

Immigration and Punishment
Cécile Fabre
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1. Introduction

Readers expecting a philosophical bloodbath will be disappointed: I agree with much of what Joseph Carens has to say about immigration in his long-awaited book.¹ Although I am more of a cosmopolitan than he is, I am wholly sympathetic both to his argument for open borders and to his arguments for extending rights and freedoms to immigrants once they have arrived, far beyond extant practices. In this paper, I explore and probe his remarks on the immigration status of foreign convicted criminals who have served their sentence, and who wish either to immigrate into our country or who are already here and have served their sentence.

The topic does not feature prominently in academic discussions of immigration; yet it is a politically charged question which regularly attracts headlines, along the lines ‘foreign criminals roaming around the streets of Britain in their thousands’. In fact, the word ‘roaming’ is the tabloids’ verb of choice in this context, evoking wild beasts who ought to be caged in and shipped out.² Echoing those hysterically indignant voices, liberal democracies’ immigration law does allow the deportation of convicted felons, subject to certain conditions; it also regards a past criminal conviction as a legitimate criterion for refusing entry to would-be immigrants.

Carens rejects deportation when it is not called for by considerations of national security (102-105), and agrees that considerations of public order can justify barring convicted foreign criminals from entering the country (177). I broadly agree with his arguments against deportation: my remarks there are clarificatory and exploratory as much as anything else (section 2). But both his argument for open borders and his scepticism with respect to radical cosmopolitanism are in tension with his claim that past criminal convictions can act as a bar to entry. (section 3).

Two remarks before I begin. First, I examine the issue from the point of view of a liberal democracy whose citizens and officials are, on the whole, committed to the values which underpin Carens’ ethics of immigration and which are instantiated by civil, political and social rights – in other words, a community like Britain, Canada, much of the European Union, Australia and the United States.

Second, I assume throughout that the criminals about whom decisions to deport or admit are made have been rightfully convicted of common and violent crimes. I will not consider whether foreigners convicted of conspiracy to commit terrorist offences may be deported at the end of their sentence on grounds of national security. On balance, I agree with Carens that they may. Such cases strike me as relatively easy to handle within the framework of his overall argument. Common criminals however present trickier issues – hence my focus here.

¹ See J. H. Carens, *The Ethics of Immigration* (Oxford: Oxford University Press, 2013), 276. Unless otherwise stated all page numbers in footnotes and main text refer to this book.

² See, e.g., <http://www.express.co.uk/news/world/474234/Thousands-of-foreign-criminals-and-RAPISTS-roaming-Britain-and-dodging-deportation>; <http://www.telegraph.co.uk/news/uknews/2419595/Soham-inquiry-Thousands-of-foreign-criminals-may-be-roaming-free-due-to-failures.html>. These are but two examples. There are many others.

2. Deportation

Carens' arguments against deportation unfold against an important background assumption in this part of the book which he then challenges – namely that states have the right to control who gets in. Even if states have that right, he argues, there are three strong arguments against the deportation of foreign convicted criminals (for short, deportation).

The first argument appeals to the importance of social membership. A felon who came to this country as a child, has never lived in his country of citizenship, has been schooled here, has worked here, formed relationships with other long term residents, and has a wife and children here, belongs to *this* civil society. To deport him, when we would not deport *citizens*, is to attach to citizenship a weight which it should not have. Social membership, and not citizenship, is morally relevant. (102).

Second, if that felon has been here for a long time, we collectively have as a society played an important part in failing to inculcate the relevant social norms in him, or in failing to provide him with the economic and social opportunities which might have blocked his path to crime. That felon is *our* problem, and it would be unfair on our part to impose on his country of citizenship, with which he only has a purely formal, legalistic tie, to take him in. (104–105).

Third, suppose that this felon has a family here. To send him away would deprive him of the opportunity to continue to have a family life with his wife and children; importantly, it would also deprive them of that very same opportunity. (105). This – the right to family life – is one of the most important constraints on immigration laws in countries which are signatories to the European Convention of Human Rights.

