

Keeping the Rewarding Lawbreaking Objection Alive

In Joseph Carens' *The Ethics of Immigration*, he claims that “the moral claims of irregular migrants are surprisingly strong,” even when we operate under the assumption that “the state is morally entitled to apprehend and deport migrants who settle without authorization.”¹ Perhaps the most striking moral claim he suggests irregular migrants possess is the “individual right for [them] to transform their status from irregular to legal after a fixed period of time of residence, such as five to seven years.”² He terms this concept *regularization*, and the grounding premise for it is rather simple: “the longer the stay, the stronger the moral claim to remain.”

Why? Those who live in an area for longer generally have stronger ties to a state than those who just got there. Time also increases one's experiences in a state — sensations that “that [give] life its purpose and texture.” And that membership in a society, according to Carens, is a morally special characteristic that can eventually grow strong enough to create “a moral claim to have ... actual social membership legally recognized.”³

Thus, by Carens' account, “The moral right of states to apprehend and deport irregular migrants erodes with the passage of time,” and inversely, the moral right of migrants to have their membership legally recognized grows. He doesn't defend a specific timeframe for this to occur, but gestures at one: “states should establish an individual right for migrants to transform their status from irregular to legal after a fixed period of time of residence, such as five to seven years.”

Carens addresses several counterarguments to his regularization proposal. Of interest to this paper, one such counterargument takes issue with regularization because it rewards lawbreaking. But Carens assures readers that his advocacy of regularization doesn't encourage lawbreaking to any greater extent than is commonly accepted in other contexts. However, in this paper, I

¹ Carens, Joseph. *The Ethics of Immigration*. United Kingdom: Oxford University Press, 2013, 130.

² Carens, *The Ethics*, 130.

³ Ibid, 144.

demonstrate that Carens' rejection of the rewarding lawbreaking objection is unsuccessful. First, I show that his entire response to this objection actually engages with a slightly differently worded objection, meaning he fails at the outset. But even his rejection of that different objection, I argue, is unpromising.

Shifting the Terms of the Objection

The strongest moral argument against regularization, Carens predicts, is what we can call the *rewarding lawbreaking* objection: “[P]erhaps the strongest moral objection to amnesty is that it rewards lawbreaking.”⁴ We can phrase this objection in precise terms as follows:

P1: Regularization rewards lawbreaking.

P2: Rewarding lawbreaking is always morally problematic.

C: Regularization is morally problematic.

Carens begins his response to this objection by likening violating immigration laws to speeding while driving. And as he correctly observes, “We don't describe drivers who exceed the speed limit as illegal drivers or criminals.”⁵ Thus, “the force” of the rewarding lawbreaking objection, Carens argues, “depends on our not noticing the stance toward what we might call ‘ordinary’ lawbreaking in other contexts.” However, in making the comparison between violating immigration laws and speeding, Carens has already made a cunning move: He's changed the *terms* of the objection to a weaker version that's easier for him to reject. The example he cites — drivers who speed without getting caught — involves no *rewarding* of the lawbreaking behavior.⁶ Rather, this lack of enforcement can only be described as “having a permissive attitude towards lawbreaking.” Carens himself seemingly confirms that he's addressing *permitting* lawbreaking as opposed to *rewarding* it when he writes, sentences later, that

⁴ Ibid, 155.

⁵ Ibid.

⁶ We can imagine if the speeding example was more accurately portrayed as rewarding lawbreaking: Consider an official policy that states any driver who speeds without getting caught for 10+ miles receives immunity from traffic enforcement for the rest of their journey. This would certainly be a much harder policy to defend.

immigration laws are similar to traffic laws insofar as their social functions “can be served reasonably well even if there is a fair amount of deviance and most of those violating the rules *never get caught*” (emphasis added).⁷ “Never getting caught” sounds a lot more like permitting lawbreaking than rewarding it. Thus, we can conclude that Carens is in fact engaging with this objection instead:

P1: Regularization represents a permissive attitude towards lawbreaking.

P2: A permissive attitude towards lawbreaking is always morally problematic.

C: Regularization is morally problematic.

