

The Ethics of Immigration Detention

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Declaration

This thesis is solely the work of its author. No part of it has previously been submitted for any degree, or is currently being submitted for any other degree. To the best of my knowledge, any help received in preparing this thesis, and all of the sources used, have been duly acknowledged.

Dissertation Format

I have decided to write and submit this dissertation in the “Thesis by Compilation” format, which is one of several formats that the Australian National University offers for the PhD. The Thesis by Compilation is comprised of standalone papers, such as research articles or chapters in books, of which the candidate is the sole or joint author. These papers must either be published, accepted for publication, under review, or in preparation for submission. The papers that comprise this dissertation satisfy one of these criteria. Because of this, these papers have had to adhere to the spatial constraints appropriate for peer-reviewed philosophy journals—an effect of which is that, in these papers, you will read passages where I explain that certain points cannot be addressed either because it “would take us too far afield” or because doing so is “prevented by spatial constraints.” I mention this because such phrases could otherwise seem out of place in a dissertation. Furthermore, you will find that some of these papers reiterate the same points. For example, multiple chapters define immigration detention. While this might seem unduly repetitive, it is necessary because these papers are standalone pieces. Finally, four papers unrelated to immigration detention are referenced in Appendix A. These papers were written during my PhD candidature, and are referenced within this dissertation in accordance with Section 15 of the Australian National University Thesis by Compilation Procedure.

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Abstract

This dissertation is comprised of five standalone papers, which, in different ways, explore the moral status of immigration detention. My motivation for writing these papers is two-fold. First: immigration detention is one of the most pervasive and most harmful forms of border enforcement that is currently administered across the liberal democratic world. Second: despite this, questions pertaining to the moral status of immigration detention have received very little attention from moral and political philosophers who are otherwise interested in exploring the ethics of migration and border enforcement. In its modest way, this dissertation is intended to help fill this research gap by enriching the way that we understand immigration detention, the ways that it can harm the immigrant detainees, and the circumstances under which the state is permitted to administer it. In writing each of these papers, I have made the conscious decision to remain neutral in regard to the more general open versus closed borders debate. This decision was made in order to highlight that the moral status of immigration detention cannot be fully subsumed under questions relating to whether a legitimate state is morally permitted to exclude would-be migrants from entering, settling, or remaining inside of its territory. If there is a main upshot of these papers, it is this: although most real-life immigration detention *policies* are gratuitously unjust due to the suffering of the immigrant detainees, there are conditions under which the *practice* of immigration detention can be morally justified. The catch, however, is that these conditions are not normally satisfied in the real-world. And the corollary of this, as I will go on to explain, is that the state has a moral reason to enforce its territorial borders with more benign forms of border enforcement—such as non-custodial measures.

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Introduction

Our world is comprised of nation-states that are demarcated from one another by their territorial borders. This is a recent development in our global history. But it has had profound normative implications that fall squarely within the purview of modern moral and political philosophy. As Michael Walzer astutely observed some decades ago, an effect of these territorial borders is that they effectively divide the world into two distinct groups: members and strangers (see Walzer, 1983: 31–63). Those of us who were lucky enough to be born within an affluent liberal democracy are never strangers in the true sense of the word. Most territorial borders are of course closed to us, at least in the sense that we must be given permission in order to legally cross them. But this is a part of our lives that often escapes our notice. We go most of our lives without ever needing to migrate—our basic human rights, for example, are for the most part adequately satisfied at home. And when we find ourselves stepping across a territorial border for some reason, we tend to find it nothing more than a mere hindrance: we can afford a plane ticket, are entitled to visa-free travel, and when we arrive at the border our passports are processed in a swift and relatively friendly manner. But things are not so easy for those who are born elsewhere in the world. These people are strangers in the true sense of the word. They require visas in order to travel to another nation-state—and their visa applications are often rejected on trivial grounds. And for those who decide to irregularly migrate across the ocean on a rickety boat, or overland in the back of a van or by trudging through snow and desert, the prospect of a territorial border is all too real. It is not a mere hindrance; it is a coercively enforced barrier to a better life. To these people, it is clear, as Joseph Carens (1987: 251) once recalled, that “borders have guards, and the guards have guns.” This is because it is through the presence of those guards, along with the use of their guns, that the distinction between members and strangers is enforced.

There is some historical precedent of philosophers touching on normative issues that are related to migration. In the *Crito*, for instance, Plato wrote that “any Athenian who wishes, when he has been admitted as an adult ... may take his possessions and leave for wherever he wants.”¹ In several sections of his final work, *The Laws*, he cautioned against large-scale or unrestricted immigration on the grounds

¹ Quoted from Plato, *Crito 51d* (New York: Penguin Random House, Penguin Classics).

that it “would cause immense damage to peoples who enjoy a good polity under right laws” within the destination state.² However, Plato somewhat moderated this view by permitting the temporary visitation of non-citizens into the state.³ As he explains, “for the citizens to refuse altogether either to admit others or to go abroad themselves is by no means a possible policy, and, moreover, it would appear to the rest of the world to be both churlish and cross-grained, since they would get the reputation of adopting harsh language ... and methods both tyrannical and severe.”⁴ In *The Politics*, Aristotle agreed with Plato about the potential dangers of unrestricted immigration.⁵ But to the contrary of Plato’s comments in *The Laws*, Aristotle argued that regulated trade and immigration is not necessarily detrimental to good governance. If these risks to public order could be mitigated, it would, according to him, be beneficial to all parties.⁶

Several centuries after Aristotle, the Greek Stoic philosopher, Epictetus, wrote critically in his *Discourses* of those who see freedom as consisting of the liberty to “come from any place I choose, and

² Quoted from Plato, *The Laws* 950a (In, *Plato in Twelve Volumes*, Vols. 10 & 11, translated by R.G. Bury. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1967 & 1968.). There are several additional passages in this text where Plato addresses the topic of immigration, inclusion, and multiculturalism (see e.g., *The Laws* 704d–5b; 736c; 950a–e).

³ See Plato, *The Laws op. cit.*, 950a–e.

⁴ Quoted from Plato, *The Laws op. cit.*, 950b.

⁵ Aristotle raises several case studies in which immigration led to the original inhabitants of the state being outnumbered, and subsequently expelled, by foreigners (see Aristotle, *The Politics* 1303a; 1306a. In, *Aristotle in 23 Volumes*, Vol. 21, translated by H. Rackham. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1944.). For example, Aristotle writes the following: “Also difference of race is a cause of faction, until harmony of spirit is reached; for just as any chance multitude of people does not form a state, so a state is not formed in any chance period of time. Hence most of the states that have hitherto admitted joint settlers or additional settlers have split into factions; for example Achaeans settled at Sybaris jointly with Troezenians, and afterwards the Achaeans having become more numerous expelled the Troezenians, which was the Cause of the curse that fell on the Sybarites; and at Thurii Sybarites quarrelled with those who had settled there with them, for they claimed to have the larger share in the country as being their own, and were ejected; and at Byzantium the additional settlers were discovered plotting against the colonists and were expelled by force of arms; and the people of Antissa after admitting the Chian exiles expelled them by arms; and the people of Zancle after admitting settlers from Samos were themselves expelled; and the people of Apollonia on the Euxine Sea after bringing in additional settlers fell into faction; and the Syracusans after the period of the tyrants” (*The Politics op. cit.*, 1303a).

⁶ Aristotle, *The Politics op. cit.*, 1327a.

go where I choose.”⁷ During the Early Modern Period, the writings of Francisco de Vitoria (2000/1532), Hugo Grotius (1916/1609), and Emmerich de Vattel (2008/1758) endorsed the free movement of goods and people across both the land and the sea. Writing still closer to our time, Henry Sidgwick argued, in the *Elements of Politics*, that the state “must obviously have the right to admit aliens on its own terms, imposing any conditions on entrance or tolls on transit, and subjecting them to any legal restrictions or disabilities that it may deem expedient” (Sidgwick, 1897: 248).⁸ But with the exception of Sidgwick, who wrote during a time when nation-states were starting to become the dominant actors in international relations, these philosophers wrote about immigration in a global context that was vastly different from our own. Indeed: it was not until the late twentieth century, first in the work of Michael Walzer (1983), and then, a few years later, in the first of a series of papers written by Joseph Carens (1987), that analytic moral and political philosophers started to pay close attention to normative issues that specifically relate to the movement of people across the territorial borders of nation-states (see Wilcox, 2009; Fine, 2013).

