

# Differentiated Rights, Marginalization, and the Right Not to Stay

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## ABSTRACT

Most theorists have assumed that temporary movement is only second-best to the real goal of those working in rich countries, namely to permanently move and settle there, rather than returning to their countries of citizenship. Ottonelli and Torresi argue against this conception of justice in migration, instead proposing that temporariness may be part of the migration projects of temporary foreign workers. To remedy current problems in temporary migration regimes, they instead suggest differentiated rights for temporary foreign workers. I argue that some of these rights may be able to address the vulnerability and precarity of temporary foreign workers in host societies; however, the rights proposed cannot remedy the social marginalization of temporary foreign workers. Moreover, social and political marginality seems to be a building block for the normative argument for differentiated rights. This is problematic for a normative theory of justice in migration in liberal egalitarian states.

**Keywords:** differentiated rights, marginality, social inclusion, relational autonomy.

## 1. INTRODUCTION

In the growing literature on justice in migration, the treatment of temporary foreign workers has gained the necessary critical scrutiny only slowly. Most theorists have assumed that temporary movement is only second-best to the real goal of those working in rich countries, namely to permanently move and settle there, rather than returning to their countries of citizenship. The assumption underlying this blind spot in the literature, put simply, is that most people would prefer to permanently live and work in countries that attract temporary workers—i.e. countries that have economies in demand of workers from abroad—rather than only temporarily work there, under often difficult conditions, and then return

home. In their book, *The Right Not to Stay* (2022), Ottonelli and Torresi propose an important corrective to this assumption. Instead of falling into the trap of assuming permanence, they argue that the *temporariness* of the move may be an important reason for many in deciding in favor of temporary work. Precisely because some countries seek temporary workers, moving to them is attractive. Accordingly, the work that is accessible for temporary workers should be considered part of a life plan for many temporary workers, instead of being considered second-best. However, what is lacking in temporary foreign worker programs is recognition of the specific life plans of which temporary work is a part. Thus, Ottonelli and Torresi criticize the fact that host countries haven't adopted a catalogue of rights that protect the specific interests of temporary foreign workers in host societies, i.e. rights that recognize such life plans. The currently provided rights protection, they argue, is modeled on sedentary workers and their needs, and distinctly not modeled on the needs and goals of temporary foreign workers. Instead of applying a system of one-size-fits-all to all workers, host societies should thus instead adopt differentiated rights regimes tailored to the needs and goals of temporary foreign workers.

A note on terminology: Ottonelli and Torresi refer to "temporary migrants". However, since the discussion really focuses on temporary foreign workers, rather than, say students, who are also temporary migrants, I will use the term "temporary foreign workers". As will become clear in the discussion, it is the treatment of these migrants that is most problematic in the current theoretical discussion, as it is in the actual world.

Regimes of differentiated rights for temporary foreign workers have been discussed in the literature previously (Brock 2020; Lenard and Straehle 2011; Song 2018). What is novel in Ottonelli and Torresi's proposal is the argument for the basis of differentiated rights. Whereas previous arguments for differentiated rights have grounded the argument on concerns over domination (Song), membership (Lenard and Straehle) or the legitimacy of the host state (Brock), Ottonelli and Torresi rely on the value of the temporary move for the individual life projects of temporary migrants to justify differentiated rights. Treating temporary work as part of individual life plans also provides a guide to what kinds of rights host states should implement for temporary workers.

In my comments, I want to address the basis of the claims, as established by Ottonelli and Torresi, their effect and the consequences of the claims as suggested. I will end with a brief reflection on what the conceptualization of differentiated rights for temporary workers, as proposed here, implies

for the idea of the self. I share Ottonelli and Torresi's starting point, namely reflecting on what individual autonomy and agency may demand. We agree that one of the requirements of individual autonomy and agency are options amongst which to choose and along which to design the kind of life plan that is under consideration here. However, I doubt that people can plan and opt for what I call the *divided self*. Yet such a self is possibly the result of the kind of marginalization in host societies that flows from Ottonelli and Torresi's proposal.

## 2. THE BASIS OF CLAIMS FOR DIFFERENTIATED RIGHTS FOR TEMPORARY FOREIGN WORKERS

According to Ottonelli and Torresi, temporary foreign workers enter into relationships with members of the host society that contribute to the overall welfare of the host society.

