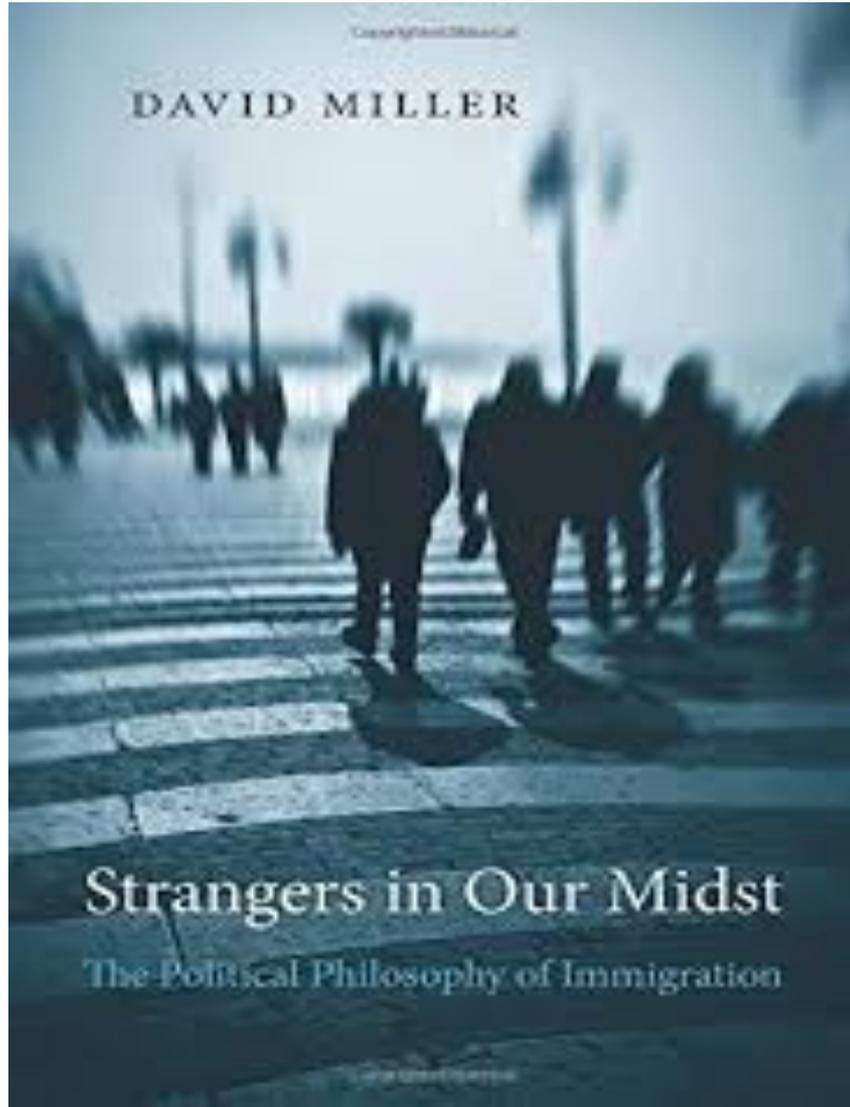


Crimmigration and the Ethics of Migration

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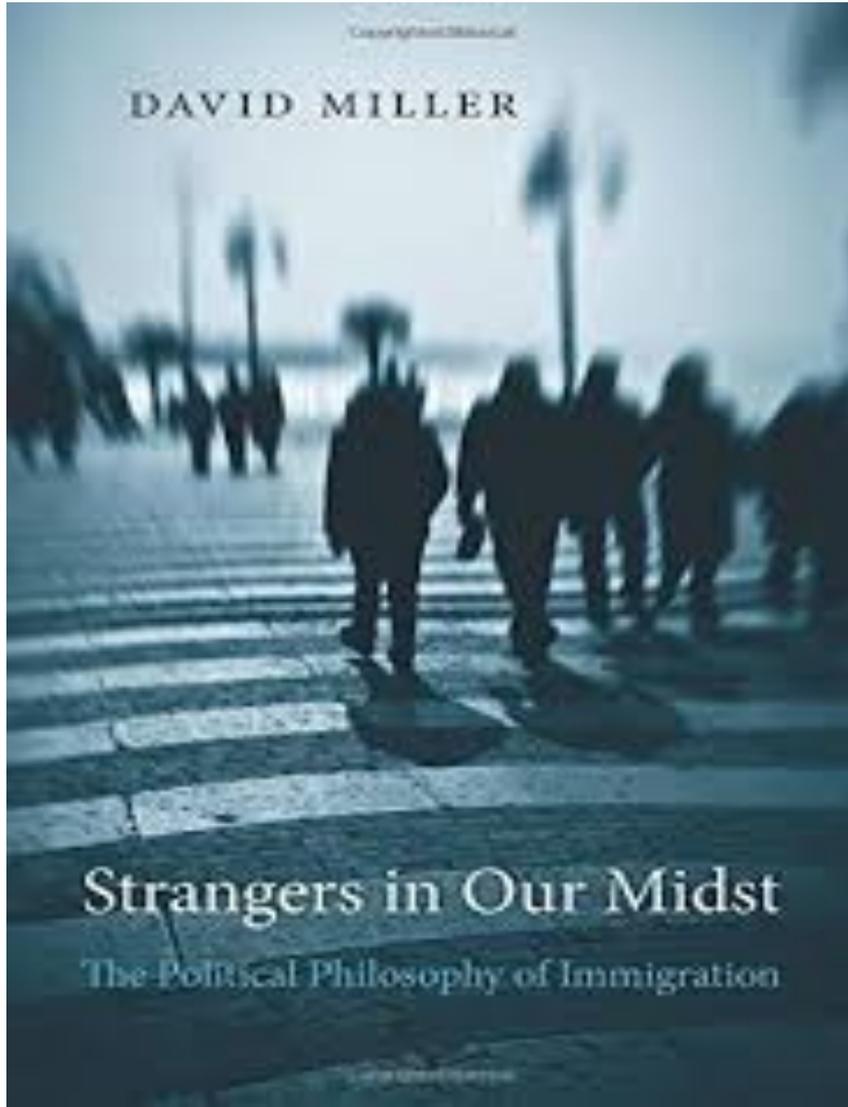
David Miller's: *Strangers in Our Midst*



The case against immigrant rights

1. Enforcement is “preventative” and not “coercive.”
2. There is a difference between “protecting” human rights and “detering” people from exercising their human rights.

David Miller's: *Strangers in Our Midst*



The Problem of “Crimmigration”

1. Criminal convictions come to have immigration consequences.
2. Immigration violations come to have criminal consequences.
3. Tactics of one enforcement agency come to be used by another agency in constitutionally problematic ways.

“Borders have guards, and the guards have guns”



Arash Abizadeh



“Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders” (2008)

1. State coercion is legitimate only if those who are subject to it have a democratic say about it.