Walzer and Carens have had a profound impact on the contemporary philosophical landscape. There is an ever-growing number of philosophers who now work on the moral and political philosophy of migration. But while there is a diversity in the issues on which these philosophers have focused, there is no denying that most of the ink has been spilled mulling over the fact that nation-states have territorial borders—rather than over the fact that those borders have guards, and the guards have guns. To express this same observation in less cryptic language: most of the philosophical literature relating to migration has sought to delineate the circumstances under which a legitimate nation-state is morally permitted to exclude a would-be migrant from being able to enter or settle inside of its territory, while comparatively less effort has been made in attempting to delineate the moral status of the different institutions of border enforcement that these states use to exclude would-be migrants. This is not to say that the moral status of border enforcement has received *no* attention from philosophers who are otherwise interested in the

⁷ Quoted in Epictetus’ *Discourses*, Book IV §34 (New York: Penguin Random House, Penguin Classics).

⁸ In the sentences immediately following the passage that has been quoted, Sidgwick proceeds to argue that the state holds a duty of care towards the people whom it admits (i.e., that it would be morally impermissible for the state to intentionally injure them and that it ought to prevent them from being injured by its extant political members).

ethics of immigration (for a review of this literature see Lister, 2020). And there is, to be sure, a rapidly growing body of non-philosophical literature that touches on the various harms that can be associated with border enforcement (see e.g., Silverman & Lewis, 2017; Cox & Goodman, 2018; Ryo & Peacock, 2019). The point is, rather, that questions about the moral status of border enforcement are only starting to edge their way into the philosophical limelight. And this is, at least to my eyes, surprising given that most forms of contemporary border enforcement are incredibly harmful. What is even more to the point, however, is that due to the lack of interest among philosophers, we have a treasure trove of philosophical questions about the moral status of border enforcement sitting right before us—waiting to be explored.

Border enforcement can, of course, take innumerable forms.⁹ Although these different forms of border enforcement warrant careful philosophical analysis in their own right, in this dissertation we will focus specifically on *immigration detention*. This is the form of administrative detention that is designed to effectuate immigration-orientated goals, such as the identification and removal of irregular migrants. And there are three reasons that have, together, motivated this focus. First: immigration detention is one of the most harmful forms of border enforcement that is administered throughout the liberal democratic

⁹ Border enforcement can be roughly understood as any action that is taken by the state, or by a group of states, to monitor their territorial borders and to regulate the cross-border movement of goods, capital, people, non-human animals. In regard to the cross-border movement of people, border enforcement is comprised of a set of social and legal institutions that help the state effectuate its immigration-orientated goals—which could include, for example, facilitating the identification, admission, settlement, and exclusion of prospective migrants. In some cases, border enforcement is administered extra-territorially and outside of the territorial borders of the state. For example, a would-be migrant is subjected to border enforcement extra-territorially whenever they are required to obtain an entry visa, pass a mandatory health check prior to departure, present their travel documents at a port of exit, are held in immigration detention pre-admission outside of the borders of the transit or receiving state, or when they are interdicted at sea and forcibly towed back to their point of departure. By contrast, a would-be migrant is subjected to border enforcement inside the borders of the state when, for example, they are incarcerated, detained in immigration detention, or released on some kind of non-custodial measure, such as bail or parole, while the state assesses their application for political asylum or effectuates a removal order. Regardless of where border enforcement is administered, what these institutions have in common is that they help the state establish and maintain the efficacy of its territorial borders.

world.¹⁰ I will consider these harms at length in the following pages. But as a helpful point of reference for the time being, we can note that most contemporary immigration detention policies place significant constraints on the freedom of movement of the immigrant detainees—and, in the most egregious cases, the immigration detention centres in which these would-be migrants are detained are hotbeds of serious human rights abuses (see generally Edwards, 2001; Patler & Golash-Boza, 2017). Second: immigration detention is one of the most pervasive forms of border enforcement that is administered throughout the liberal democratic world. According to the most recent data that have been published by the Global Detention Project, for instance, there are at least 125 states, including every liberal democracy, that currently administer immigration detention in some form.¹¹ And in most of these states, there has, over

¹⁰ Although I have restricted the scope of my analysis to liberal democratic states, I recognise that my arguments might have important implications for the moral status of immigration detention as practiced within other political regimes. As one of the examiners notes, given that I ground many of my arguments in universal human rights—such as the right to health, the right to freedom of movement, and the right to not be detained—those arguments need not be restricted to liberal democratic states. That said, it is important to restrict the scope of my analysis in this way given that non-liberal and non-democratic states may possess additional reasons for justifying immigration detention, grounded in their own political or ideological frameworks, that could shape their approach to immigration in ways unavailable to liberal theory. For example: a Marxist state, such as the former USSR, might have distinctive ideological reasons to restrict emigration and immigration—such as concerns about how population movements can affect the transition from socialism to communism—that are not applicable to liberal democracies. I do not wish to rule out the possibility that these alternative political philosophies can yield different and potentially interesting conclusions about the moral status of immigration detention and border enforcement. But in the context of this dissertation, it is necessary to narrow the scope of analysis to liberal democracies in order to allow for more precise engagement with existing debates in the liberal, analytic tradition of political philosophy on which the project builds.

¹¹ As an examiner notes: there is often a tension between the ideals that liberal democratic states profess, and the practices and policies that they adopt in regard to immigration. For example: the externalisation of immigration detention to non-liberal or non-democratic states with weaker rule-of-law protections (e.g., the European Union externalising their immigration detention policies to Libya and Turkey, or Australia doing so in regard to Papua New Guinea and the Republic of Nauru) illustrates that these states are willing to compromise core liberal-democratic principles—such as respect for rights and due process—when applied to non-citizens with an irregular migration status. Although this does not necessarily undermine the normative claims of liberalism, it does reveal that real-world liberal democracies selectively apply their commitments—which, in turn, raises important questions about the scope and consistency of liberal-democratic obligations in a global context. Data on the use of immigration detention within these states can be accessed online at the following link: <https://www.globaldetentionproject.org>

the years, been a rise in both the number of immigration detention centres in operation and the number of would-be migrants who are detained each year (for excellent historical accounts of how immigration detention emerged and proliferated throughout the liberal democratic world see e.g., Cornelisse, 2010; Wilsher, 2011). Third: questions relating to the moral status of immigration detention are underexplored by moral and political philosophers who are otherwise interested in the ethics of immigration and border enforcement (for important exceptions see e.g., Silverman, 2014; Hidalgo, 2015; Mendoza, 2015; Sager, 2017; Hosein, 2019: 78–103; Hillier-Smith, 2020, 2025; Reed-Sandoval, 2022; Sandven, 2022, 2023).

These considerations have motivated me to write five papers, which, in different ways, explore the moral status of immigration detention. The five chapters of this dissertation each correspond to one of those five papers. Chapter One is unique in the sense that it was not written with the intention that it would be published. It was, instead, written in order to provide some helpful context and background information for the chapters that follow. This chapter begins by explaining what immigration detention is. While immigration detention is defined in other chapters, I have spent considerable space explicating its key features in this chapter. My reason for doing so is that such information is incredibly helpful, but generally unsuitable in a peer-review format where spatial constraints are an ever-present consideration. The chapter proceeds to define three concepts that will play an important role in the arguments that are developed throughout the next four chapters: *immigration*, *normative reasons*, and *moral rights*. It ends by reviewing the philosophical literature and non-philosophical literature pertaining to the open versus closed borders debate, the ethics of border enforcement, and the ethics of immigration detention—and, in so doing, explains that the moral status of immigration detention cannot be determined by appealing to substantive positions that have been defended in the more general open versus closed borders debate.