It should be obvious why this version is significantly easier for Carens to handle: Most would agree that lawbreaking activity should, *prima facie*, be punished. Thus, permitting lawbreaking represents a break from that intuition. But *rewarding* lawbreaking is an even larger break from that intuition, and thus requires more robust justification. (From an informal semantic perspective, rewarding lawbreaking necessarily involves permitting it *and* issuing the positive reward, meaning there’s simply more to cover.)

More importantly, because he is engaging with a different (weaker) version of the argument, Carens has already failed to overcome the “rewarding lawbreaking” objection, meaning I’ve technically completed what I set out to do in this paper: demonstrate that Carens’ rejection of *that* objection is unsuccessful. But to end here would make for a rather unsatisfying paper (not to mention I haven’t hit seven pages yet), so in the proceeding section I address his rejection of the permitting lawbreaking objection and show why even that effort is unpromising.

Response to Permitting Lawbreaking Objection⁸

⁷ Carens, *The Ethics*, 155.

⁸ Crucially, note that I’m using “permitting lawbreaking” as a term of art in this paper as an abbreviated version of “having a permissive attitude towards lawbreaking.” Permitting lawbreaking does *not* suggest that authorities formally commit to not enforcing the laws. Rather, it means authorities create a general sentiment that there is low likelihood of punishment for lawbreaking due to their lax (and presumably unintentional) enforcement of the laws.

Carens appears to target P2 of the permitting lawbreaking objection; he rejects the assertion that a permissive attitude towards lawbreaking is always morally problematic. To do so, he makes what sounds like a resource allocation argument: “*For enforcement purposes*, it makes sense to *focus on* the really dangerous violators, [but] [f]or run of the mill violations (ordinary speeding, irregular migration for work), just having the rules in place and occasional enforcement will maintain order at a sufficient level” (emphasis added).⁹ Carens’ suggestion, essentially, is that lax enforcement of lawbreaking (read: a permissive attitude towards lawbreaking) doesn’t always produce bad consequences — rather, allocating resources to more serious harms instead actually produces *good* consequences. I have two responses.

First, Carens appears to be making a suspiciously empirical claim rather than a normative one. That is, Carens is *observing* that law enforcement officials presently operating under conditions of scarcity (not enough officers, not enough speeding cameras, etc.) choose to prioritize more serious crimes, and then further *observing* that the consequences of that prioritization are generally satisfying or intuitive. But that empirical observation leaves room for the low-hanging fruit of an argument that, in an ideal world where law enforcement was sufficiently equipped, we could achieve *better* consequences with increased punishment of lawbreaking. For example, perfectly enforcing speeding laws would plausibly reduce at least some traffic accidents or pedestrian collisions. But we might further question why the consequences matter at all in our normative account of a response to lawbreaking. After all, it would certainly be reasonable to argue that democratically (or replace with whatever your favorite justification for state coercion is) enacted laws, no matter how trivial, *ought* to be enforced by the state, even if that enforcement led to suboptimal consequences.

But second, even if we were to grant Carens that, as a normative matter, we ought to allow lawbreaking to go unpunished when it produces socially beneficial consequences, he again falls victim to the fact that his advocacy doesn’t merely involve permitting lawbreaking — it also

⁹ Carens, *The Ethics*, 155.

involves *rewarding* it. Carens' account of regularization involves granting an individual official legal status and the full package of privileges and rights associated with that recognition as a reward for having circumvented the grasp of law enforcement for a lengthy period of time. This is completely unlike "just having the rules in place and occasional enforcement" — this is creating a brand-new rule that bestows benefits on law violators, which seems wrong. The onus is on Carens to demonstrate that rewarding lawbreaking (as in regularization) is meaningfully indistinguishable from permitting lawbreaking.