2. Unilateral immigration controls coerce those that have not had a democratic say or consented.

Con. States are not justified in “unilaterally” enforcing immigration exclusions.

Miller's Response to Abizadeh

Coercion involves forcing a person to do a very specific thing.

Prevention involves forcing a person *not* to do a specific thing, while leaving other options open.

Preventing someone reduces their freedom to act, so it does require some level of justification.

Immigration controls are only preventative, not coercive, so require some but not the same kind of democratic justification or level of protections.

Prevention-Through-Deterrence

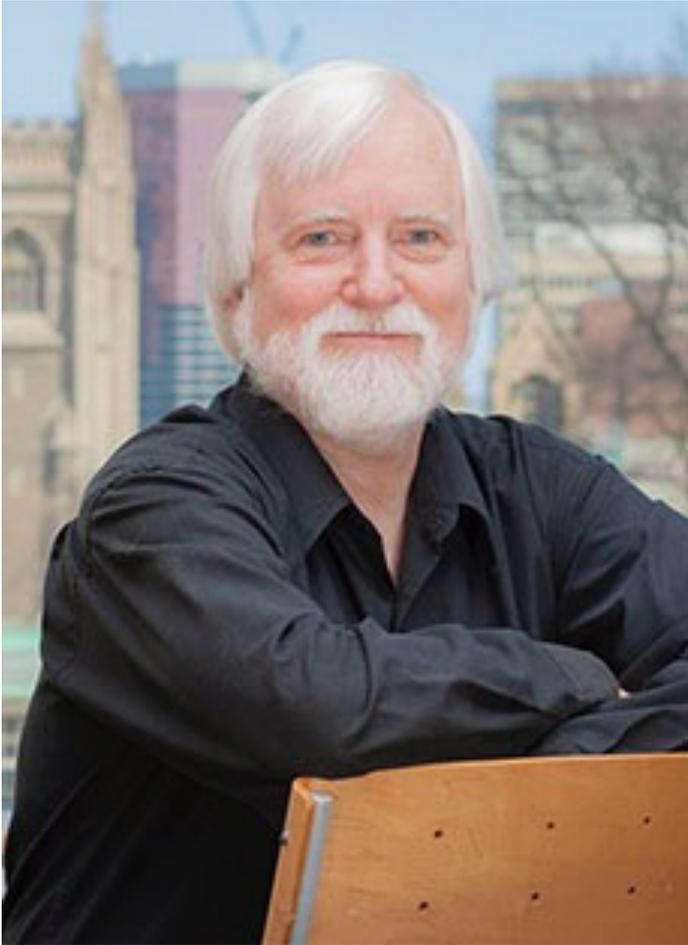
“...the fortified US border with Mexico has been more than 10 times deadlier to migrants from Mexico during [1995-2004] than the Berlin Wall was to East Germans throughout its 28-year existence. More migrants (at least 3,218) have died trying to cross the US/Mexico border since 1995 than people—2,752—were killed in the World Trade Center attacks.” —*Wayne Cornelius*