This special regime of rights is due to temporary migrants because the latter importantly contribute to social cooperation within the receiving society, but they also tend to occupy a marginal and vulnerable position that conventional citizenship rights, tailored as they are to the needs and interests of permanent members, will often fail to address. (8)<sup>1</sup>

The first basis of the claim for differentiated rights is thus that temporary foreign workers stand in an instrumental relationship with the host state, which satisfies their need for gaining access to the labor markets of rich economies, and which satisfies these economies' need for the labor that temporary foreign workers offer. What the authors seem to suggest here is that both parties to the relationship enter into it assuming a kind of reciprocity of gains, with both parties being able to realize some of their goals.

The second basis for the claim for differentiated rights is that *without* such rights, the instrumental relationship is unjust: while temporary foreign workers keep up their part of the bargain—they bring their labor, work, and leave—host states neglect the needs of temporary foreign workers, subjecting them instead to a rights regime that doesn't appropriately protect their interests. The postulated reciprocity is thus jeopardized if temporary foreign workers are not able to pursue their migration project, which is to say that they are not able to gain what they

<sup>1</sup> Valeria Ottonelli and Tiziana Torresi, "Précis of *The Right Not to Stay*", this volume. All quoted passages, unless otherwise specified, are from this text. This article also refers to Ottonelli and Torresi's book *The Right Not To Stay*, Oxford University Press, 2022.

have bargained for.

The third basis of the claim for differentiated rights is the argument from vulnerability, precarity, and exploitation: the wrong that Ottonelli and Torresi identify in the unequal bargain is not simply that temporary foreign workers cannot realize their migration project, but more troubling still, that they are made vulnerable to abuses and exploitation in the specific labor relations. Liberal egalitarian states that implement temporary labor regimes are thus called upon to ensure that the migration projects that people pursue don't keep them in a situation of marginality, vulnerability and precarity.

Now, one could argue that this demand on host states goes further than what justice requires—critics could say that migrants enter into labor relationships knowingly, and hence accept the kinds of endemic problems that these relationships bear. Why, to put it differently, should host states protect the goals of the life projects of migrants? While liberal egalitarian states are called upon to protect and help enable the reasonable life projects of citizens, it is not clear that temporary migrants and their life projects should be equally the concern of liberal egalitarian states.

To put this differently, critics could argue that “we don't even have a clear term or label for this sort of claim-making. Immigrants are making claims to welfare programs not as human beings or as citizens, but as what? Workers? Tax-payers? Residents? Denizens? Guests?” (Kymlicka 2022). Sarah Song (2019) has suggested that we call temporary foreign workers “sojourners” as an expression of their status, as well as the fact of being on the territory for a set period of time (Song 2019). Others have suggested the term “demi-citizenship” or “transnational citizenship” (Bauböck 2022), yet it is not clear that this is what the authors aim to capture.

Instead, Ottonelli and Torresi argue that the problem in the debate is precisely the focus on citizenship; accordingly, the idea that temporary foreign workers are protected in their citizenship rights through their country of origin is not helpful if the worry is about vulnerability, exploitation and marginalization in the host state. Precisely because vulnerability and precarity arise in the host state, remedying these is the moral task for the host state. In this vein, they argue that a focus on citizenship is not the answer. Second, they argue that many temporary migrants don't want to access citizenship in the host state—in fact, as I summarized earlier, the point of many migrants' migration project is precisely the temporary stay in a country different from that of their citizenship. Suggesting that they would be protected against vulnerability, marginality and precarity if they applied for citizenship thus disregards

individual needs and individual migration projects.

On the other hand, though, and possibly in tension with the strong stance for the basis of differentiated rights as distinct from citizenship rights, Ottonelli and Torresi need to accept that citizenship matters: either we think of temporary foreign workers as citizens in the making, or we think of them as “temporarily absent citizens of their country of origin” (Kymlicka 2022). Indeed, only in light of the second perspective on citizenship, I would argue, can we make sense of some of Ottonelli and Torresi’s proposals. For instance, take their call to accommodate the needs of temporary foreign workers to be able to care for family members left back home. Some temporary work programs have acknowledged such needs—the now suspended Canadian Live-in Caregiver Program (LCP), for instance, stipulated that live-in caregivers were allowed to bring their children with them. Very few live-in caregivers actually did this, however (Brickner and Straehle 2010). And indeed, the authors suggest that having to take care of family members in the country of employment may go against the migration project: if the goal is to spend a predetermined amount of time in the host country, maximize the opportunity to gain as much as possible, and then return, then having to shoulder care obligations and the extra costs of having children around, say, maybe counterproductive. Therefore, Ottonelli and Torresi suggest that possible measures to ensure the care of family members staying back home should involve the country of citizenship *and* the country of employment. Thus, they want to mobilize the governments of receiving states and states of origin to cooperate and share the responsibility of enabling the life plans of temporary foreign workers, akin to how the citizens, i.e. the temporary workers, share their lives between the two states.