Chapter Two explores the relationship between immigration detention and the right to freedom of movement of the immigrant detainees. It starts by granting that legitimate states hold the moral right to unilaterally determine who is able to enter and settle in their territory, and then proceeds to develop a presumptive case against immigration detention. It is argued that under minimal conditions that are both perfectly consistent with a commitment to closed borders, and that are usually satisfied in the real-world, immigration detention harms the immigrant detainees in virtue of infringing their moral right to freedom of movement. This is done via a so-called *instrumental strategy*: showing first that immigration

detention infringes the right to health of the immigrant detainees when it is administered for longer than three months, and, second, that the most reliable way for the state to protect this right when immigration detention exceeds this three-month threshold is to grant the immigrant detainees the *right to freedom of exit*. This is an instantiation of the more general right to freedom of movement. And it is understood as the positive claim-right to be temporarily released into the community on a non-custodial measure, such as bail, parole, or a recognisance release order. The key upshot of this paper is that the state will infringe this right to freedom of exit if it detains somebody in immigration detention for more than three months.

Chapter Three explores the so-called *deterrence arguments* in favour of immigration detention. These arguments can be understood as a sort of cost-benefit analysis or utilitarian calculation. In simple terms: a deterrence argument acknowledges that immigration detention imposes a set of predictable and significant costs onto the immigrant detainees, but maintains that this is morally justified, on the balance of normative reasons, because it is a cost-effective way for the state to deter irregular migration. In other words: it is all-things-considered morally permissible for the state to administer immigration detention in virtue of the net-benefits that are supposedly accrued by effectively deterring irregular immigration. Deterrence arguments have become incredibly popular in public discussions of immigration detention. But they have only started to receive attention from philosophers and social scientists who are interested in the ethics of border enforcement (see e.g., Pickering, 2001; Pickering & Lambert, 2002; Pickering & Webber, 2014; Silverman & Nethery, 2015; Little & Vaughan-Williams, 2016; McKay, Hall & Lippi, 2017; Eades, 2018). This paper contributes to that emerging research in three important ways. First: it outlines the general structure of a deterrence argument. Second: it argues that deterrence arguments are *prima facie* plausible as well as compatible with a range of substantive positions that are defended in the immigration ethics literature. Third: it explains that, despite being *prima facie* plausible, deterrence arguments lack robust empirical support. While this last point does not entail that deterrence arguments are unsound, it does provide us with a strong reason to refrain from endorsing them for the time being.

Chapter Four also focuses on the relationship between immigration detention and deterrence. It is a response to an earlier paper, published by the U.S. legal theorist, Emily Ryo (2019). In her earlier paper, Ryo introduces three conditions that need to be jointly satisfied in order for these deterrent effects to be produced: would-be migrants must know that immigration detention is administered as a sanction

for irregular migration, they must be able to conduct a relevant cost-benefit analysis, and they must determine, on the basis of a relevant cost-benefit analysis, that irregularly migrating is not the utility-maximising decision for them in virtue of the risk of being detained in immigration detention. By appealing to a set of social-psychological and behavioural economics data, Ryo argues that these ‘deterrence conditions’ are generally not satisfied in the actual-world. Ryo describes her analysis as a “call and a road map” to researchers who are interested in the relationship between immigration detention and deterrence (Ryo, 2019: 237). And the goal of my paper is to take up this call by providing evidence for, as well as pushing back against, several important components of Ryo’s analysis. This is an important task given that the arguments that Ryo develops, if sound, will have notable implications for the moral status of immigration detention. The upshot of this paper is that although Ryo reaches the right conclusion about immigration detention failing to deter irregular migration among asylum seekers in the United States, the reasoning that she uses in order to reach that conclusion is, at times, mistaken. By highlighting the places where her analysis succeeds, as well as the places in which it goes awry, this paper makes an important contribution to the recent research into immigration detention and deterrence.

The last paper in this dissertation (excluding those which are included in Appendix A) defends a position about the practice of immigration detention that I call *contingent abolitionism*. This is a phrase that I have borrowed from the philosophical literature on prison abolitionism. In simple terms: someone is a contingent abolitionist about ϕ just in case they believe that there is a possible world in which ϕ would be morally justified in virtue of satisfying some set of conditions, but that these conditions are not satisfied in the actual-world (and, hence, that ϕ ought to be abolished). This can be contrasted with *modally robust* abolitionism, which is the view that there is no possible world where ϕ is morally justified. Here is an example of this distinction in action. Like many other people alive today, I am a modally robust abolitionist about the practice of slavery. I believe that there is no possible world where the practice of slavery is morally justified—and this is because there is something inherently immoral about any practice that treats human beings as property. By contrast, I am contingent abolitionist about the practice of incarceration. I believe that there are certain conditions that, if satisfied, would morally justify the practice of incarcerating certain people (e.g., rights forfeiture, a utilitarian calculation, or a

well-developed retributivist principle). But I also believe that these conditions are generally not satisfied in the actual-world. And the corollary of this is that, within the actual-world, incarceration is unjustified.

I develop an analogous position with regard to the practice of immigration detention. First: I argue that we each hold the right to not be detained, and that immigration detention *prima facie* infringes that right. Following Michael Huemer (2010: 431–432), I maintain that an act is a *prima facie rights infringement* just in case, under normal circumstances, it infringes somebody’s claim-right. Second: I consider and reject three popular ways in which one could try to morally justify this *prima facie* rights infringement (i.e., appealing to substantive positions defended in the open versus closed borders debate, the supposed deterrent effects of immigration detention on irregular migration, and the process of rights forfeiture). Third: I argue that the practice of immigration detention could, in principle, be morally justified on the basis of risk management, but that, in the actual-world, this condition is not satisfied in virtue of the risk profile of most would-be migrants. The upshot of this is that we ought to be contingent abolitionists about the practice of immigration detention: we ought to maintain that the conditions which can, in principle, morally justify the practice of immigration detention are not satisfied in the real-world.

In having written these five papers, I acknowledge that they have only just scratched the surface of the philosophical and social scientific questions that relate to immigration detention. My discussion of the right to health in Chapter Two, for example, could help to inform much of the recent work on the corrosive health-related impacts of immigration detention (for excellent review articles on the corrosive health-related impacts of immigration detention on the immigrant detainees see Bosworth, 2019; von Werthern et al., 2018; Mares, 2021)—while my discussion of the right to freedom of movement, in that same chapter, could help to inform the legal distinction between a so-called *restriction of liberty* and a *deprivation of liberty* that has been the topic of ongoing discussion in the jurisprudential literature on this subject (see generally Allen, 2009; International Organisation for Migration, 2023).¹² Several topics

¹² In simple terms, the legal distinction between a so-called *deprivation of liberty* and a *restriction of liberty* can be understood in the following way: a deprivation of liberty is a particularly egregious limitation on a person’s freedom of movement that occurs in the context of detention, and a restriction of liberty is a less-egregious limitation on a person’s freedom of movement that typically occurs in the context of non-custodial measures (such as bail, parole, and recognisance release orders). What it

for future research likewise fall out of our discussion of deterrence in Chapter Three and Chapter Four. Perhaps most obviously, there is a strong need to conduct empirical research on whether immigration detention is an effective deterrent against irregular immigration. And additional work will also need to be conducted in order to determine whether these deterrent effects, if they are in fact produced, could morally justify the practice of immigration detention. As I explain in Chapter Four, there is, for example, reason to believe that such deterrent effects would, in general, only be produced at the expense of violating a standard proportionality or necessity constraint. Finally, my discussion of risk management in Chapter Five could be further developed by considering the process through which states ought to conduct their risk assessments of would-be migrants.¹³ I hope to address these topics in future research.

is that constitutes an “egregious” limitation on our freedom of movement vis-à-vis this distinction is, however, an ongoing debate among legal theorists (see generally the in-text citations at the end of the sentence which corresponds to this footnote).

¹³ As I explain in that paper one of the main questions here is whether the state is morally permitted to statistical generalisations while conducting its risk assessments—or whether it must instead rely on individualised data relating to the would-be migrant. For example: would it be morally permissible for the state to detain a would-be migrant who has emigrated from a state or region that has a high likelihood of its members carrying a contagious disease, even if there is a lack of individualised evidence showing that this specific would-be migrant is in fact a carrier of that disease (e.g., detaining West Africans upon arrival during the Ebola epidemic)?