- Close to 6,000 migrants died between 2000-2014 because of this deterrence strategy.

*“The Wrong
Kind of
Mexican”*
The Story of
Marie Justeen
Mancha



Joseph Carens



“The Rights of Irregular Migrants” (2008)

1. States have an obligation to protect basic human rights of everyone present.
2. Extending immigration enforcement into certain areas undermines this much more important task.

Con. There ought to be a “fire wall” keeping immigration enforcement away from these crucial areas.

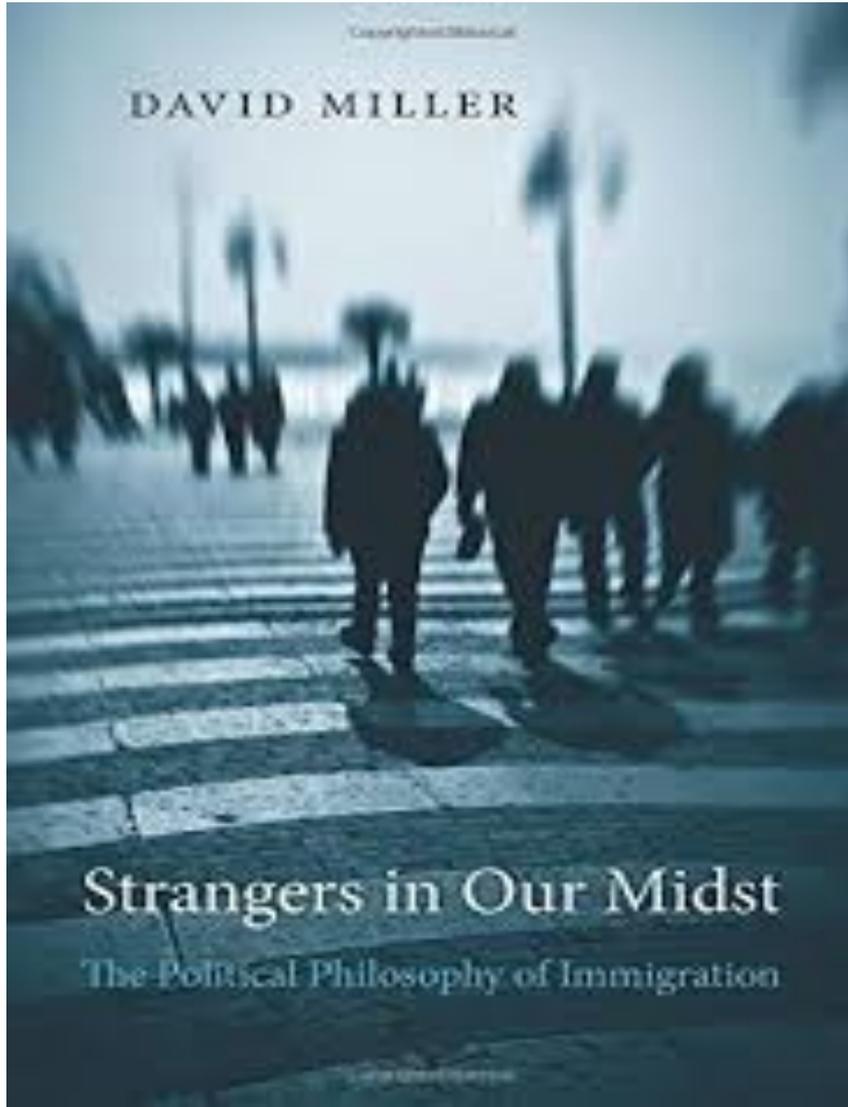
Miller's Response to Carens

Carens goes too far and a “firewall” seems intuitively wrong and unworkable:

Being **deterred** from asserting my rights is not the same as being **denied** of my rights.

