

# Crimmigration and the Ethics of Migration

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**Abstract:** David Miller's defense of a state's presumptive right to exclude non-refugee immigrants rests on two key distinctions. The first is that immigration controls are "preventative" and not "coercive." In other words, when a state enforces its immigration policy it does not coerce noncitizens into doing something as much as it prevents them from doing a very specific thing (e.g., not entering or remaining within the state), while leaving other options open. Second, he makes a distinction between "denying" people their human rights and "detering" people from exercising their human rights. On this view, when those assigned to protect or fulfil human rights are also tasked with performing immigration enforcement duties, undocumented immigrants are not being denied their human rights, even when this deters them from exercising those rights. In this article, I argue that Miller's two distinctions have an implication that he might not have foreseen. Specifically, I argue that these distinctions provide ideological cover for what has come to be known as "crimmigration" and that we have strong reasons for wanting our theory of immigration justice to reject this, even when doing so leaves open the possibility for an indirect open-borders argument.

## Introduction

In *Strangers in our Midst*, David Miller argues that states have a presumptive right to exclude non-refugee immigrants. In making his case, Miller recognizes that if justice were to forbid (or sufficiently constrain) a state's ability to *enforce* its desired immigration policy, this could limit its right to exclude and in turn provide an opening for an indirect argument for open-borders.<sup>1</sup> In an effort to foreclose this possibility, Miller concedes that immigrants (especially undocumented immigrants) are owed some protections from immigration enforcement, but not enough to constrain a state's ability to enforce its desired immigration policy. The success

of Miller's argument ultimately rests on two key distinctions. The first is that immigration controls are preventive and not coercive. In other words, when states enforce their immigration policy they are not so much "coercing" immigrants as they are "preventing" them from entering or remaining in the state's territory. The second is a distinction he draws between "protecting" human rights and "detering" people from exercising their human rights. He argues that, while protecting human rights is a requirement of justice, deterring people from exercising their human rights is not a violation of justice.

If these two distinctions hold, they are enough for Miller to foreclose the possibility of an indirect open-borders argument being generated from constraints justice would place on immigration enforcement. I argue, however, that maintaining these distinctions comes at a very high cost. These distinctions do more than just foreclose the possibility of an indirect open-borders argument, they also—even if this was not Miller's intention—provide ideological cover for what has come to be known as "cimmigration." Cimmigration is a term used by migration scholars to refer to three areas in which criminal law enforcement and immigration law enforcement are problematically conflated. The first is when criminal convictions come to have immigration consequences, such as a revocation of a visa or green card. The second is when immigration law violations come to have criminal-style punishments. The third is when the tactics sanctioned for criminal law enforcement are commandeered for the purposes of performing immigration enforcement or vice versa.

In this article, I argue that all three aspects of cimmigration lead to serious injustices. Preventing these injustices requires giving up on Miller's two distinctions. This therefore leaves us with a choice. We can accept Miller's distinctions and guard against the possibility of an indirect argument for open-borders, or we can leave open the possibility of an indirect argument for open-borders by guarding against the injustices of cimmigration.

## 1. David Miller's Two Distinctions

### 1.1. Prevention versus Coercion

For those of us concerned with immigration justice—not merely in the abstract but in our everyday lives—one of the practices that we tend to find most disconcerting is the enforcement of immigration laws. People who—for no other reason than the fact they were born on the wrong side of an arbitrary line or to the wrong set of parents—can be removed, detained, separated from their parents, or prevented from escaping a life-threatening situation in their home country, often under the threat of lethal force. This is the reason the opening line to Joseph Carens's now

classic essay on open borders is so compelling (and so often cited): “Borders have guards and the guards have guns” (1987, 251).

After that initial reminder, however, philosophers seemed to have little to say about the ethics of enforcing immigration law or about the kind of treatment those who defy or are seeking to defy immigration laws (i.e., undocumented or precluded<sup>2</sup> immigrants) should expect to receive. Debates over immigration justice tended instead to focus on whether an abstract individual has the presumptive right to immigrate anywhere in the world they wish or whether an overly idealized political community has the presumptive right to exclude any or most noncitizens.<sup>3</sup>

Arash Abizadeh, however, broke from this trend early on (2008). He argued against states having a unilateral right to enforce immigration restrictions because in order for government coercion to be legitimate it must be justified to all those over whom it is exercised. In this regard, the case of immigration enforcement presents an interesting problem. This enforcement seems to clearly be an instance of coercion (e.g., guards with guns), but at the same time it is being deployed against people (i.e., noncitizens) who have neither consented to be excluded nor have had any say in the government that is coercing them. From a democratic theory perspective (although I suspect from almost any liberal perspective) this kind of coercion would seem *prima facie* illegitimate. If it is illegitimate, then it seems that we have arrived at a rather unintuitive conclusion: states are *not* justified in “unilaterally” enforcing immigration exclusions.<sup>4</sup>

Whether one ultimately agrees or disagrees with the whole of Abizadeh’s argument is not necessarily important. What matters is that Miller believes that, if correct, Abizadeh’s argument could potentially provide the basis for an indirect open-borders argument, and Miller would like to foreclose that possibility. Miller therefore responds to Abizadeh by suggesting that there is an important, even if not always clear, distinction between coercion and prevention. According to Miller, coercion involves forcing someone to do a very specific thing, while prevention gets a person to *not* do a specific thing, but also leaves other options open. For example, I would coerce you if I put a gun to your head and forced you to give me your wallet. But I would only be preventing you if I put a gun to your head and said do *not* touch my wallet and left other options available to you, specifically the option of walking away with your life but not my wallet.

