to explain why the state should have a responsibility to provide people with compensation for not working when it has no obligation to permit them to look for work in the first place.

## SOCIAL AND ADMINISTRATIVE RIGHTS

Many of the legal rights that modern democratic states provide are not basic human rights, or children's rights, or work-related rights. Some of these legal rights are administrative permissions connected to the state's regulatory functions. A license to drive a car or a boat (or a license to own a gun) is a typical example. Others are rights of access to public facilities, such as libraries and swimming pools. Still others provide some benefit or meet some need that the political community has decided should not be left entirely to the market, such as subsidized tuition or loan programs to make it easier to obtain a higher education, or publicly funded health care, or social housing and income support programs. Although these rights are disparate in many respects, I will lump them together here under the general heading of administrative and social rights.

As a general matter, tourists and temporary visitors are not entitled to administrative and social rights. This distinguishes them from basic human rights of the sort discussed in the first section. So far as I know, no one regards the exclusion of tourists and temporary visitors from these rights as morally problematic. It is normally reasonable to tie administrative and social rights to membership in the society that provides them. On the other hand, they are rights of membership, not rights of citizenship. Every democratic state provides these rights not only to citizens but also to noncitizens who are permanent residents, at least for the most part. I have argued elsewhere that granting such rights to residents is more than a common pattern: it is something morally required as a matter of democratic justice.<sup>16</sup> When it comes to temporary residents, the picture is a little blurrier. They normally receive some of these rights but not others, and the strength of their moral claims depends in part on how long they have been resident and why they are present.<sup>17</sup>

Where do irregular migrants fit on this moral map? Should their unauthorized immigration status affect their access to administrative and social rights, or should their access to such rights simply follow the principles that apply to migrants whose presence is authorized?

One position, by now familiar, is that irregular migrants should not have access to any of these rights. An even stronger view is that officials charged with providing such rights should be required to report any efforts by irregular migrants to obtain these rights or to make use of them. The underlying principle is that the state should do nothing to facilitate the presence of irregular migrants within its territory or to reward those who have violated immigration laws, and indeed that it should actively make life more difficult for irregular migrants where it can do so in order to encourage those present to go home and to discourage new ones from coming. On the stronger view, the state should affirmatively coordinate the actions of all its administrative officials with an eye to enhancing the enforcement of immigration laws. This general line of argument provides the public justification for recent initiatives to deny a driver's license and in-state tuition at public universities to irregular migrants, and it lay behind Proposition 187 in California.<sup>18</sup>

As readers will have anticipated, I reject this view. Given the presupposition of this article that the state is entitled to control its borders and to enforce immigration laws, the state must be able to employ some methods to pursue these goals, and I will indicate in the next section what some permissible methods might be. Nevertheless, as I have argued throughout, the right to enforce immigration laws is not a moral *carte blanche*. The state is still constrained by norms of proportionality and rationality, norms that are violated by punitive policies that drive irregular migrants further underground without significantly advancing the goals of immigration control. Moreover, the state's assignment of administrative responsibility for law enforcement is constrained by norms of competence and fairness, norms that are violated when people with no special training in immigration matters are given responsibility for carrying out immigration laws.

Take, for example, the policy of denying driver's licenses to irregular migrants. Such a policy makes it more likely that irregular migrants will drive without licenses and without insurance, thereby increasing risks that these general regulations are designed to reduce. Of course, the issue is not just about driving. A driver's license serves as an important source of identification that can be used

(in some states) to open bank accounts. But why should the state seek to deny irregular migrants the opportunity to open bank accounts? To do so makes their lives a little more difficult, but not so much so that they are likely to leave the country or not come in the first place. On the other hand, such a denial increases incentives to expand the informal economy (including the informal banking sector), which reduces overall societal control over activities that the state wishes in principle to regulate.

When it comes to programs that involve a significant element of redistribution or financial support (as in income support programs or reduced-tuition programs), I think the crucial issue is the length of residency. In my view, it is not unjust (though it is ungenerous) to deny access to such programs, even to authorized migrants who have only recently arrived or who are staying only for a short time.<sup>19</sup> The same principle should apply to recently arrived irregular migrants. As time passes, the justification for excluding authorized migrants from such programs diminishes, and the same is true for irregular migrants.<sup>20</sup>

In sum, irregular migrants should normally have access to administrative and social rights on the same basis as authorized migrants. On the other hand, the arguments supporting the equal allocation of rights in this area are not as fundamental and powerful as they are in the areas previously discussed, because the rights in question are (often) less clearly grounded in the fundamental moral claims of individuals or the fundamental moral standards of the society. They are (often) legal rights created to advance some legitimate, but less-than-vital, social or political goal. Moreover, while there is still a good case for a firewall between immigration enforcement and other state activities, the case for such a firewall is less tied to the fundamental rights of the irregular migrants themselves and relies more on general concerns for such values as proportionality, rationality, consistency, and competence.