Length of stay abroad will play an important role when assessing claims that temporary foreign workers can possibly make towards the state of employment, as will the question of return migration. Many cases in Canada, for example, involve the same temporary foreign workers who spend nine months of the year in Canada working, over many years. In a very real sense, temporary foreign workers such as these are at least *de facto* dual citizens if not *de jure*. Yet to what extent these cases actually fall into the category of temporary foreign workers that the authors have in mind is not clear, since they document with empirical evidence that at least some temporary foreign workers adopt the view that short-term stays that help them maximize their gains is the desired model of foreign work, rather than permanent movement. In contrast, return migration, such as that documented in the Canadian case, may indicate the migrants’ preference for having access to permanency and citizenship, rather than

the kind of short-term instrumental relationship the authors suggest. One question that Ottonelli and Torresi's account raises, then, is whether migrants would have the same preferences reported in their book, if they had access to permanent migration.

One important indicator for assessing the interests of migrants in this respect may be the figures of those who are in temporary work programs that offer a path to permanent residency. Again taking the case of the now suspended LCP in Canada, which was one of the few programs for so-called "low-skilled workers" that offered access to permanent residency and citizenship, the figures are indicative of migration projects as *settlement* projects: In 2009, the Canadian government estimated that 10,000 women would receive permanent residency through the LCP in each of the following ten years. It also stated that on average, 90% of live-in caregivers applied for permanent residency and that 98% of those applicants are successful (Straehle 2019).

Regardless of the intentions of temporary migrants, it is fair to say that access to citizenship plays an important role when assessing the basis of claims for differentiated rights. For instance, one important question is to what extent the moral demands on states of employment to enable differentiated rights for temporary foreign workers would be the same across the board—or if we can make distinctions between "closed" states, in which access to permanent residency and citizenship is limited, and "open" states that offer access to permanent residency and citizenship for temporary foreign workers over a short period of time. While it is plausible to say that the normative basis for differentiated rights for temporary foreign workers is strongest in closed states, open states such as Canada could point to possible access to permanent residency and citizenship as a justification against granting differentiated rights. Indeed, this has been Canada's strategy for the longest time (Koning and Banting 2013). What we find, then, is that states that are relatively open, aiming to attract migrants as permanent residents, are also those states that are "more closed" to demands for differentiated rights (see Kymlicka 2022).

Thus, on the one hand, there is the migration project of individual migrants who hope to maximally benefit from the time-limited move; on the other hand, there is the interest of the host state to turn migrants into residents. The question that Ottonelli and Torresi's proposal raises is to what extent the latter have a moral obligation to help realize the former. Of course, Ottonelli and Torresi make their case not on the basis of time of residency, but support their demands for differentiated rights for temporary foreign workers with the argument that without such rights, temporary foreign workers suffer vulnerability, precarity and marginality. We can

imagine that states that enable access to citizenship could point to the full set of citizenship rights to forestall any differentiated rights claims, suggesting that the concern over vulnerability, precarity and marginality would be addressed through access to citizenship.

### 3. THE EFFECT OF THE CLAIMS

A second worry we may have is about the actual effect of the differentiated rights that Ottonelli and Torresi propose. The authors suggest that temporary foreign workers should have access to labor rights, welfare and portability rights, especially for contributions to social welfare measures, the benefits of which they may otherwise have to forego when they return to their country of citizenship. It is plausible to accept that the differentiated rights proposed in the domains of labor, welfare and portability address the potential vulnerability and precarity of temporary foreign workers. And to be sure, many of these rights, such as portability and health care rights, have been established in temporary foreign worker programs in liberal states, even while encompassing access to all welfare rights is contested (see Koning 2019). However, it is not clear that such differentiated rights address the marginality of temporary foreign workers.

In fact, I would argue that there is a tension in the argument here: Ottonelli and Torresi start out their argumentation by stating that temporary foreign workers often find themselves in a position of vulnerability and marginality, which

exposes them to unacceptable risks, creates a *de facto* two-tier society and revives forms of social subordination that the liberal egalitarian ideal was meant to eradicate. (3)

On the basis of the original design of the liberal egalitarian state, and the interests underlying it, the state of employment subscribing to liberal egalitarian ideals should thus implement a rights regime that prevents marginality, and especially the creation of a two-tier society. This is not only in the interest of temporary foreign workers, but importantly also in the interests of its citizens (Lenard and Straehle 2012).