Miller concedes that preventing someone does reduce their freedom, which is why he concedes that the difference between prevention and coercion is more a matter of degree. They are opposite ends along a spectrum. Prevention therefore also requires some justification, but given that it does not fully compromise one’s autonomy it does not need the same level of justification (or protections) that normally accompany coercion.

Working with this distinction, Miller suggests that we should think of immigration enforcement as preventative and not coercive. After all, immigration

enforcement is not so much forcing precluded immigrants to stay in any specific country, as much as it is merely making the choice to enter a specific one very costly, while leaving other options open. As Miller writes: “[immigration] authorities are not trying to direct [a precluded immigrant’s] life, even though they may be frustrating his wishes by excluding him. If the immigrant enters illegally, he may become subject to coercive means to remove him, just as I may have to call the police to get rid of an unwelcome intruder in my house” (2016, 74). On Miller’s view, immigration enforcement is preventative up to the point where a precluded or undocumented immigrant is directly confronted by agents and are “handcuffed and put on planes . . . or the boats they are traveling on are forced to turn around . . . [then] these are rightly described as coercive measures” (2016, 73)

The difference here might seem trivial, but it has serious moral and ethical implications. To give just one example, take the infamous U.S. immigration enforcement strategy dubbed “prevention-through-deterrence.” This strategy was put in place by the U.S. in 1994 and its stated aim is to make entry into the U.S. so difficult and dangerous that precluded immigrants will not try to enter the U.S. clandestinely. According to noted migration scholar, Wayne Cornelius, this strategy “has been more than 10 times deadlier to migrants from Mexico during [1995–2004] than the Berlin Wall was to East Germans throughout its 28-year existence. More migrants (at least 3,218) have died trying to cross the US/Mexico border since 1995 than people—2,752—were killed in the World Trade Center attacks on 11 September 2001” (2005, 783).

For Abizadeh, this kind of an enforcement strategy would clearly count as coercive and unjust. For Miller, however, it still technically falls on the preventative side of the spectrum and therefore is not necessarily unjust. Miller would obviously find the thousands of migrant deaths regrettable, but on his view the migrants are to blame, not the state. After all, the U.S. government did not force precluded immigrants into the desert, rivers or mountains, but only denied them their preferred option (i.e., legal entry through an official port of entry) and left other options open (i.e., staying where they were). So, while Miller’s view does not deny that we must justify the use of coercion against immigrants, strategies like *prevention-through-deterrence* do not require as much justification because they are merely preventative and not coercive.

## 1.2. Denying versus Deterring Access to Human Rights

The distinction between prevention and coercion helps Miller foreclose the possibility of generating an indirect open-borders argument from significant constraints on border enforcement. But immigration enforcement does not end at the border. There are also internal forms of immigration enforcement, and these can be just as problematic for liberalism as border enforcement. For example, in liberal democracies citizens are often wary of government officials having the power to randomly

stop and ask them for their papers or to let them search their homes, vehicles, or places of worship for people who might be harbored or seeking refuge there. In short, determining the proper kinds of tactics and methods internal enforcement may or may not properly use to locate and apprehend undocumented immigrants can prove to be morally and politically tricky.

On top of concerns that internal immigration enforcement can infringe on the rights of citizens, there is the added requirement that governments have to protect the basic human rights of *all* persons in their jurisdiction and not just citizens. Among the basic package of human rights that states are expected to protect are things such as education for children, work-related rights, tenant rights, protection from crime, and access to emergency healthcare. Joseph Carens has correctly noted that this basic package of rights can be inaccessible to undocumented immigrants (and potentially their citizen children) if those responsible for providing these services and protections are also mandated to report the immigration status of those they serve, protect, or with whom they come into contact. As a way of solving this potential conflict, Carens has proposed a “firewall” between immigration enforcement and those agencies and service providers assigned to protect and fulfill basic human rights (2008). One real life example of this practice is that all children, regardless of immigration status, have the right to education in the United States, and so public schools are prevented from gathering immigration information about school children and their families because otherwise undocumented students or students with undocumented family members would be deterred from getting their education out of fear of immigration consequences (*Plyler v. Doe*, 457 U.S. 202 [1982]).