## IMMIGRATION ENFORCEMENT AND EMPLOYER SANCTIONS

Although this essay focuses on the rights of irregular migrants, the mechanisms for enforcement of immigration laws are not limited to sanctions against or restrictions on the rights of the migrants themselves. This is important because, as we have seen, one of the strongest arguments against granting work-related legal rights to irregular migrants is that such rights increase the incentives for the migrants to come. Making things harder for the migrants by restricting their rights

is not the only way to reduce incentives to come and stay, however. Employer sanctions constitute an alternative (and often underutilized) mechanism of enforcement. Irregular migrants normally want to work. If they could not find jobs, they would be much less likely to come in the first place. From an economic perspective, a reduction in demand seems far more likely to be effective in reducing supply than any effort to reduce supply directly (for example, by increased border control) or indirectly (for example, by worsening the conditions of work). The potential economic gains for irregular migrants are so great, even in the face of severely restricted rights, that the supply is likely to be reduced only if the overall level of demand declines sharply. From a democratic perspective, one of the clear advantages of employer sanctions over policies aimed at irregular migrants themselves is that employer sanctions impose duties on people who already have legal membership in the community. From this perspective, the employers' moral duty to obey laws prohibiting them from hiring irregular migrants is arguably clearer and stronger than the duty of irregular migrants not to seek jobs without the state's authorization.

The real debate over employer sanctions is about design and implementation. Given the initial assumptions of this article, there would be no objection in principle if a state were to deploy an effective system of controls that required employers to check all workers for work authorization status at the time of hire, that provided a reliable form of documentation about that status, that made it easy for employers to satisfy a requirement to verify the identity of the individual possessing the document, and that did not enable the state to infringe too much on the liberty and privacy of individuals. Whether such desiderata can actually be combined in any real-world system is another question. The stronger the documentation requirements, the more likely it is that they will violate civil liberty concerns. The easier it is for employers to meet the verification requirements, the more likely it is that they will be ineffective, since the employers can avoid sanctions simply by meeting the requirements, even if they may suspect that the workers are irregular migrants. The harder it is for employers to meet the verification requirements, the more unwilling they will be to hire workers who share the socioeconomic and ethnic characteristics of the groups from which most irregular migrants in a particular state come, thus discriminating in morally objectionable ways against people who are authorized to work. If the sanctions are severe and rigorously enforced, employers will have strong incentives not to hire workers whom they otherwise would hire. If the sanctions are

modest and only occasionally enforced, they will be treated by employers simply as a cost of doing business. Indeed, some ways of implementing employer sanctions actually increase the power of employers with respect to irregular migrants, perhaps increasing the incentives to hire such migrants in the first place. For example, if employers are able to examine the work authorization papers of their workers subsequent to the initial hiring, or are able to report their own workers to immigration authorities, they may be able to threaten irregular migrants with exposure of their unauthorized status if the workers are not sufficiently quiescent with respect to pay and working conditions. That appears to have been the result of recent employer sanction policies in the United States.<sup>21</sup>

It may sometimes be the case that the ineffectiveness of employer sanctions is intended, at least by some of those designing or implementing the policy, because the presence of the restrictive policy on the books satisfies one political constituency, while the weak implementation satisfies another. For the purposes of this essay, however, the important point is that employer sanctions provide a more legitimate option for restricting irregular migration than most restrictions on the legal rights of the irregular migrants themselves. The fact that the state may be unable to use this mechanism effectively because of the political power of other forces within the state does not affect this normative argument.

#### NOTES

<sup>1</sup> For critical discussion of the terminological issues and related matters, see Nicholas P. De Genova, "Migrant 'Illegality' and Deportability in Everyday Life," *Annual Review of Anthropology* 31 (2002), pp. 419–47.

<sup>2</sup> The scholarly literature on irregular migrants is relatively thin and explicitly normative discussions are rare. I do not know of any previous work by a political theorist or philosopher that takes questions about the rights of irregular migrants as its focus. Legal studies often include normative dimensions, though these are usually tied to particular legal traditions. The best work on irregular migrants in American law is by Linda Bosniak. See, e.g., Linda S. Bosniak, "Exclusion and Membership: The Dual Identity of the Undocumented Worker under United States Law," *Wisconsin Law Review* 6 (1988), pp. 955–1042; Linda S. Bosniak, "Opposing Prop. 187: Undocumented Immigrants and the National Imagination," *Connecticut Law Review* 28, no. 3 (1996), pp. 555–619; Linda S. Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton, N.J.: Princeton University Press, 2006); and Linda S. Bosniak, "The Undocumented Immigrant: Contending Policy Approaches," in Carol M. Swain, ed., *Debating Immigration* (Cambridge: Cambridge University Press, 2007), pp. 85–94. Owen Fiss has an important argument about the implications for irregular migrants of the American constitutional commitment to equality in Owen Fiss, "The Immigrant as Pariah," *Boston Review* 23, no. 5 (October/November 1998), pp. 4–7. The same issue contains several responses to this article and a reply by Fiss. Some studies focus on the rights of irregular migrants under human rights laws, whether national, regional, or international. See, e.g., Barbara Bogusz et al., eds., *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden: Martinus Nijhoff, 2004). There are also a number of sociological and policy studies that, while primarily empirical, include critical analyses and normative claims, as, e.g., Bill Jordan and Franck Düvell, *Irregular Migration: The Dilemmas of Transnational Mobility* (Northampton, Mass.: Edward Elgar, 2002); Joanne van der Leun, *Looking for Loopholes: Processes of Incorporation of Illegal Immigrants in the Netherlands* (Amsterdam: Amsterdam University Press, 2003); and Helene Hayes, *U.S. Immigration Policy and the Undocumented: Ambivalent Laws, Furtive Lives* (Westport, Conn.: Praeger, 2001). Matthew Gibney makes