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Chapter One

Background Information and Literature Review

Abstract: Although this dissertation was completed by compilation, this chapter was not written with the intention of it being published. It was, instead, written in order to provide some helpful context and background information for the four chapters that follow. The chapter begins by explaining what immigration detention actually is. It will then define three concepts that will play an important role in the arguments that are developed throughout the next four chapters: immigration, normative reasons, and moral rights. The chapter ends by reviewing the philosophical and non-philosophical literature on the open versus closed borders debate, the ethics of border enforcement, and the ethics of immigration detention.

Keywords: border enforcement, closed borders, immigration detention, moral rights, normative reasons, open borders.

1. Understanding Immigration Detention

All of the chapters that follow analyse the moral status of the practice of immigration detention. But in order to make sure that the analyses conducted in those chapters hit their intended target, it is important to provide a formal definition that specifies what immigration detention actually is. At a first pass, you might think that this is unnecessary. One of the reasons why you might think this is that most of us have a relatively good, intuitive understanding of what detention simpliciter is. We can easily give examples in which people have been detained—whether it is prisoners of war, incarcerated criminals, or children who are held in class after the school bell rings. When pressed for an explanation of what connects these disparate cases, we would likely point out that, in each instance, these people are being detained because

another agent has imposed a non-trivial constraint on their freedom of movement. What exactly counts as a “non-trivial constraint” on our freedom of movement is something that would need to be specified, of course. But it is easy to come up with paradigmatic examples, such as those that were provided above, which help to abate the vagueness of this phrase. This is important because it could be taken as evidence that we do not need a formal definition of immigration detention. Simply put: immigration detention is just detention that occurs in a migration-related context. And because detention simpliciter is understood in terms of freedom of movement, we can understand immigration detention like this without circularity.

It is hard to deny that immigration detention is a form of detention simpliciter. This much would seem to be true as a matter of definition. But the issue with understanding immigration detention in this way is that what counts as an act of being ‘detained’ in a migration-related context is often very unclear. Many of us will be able to identify paradigmatic cases of immigration detention being administered by liberal democratic states. You might, for example, recall the widely-circulated photos of children being detained in cages during the first presidency of Donald Trump. But there are countless other examples that are less clear-cut. Consider, for example, cases where immigrants are stopped at a border checkpoint while an immigration officer rummages through their luggage and checks whether they have valid travel documents. Likewise: think about Mehran Karimi Nasseri, as depicted by Tom Hanks in *The Terminal*, who was caught in diplomatic limbo and trapped inside a departure lounge in Charles de Gaulle Airport, France, from 1988 to 2006. You might also recall cases where Latin American migrants have been held at gunpoint by vigilante groups operating on the Southern United States border, or the so-called Tampa Affair in Australia where a group of asylum seekers were forced to stay on a Norwegian freighter after the government denied them entry. In all of these cases, a non-trivial constraint has been placed on the freedom of movement of these prospective immigrants: they cannot enter their prospective destination state, nor can they return home at their own discretion. But despite this, their situation seems markedly different from the cases where immigrants are held inside a purpose-built immigration detention centre.

These are not fringe cases. They occur with relative frequency throughout the liberal democratic world. And what is important for us is that because these cases are considerably different from instances in which people are being detained inside of a purpose-built immigration detention centre, and because, for this very reason, it is unclear whether they are actually being detained, we cannot determine whether

these cases count as immigration detention by just appealing to our intuitive understanding of detention simpliciter. What we instead need is a *definition* of immigration detention. But in the current literature at least, this is a bit of a fraught task. Immigration detention is not defined in international law. And this has resulted in plurality of definitions of immigration detention having been advanced in the literature.¹ These definitions tend to emphasise different features of immigration detention, and, in consequence of this, diverge from one another in subtle ways. However, they also converge on certain important points. And by synthesising these points of overlap, it is possible to formulate a relatively ecumenical definition of immigration detention: *the state sanctioned practice of detaining a would-be migrant, in a designated location, in order to effectuate a migration-orientated goal*. What is helpful about this definition is that

¹ Definitions of immigration detention have been proposed by, for example: Stephanie Silverman & Evelyn Massa, 2010: 679 [“the holding of foreign nationals, or non-citizens, for the purposes of realising an immigration-related goal”]; Michael Flynn, 2012: 67 [“the detention of non-citizens because of their status”]; Stephen Legomsky, 1999: 531–549 [who defines it in relation to the social and legal functions that it serves]; the United Nations High Commissioner for Refugees, 1999 [the “confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory”]; Elspeth Guild, 2005 [defines immigration detention in relation to the political institutions that enact and enforce it]; Galina Cornelisse, 2010: 4 [“the term immigration detention is used to designate deprivations of liberty under administrative law for reasons that are directly linked to the administration of immigration policies. Consequentially, both irregular migrants and asylum seekers fall under the scope of this work”]; International Organisation for Migration, 2011: 2 [“the restriction of freedom of movement through confinement that is ordered by an administrative or judicial authority”]; Alice Edwards, 2001: 8 [“detention of refugees, asylum-seekers, stateless persons and other migrants, either upon seeking entry to a territory (front-end detention) or pending deportation, removal or return (back-end detention) from a territory. It refers primarily to detention that is administratively authorised, but it also covers judicially sanctioned detention”]; International Detention Coalition, 2015: 79 [the “deprivation of liberty for migration-related reasons”]; Mary Bosworth & Sarah Turnbull, 2014: 92 [“the practice of confining individuals identified as non-citizens in order to achieve immigration-related aims (e.g. identification, removal, etc.). The apparatus of immigration detention is complex and ambiguous, combining elements of hospitality and care with coercion and control”]; Alessandro Spena, 2016: 204 [“by ‘immigration detention’ I refer to individuals being, more or less temporarily, confined in holding centres pending either an assessment of their migrant status or the execution of their expulsion”]; and, Stephanie Silverman & Ben Lewis, 2017: 95 [immigration detention is “part of administrative law” that “[involves] the state’s coercive, warrantless deprivation of liberty”].

it makes explicit five properties of immigration detention that are often overlooked. These properties of immigration detention distinguish it from other forms of administrative or criminal detention—and, in what remains of this section of the chapter, we are going to consider all five of these properties in turn.

First: immigration detention is *state sanctioned*. The upshot of this is that immigration detention can only be administered in one of two ways: directly by the state, or indirectly by a private contractor that operates under the direction of the state. This feature of our definition accounts for the role played by non-state actors, such as private prison corporations, for example, in helping administer immigration detention. But it also serves to distinguish immigration detention from closely related forms of detention that are administered for immigration-related purposes, but which are not sanctioned by the state. Here we can think of cases in which armed vigilante groups, who operate outside of the direction of the state, detain would-be migrants in makeshift camps. A well-publicised example of this occurred in the United States in 2019 in which a local militia group, called the United Constitutional Patriots, detained groups of irregular migrants in New Mexico at gunpoint before releasing them to the Border Patrol.² This does not count as immigration detention, according to our definition of it, given that the actions of the United Constitutional Patriots were not sanctioned by the United States government. As a further point worth noting: the fact that immigration detention is state sanctioned entails that it is subject to, and is regulated by, a set of international conventions and protocols (see International Organisation for Migration, 2011).

Second: immigration detention is the state sanctioned practice of *detaining* a would-be migrant in a designated location. This feature of our definition is meant to highlight that immigration detention, as we have already explained, is a form of detention simpliciter. One important corollary of this is that because immigration detention is a form of detention simpliciter, it constitutes a *deprivation of liberty* under current international law.³ This is a legal term-of-art that, roughly speaking, denotes an especially

² An overview of the operations of the United Constitutional Patriots is provided by Simon Romero, "Militia in New Mexico Detains Asylum Seekers at Gunpoint" (New York Times, 18 April 2019).