Miller, however, thinks that this solution goes too far. He is concerned that Carens’s firewall will limit immigration enforcement, potentially forming the basis for an indirect open-borders argument, or, more minimally, undermining a state’s presumptive right to exclude non-refugee immigrants. To Miller’s credit, he does not try to deny that, absent a firewall, many undocumented immigrants will be deterred from exercising their basic human rights. He believes, however, that being “deterred” from exercising one’s human rights is fundamentally different from being “denied” those rights. For example, being relegated to a cramped space for days on end without anything to eat would normally be thought of as a denial of basic human rights. If, however, I find myself in that situation because I have committed a crime and do not wish to be discovered, then it seems strange to suggest that the state is denying me my basic human rights. After all, I am free to leave the cramped space, get food, and even receive medical attention if I need it. The state does not so much seem to be denying me my human rights, as deterring me from exercising them. I am essentially making a choice of living in this state of affairs in exchange for something I value much more (i.e., not going to prison). Miller believes that this is the case with undocumented immigrants. They are choosing to forego access to certain goods that they have a right to in order to avoid being detained or deported

(Miller 2016, 118–20). Thus, their lives in the shadow of society is not necessarily a denial of human rights because they have the choice to live outside the shadows, even if it is a risky or costly choice.

At this point, it seems that Miller has successfully rejected limits on immigration enforcement that could ground an indirect argument for open borders or in some way undermine his positive case for a state's presumptive right to exclude non-refugee immigrants. He has refuted Abizadeh's assertion that immigration enforcement is coercive by suggesting instead that it is preventative. This means that it does not require the same level of justification nor the same degree of protection as do other forms of coercive law enforcement (e.g., police intimidation). But this latitude is also not a blank check. States must still respect and protect the basic human rights of everyone, which includes undocumented immigrants. This shifts the problem away from enforcement at the border to internal practices of immigration enforcement. Miller here rejects something like Carens's firewall proposal by suggesting that there is a difference in practices that deny undocumented immigrants their basic human rights and those that merely deter them from exercising those rights.

In this essay, I would like to provide a criticism of Miller's distinctions that focuses on a further (and what I take to be an unwanted) implication of his view. This line of criticism is different from, but not necessarily inconsistent with, some of the more direct criticisms that others have already leveled against Miller's distinctions.<sup>3</sup> On my view, one of the problems that Miller never considers is the practices of crimmigration. In the section that follows, I will outline crimmigration's three parts and why each is morally troubling. I will then conclude that while Miller's response to both Abizadeh and Carens might have been strategically helpful to his overall rejection of open-borders, it has made his account vulnerable to the charge that it lends ideological support to this more troubling practice.

## 2. Crimmigration

Following the work of immigration law professor, César Cuauhtémoc García Hernández (2015), the phenomenon that has come to be known as crimmigration is composed of three aspects:

1. Criminal convictions carrying immigration consequences.
2. Violations of immigration law leading to criminal punishments.
3. Tactics sanctioned for one particular kind of law enforcement being commandeered for the purpose of performing a different kind of law enforcement.

In this section, I would like to look at each of these three aspects and offer reasons for why we should find them morally troubling. I will then conclude the essay by suggesting that the best way to deal with the problem of crimmigration is to endorse something like Carens's firewall proposal with respect to immigration and criminal law enforcement. In other words, there should be a firewall to ensure that neither the function nor mission of either form of law enforcement is undermined or corrupted by having to perform the function or mission of the other. This firewall should also extend to punishments so that the penalty for one kind of law violation is not used to punish a different kind of law violation. For example, deportation should never serve as a punishment for a criminal offense nor should incarceration be used as part of immigration enforcement. However, with respect to process and procedure I think we ought to adopt something closer to Abizadeh's view. We should treat the prospect of deportation and immigration detention as coercive rather than preventative. Those facing removal or waiting to have their asylum cases heard ought to be afforded the same robust set of constitutional protections as citizens do when facing criminal charges. I submit that this conclusion is not in itself an open-borders argument, but it does (as Miller rightly suspected) provide the basis for an indirect one.<sup>6</sup>

### 2.1. Criminal Convictions Carrying Immigration Consequences

Today, a vast number of crimes carry immigration consequences, and often the criteria for whether a crime will have an immigration consequence is vague (e.g., moral turpitude). Immigration consequences can include revocation of visas and green cards resulting in deportation as well as long-term or life-long bans on applying for visas in the future. Incentivizing immigrants to obey the law with the threat of deportation might not initially seem all that problematic and perhaps even intuitively appealing to most people. After all, if someone is seeking to join our club, why could we not ask them (especially during a probationary period) to respect our rules? Despite its initial appeal, I want to suggest this approach raises four potential worries that ultimately outweigh the benefits.

First, this approach unfairly alters the process and procedure by which an individual's guilt or innocence is determined in today's criminal justice system. Second, immigration consequences unjustly punish someone twice for the same offense. Third, deportation is too cruel and unusual to serve as a legitimate punishment (at least in the case of long-term resident immigrants). Lastly, deportation of convicted criminals can function as a way of dumping unwanted (and perhaps dangerous) groups of people onto other countries without the social and political institutions to respond to the needs of these groups. Just to be clear, these concerns do not require that we be sympathetic to people who do or have done horrible things. The concerns raised here are meant to appeal to our shared sense of fairness and desire to avoid creating a situation in which there are parallel and competing



systems of justice. It therefore does not require (but is also not inconsistent with) accounts that appeal to sympathy for those rightfully convicted.