On the other hand, though, Ottonelli and Torresi argue that the same state should accept that temporary foreign workers may choose to remain marginal in order to maximize the benefits of their migration project (3). That temporary foreign workers remain marginal within the host society actually seems *instrumental* for the argument against conceiving of their migration projects as settlement projects. In this vein, one of the pillars of the argument is that temporary foreign workers should be protected within

the sphere of work and adjoining interests; the social and political center of temporary foreign workers' lives, however, remains in the country of origin. Thus, access to social and political rights is not of paramount importance to temporary foreign workers if they stand in the way of maximizing the profit of their temporary work. If social and political rights are an expression of inclusion, as integrative measures that are meant to include all members of society, but that come with a cost, then we should accept that temporary foreign workers can forego these rights in order to avoid having to bear their cost. In this sense, the authors accept that temporary foreign workers remain marginal in the receiving society. But if the argument for differentiated rights is in part to address marginality, yet to remain marginal is instrumental for temporary foreign workers' migration projects, then the proposal is faced with a tension. Otherwise put, if differentiated rights aim to equalize the possibility of realizing individual life projects for both citizens and temporary migrants, as Ottonelli and Torresi suggest, then to demand the right to remain marginal to the political and social sphere seems to undermine the case for differentiated rights.

To be sure, Ottonelli and Torresi could highlight two different kinds of marginality: they could argue that there is a difference between temporary migrants being exploited within the labor market, on the one hand, and the political marginality experienced by those who don't have voting rights. While they find the first one morally problematic, they think the second one is acceptable in the context of the individual life plans of temporary foreign workers. However, it is not clear that the rights to protection against labor marginalization can be that clearly separated from political and social marginalization. To illustrate, take the case of the many labor unions that are regularly called upon to help *implement* and *realize* the rights of their members, both those with migratory and those with a citizenship background (see UFCW 2020). This is to say that granting differentiated rights to temporary foreign migrants won't be sufficient to equalize their position in society if the implementation and protection of these rights are not monitored through political means. And indeed, the authors acknowledge this in their discussion of non-governmental migrant organizations, as I discuss below (12).

#### 4. THE CONSEQUENCES OF THE CLAIMS

The basis and the effect of a differentiated rights regime finally raise the question of the consequences of the claims for differentiated rights as proposed by Ottonelli and Torresi. As I noted above, the argument for



special rights is justified with the idea of social cooperation, i.e. the argument that temporary foreign workers participate in relationships of social cooperation to promote the welfare of the host society. As I suggested, we can think of the agreement between temporary foreign workers and the host state as one in which a certain level of reciprocity is at play, in the sense that both parties to the agreement benefit from and receive what they have bargained for. But what form does the social cooperation in question take?

Consider the authors' argument that voting rights for temporary foreign workers would impose an unfair burden (11), since conferring voting rights (and tying the conferral of voting rights to certain measures of inclusion) would constitute a public misrecognition of their life plans and their decision to keep their social center in the countries of origin:

The social integration, engagement with the local political system, and investment in education that their full participation would require would divert energies and resources from their project and purpose, which is to collect capital in the host country to be spent at home. (11)

Similarly, consider the claim that trade unions would be the best advocates of the labor-political interests of temporary foreign workers, and that this kind of representation does not require "deep engagement with its social and political system" (Ottonelli and Torresi 2021: 12).

Yet how do we think of "the social" in this context? What form does the social cooperation in question take—especially in light of my comments concerning the remaining, and putatively self-chosen marginality of temporary foreign workers? And is this not what marginalization means—to stand apart from the social and political context?

My worry about possible tensions in the argument goes further: while the social and political marginalization of temporary foreign workers is first accepted as a possible necessary evil in the context of broader specific and targeted differentiated rights aimed to help realize the migration projects of temporary foreign migrants, keeping apart from society becomes a building block for the proposal for differentiated rights for temporary foreign workers. This seems to me problematic: it may be justifiable to accept other benefits as countervailing reasons to accept marginality, but I doubt that it should be written as a condition into a normative proposal to address vulnerability, precarity and exploitation in liberal egalitarian states. Methodologically, marginality serves as a ground for differentiated rights, while at the same time serving as a normative denominator for temporary migrants. It is the latter use that I criticize, because it reifies marginality, whereas the former use aims to address and combat it.