³ See e.g., Article 4(2) of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. See also Article 16 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* for a discussion of deprivations of liberty in the context of immigration specifically.

egregious limitation on a person's freedom of movement that occurs only in the context of detention. It can be contrasted with so-called *restrictions of liberty*, which are less egregious limitations on a person's freedom of movement that occur within the context of non-custodial measures such as bail, parole, and recognisance release orders. (For excellent discussions of this legal distinction between a deprivation and a restriction of liberty, see Edwards, 2001: 8; International Organisation for Migration, 2011). This distinction is important, from a legal point of view, because it entitles the immigrant detainees to a set of procedural safeguards that are not entitled by restrictions of liberty (see Edwards, 2001; Allen, 2009; Costello, 2015; Gilman, 2013, 2016; Campesi, 2015: 440; Wilsher, 2011; Gilman & Romeo, 2018). In addition to this, the fact that immigration detention constitutes a deprivation of liberty has been one of the primary criticisms raised against it in the non-philosophical literature (see e.g., Gilman, 2013, 2016).

Third: immigration detention is the state sanctioned practice of detaining a *would-be migrant*. This entails that a person cannot be detained in immigration detention unless they are in the process of migrating internally or internationally. Hence if the state were to apprehend one of its citizens who was not in the process of migrating and detain them inside of an immigration detention centre, this would not count as *immigration* detention, precisely because that citizen is not a would-be migrant. Although anyone could, in principle, be detained in immigration detention, in practice the state tends to administer immigration detention in regard to immigrants who are thought to be in breach of immigration law (see Legomsky 1999: 536; Silverman and Massa 2012: 679). In most real-life cases, these are asylum seekers who are apprehended for suspected irregular entry (and who are detained while the state confirms their identity and assesses their application for asylum) or voluntary migrants who are apprehended for visa overstaying or on suspicion that they committed a criminal or administrative offence that would render their visa invalid (and who are detained as an adjunct to removal or trial) (Silverman and Nethery 2015: 24–26).⁴ However, there is no in principle reason why the state cannot detain other groups of migrants.

⁴ As an important aside: a migration status is fluid and can change at any point during a person's journey to, or residence inside of, a country. For example, those who irregularly enter a state in order to flee conflict might be classified as irregular migrants immediately upon entry, but later acquire regular status if they are granted asylum. Conversely, migrants who enter a country

Fourth: immigration detention is administered inside a *designated location*. This feature of our definition serves to distinguish immigration detention from the process of being temporarily stopped at an official border crossing for immigration processing (see Silverman & Massa, 2012: 679). The phrase ‘designed location’ is intentionally vague, as it is meant to denote a wide range of locations at which immigration detention can occur. In most cases, immigration detention occurs inside of purpose-built facilities that are usually referred to as “immigration detention centres” or “immigration processing centres.” But it can also occur in so-called “alternative places of detention,” which can include hotels,⁵ land and sea borders,⁶ the international zone of an airport,⁷ islands,⁸ boats,⁹ and inside of one’s home.¹⁰

Fifth: immigration detention is administered by the state *in order to effectuate a migration-orientated goal*. These goals include, for instance: the identification, admission, settlement, and removal of a would-be migrant. This feature of our definition helps distinguish immigration detention from other forms of detention that can be administered in relation to a would-be migrant—such as when they are criminally incarcerated, or detained in an administrative setting such as pretrial detention or mandatory quarantine. A further point to consider is that although immigration detention must be administered for immigration-related purposes, the category of law through which it is administered can differ over time and space. For example: in the Republic of Cyprus, irregular entry and irregular residence are criminal

through regular migratory channels might become irregular if their visa or residence permit expires or if temporary protected status is withdrawn—as has occurred in the United States in cases where long-term residents suddenly lose their legal status.

⁵ Asylum Seeker Resource Centre. 2022. (“Park Hotel Park Hotel empty as 26 refugees are released, Morrison Government refuses to release remaining 6, *Online Media Release*). Accessible at the following link: <https://asrc.org.au/2022/04/07/park-hotel-empty-as-26-refugees-are-released/>

⁶ *Ilias and Ahmed v. Hungary*. (2019). European Court of Human Rights. App. No. 47287/15. *R.R. and Others v. Hungary*. (2021). European Court of Human Rights. App. No. 36037/17.

⁷ *Amuur v. France*. (1996). European Court of Human Rights, App. No. 19776/92.

⁸ *Guzzardi v. Italy*. (1980), European Court of Human Rights. App. No. 7367/76, paragraph 93; *Khlaifia and Others v. Italy*. (2016), European Court of Human Rights, App. No. 16483/12.

⁹ *Medvedyev v. France*. (2010), European Court of Human Rights, App. No. 3394/03; *J.H.A. v. Spain*. (21 November 2008). United Nations Committee Against Torture (CAT), CAT/C/41/D/323/2007.

¹⁰ See, *Guzzardi op cit.*

offences, which are punishable by up to two years in prison (Cornelisse 2010: 5–6). The practical import of this is that irregular migrants in the Republic of Cyprus are detained in police custody while the state determines their identity, rather than being detained in an administrative setting—which is what happens in some countries, such as Australia. With that being said, though, detaining migrants in police custody in order to facilitate their identification counts as immigration detention according to our definition.

2. Other Key Concepts

This section introduces three concepts that will play an important role in the following four chapters of this dissertation: immigration, normative reasons, and moral rights.

2.1. Immigration

Migration is the process through which people cross administrative borders for the purpose of changing their residency (see de Hass, Castles & Miller, 2019: 21). It does not matter whether these administrative borders demarcate the likes of municipalities, provinces, regions, or nation states. What is important is that in order for migration to occur, people need to move across such borders with the intention of living in another administrative unit. And the immediate corollary of this is that when a person crosses one of these administrative borders without the purpose of changing their residency—for example, when they are a businessperson, nomad, student, tourist, and so forth—their mobility does not count as migration.

Immigration is the process through which a person migrates to another country, while *emigration* refers to the process through which they migrate from the country in which they are currently located. In the following four chapters, we will focus exclusively on *international immigration*. The reason for this is that although immigration detention can, in principle, be administered towards any migrant, in practice liberal democratic states tend to only detain irregular international immigrants in immigration detention.

There are different ways to break down this general category of international immigration. One way to do so is by distinguishing between the *causes* that motivate a person to internationally migrate. As the name suggests, *voluntary* international immigration occurs when a person immigrates to another

nation state at their own discretion.¹¹ They acted by choice, with free will, and without compulsion from another agent or natural phenomenon. By contrast, *forced* international immigration occurs when people lack this discretion. They have crossed an international border—but they did so without choice, without free will, and with some sort of compulsion from another agent or a natural phenomenon. Perhaps they were forced to leave home because of conflict, famine, war, or because their homes were destroyed by the effects of climate change. A *refugee* is a specific type of forced migrant.¹² The 1951 United Nations Convention Relating to the Status of Refugees defines a refugee as a person who,

... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country.

An *asylum seeker* is a person who has either applied for refugee status, or who is in the process of doing so, and who is still awaiting a formal decision on their recognition as a refugee. In most circumstances, this process of determining a refugee status is conducted by the country to which an asylum seeker has immigrated. But in other circumstances—such as when state institutions are non-existent or too weak—it is conducted by the United Nations High Commissioner for Refugees (UNHCR) or the United Nations

¹¹ Admittedly, these definitions of forced migration and voluntary migration leave much to the imagination. For example, you might reasonably question what counts as the exercise of discretion or free will in this context. There is a relatively large body of academic literature that has critically examined this distinction between forced and voluntary migration, often arguing that these terms exist on opposite ends of a migration spectrum (see e.g., Ottonelli & Torresi, 2013; Erdal & Oeppen, 2018). While I acknowledge that there are different ways to understand this distinction between forced migration and voluntary migration, I will deliberately leave such matters aside since they do not impact the cogency of the arguments developed in this dissertation.

¹² While I have cited the 1951 Convention definition of a refugee below, other definitions have been advanced in international law and the academic literature (for an excellent discussion of these competing definitions see Gibney, 2018). In what follows, I leave this conceptual disagreement aside since it does not impact the cogency of the arguments developed in this dissertation.

Relief and Works Agency for Palestine Refugees in the Near East (UNWRA). I mention all of this here because, as already explained, asylum seekers are one of the primary targets of immigration detention.