In determining matters of guilt or innocence, justice requires that the procedures we use be the same for all the accused, regardless of factors such as race, sex, or nationality. Attaching immigration consequences (i.e., deportation) to criminal convictions, puts noncitizens caught up in the criminal justice system in a very difficult position. Prosecutors know which convictions are likely to result in deportation and can use this bargaining chip to obtain more control over the process of plea bargaining. Given the way the U.S. criminal justice system is currently setup, citizens who are criminally charged are today strongly incentivized to take plea deals, even when they are innocent, rather than risk going to court where the potential of a significantly harsher penalty (e.g., a longer jail sentence) awaits them (Yoffe 2017). When the defendant is not a citizen, they face even more pressure to accept a plea for a crime that is not deportable, even when they are innocent, rather than to opt for a risky trial for a criminal charge that carries the consequence of deportation. Noncitizens may be forced to take a longer sentence in exchange for being charged with a non-deportable crime or face a high-risk trial where deportation is a likely outcome. In essence, when a criminal defendant is a noncitizen, the prosecutor has a whole extra set of bargaining chips than if the criminal defendant is a citizen. This of course results in worse outcomes for noncitizen criminal defendants.

Again, this is not to say that people who commit crimes should never suffer repercussions for their bad actions nor that the current criminal justice system is fair and perfect. Far from it. My point is just that there is a conflict between our belief that a system of justice should be the same, warts and all, for all the accused and the idea that it is okay to add immigration consequences to criminal convictions. When immigration consequences are also at play in the adjudication of criminal convictions, this creates conflicting incentives, which in turn creates a separate and competing system of justice for noncitizens.

Beyond plea bargaining and trial, there is still the issue that noncitizens are being doubly punished for the same crime. The fact that noncitizens are receiving a double punishment seems fairly clear, but some might counter that this is not necessarily unjust. After all, there are many cases in which people are doubly punished for the same crime, and the added punishment is unproblematic or even just. For example, no one sees anything wrong with revoking the driving privileges of those convicted of too many DUIs, even after the convicted have served their sentence or paid their fine. Similarly, the Domestic Violence Offender Gun Ban prohibits a person convicted of domestic abuse from purchasing, possessing, or transporting a firearm and this applies even after they have served their sentence (18 U.S. Code). Assuming we find no fault in one or the other of these cases, could the addition of immigration consequences not be said to be similar?



The analogy between these cases does not hold up. In the cases where the added punishment is unproblematic, this is either because the added punishment is meant to address the irresponsibility of the actor and/or is narrowly tailored to prevent a related (and often worse) incident from occurring in the future. For example, operating a motor vehicle is inherently dangerous to both the operator and those around them. Operators of motor vehicles must therefore show themselves to be responsible actors because accidents can happen even when no one is behaving recklessly. So, when someone has repeatedly shown themselves to be irresponsible in operating a motor vehicle, then it seems reasonable to take away that privilege.

In other cases, the offender might not have necessarily shown themselves to be negligent, but other factors are brought to bear. For example, someone convicted of domestic abuse might not have necessarily shown themselves to be negligent around guns, but studies are marshalled to demonstrate a causal link between intimate partner homicide and the presence of guns in the house (Díez et al. 2017). Whether one believes gun ownership is a right or supports the Domestic Violence Offender Gun Ban is not what matters here. What matters is the logic undergirding this particular case. The thing to note is that if this secondary punishment is just, it is not only because of the causal connection (e.g., without the presence of X, Y is less likely to occur), but also because it is narrowly tailored for a specific purpose. In other words, the proposed remedy (e.g., taking guns away from convicted domestic abusers) is not a vague or overbroad recommendation. Similar results could perhaps be achieved if we were to cutoff the hands of convicted domestic abusers, but this should obviously be rejected as being overly broad. Therefore, a second way of justifying an additional punishment is to show that this added burden would help prevent a related and perhaps even worse offense from occurring (e.g., intimate partner homicide) and that this added punishment is rational and narrowly tailored to bring about this worthwhile end.

The case of deporting convicted immigrants might appear to share some of the features of the cases above, but I submit that it does not fit either very well. A noncitizen who discharges a gun in a public place has no doubt acted negligently.<sup>7</sup> The negligence in that case, however, is with respect to the use of firearms and not with immigrating per se. If we wish to add an additional punishment to this case, it would seem more logical to take away their right to purchase, possess, or transport firearms. This should hold true in other cases where noncitizens act negligently, an additional punishment should not itself be out of the question, but deportation as an added punishment seems unwarranted. At least it does not seem to follow in the same way that losing one's privilege to drive seems to follow from the case of driving under the influence.

But even if this is right, deportation as an additional punishment can still be just if there are other factors showing a strong and narrow connection between their lawful presence and the occurrence of certain specific crimes. For example,

maybe noncitizens have dramatically higher recidivism rates than the general population and thereby deporting convicted noncitizens would help bring about a significant enough drop in crime to justify their removal. This kind of argument would therefore seek to make the case of convicted immigrants more analogous to the case of domestic abusers than to the DUI case.