Carens illustrates all three arguments with the following real-life example. Imagine someone – we call him Victor – who comes to the US with his family from El Salvador, at a very young age, who goes to school there, is adopted by his American stepfather, marries an American, has American children, and has a job in the US. Mistakenly assuming that his adoption by an American citizen confers on him US citizenship, he votes in elections (where presumably one need not provide documentary evidence of one's citizenship status to polling stations officials). Not all goes well, unfortunately: he also belongs to a gang and is convicted of drug-related offenses. Under US Immigration Law, at the end of his sentence he is deported to El Salvador, which he left at the age of 4 and where he has no remaining connection.

This is a depressingly familiar story. Carens regards deportation in this and similar cases 'as a scandal, the most blatant and severe injustice against noncitizens of any of the practices [he criticises].' (102). I agree. But I have four remarks.

First, I suspect that some might support his judgement in Victor's case on the grounds that American penal policy with respect to drug offenses is itself profoundly unjust, and that this man was wrongfully convicted to begin with. Interestingly, however, Carens' three arguments against deportation are equally effective at protecting another criminal – call him Frank – who is as socially integrated as Victor, but who has committed a violent crime against one or several other person, such as rape, murder (with a sentence falling short of a life term), assault, or paedophilia. For Frank, no less than Victor, is a member of our civil society. Given the seriousness of his crimes, our failure to inculcate in him social norms against paedophilia, assault, rape and/or murder seems even more glaring, and it would also be even more unfair to dump him on his country of citizenship.

Finally, Frank does have a family life and its attendant rights, and so do his partners and children. To a liberal democrat, Victor's case is relatively easy. Frank's is harder. But it is a striking feature of Carens' arguments that they should protect the latter as well as the former.

My second remark pertains to the right to family life. Carens thinks that it is the weakest of the three bases for resisting deportation, on the grounds that it would also extend to all sanctions affecting criminals' relatives, and not just deportation. I find this puzzling. The reason why courts appeal to the importance of family life when blocking deportation orders is precisely because it is so much weightier (for those who have a family) than our interest in continued social membership. Moreover, the argument has the merit of drawing our attention to this particularly egregious feature of penal practices in general - namely that those practices tend to be disproportionate not just in the narrow sense that the burden imposed on the criminal is often out of proportion to the crime he committed (this is particularly true of drug offenses), but also in the wide sense that the harms incurred by third parties are out of proportion with the goods (such as they are) derived from punishment.³

Third, some felons will not be caught by Carens' protective net. Most obviously, and as he acknowledges, someone who is convicted of a serious crime six months after entering the country may justifiably be sent back to his country of citizenship, since he is not really a member here and since we are not really responsible for his failings. (104). That said, consider the case of Guy, a French citizen who emigrated with his family to the US at the age of 4, before coming to Britain at the age of 25 - where, two months later, he commits a rape which lands him in jail for 4 years. It would be unfair to impose him on the French. For at the bar of the fairness argument, he ought to be returned to the country in which he spent most of his formative years, whether or not he is a citizen thereof - in other words, the US. I take it that Carens would agree.

The second category of felons who are not strongly protected from deportation by Carens' lights are those who, though they have lived here for a long time, do not have a family life, have always lived on the margins of our society, and whose crime (and marginalisation, for that matter) cannot easily be traced back to a failure on our part to inculcate the relevant moral norms or provide decent social and economic opportunities: not all rapes, murders and paedophilic assaults are committed by people from low socio-economic backgrounds with no clear understanding of prevailing norms. Perhaps there are very few people who fall in that category. But there are some, and we need to know what to do with them. This is the point at which a duty to take back one's citizens would provide a satisfactory solution to this problem. Equally, however, we ought not to return those convicts to their country of citizenship *if* we have reasons to believe that they would face persecution upon their return. This point is entirely consonant with the overall argument of the book and generates a fourth argument against deportation - one which in fact applies to non-felons as well.