Another way to break down the general category of international immigration is to refer to the *process* through which a person migrates. *Irregular* international immigration occurs when somebody internationally immigrates outside of the regulatory norms of the sending, transit, or receiving state (see International Organisation for Migration, 2019). This could, but need not, involve any criminal offences. There are three main ways through which a person can acquire an irregular migration status. First: they could acquire this status because they have *irregularly entered* a state. Perhaps they entered with false or misleading identity documents, or entered outside of an official border crossing. Second: they could acquire this status because they *irregularly reside* inside of a state. Perhaps they have overstayed their visa, or committed some sort of administrative or criminal offence that rendered their extant visa invalid. Third: they could acquire this status because of their *irregular employment*. Perhaps their visa prohibits employment, either in general or over a specified number of hours in a given timeframe, and they have breached this condition. I mention all this here because, as we have already explained, irregular migrants are the people who are detained in immigration detention. For example: asylum seekers are detained in immigration detention pre-admission *because* of their irregular entry. The state will, therefore, typically detain them while it confirms their identity, creates their risk profile, and determines their refugee status.

2.2. Normative reasons

Almost all of us possess the concept of a reason (see generally Parfit, 2011: 67–68).¹³ This is evidenced by the fact that we frequently apply this concept within our practical deliberation: when we are deciding

¹³ Derek Parfit makes a similar point at the beginning of *One What Matters, Volume One*. He writes that “it is hard to explain the concept of a reason, or what the phrase ‘a reason’ means. Facts give us reasons, we might say, when they count in favour of our having some attitude, or our acting in some way. But ‘counts in favour of’ means roughly ‘gives a reason for’. Like some other fundamental concepts, such as those involved in our thoughts about time, consciousness, and possibility, the concept of a reason is indefinable in the sense that it cannot be helpfully explained merely by using words. We have to explain such concepts in a different way, by getting people to think thoughts that use these concepts. One example is the thought that we always have a reason to want to avoid being in agony” (Parfit, 2011: 67).

whether to stay home on a weekend afternoon or go outside for a walk, or when we are deciding whether to purchase organic or non-organic vegetables at a local market, for example, we consider which reasons we have for performing one of these actions over the other. We might consider the amount of pleasure we would experience from reading a book, compared with going outside for a walk. And looking outside at the dreary weather, we might, after all, decide to spend the afternoon inside. Or when shopping at the local market, we might consider whether the environmental benefits of purchasing organic vegetables make up for their exorbitant price. Even if we do not outright frame our practical deliberation like this, in these cases we nevertheless weigh reasons against each other when deciding what actions to perform. As Derek Parfit (2011: 68) has explained, “when we are aware of facts that give us ... reasons to act in some way, we *respond* to those reasons if our awareness of these facts leads us to do, or try to do, what we have these reasons to do.” This does not require us to think about facts under the concept of a reason.

But all of this might leave you wondering: what exactly is a reason? After all: there is a world of difference between possessing a concept and being able to define it. Most philosophers who work in this area answer this question by distinguishing between two categories of reasons: motivating reasons, and normative reasons (see Dancy, 2000: 21–25; McNaughton & Rawling, 2018; Alvarez & Way, 2024). At a first approximation, a *motivating reason* is a consideration that explains why somebody performed a specific action.¹⁴ In contrast, a *normative reason* is a fact that somehow counts in favour of performing

¹⁴ The distinction between a motivating reason and a normative reason is sometimes said to originate in the writings of Francis Hutcheson (for a discussion of this claim see Frankena, 1958: 44). The quote usually cited in support of this claim is as follows: “When we ask the reason of an action, we sometimes mean 'What truth shews a quality in the action, exciting the agent to do it?' Thus, why does a luxurious man pursue wealth? The reason is given by this truth, 'Wealth is useful to purchase pleasures'. Sometimes for a reason of actions we shew the truth expressing a quality, engaging our approbation. Thus the reason of hazarding life in just war is that 'it tends to preserve our honest countrymen, or evidences public spirit'. The former sort of reasons we will call exciting, and the latter justifying. Now we shall find that all exciting reasons presuppose instincts and affections, and the justifying presuppose a moral sense” (Hutcheson, 1728: 404). However, Jonathan Dancy (2000: 20–21) has argued that the distinction between a motivating reason and a normative reason does not perfectly correspond to Hutcheson’s distinction between two kinds of truth. According to him, the distinction between these two types of reason is best understood in terms of what questions can be properly asked of them: “If we do speak in this way, of motivating and normative reasons, this should not be taken to suggest that there are two sorts of reason, the sort that motivate and the sort that are good. There

an action.¹⁵ In the first example in the preceding paragraph, we can say that our motivating reason for staying at home is that the weather is dreary; this could also be a normative reason insofar as staying inside will increase our pleasure—and an increase in pleasure, so we might say, is a fact that counts in favour of staying at home with a book. In the second example, our motivating reason for purchasing organic vegetables could be that we wanted to feel morally superior compared to people who purchase non-organic vegetables. But this is not a normative reason; it does not count in favour of purchasing organic produce. A normative reason for purchasing organic vegetables is, for example, that it is better for the environment or that there are conventional social norms that require us to purchase such produce.

This brief discussion of normative reasons has already made explicit two very important points. First: normative reasons are ordinarily tied to particular normative domains—such as those of morality, prudence, and etiquette. While shopping at the local market we can, for example, ask ourselves whether in terms of *prudence* we should purchase organic vegetables. And the answer to this question might be that we should not, given that we would prefer to spend our money on something else. But we can also ask ourselves whether in terms of *morality* we should purchase those same vegetables. And the answer to this question might be that we should, given the environmental benefits of producing and purchasing organic produce. These normative domains produce prudential reasons and moral reasons, respectively. Second: normative reasons can compete against one another. In the example that was just provided, our prudential reasons are competing with our moral reasons. And this is because those normative reasons

are not. There are just two questions that we use the single notion of a reason to answer. When I call a reason “motivating”, all that I am doing is issuing a reminder that the focus of our attention is on matters of motivation, for the moment. When I call it “normative”, again all that I am doing is stressing that we are currently thinking about whether it is a good reason, one that favours acting in the way proposed” (Dancy, 2000: 2–3).

¹⁵ In what sense does a normative reason ‘count in favour’ of performing an action? On this point, I defer to Thomas Scanlon who wrote that “I will take the idea of a reason as primitive. Any attempt to explain what it is to be a reason for something seems to me to lead back to the same idea: a consideration that counts in favour of it. ‘Counts in favour of it how?’ one might ask. ‘By providing a reason for it’ seems to be the only answer. So I will presuppose the idea of a reason, and presuppose also that my readers are rational in the minimal but fundamental sense that I will presently explain” (Scanlon, 1998: 17). In a similar sense, Derek Parfit, as quoted earlier, writes that “‘counts in favour of’ means roughly ‘gives a reason for’” (Parfit, 2011: 67).

have a different *direction*: our prudential reason counts against purchasing the organic vegetables, while our moral reason counts in favour of doing so. We can say that they are both *pro tanto* normative reasons because they genuinely count either for or against performing an action. But what I should do *all-things-considered* is going to depend on which of these two *pro tanto* normative reasons proves the weightiest.

Derek Parfit provides a good explanation of the process through which we weigh countervailing normative reasons against one another. He writes that:

When we must choose between different possible acts, our reasons may conflict, and they can differ in what we can call their force, strength, or weight. If I enjoy walnuts, this fact gives me a reason to eat them; but, if they would kill me, this fact gives me a stronger or weightier conflicting reason not to eat them. When we have several reasons to act in some way, these reasons may *together* be stronger than, or outweigh, some single stronger conflicting reason. If I could either save you from ten hours of pain, or save each of ten other people from nine hours of pain, I would have a stronger set of reasons to act in this second way. As we can more briefly say, I would have *more reason* to act in this way (Parfit, 2011: 68).