There are, however, at least two problems with making this analogy. First, the empirical evidence does not support the view that immigration status is either a cause or good indicator of increased criminal activity or recidivism (Nowrasteh 2019). Even if it were, deportation as compared to losing one's ability to drive or to own a firearm does not seem to be tailored narrowly enough to a specific outcome. In this case, the proposed remedy is overly broad and extreme. It would be more analogous to cutting off the hands of a domestic abuser than taking away their firearms. In other words, the secondary punishment would not be limited to preventing one or even two specific offenses from occurring, but to crime in a more general sense. Deportation because of criminal conviction is not tailored to achieve any particular government end. It is also not clear why a less extreme and more narrowly tailored measure would not be the preferred option. Why not propose more tailored responses (e.g., take away a person's right to possess a firearm or privilege to drive) instead of deportation? In short, arguing that the addition of immigration consequences to criminal convictions is just like the added punishments sometimes justly tacked onto convictions for other crimes does not hold up.

Some might say, however, that I am thinking about this in the wrong way. Maybe the immigration consequences are not so much added punishments as they are the result of a breach of contract. After all, noncitizens have been allowed to enter the U.S. on the condition that they follow the law. When noncitizens break the law, they have breached the contract and have made themselves subject for removal. This last point brings us to the third potential worry, which is that there are certain forms of punishments that we, as a society, should find too abhorrent for even the worst of criminals. Exile or banishment is now widely considered to be such a punishment. Exile or banishment is not just an obstacle to living one's life that one can learn to overcome (e.g., losing one's privilege to drive or not being able to own a gun). It is a fundamental reordering of one's life that is surpassed in magnitude perhaps only by death or life in prison. Deportation for long-term resident immigrants is essentially a form of exile or banishment and for this reason should be off the table as a possible consequence for any criminal conviction.

A final concern is that there might be something inherently wrong with countries deporting criminals to other countries. This was the exact complaint (although perhaps unfounded) that the U.S. leveled against Cuba during the infamous 1980 Mariel Boatlift. During that incident the U.S. accused Cuba of emptying out its prisons by sending its prisoners to the U.S. as political asylees. Similarly, the now infamous crime syndicate, Mara Salvatrucha (i.e., MS-13), had its origins as a street

gang in Los Angeles, but then expanded into Central America when its members were deported after serving jail sentences in the U.S. (Chacon 2007). While it does feel unfair to ask countries to put up with convicted noncitizens after they get out of prison, it is also not clear why their home country should have to deal with them either. This is especially the case when the noncitizen in question has lived a significant portion of their lives (and committed the crimes in question) in the country now seeking to deport them and/or when their home countries lack the institutions to properly deal with or help former convicts after their release.

Given the way that modern prisons work, most people released from prison today find it difficult to reintegrate into society even under the best of conditions. To then add deportation on top of this would not only set them up for failure but will almost assure that they fall back into a life of crime, except that the consequences for failing to help this former convict reintegrate into society will be borne by a different country, one that likely did not create the situation for the person who is now trying to reintegrate. This is a kind of externalization of the costs for our failing criminal justice system that are then spread to other countries. As MS-13 shows, deportation of convicted criminals is a way of making other countries deal with our problems (e.g., gang violence).

## 2.2 Violations of Immigration Law Leading to Criminal-Style Punishments

The second aspect of crimmigration deals with immigration violations carrying criminal (as opposed to civil) style punishments. It will sometimes surprise people to learn that before 1929 there were no criminal penalties attached to entering the U.S. without authorization (Cohen 2020, 101–2). Yet, today immigration violations—and in particular illegal reentry—constitute the largest category of federal offenses (Hernández 2015, 11). To be clear, I am not suggesting that violations of immigration law (e.g., overstaying a visa, engaging in a fraudulent marriage or knowingly hiring an undocumented immigrant<sup>8</sup>) should carry no penalties.<sup>9</sup> The claim I want to make in this section is far more modest. I want to suggest that attaching criminal-style punishments (e.g., incarceration) to immigration violations is inconsistent with the reasoning used to justify the immense and unchecked power the federal government, and specifically the executive branch, currently enjoys over immigration.

Unlike what some philosophical accounts seem to assume, the federal government's authority to control immigration has not always been so obvious. For example, the U.S. constitution makes mention of the war and commerce powers, as essential sovereign powers, but makes no mention of the power to control immigration. Who and to what extent has the power to control immigration in the U.S. was determined only through a series of nineteenth-century Supreme Court cases. The first set of these cases took place in the mid-nineteenth century and was known as the Passenger Cases. These cases made it clear that the federal

government (and not state or local governments) had the exclusive right to admit immigrants. Up to that point, and even for a few decades after, state and local governments—not the federal government—were actually controlling immigration into the U.S. (Tichenor 2002, 49–70).

The second set of cases were the Chinese Exclusion Cases. These cases upheld the constitutionality of excluding immigrants (specifically Chinese nationals) on racist grounds. Thankfully the laws behind these cases have since been repealed, but the precedent set by the court's decisions in these cases have not. Collectively these two sets of cases give the U.S. federal government, and in particular the executive branch, “plenary power” over immigration. In other words, the federal government alone can make laws or policy decisions about which noncitizens may be admitted, excluded, or removed. Moreover, the federal judiciary has very limited power to review decisions by the U.S. Congress and Executive Branch. This means that U.S. immigration courts are *not* part of the judicial branch. These courts are a part of the Department of Justice (DOJ), which falls under the Executive Branch and is therefore administrative and not criminal law. Decisions made in immigration court are not made by a jury of one's peers, but by judges appointed by the DOJ and not confirmed through congress or elected by the people. They must follow directives from the Attorney General, who is appointed by the current President.