³ I borrow the distinction between narrow and wide proportionality from Jeff McMahan's discussion of proportionality in defensive harm. (J. McMahan, *Killing in War* (Oxford: Oxford University Press, 2009). For a brief discussion of wide proportionality and punishment, see V. Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2001), 358-59.

Fourth, and relatedly, deporting a foreign criminal at the completion of his sentence when one would not deport a citizen convicted to the same sentence for the same assault, when citizenship alone protects the latter from deportation, breaches the principle that the same crime should receive the same punishment. The clause ‘when citizenship alone...’ is important. Carens seems to endorse the view – enshrined in international law – that no matter how long one has been absent from one’s country of citizenship, one may never be expelled from it (other than in response to justified extradition requests, presumably), even as a form of punishment (101). But recall Guy, the convicted French rapist. Suppose that he committed this crime together with a British citizen – call him Henry – who also emigrated with his family to the US at the age of 4 and came to the UK at the age of 25 two months before the rape. Neither enjoys social membership in Britain, neither has a family here, and for neither can one trace the crime to British social, educational and economic policy. Yet Guy may justifiably be sent to the US against his will, whereas Henry may not. As a cosmopolitan who believes that borders and therefore citizenship alone are morally arbitrary, I find that disquieting. So would Carens, I suspect, in the light of his overall aim, which is to narrow the moral gap between citizens and non-citizens.

3. Exclusion

There is more to be said about the post-sentence deportation of convicted criminals, and related issues such as the extradition of foreign suspects and the pre-emptive deportation of foreigners who are deemed to present a risk to national security. In the remainder of this piece, I explore Carens’ claim that a past criminal conviction can be a legitimate criterion for *exclusion*, even if one relaxes the assumption that states have a strong presumptive right to control who gets in – in other words, even under an open borders policy. Importantly, the claim does not apply to just any conviction: Carens takes care to warn us against the dangers of turning away people whose criminal conviction in their country of citizenship is unsafe. Subject to that *caveat*, a state may deny entry to those agents on grounds of public safety (177). Many will find that plausible: after all, it is not as if we do not already have convicted rapists, paedophiles, and killers living in our midst. So why should we take on any more of them? Further, considerations of social membership, fairness and family life seemingly do not apply here – and there is no obvious inconsistency therefore between opposing deportation and endorsing exclusion.

Upon further reflection, however, it seems to me that we have some reasons to open our borders even to those people. First, consider a convicted criminal whose partner and children have managed to come to Britain before he was sentenced in his home country and able to join them. Were he to apply post sentence for entry to join them, the argument from the right to a family life would apply if it would also apply against a deportation order in this case.

Second, rightfully convicted criminals, even the most violent ones, can also themselves be victims of persecution in their home country. In such cases, their criminal past might well be outweighed by their bleak present and future prospects for a minimally decent life.

Third, one can also imagine cases where we (that is to say, residents in Britain) are partly responsible for the circumstances under which they committed those serious crimes. If it is true that dire poverty is an important factor in the

commission of crimes, if our foreign policy (both military and economic) is an important factor for poverty in so-called Third World countries, and if it is true (as I believe it is) that this policy is unjust, then there is a sense in which those criminals are *our* problem. Taking them in post-sentence might be one way to correct for our dereliction of duty towards the distant poor – by offering them rehabilitative opportunities which they would lack in their country of citizenship.

I suspect that many will balk at this proposal. Too radical, they will say. Too utopian. Then again, the open borders argument for which Carens is well-known is extraordinarily utopian. And, contrary to what Carens seems to suggest, it is remarkably permissive of foreign criminals seeking entry. For consider. Carens gives three reasons for opening borders: freedom of movement is a precondition for most of our other freedoms; it is required by equality of opportunity understood as equality of access to social positions unconstrained by irrelevant factors such as race and gender, for the simple reason that one cannot avail oneself of those opportunities unless one can actually go where they happen to be; finally, freedom of movement enables people to go in search of a better life and thus reduces social, political and civil inequalities (228). None of this is controversial with respect to freedom of movement *within* borders: and all three considerations apply to freedom of movements *across* borders, despite claims (which Carens masterfully rejects) that the two cases are relevantly disanalogous (237-254).