The strength of a *pro tanto* normative reason is, in this way, strongly analogous to the mass of an object. When we are deliberating over what action we should perform, our aim is to identify the relevant set of *pro tanto* normative reasons and then determine which of those reasons, if any, has the greatest weight. This immediately brings to mind the metaphor of a traditional scale (one that consists of two bowls that are suspended at an equal distance from a fulcrum). In this metaphor: the bowls which are on either side of the fulcrum represent the different actions that we can perform, while our *pro tanto* normative reasons are weights that can be placed in either of those bowls to thereby tip the scales in either of two directions. An action is permissible relative to some normative domain just in case the bowl containing the weights is resting at the equilibrium point of the scale; it is required or impermissible relative to some normative domain just in case the bowl containing the weights is resting below or above the equilibrium point of the scale, respectively. An interesting feature of this metaphor is that when a *pro tanto* normative reason pushes the bowl on one side of the fulcrum below the point of equilibrium, it will simultaneously raise

bowl on the other side of the fulcrum by an equal amount. Weighing normative reasons is, in this sense, a zero-sum game: the property of a pro tanto normative reason that makes one action permissible is the exact same property that makes other actions impermissible. And this explains why, according to many philosophers, it is impermissible to act against an undefeated or unopposed pro tanto normative reason.

So, how does this work? (For an excellent discussion of the process of weighing countervailing sets of pro tanto normative reasons against one another see e.g., Lord & Maguire, 2016; Cullity, 2018). Let us apply the metaphor of a scale to our continuing example about purchasing organic vegetables. In this example: the bowls that are on either side of the fulcrum represent the actions that are available to us—to either purchase organic vegetables, or refrain from doing so. Right now, both of these bowls are resting at the point of equilibrium on the scale. But the bowl which is on the left-hand side of the fulcrum will drop below the point of equilibrium at the very moment that we place our moral reason into it. This will, simultaneously, cause the bowl that is on the right-hand side of the fulcrum to rise above the point of equilibrium. We will then place our prudential reason into the bowl that is on the right-hand side of the fulcrum. Depending on the weight of this pro tanto normative reason, it will cause the bowl on the right-hand side to either remain above the point of equilibrium, fall below the point of equilibrium, or bring both of the bowls back to the point of equilibrium. The outcome of this procedure will determine the moral status of our action. In the standard terminology: a pro tanto normative reason is *decisive* just in case it uniquely outweighs every countervailing set of pro tanto normative reasons (it is below the point of equilibrium), while it is *sufficient* just in case it has the same weight as a countervailing set of pro tanto normative reasons (both bowls are at the point of equilibrium).¹⁶ This determines what action

¹⁶ Two footnotes in one. First: the process that I am describing here is known as a *one-dimensional model* of normative reason strength. It is a one-dimensional model because it assumes that the weight of a normative reason is to be measured across only one dimension, which is analogous to the mass of an object: a pro tanto normative reason will only ever count *either* in favour of performing an action *or* against performing that action. However, there are *multi-dimensional models of normative reason strength* that have been developed in the literature as well. These models measure the weight of a pro tanto normative reason across two or more dimensions. An upshot of this is that we can have a pro tanto normative reason to perform an action without that reason thereby contributing to its moral status. For examples of multi-dimensional models of normative reason strength, see Francis Kamm (1985) [who distinguishes between the *efforts standard* and the *precedence standard*]; Joshua Gert (2000,

we ought to perform. Again, in the standard terminology: we are (morally) obligated to act in accordance with our decisive set of (moral) reasons, are (morally) permitted to act in accordance with our sufficient set of (moral) reasons, and (morally) prohibited from acting against our decisive set of (moral) reasons.

2.3. Moral rights

In the following four chapters of this dissertation, we will follow standard practice and understand the concept of a moral right in accordance with the theory of rights developed by Wesley Hohfeld (1913).¹⁷ At the heart of his theory is the observation that when people speak about rights, that term “tends to be used indiscriminately to cover what in a given case may be” one of several distinct things that are each accurately described as a right. Hohfeld thus distinguishes between four categories of rights, which are defined, and explicated with the use of examples, in the bullet points directly below:

2001, 2002) [who distinguishes between *justifying reasons* and *requiring reasons*]; Jonathan Dancy (2004a, 2004b) [who distinguishes between *peremptory reasons* and *enticing reasons*]; Douglas Portmore (2011) [who distinguishes between *moral reasons* and *morally-relevant non-moral reasons*]; Daniel Muñoz (2021) [who distinguishes between *rights* and *prerogatives*].

I am going to leave aside any further reference to multi-dimensional models of normative reason since it is irrelevant to how I use the concept of a normative reason in this dissertation. Second: in this section of the chapter, I have deliberately focused on how *first-order pro tanto reasons* play into our practical deliberation. But there is a sizeable, albeit controversial, philosophical literature in which it is argued that our practical deliberation is sensitive to so-called *second-order normative reasons* as well (see McDowell, 1978; Raz, 1975, 1989, 2021). To continue on with our metaphor: these are reasons that help determine what actions we ought to perform all-things-considered, but which are not placed on the scale together with our first-order normative reasons. They are, instead, reasons to either act on, or to refrain from acting on, the relevant set of first-order normative reasons. In some of the chapters that follow, I will adduce reasons and describe them as *either outweighing or excluding* a countervailing consideration. The reference to “exclusion” is supposed to denote that these reasons could be second-order pro tanto normative reasons. But nothing substantive hinges on this phrase or whether those facts are first-order or second-order normative reasons.

¹⁷ Although Hohfeld developed a theory specifically and exclusively of *legal rights*, in this dissertation I am going to assume, without argument, that this theory applies *mutatis mutandis* to moral rights too. This is a relatively uncontroversial assumption, which has been discussed and defended at length elsewhere in the literature (see e.g., Thomson, 1990: Chapters One and Two).

- **Privilege-right:** An agent A has a privilege-right to ϕ just in case A has no duty not to ϕ . For example: an agent A has a privilege right to dress in a certain way or listen to a certain genre of music precisely because they do not have a duty to not dress in that way or to not listen to that genre of music. Privilege-rights are sometimes referred to as *liberty-rights*, although I have chosen to avoid that terminology so as to minimise any confusion with the fact that it is often said that we each have a claim-right to liberty.
- **Claim-right:** An agent A has a claim-right that another agent B ϕ just in case B has a duty to A to ϕ . For example: an employee has a claim-right against their employer that they are paid the salary listed in their employment contract. This is because the employer is duty-bound to pay their employee for their labour. Hohfeld referred to a claim-right as “a right in the strictest sense.”
- **Power:** An agent A has a power just in case they are able to alter their own or another person’s privilege-rights or claim-rights. For example: an employer has the power to order their employees to complete certain tasks that fall under their job description.
- **Immunity:** An agent A has an immunity against another agent B just in case B is not able to alter a set of A’s privilege-rights or claim-rights. For example: an employee has an immunity against their employer in regard to not being ordered to complete tasks that fall well outside of their job description.

Privilege-rights and claim-rights are instances of what H. L. A. Hart (1961) referred to as *primary rules*. They are rules that require us to either perform or refrain from performing certain actions. By contrast, powers and immunities are instances of what Hart (1961) referred to as *secondary rules*. They are rules that specify how we can introduce new primary rules or change pre-existing primary rules in some way.

Four important points fall out of this theory of rights. First: Hohfeld (1913: 30) displayed these rights in a table of opposites and correlatives, which is listed below:

{ Jural	rights	privilege	power	immunity
{ Opposites	no-rights	duty	disability	liability
{ Jural	right	privilege	power	immunity
{ Correlatives	duty	no-right	liability	disability

This table was designed to highlight the logical relations that stand between each of the four categories of rights. For example: according to Hohfeld, a claim-right correlates with a duty in the sense that, if I have a claim-right that a certain state of affairs obtains, you are duty-bound to make sure that that state of affairs does, in fact, obtain (see generally, Thomson 1990: 41–43). Likewise: a privilege-right is the opposite of a duty in the sense that, if I have a privilege-right to perform some action, it follows that I do not have a duty to refrain from performing that action. Although these logical relations will not play an explicit role in the arguments developed in this dissertation, they provide a background explanation for why the state is duty-bound to respect, and respond to, the rights held by the immigrant detainees.