## 5. THE DIVIDED SELF

Finally, the proposal for differentiated rights based on a position apart from society raises the question about the nature of individual life plans—what I call my worry about the divided self. Recall that one of the novel and innovative contributions that Ottonelli and Torresi make is to ground their proposal on the life plans of temporary foreign workers—and on the worry that migration regimes ought to take seriously the autonomy and agency of temporary foreign workers. As I stated at the outset, we agree that autonomy and agency require a range of reasonable options amongst which to choose the shape our lives should take.

Recall the definition of autonomy and voluntariness that the authors provide. The idea, which I share, is that temporary foreign workers may reasonably design a life that includes long periods away from their state of origin, their homes, in the pursuit of instrumental goals to make the life precisely in that home better upon their return, and better for their loved ones while they are away. In this vein, I agree with Ottonelli and Torresi that autonomy is fundamentally a relational concept. The autonomous self is described as necessarily relying on a web of relationships:

The term “relational autonomy” ... is an umbrella term, designating a range of perspectives [that] are premised on a shared conviction ... that persons are socially embedded and that their agents’ identities are formed within the context of social relationships and shaped by a complex of intersecting social dynamics such as race, class, gender, and ethnicity. (Mackenzie and Stoljar 2000: 4)

What is important about this conception of autonomy is its social aspect. Individuals design their life plans often in relation to the needs and interests of those close to them—a fact that Ottonelli and Torresi recognize in their proposals to think about the family care obligations that many temporary foreign workers may have to consider when designing their migration project. Agency and autonomy, moreover, also respond to social context.

Presumably, though, it isn’t part of anybody’s ideal life plan to put their social lives on hold. Neither is keeping away from people where they work, i.e. where they will spend considerable amounts of time. In this vein, I wonder how plausible the normative account for differentiated rights based on social and political marginality in the host society actually is. Can we really assume that people can compartmentalize their selves in this way?

As I suggested above, much hangs on the question of the time spent

abroad. In order for such differentiated rights to make sense, we need to assume some time period longer than a few months to warrant the granting of rights. A student worker for three months wouldn't find social marginalization problematic for their sense of self. But recall the situation of many temporary foreign workers in Canada who recurrently work for nine months per year away from home. Note that the worry is not about time away from home that one spends together with those in similar situations, while studying for instance. A foreign student isn't socially marginalized in the same way that Ottonelli and Torresi depict the situation for temporary foreign workers—after all, students hang out together and mingle with the local student body. Temporary migrants, in the proposal submitted by Ottonelli and Torresi, would rather not mingle with locals, however. And, to be sure, the authors provide empirical evidence based on interviews with temporary migrants, which suggest that for many, their life plan is indeed to maximize work and not pursue social contacts. Note, though, that these interviews are given by actual workers who have to navigate the very non-ideal conditions of temporary work in the here and now. In a more ideal, normatively sustained model of temporary foreign work, like the one that Ottonelli and Torresi propose, it seems at least doubtful to me that individual migrants would choose to compartmentalize between their work self in the host society, and their social self in their society of origin. Recall that Ottonelli, Torresi and I agree that the definition of the life plans proposed relies fundamentally on the idea that individuals have social roles to play. We play those roles in our family and communities, where they help us satisfy our social needs and those of others. Importantly, though, social needs will follow us wherever we go. Thus, we can only make sense of the argument about life plans if we also accept that the individuals who make such plans have social needs. And not all social needs can be put on hold for the duration of the work abroad. Again, witness the engagement that many seasonal agricultural workers in Canada have with the Agricultural Workers Alliance, making their presence in the country public and engaging with the wider community (see AWA 2011). And indeed, this kind of engagement is what Ottonelli and Torresi call for. But if this is the case, then the argument for the separation of the social and political sphere based on an account of individual autonomy and agency doesn't make sense. Moreover, it is not clear that the proposed rights catalogue captures these needs, or that it allows individuals to pursue a coherent life plan, rather than a compartmentalized one.

## 6. CONCLUSION

While I agree that the proposed policies and rights address the important vulnerability and precarity of temporary foreign workers, social marginalization seems to be built into the proposal, possibly in order to draw a distinction from the integrative social rights that have been taken to be the building block of theories of justice in migration, and which are meant to lead to citizenship. Since the authors correctly argue that not all migrants aspire to this kind of social integration, they reject the view that immigrants ought to be integrated in order for them to have access to labor and some social rights. In their description of temporary foreign workers' social position apart from the host society, though, they seem to overshoot the mark.

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