This is an enormous amount of unchecked power for the federal government—and especially one branch of it—to have. So how does this doctrine pass constitutional muster, especially given the U.S.'s deep commitment to the rights and protections of individuals and of a government based on a system of checks and balances? It does so by largely following something like Miller's playbook. The courts make a distinction between criminal offenses (e.g., murder, robbery, or assault) and civil violations (e.g., speeding, littering, or jaywalking). When charged with the former, individuals are entitled to the maximum set of due process rights and protections, but when charged with the latter they are not. Immigration violations, the court has consistently ruled, are civil violations.

Nowhere is this distinction better articulated than in the 1896 Supreme Court case *Wong Wing v. United States*. At stake in that case was whether a noncitizen, Wong Wing, could be sentenced to 60 days of hard labor and subsequently deported without the benefit of a jury trial. The court's decision was that there was nothing unconstitutional about the federal government deporting Wong Wing without a jury trial. On their view, deportation is merely an administrative matter and would not be taking away either Wong Wing's life, liberty, or property. On the other hand, the provision of the law requiring 60 days of hard labor was unconstitutional because it would be depriving Wong Wing of his liberty without the necessary due process. So, regardless of the fact that Wong Wing was a noncitizen and subject to removal, he nonetheless was still entitled to the full range of constitutional

protections if and when the government sought to incarcerate him and coerce him into performing hard labor.

In short, the *Wong Wing* decision formalized the tradeoff that makes the *plenary power doctrine* consistent with a liberal democratic form of government. The tradeoff is that in the areas where the federal government can exercise coercion (e.g., take away a person's life, liberty, or property) that individual is entitled to a robust set of protections (e.g., trial by jury and having a lawyer appointed to them). These actions, especially when taken by the executive branch, ought to be reviewable (i.e., could potentially be invalidated) by courts of the judiciary branch. However, in cases where the federal government is not technically coercing individuals—perhaps merely preventing them—these individuals are not entitled to the typical constitutional protections afforded a criminal defendant, nor are the actions taken by the executive necessarily subject to review by the judicial branch.

In other writings, I have provided a criticism of the *plenary power doctrine* (Mendoza 2017, 1–24), but here I would like to highlight what I think the court in *Wong Wing* actually got right. The fundamental problem with allowing the federal government, and specifically the executive branch, to attach criminal-style punishments to immigration violations is that it lets them have their cake and eat it too. It allows the federal government to take away a person's liberty or property on a conviction obtained through their own special court (i.e., the DOJ) and not a judicial court. Furthermore, it does so in a manner that does not extend to the accused the full range of constitutional protections. In short, if violations of immigration law are to have criminal (as opposed to civil) style punishments, then we must extend the same robust set of constitutional protections to those facing removal or waiting to have their asylum cases heard as we do to citizens facing criminal charges. In other words, we would have to start thinking about immigration controls as coercive and not merely preventative.

### 2.3. The Commandeering of Different Enforcement Tactics and Functions

Finally, there is the issue of tactics and functions sanctioned for one particular kind of law enforcement being commandeered for the purposes of performing a different kind of law enforcement. There are at least three places where this kind of conflation can become problematic. The first is when civilians whose only potential infraction is an immigration law violation are held in custody for an indefinite period of time without receiving proper due process because they are not being held for a criminal charge. The second is when local police are tasked with or allowed to perform immigration enforcement duties. And the third is when immigration enforcement is tasked with performing functions that go beyond its mandate (e.g., performing anti-terrorism and drug enforcement duties).

Much of Miller's argument against Carens's firewall rests on the assumption that law enforcement is a singular monolithic entity. Take for example what Miller

has to say about the unworkability of a firewall in the context of law enforcement: “If someone who has been involved in criminal activities approaches the police on some unrelated matter, we would not think it wrong for the police to take further action if in the course of responding to the person’s request, evidence of his criminality comes to light. A firewall would not be appropriate here” (2016, 119). There are, however, important boundaries that do exist between the functions we ask federal, state, and local law enforcement agencies to perform and there are also boundaries within those agencies. While it is true that they do at times work together, it is always important to be clear about how and when they are to remain separate, especially when one agency attempts to usurp the function or task of another. These clear demarcations and limits can at times frustrate and even appear overly burdensome, which is often the premise of exhilarating television crime dramas, but there are good reasons for their existence. Namely, they exist to ensure that we do not suddenly find ourselves living in a police state. For example, the FBI can only investigate federal crimes, and the ability of congress to pass crime legislation is limited by Article 1, Section 8, of the Constitution. Thus, the FBI cannot act in the place of local police in investigating crimes like simple assault and battery, domestic violence, or most property crimes.

In the section above, I already highlighted some of the problems with using incarceration as a punishment for immigration law violations. Yet these problems are only exacerbated when incarceration is used as a tactic to respond to (and in some cases to try to discourage) noncitizens requesting admission or asylum. In the *Wong Wing* case mentioned above, the court made an exception for civil detention in extraordinary cases where eligibility for admission or removal could not immediately be determined or processed. As the court put it: “We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid” (*Wong Wing v. U.S.* 1896). This ruling meant that for a very specific and limited purpose, that is, to determine if a noncitizen is deportable, immigration enforcement would be allotted more freedom to detain and hold noncitizens than police are allotted in the detainment of citizens suspected of a crime without being charged or given access to an attorney.