- Undocumented immigrants are choosing to forego access to goods they have a right to in order to avoid being detained or deported.
- 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 costly choice.

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César Cuauhtémoc García Hernández



Crimmigration:

- 1) Criminal convictions carry with them immigration consequences.
- 2) Violations of immigration law leading to criminal punishments.
- 3) Tactics used in criminal enforcement used in immigration enforcement (vice-versa).

1. Criminal convictions carrying immigration consequences

Despite its initial appeal, there are at least four interrelated worries that outweighs its benefits:

1. It unfairly alters the process and procedure by which a person's guilt is determined.
2. Immigration consequences unjustly punish a person twice for the same offense.
3. Deportation, at least in the case of long-term resident immigrants, seems cruel and unusual.
4. Exports the costs for our failing criminal justice system onto other countries.

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2. Violations of immigration law leading to criminal punishments

Before 1929 it was not a crime to enter the U.S. without authorization.

By 1993 over 5% of of criminal cases appearing in federal courts had an immigration offence as its most serious offense.

By 1997 it was 13.4%

By 2001 it was 18.3%

By 2010 it was 46%

Today, immigration law violations constitute the largest category of federal offenses.

Plenary Power Doctrine

The power to control immigration is *not* one of the federal government's enumerated powers.

It's a power that's been established by case law.

Who has the power to determine immigration?

- States or federal government? Which branch?
- 1849 Passenger cases: Federal government has the power to ***admit***.

19th Century Chinese Exclusion cases

- Chae Chan Ping (1889): Power to ***exclude***
- Fong Yue Ting (1893): Power to ***remove***

Plenary Power Doctrine

Wong Wing v. United States (1896)

- Exclusion and removal are not punishments.
- But hard labor and detention are punishments.
- Accused are therefore entitled to constitutional protections and due process.
- *But* Trade off: where government can potentially exercise maximum coercion, individuals are entitled to maximum protections.
- But not in cases where the government is not “coercing” in the proper sense of the term.

2. Violations of immigration law leading to criminal punishments

It allows the federal government to take away a person's liberty:

1. On a conviction obtained through their very own special court (DOJ), not a judicial court.
2. In a manner that does not extend to the accused the full set of constitutional protections.

If immigration law violations are to have coercive consequences (e.g., jail time), then we need to radically rethink the current set-up.

We would need to treat immigration control as though it were coercive, not merely preventative

3. Criminal law enforcement tactics being used for immigration enforcement

Civil Detention

Less than 5,000 daily until the early 1990's

Now on average there are 35,000 detainees.

Secure community-type programs

Partnerships between local police and Immigration enforcement.

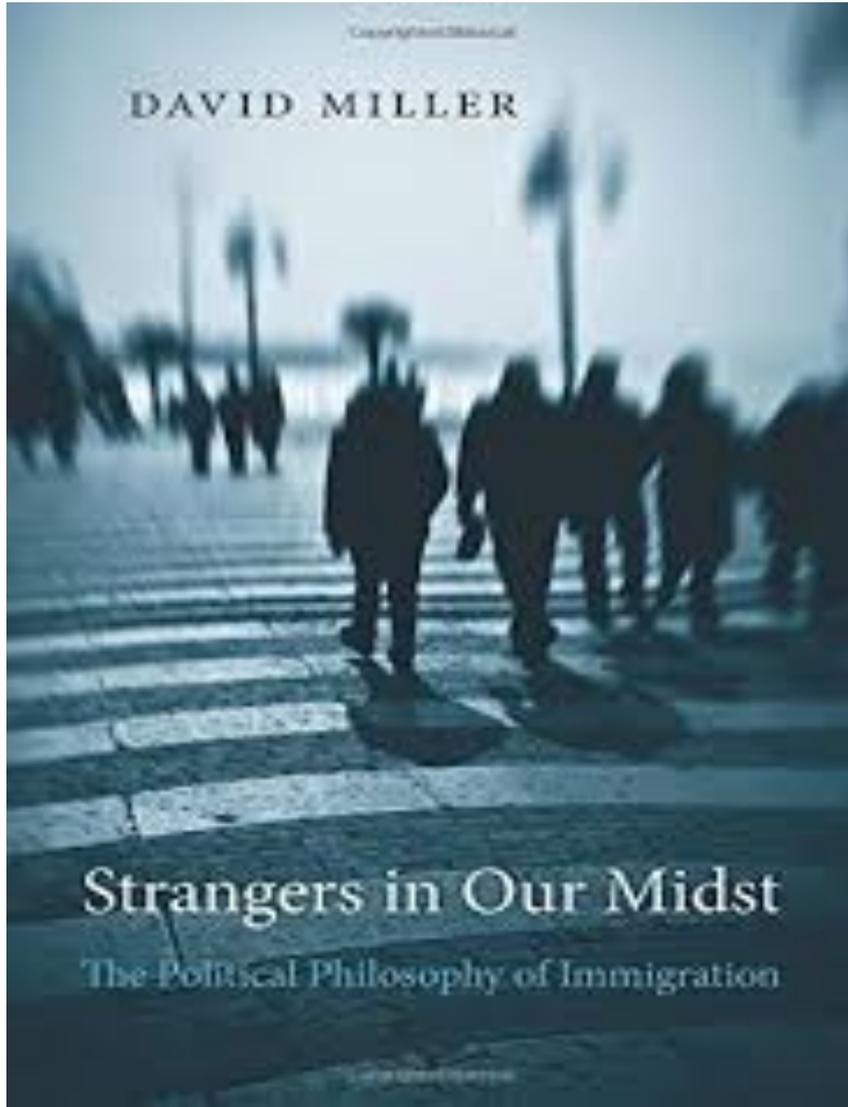
Creates distrust among communities and police.