Let us assume that Carens is right on all counts. All of this applies to convicted criminals. True, we sometimes restrict their internal freedom of movement, for example when they are on parole (247), or when we think that assigning them to a particular place of residence (e.g., away from schools) makes it less likely that they will reoffend (sexually abusing children). But these are *foreign* criminals, who have been convicted elsewhere (typically but not necessarily in their country of citizenship). They are not on parole. And in some cases at least we have no reason to think that they will reoffend. They too need jobs, from which they should not be barred on morally arbitrary grounds and to which they need to go⁴; they too are badly off, worse off indeed than so many others; they too need freedom of movement in order to enjoy most of their other freedoms.

‘But they’re criminals!’, some will say. ‘*We* should not have to deal with them, they are *someone else’s* citizens!’. But we need to distinguish between two kinds of former criminals. First, suppose that they have been rightfully convicted. In this case, they no longer *are* criminals, for *ex hypothesi*, they have served their sentence. For us to deny them entrance on the grounds that they have committed a crime is tantamount to punishing them for it. And yet we, British citizens, via the British state, are not a competent punishing party in relation to those criminals: if they were rightfully convicted, the competent punishing party is whichever party punished them. We simply do not have the authority to add to that sentence for that crime.

Second, suppose that they were not rightfully convicted and sentenced. This calls for a further distinction, between those criminals who received a lesser sentence than was fitting and proportionate, and those who received a harsher sentence than was fitting and proportionate. By denying entry to the latter, we would punish them more harshly than is appropriate – which would be unjust as well as something

⁴ Having been convicted of a serious crime is not itself a morally appropriate basis for denying someone a job *tout court* – though some convictions (i.e., for paedophile acts) are an entirely appropriate basis for barring someone from *some* jobs (i.e., working with children).

which we would not be competent to do. By denying entry to the former, we would in effect add to their sentence. The question, then, whether the burden attendant on not being admitted to Britain together with the sentence which they have already served makes their overall punishment proportionate. Whether this is so partly depends on one's overall justification for punishment. But even if it is proportionate, it still remains to be seen whether the British state is a competent punishing party. Admittedly if the criminal's victims was a British national, the British state might plausibly claim competence to punish in this way. But suppose (as is in fact more likely) that the victim was a foreigner as well. Whether Britain is a competent punishing party in this case in turn depends on whether violent crimes such as murder, rape, assault, etc., ought to fall within the remit of universal jurisdiction, whereby any state can punish any offender for certain crimes, irrespective of where those crimes were committed and against whom. As a matter of fact, they do not: only so called international crimes do, such as war crimes and crimes against humanity. Most scholars agree. I myself do not. Then again, I am a signed-up, fairly radical (in some respects) cosmopolitan. But Carens thinks that radical cosmopolitans do not pay sufficient attention to the importance of social belonging and particularistic attachments, though he also thinks that the latter are constrained by considerations of justice (161, 273). I suspect that those constraints are weaker, and the demands of particularistic attachments more robust, in his view than in my or other cosmopolitans' view. In so far as one way to honor those particularistic attachments is to grant to political community considerable immunity from interference by outsiders, including immunity from interference with punitive practices, I also suspect that Carens would resist extending universal jurisdiction to 'ordinary' crimes such as assault, rape and murder committed in peace time. I am happy of course to stand corrected on this (admittedly speculative) point of interpretation. But if I am right, interpretatively speaking, and thus if those crimes ought not to fall within the punitive jurisdiction of the British state, then the latter may not deny entry to those criminals at the conclusion of their sentence.

4. Conclusion

Carens' remarks on the problem of foreign criminals are sketchy and few and far between. This is not a criticism - far from it: the book is too rich to warrant criticism on that count. Rather, it is a warning that my own remarks when deployed against his own have been inevitably tentative and speculative. I do hope however that they have at least shown that there is more, interesting, work to be done at the intersection of the ethics of immigration and the ethics of punishment.