some brief but explicit normative claims in the final section of his report synthesizing empirical research on irregular migrants in three European states: Matthew J. Gibney, “Outside the Protection of the Law: The Situation of Irregular Migrants in Europe,” Refugee Studies Centre Working Paper no. 6 (December 2000). There are also a few important historical studies with normative implications, notably Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, N.J.: Princeton University Press, 2004).

<sup>3</sup> See Joseph H. Carens, “Aliens and Citizens: The Case for Open Borders,” *Review of Politics* 49, no. 2 (1987), pp. 251–73.

<sup>4</sup> One of the objections to the popular terms “illegal aliens” and “illegal immigrants” is that such terms may be taken to imply that migrants in these categories have no legal rights whatsoever. Hence the counter-slogan “No one is illegal.” As I note below, however, even the strongest critics of unauthorized migration will not actually defend the claim that irregular migrants have no legal rights, if they address the question directly.

<sup>5</sup> The treatment of detainees at Guantanamo Bay and the U.S. administration’s public defense of that treatment arguably constitute an exception to this general rule that, in a democratic state, no one is outside the pale of the law’s protection. On the other hand, this treatment has been widely criticized throughout the world as a violation of the rule of law, American courts have (at last) set some limits on what the government can do to the detainees, and even the defenders of Guantanamo normally claim that it is an exception, justified by the extreme danger of terrorism, rather than a legitimate exercise of a routine governmental power.

<sup>6</sup> Joseph H. Carens, “Membership and Morality: Admission to Citizenship in Liberal Democratic States,” in Rogers Brubaker, ed., *Immigration and the Politics of Citizenship in Europe and North America* (Lanham, Md.: University Press of America, 1989), pp. 31–49.

<sup>7</sup> In the United States, the taxes often go to one level of government (federal) while the costs of schooling are borne by another (state and local), but that does not affect the general point about the net fiscal burdens and benefits flowing from irregular migration.

<sup>8</sup> Decisions on whether an irregular migrant seeking work will settle in the receiving state or engage in cyclical migration may be more affected by the ease or difficulty of the cyclical migration option than by the legal availability of education for children.

<sup>9</sup> I have defended this practice from a normative perspective in Joseph H. Carens, “Live-in Domestic, Seasonal Workers, and Others Hard to Locate on the Map of Democracy,” *Journal of Political Philosophy* (forthcoming).

<sup>10</sup> This assumes that these rights are (reasonably) effective, which is often not the case in practice. I discuss this issue more below.

<sup>11</sup> For an extensive discussion of the legal rights of irregular migrants in the United States, see Bosniak, “Exclusion and Membership.”

<sup>12</sup> The next three paragraphs are adapted from Carens, “Live-in Domestic.”

<sup>13</sup> I do not mean to treat this as a purely formal question, however. If a particular economic activity is carried out almost entirely by irregular migrant workers (as might be the case, for example, with some sorts of agricultural or domestic work), and if that kind of economic activity is less regulated than other forms of work, we might inquire whether this is a way of covertly setting different rules for irregular migrants without saying so publicly.

<sup>14</sup> In most insurance arrangements—pensions are an exception—one hopes that one will never need to collect the benefits, since these compensate for a hardship one would prefer not to face.

<sup>15</sup> See Carens, “Live-in Domestic,” for further discussion.

<sup>16</sup> See Joseph H. Carens, “Citizenship and Civil Society: What Rights for Residents?” in Randall Hansen and Patrick Weil, eds., *Dual Citizenship, Social Rights and Federal Citizenship in the U.S. and Europe: The Reinvention of Citizenship* (Oxford: Berghahn Books, 2002), pp. 100–120.

<sup>17</sup> See Carens, “Live-in Domestic.”

<sup>18</sup> For discussion of Proposition 187, see Bosniak, “Opposing Prop. 187.”

<sup>19</sup> See Carens, “Live-in Domestic.”

<sup>20</sup> I have argued elsewhere that the passage of time undermines the legitimacy of keeping migrants in an irregular status at all. See Joseph H. Carens, “Democracy and Irregular Migration” (University of Toronto, unpublished). If that argument is accepted, the issue of the migrants’ long-term access to redistributive social programs will be rendered moot. However, I have excluded this sort of argument from consideration in this article.

<sup>21</sup> See Bosniak, “The Undocumented Migrant.”