Use of race in immigration enforcement

United States v. Brignoni-Ponce (1975)

United States v. Martinez-Fuerte (1976)

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“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”

3. Criminal law enforcement tactics being used for immigration enforcement

- The FBI can only investigate federal crimes, and the ability of congress to pass crime legislation is limited by Article 1, Section 8.
- FBI cannot act in the place of local police in investigating crimes like simple assault, domestic violence, or most property crimes.
- Wong Wing: for a very specific and limited purpose, immigration enforcement is allotted more freedom to detain and hold noncitizens than police are allotted in the detainment of citizens suspected of a crime.

3. Criminal law enforcement tactics being used for immigration enforcement

- Before the advent of Ellis Island in 1892, the U.S. federal government had no immigration detention centers at all!
- In the 1950's 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.
- Yet people in detention have legitimate claims to admission and a Surprising number of U.S. citizens caught up in immigration detention.

3. Criminal law enforcement tactics being used for immigration enforcement

1975 United States v. Brignoni-Ponce

- The reason for the stop was that Brignoni-Ponce and his two passengers had a “Mexican appearance.”

1976 United States v. Martinez-Fuerte

- Based on their “Mexican appearance,” their car was directed to the secondary inspection area where it was discovered that the two female passengers were unlawfully present.

3. Criminal law enforcement tactics being used for immigration enforcement



3. Criminal law enforcement tactics being used for immigration enforcement

- Immigration control is the prerogative of the federal government, while state and local agencies, such as police, are tasked with protecting and ensuring the human rights of in their jurisdiction.
- 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.
- 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.

3. Criminal law enforcement tactics being used for immigration enforcement

Problem with having immigration enforcement perform anti-terrorism and drug enforcement duties.

1. Enforcement agencies whose primary mandate is to deal with these very issues already exists and immigration enforcement is not primarily a crimefighting agency.
2. This change of emphasis has fundamentally altered the way immigration agencies perceive immigrants, as potential criminals or terrorists, rather than civilians and future citizens.

Conclusion

1. We maintain a separation between criminal law and immigration law with regard to approach consequences of infractions.

Deportation should never serve as a punishment for a criminal offense nor should incarceration serve as a punishment for an immigration violation.

2. We bring them together with regard to process.

An expansive range of constitutional protections ought to be afforded not only to those accused or suspected of committing criminal offenses, but also to cases involving immigration violations.

1. Criminal convictions carrying immigration consequences

Not really new, the colonies had laws against the transportation of “foreign convicted malefactors.”

Between 1875-1980 about 70,000 immigrants were removed because of criminal offences.

In fiscal year 2013 alone more than 200,000.

Relies on vague terms such as “crimes involving moral turpitude” and “aggravated felony.”

The number “removable offenses” dramatically expanded and were applied retroactively.

Response to Miller's "Fire wall" Dismissal

Ignores the fact that agents tasked with preventing immigration infractions have a freer hand in how they operate, because the consequences are technically not supposed to be coercive.

Would a firewall in schools, hospitals, and police departments not potentially cover up child abuse, assaults, or other such serious crimes?

Yes! But the "fire wall" is not meant to go between human rights protecting and servicing institutions or agents.