Perhaps he makes such an effort by approaching the issue a bit differently. Indeed, up to this point I have argued that there is a marked difference between permitting lawbreaking and rewarding it from a somewhat conceptual perspective, observing that the two are principally different. But Carens might argue that, on a *practical* level, this distinction is insignificant. After all, when authorities merely make a habit of not enforcing certain laws, lawbreakers are 'rewarded' because they can enjoy the fruits of their verboten behavior. Speeding drivers who never get caught, Carens might observe, enjoy a faster arrival to their destination. But I think there *are* practical differences. One that comes to mind is increased incentives for lawbreakers. In the case of speeding drivers, the only incentive that drivers today have to speed is getting to their destination faster. But if we implemented the policy mentioned earlier (see *supra*, at n.5) of granting drivers immunity for the rest of their journey if they successfully evade speed enforcement for 10+ miles, we add a new incentive to break the law — namely, the *reward* for lawbreaking. Similarly, in the regularization example, Carens is *not* proposing that authorities merely adopt a more permissive attitude towards violations of immigration laws — his suggestion of regularization grants the privilege of *recognized legal status* to lawbreakers, and thus, adds a new incentive to break those laws.

Statutes of Limitations

Carens makes one last effort to overcome the rewarding lawbreaking objection when he parallels regularization with statutes of limitations. His argument here is that though irregular

migrants do violate immigration laws by entering without authorization, “that does not mean that we should punish people many years after the fact.” Essentially, regularization doesn’t reward lawbreaking because the state’s authority to punish irregular migrants deteriorates over time anyways.

But the gaping problem in this argument is that Carens grossly misrepresents why statutes of limitations exist. Here’s a summary of his account:

It’s sensible for statutes of limitations to exist for crimes where *not* having a statute of limitations would (a) “not enhance deterrence” or (b) cause greater (presumably emotional) harm to the perpetrator “than is warranted by the original offense.”¹⁰

To draw out why Carens is wrong, consider the sort of offense for which a statute of limitations makes the most sense: petty crimes (think theft or simple assault). We agree that there *should be* a statute of limitations for petty crimes, *despite* the fact that (a) not having the statute of limitations *would* increase deterrence¹¹ and (b) most petty crimes are pled down to misdemeanors that mandate community service and therapeutic interventions, meaning the stress of being “on the run” for a petty crime really can’t be said to be more than is warranted by the original offense. Clearly, Carens’ explanation for why statutes of limitations exist is deficient.

Here's a better explanation: We have statutes of limitations for offenses because (a) we lose faith in the integrity or availability of evidence needed to accurately convict the accused after a prolonged period of time and (b) a wrongful conviction would cause substantial harm to the accused. This concern is outweighed, however, by particularly egregious crimes where the interest in retribution or deterrence is particularly potent (e.g. murder, rape, etc.).

¹⁰ Ibid.

¹¹ The reasoning for this is familiar — deterrence, d , is typically seen as the function of two discrete values: severity, s , of punishment and the probability, p , that such punishment is actually realized. So we can express this as $d = s \times p$. Removing a statute of limitations for a crime increases the value of p , simply because extending the *timeframe* in which a crime can be prosecuted increases the probability that such a prosecution occurs.

Why is this discussion important? It's because Carens employs the concept of statutes of limitations to service his overarching point that the passage of time "erode[s] the state's power to pursue actual crimes." And if we "are prepared" to do that, Carens asserts, then "it makes even more sense to let time erode the power of the state to pursue immigration violations."¹² But as I have just demonstrated, it is not *the passage of time* that undergirds statutes of limitations — time only matters because it usually indicates something about the integrity and availability of evidence. For example, as time passes after an alleged crime, a defendant might lose access to evidence that could exonerate her. Surveillance camera recordings get overwritten, calendars with alibis get thrown out, exonerating witnesses' memories get fuzzy, forensic evidence becomes instable, and so on. But these arguments do not apply to immigration violations; after all, an individual's (unauthorized) presence in a country seems like sufficient evidence by itself to find that she has violated an immigration statute. Thus, Carens cannot draw a parallel between regularization and the arguments for statutes of limitations, meaning he offers no positive reason to believe that the state's power to prosecute immigration violations wanes over time.

Conclusion

I've argued that Carens' response to the rewarding lawbreaking objection is unsuccessful because (1) he engages with a weaker worded objection from the get-go and (2) even his response to that weaker objection is unsatisfying. However, that does not necessarily mean that the rewarding objection in fact succeeds in striking down Carens' regularization argument — all I have shown is that Carens' swift dismissal of it is unwarranted, and that this objection probably has more potent thrust than Carens gives it credit for.

¹² Carens, *The Ethics*, 155.