The practice of detaining noncitizens was initially rarely used and when it did occur it took place in mostly private venues, such as passenger ships, not jails or prisons. In fact, most would be surprised to learn that before the advent of Ellis Island in 1892, the U.S. federal government had no immigration detention centers at all, and in the 1950s the practice of detention was almost entirely phased out (Hernández 2019). Today, however, approximately 400,000 persons a year find themselves in U.S. immigration detention and on average their cases can take more than a year to be heard.



One could look at this issue in a manner that I think is consistent with Miller's view, which would be to point out that, unlike prisoners, noncitizens in detention can be released at any time, so long as they stop fighting their deportation. The problem is that many of the people in detention have legitimate claims to admission or to not be removed. Surprisingly, there is a significant number of U.S. citizens caught up in immigration detention facing wrongful deportation, and there are also many noncitizens with legitimate claims to asylum (Cohen 2020, 26–9). In these cases, immigration detention once again turns out to be a kind of sleight of hand, where the government takes advantage of a legal loophole to get the best of both worlds. Without a firewall, incarceration—which is meant to be used exclusively in criminal contexts—gets abused in the immigration context. Immigration agents exercise a maximum amount of coercion against an individual (e.g., *de facto* incarceration), while at the same time not having to offer them any due process rights or protections that normally provide checks on the excesses of such power (e.g., right to a speedy trial, right to an attorney).

A second area where a lack of a clear distinction (i.e., a firewall) between criminal and immigration enforcement can become problematic is in the partnerships formed between local police and federal immigration enforcement. These partnerships tend to sow mistrust among immigrant communities and police. When police are asked to function as auxiliary immigration enforcement agents, immigrants are less likely to call on them when they are the victims of crime or come forward as witnesses to help solve crimes. Citizens who live in mixed households are also less likely to call or talk to police, even in instances of domestic abuse, for fear that these interactions could lead to the deportation of a family member or friend.

These consequences were already raised by Carens in his argument for a firewall, but proved insufficient to convince Miller of its necessity. For Miller there is a difference between denying human rights and deterring one from exercising those human rights. The consequences just mentioned might prove unfortunate but for him they are not a denial of human rights. Miller, however, seems to overlook two distinct issues that, while not raised by Carens, could justify a firewall between police and immigration enforcement. The first concerns the kind of individual profiling immigration agents are currently allowed to use for immigration enforcement purposes, which are disallowed in criminal investigations. The second concerns the nature of federalism and how we ought to understand the relationship between these different agencies.

For the purposes of immigration stops and inspections, the U.S. Supreme Court has ruled that individuals can be profiled (e.g., racially, ethnically, or nationally) so long as this is done within 25 miles of the border, and within this zone they may also conduct warrantless searches and seizures that do not require probable cause (Cohen 2020, 48–50). I have noted in other writings the inherent problems with such practices (Mendoza 2016), but will bracket those criticisms



here for the sake of focusing more generally on how a lack of a firewall creates a kind of legal (and perhaps moral) loophole that allows an enforcement agency to circumvent limits on its power by exploiting the opportunity to perform the function of a different enforcement agency. Currently, police are not (and should never be) allowed to racially profile individuals or conduct warrantless searches and seizures without probable cause. But if we allow the lines between police and immigration enforcement to be blurred, there is nothing to prevent police from using immigration concerns as a pretext to racially profile or unconstitutionally stop and search individuals that they otherwise would have no justification to detain. After all, if police can approach someone on an unrelated matter and in the course of their interaction evidence of their criminality comes to light that can be used against them, why would this not serve as a perverse incentive to misuse their immigration enforcement powers? In short, even if we think (as I do) that immigration enforcement should not be allowed to engage in certain activities (e.g., racial profiling), it is clear from these sorts of examples that the potential for corruption should be reason enough for erecting a strict firewall between police and immigration enforcement.

Beyond a concern for corruption, there is also a conflict between these kinds of partnerships and federalism more generally. Under federalism, the state and the federal government check one another, and the federal government is one of limited powers based on the U.S. Constitution. Therefore, constitutional concerns arise when the local and state law enforcement, which have jurisdiction over most classic crimes, are asked or coerced into participation in the supposedly exclusively federal jurisdiction of immigration enforcement. Navigating these distinct but occasionally overlapping jurisdictions is tricky, and it raises moral and political questions when state and local law enforcement are asked to engage in the enforcement of federal immigration law. This is especially the case when this cooperation could undermine the aims of those state and local agencies or divert away scarce state and local resources.

Immigration control is a prerogative of the federal government, while state and local agencies, such as police, are tasked with protecting and ensuring the human rights of those present in their jurisdiction. When police chiefs argue that they do not want to participate in assisting federal immigration enforcement, they typically argue that doing so makes their communities less safe (Wexler 2017). Thus, coercing or encouraging local police to assist in immigration enforcement creates a trade-off between the equal protection of their residents and enforcing federal immigration policy. This is especially the case when doing so is detrimental to the interests of those state and local governments. Installing a firewall is sound policy so as to avoid confusion about what the priorities of certain agencies are and are not. Moreover, if local law enforcement's job is, among other things, to provide security of the person, they could be denying these communities rights by engaging

in practices that undermine that ability. Thus, even using Miller's distinction, the local police could be failing to protect the human rights of their communities by engaging in immigration enforcement.

A final concern is when immigration enforcement is tasked with or is expected to perform functions that go beyond its original mandate (e.g., serving as anti-terrorism and drug enforcement agents). Since the 1990s and especially after the terrorist attacks on the World Trade Center in September 11, 2001, immigration enforcement in the U.S. has also been expected to perform anti-terrorism and drug enforcement tasks. This might not initially seem problematic, but there are two ways in which it is. First, there already exist enforcement agencies whose primary mandate is specifically to deal with these very issues (e.g., drug-trafficking and terrorism). These agencies include the Drug Enforcement Agency (DEA), the Bureau of Alcohol, Tobacco, Firearms and Explosives (FTA), or the Federal Bureau of Investigation (FBI). This is not to say that these agencies cannot (or should not) at times coordinate with each other, but we need to be clear that immigration enforcement is not primarily a crimefighting agency.

Second, this change of emphasis has fundamentally altered the way immigration agencies approach and perceive immigrants. Instead of viewing immigrants as aspiring citizens and using coercive measures, such as detention, as methods of last resort, immigration enforcement today treats immigrants (and especially asylum seekers) as potential criminals or terrorists. Because of this, draconian measures in the screening process of immigrants is now the norm. As has been stressed above, the federal government has a tremendous amount of leeway in what it can do with respect to immigration control, but it gets this leeway because it is not seen as primarily serving a crimefighting function. It is supposed to be serving an administrative function.

## Conclusion

Crimmigration poses many threats to liberal values including due process, freedom from unreasonable government search and seizure, police overreach, and fairness in punishment. To address these threats, we must turn the logic of Miller's distinctions on their head. We should maintain a strict separation between criminal and immigration law with respect to approach and consequences. In other words, there should be a firewall to ensure that neither the function nor mission of immigration law enforcement and criminal law enforcement is undermined or corrupted by having to perform the function or mission of the other. With respect to consequences, a penalty like deportation should never result from a criminal conviction alone, nor should a criminal-style punishment (e.g., incarceration) be attached to an immigration violation.

Criminal law and immigration law, however, should come together with respect to process and procedure. In other words, a robust set of constitutional protections should be afforded to those accused or suspected of both criminal and immigration offenses. The rights afforded to criminal defendants, including rights to speedy adjudication and legal counsel and rights against racial and ethnic profiling and search and seizure with no probable cause should be afforded in immigration enforcement because such processes and procedures are part of the protection of human rights. Just because human rights against discrimination and privacy are denied for the sake of immigration enforcement does not turn that denial into a mere “deterrent” that would be avoided if one had not immigrated.

I recognize that Miller did not have something like crimmigration on his mind when he initially developed the distinction between coercion and prevention and between protecting human rights and deterring people from exercising them. He worked these distinctions out in an effort to foreclose the possibility of an indirect open-borders argument. Yet, I see no other way of resolving (or guarding against) the problems that come with crimmigration other than by following and building on the recommendations of Abizadeh and Carens.

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## Notes

1. An indirect argument for open-borders arrives at its conclusion without directly appealing to either an expanded understanding of individual liberty (e.g., arguing that immigration is a human right) nor explicitly making the case that immigration restrictions deny the equal moral worth of those being excluded (e.g., radical cosmopolitanism). For one version of an indirect open-borders argument, see Sager 2016.
2. I use the term “precluded” in this essay to designate noncitizens who are intending to enter a foreign country but currently lack official permission to do so. These noncitizens are not yet “undocumented,” but if successful in their efforts, are likely to become so. In theory, this group should not include asylum seekers, which is a separate category, but in practice it often does, as many who meet international law standards to be asylum seekers are not given the opportunity to demonstrate that they are and gain legal entry into another country.
3. Some recent exceptions to this rule include Sánchez 2011; Silva 2015; Silverman 2014; Reed-Sandoval 2016; and Lister 2020.
4. Abizadeh leaves open the possibility that immigration controls could be legitimate, if they were part of some multilateral scheme or if noncitizens themselves consented to be excluded, but in either case, this still precludes states having the kind of inherent right to exclude that Miller defends.
5. See Abizadeh 2010; Blake 2019, 102–3; and Sager 2020, 26–30.
6. For a criticism of my view, which suggests my view does in fact (or should) lead to an open-borders conclusion, see Sager 2020, 55–9.
7. As happened in the case of Juan Francisco López-Sánchez, who discharged a gun in San Francisco leading to the death of Kate Steinle (Pearson 2015).
8. Interestingly, it was not until after 1986 that knowingly hiring an undocumented immigrant was a punishable offense in the U.S. (see Stumpf 2006, 384).
9. For a convincing argument that they should carry no penalties and that there are even times when there is a moral obligation to break these laws, see Hidalgo 2018, 114–184.

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