Second: many of the rights that are commonly discussed in the philosophical literature are, on close examination, complex sets that can contain a messy combination of these four categories of rights. These complex sets go by different names. For example: Judith Thomson (1990: 55–59) refers to them as *cluster rights*, while Joel Feinberg (1973: 73) refers to them as *right categories*. Here is an example. You presumably have a property right over the computer that you are currently using in order to read this sentence. However, this “property right” is not singular. It is, rather, a messy combination of rights that can include, but might not be limited to: the claim-right that other people do not use your computer without your consent; the privilege-right to use your computer as you see fit; the power to waive your right by, for example, allowing other people to use it; and the immunity against all other people ordering you to let them use your computer. This is important for the following reason. Many of the arguments developed in this dissertation fall against the backdrop of the more general open versus closed borders debate—and closed border theorists, as we will see in the next subsection, argue that a legitimate state holds the *right to exclude*. The right to exclude is, on close examination, a cluster right or right category.

Third: *ceteris paribus* and within certain limits, a claim-right is *enforceable* (see Thomson 1990: 105–122). Thomson takes this to mean the following. On the one hand: if you hold a claim-right against

me that a specific state of affairs obtains, then I will thereby become duty-bound to ensure that this state of affairs does in fact obtain. To use Thomson's own example: if you hold a claim-right against me that I deliver 100 widgets to you next Friday (perhaps we signed a contract for this exchange), I will thereby become duty-bound to deliver those widgets by that deadline. On the other hand: if you hold a claim-right against me that a specific state of affairs obtains, then, *ceteris paribus* and within certain limits, it is morally permissible for you to prevent me from failing to let that state of affairs obtain. Returning to that same example: *ceteris paribus* and within certain limits, it is morally permissible for you to ensure that I do, in fact, deliver those widgets to you by next Friday. In other words, it is morally permissible for you to take steps to ensure that I do not infringe your right by failing to let that state of affairs obtain.

What these steps are is going to depend on the circumstances of the case at hand, of course. As Thomson (1990: 107–109) explains: in the example just described, you would be permitted to make me deliver those widgets by phoning me and saying, in your fiercest way, “DELIVER THOSE WIDGETS BY FRIDAY OR I’LL SUE!” However, you would not be permitted to make me deliver those widgets by shooting me in the foot or otherwise coercing me with the threat of bodily harm. Thomson explains this by appealing to a Kantian *Sole-Means Principle for Permissibility*. Alternatively, it could be argued that the way in which we enforce a claim-right must be necessary and proportional. But in any case, the way that we ground this enforceability does not really matter in the context of this dissertation. Rather, I have raised all of this here because many of the arguments developed in the following four chapters only make sense if we understand the state, and the immigrant detainees, as holding enforceable rights.

Fourth: earlier in this section, we explained that a person has a power just in case they are able to alter their own or another person's privilege-rights or claim-rights. What this means, in more practical terms, is that rightsholders are entitled to perform various actions with their rights—and, in addition to this, have various things done to those rights by other people. As a case-in-point, we are able to *waive* our claim-rights. This involves consenting, for a given period of time, to another person using the object over which we hold that right (which is to say that, in doing so, we maintain our claim-right and grant another person a corresponding privilege-right). For example: I have a claim-right over my computer, which makes you duty bound not to use it without my permission. But I could, however, waive that

right by consenting to you checking your emails on it. When we waive our rights, we will still maintain the power to withdraw our consent at any point in time—and that withdrawal will still hold moral force.

Another thing that we are able to do with our rights is *alienate* or *relinquish* them. This involves giving up those rights for a temporary or permanent length of time. For example: I alienate my property right over my computer if I rent or sell it to you; during the agreed upon length of time, I am no longer entitled to use it. To the contrary of cases in which we waive our rights, when we alienate or relinquish them, we lose the discretionary power to retrieve those rights until the relevant period of time has lapsed. Finally: our rights are *forfeited* just in case they are taken away from us for a pre-determined amount of time. Incarcerated criminals, for example, are often said to have forfeited their right to liberty or freedom of movement in virtue of their criminal wrongdoing (see generally Wellman, 2012). This explains why, all else being equal, it is morally *permissible* to incarcerate criminals but morally *impermissible* to treat non-criminals in the same way. I mention all of this here because the process of rights waiver, alienation, and forfeiture will play an important role when we later discuss the ethics of immigration detention.

3. Literature Review

This section of the chapter conducts a short review of the philosophical and non-philosophical literature in this field. The first subsection will review the open versus closed borders debate. The next subsection discusses the ethics of border enforcement within the context of that debate. The goal is to explain that, despite first appearances to the contrary, the moral status of border enforcement—whether it is border enforcement in general, or a specific institution of border enforcement such as immigration detention—cannot be fully determined by appealing to the substantive positions that are defended in the open versus closed borders debate. The final subsection will then review the literature relating to the ethics of border enforcement, including the moral status of immigration detention.

3.1. The open versus closed borders debate

In broad strokes, the open versus closed borders debate pertains to the conditions under which it is all-things-considered morally permissible for a legitimate state to unilaterally enforce its territorial and/or political borders (see generally Wilcox, 2009; Fine, 2013; Wellman, 2024). Within the context of this

debate, a *closed border theorist* is someone who maintains that the state has a so-called *right to exclude*. Sarah Fine (2010: 342–343; 2013: 225) explains that this is not a singular right, but is, instead, a cluster right or right category that is usually thought to be comprised of three conceptually-distinct claim-rights: the right to exclude prospective immigrants from entering its territory (from crossing into geographical borders), the right to exclude prospective immigrants from settling inside of its territory, and the right to exclude immigrants from acquiring legal membership within the political community (from acquiring permanent residency or citizenship). For the sake of simplicity, in what follows we will follow the conventional view and refer to “the right to exclude” rather than the three claim-rights that comprise it.

Closed border theorists have developed a swathe of arguments in attempts to show that the state holds the right to exclude (see Carens, 2013: 255–287; Fine, 2013). Many of these arguments claim that the state holds the right to exclude in virtue of the fact that it has a more fundamental right to, or interest in, collective self-determination. Within this context, *self-determination* refers to the ability of a group of people, such as a nation or a state, to set the terms of their common lives without outside interference (Fine, 2013: 258). Although different closed border theorists develop their self-determination arguments in different ways, what these arguments have in common is that they each highlight the importance of the state being able to set its own membership rules, control the shape of its citizen body—and, in so doing, being free to determine the shape of the ‘self’ that is supposed to be self-determining (Fine, 2013: 258). In terms of details, closed border theorists have grounded the importance of self-determination in the value of cultural and political autonomy (Walzer, 1983; Miller, 2005, 2016), freedom of association (Wellman, 2008; Wellman & Cole, 2011: Chapter 13), ownership of public institutions (Pevnick, 2011), and freedom from human rights obligations (Blake 2013). For the most part, these arguments are limited in scope: they do not entail that the state holds the right to exclude forced migrants, like asylum seekers.

By contrast, an open border theorist is someone who maintains that there is a presumptive case in favour of unrestricted international immigration. Within the non-philosophical literature on this topic, this presumptive case has been spelled out in a number of different ways (see generally Bauder, 2015). *Market economy perspectives*, for example, endorse open borders in response to the putative economic benefits that it would bring (Chang, 1997; Block, 1998; de Soto, 1998; Binswanger, 2006; Gill, 2009; Dalmia, 2012; Basik, 2013). Other arguments that have been developed within this literature focus on,

for example: the way in which a system of open borders would undermine, and eventually abolish, the current global capitalist system (Sassen, 1988: 36; Brown, 1992: 132; Hayter, 2000; Bauder 2003, 2006: 19–34; Düvell, 2003; Samers, 2010: 142–144); the way in which a system of open borders would rectify the fact that capitalism has uprooted and displaced people all around the world (Hayter, 2000; Darder, 2007); that immigration controls originate from racism and help perpetuate a global system of apartheid by stopping racialized migrants from being able to internationally migrate (Hayter, 2001; Balibar, 2004; Sharma, 2005, 2006); that immigration controls disproportionately target women and children (Preston, 2003); and, lastly, that a system of open borders would deter military aggression (Gill, 2009: 112–113).

In the philosophical literature on this topic, it has become extremely common for open border theorists to defend this presumptive case by appealing to the *human right to unrestricted international migration* (Huemer, 2010; Carens, 2013: 236–254; Oberman, 2016).¹⁸ This right is typically understood as a universal negative moral claim-right that is held against all states to not prevent those who wish to enter and settle inside their territory from being able to freely do so (Miller, 2016). Different approaches have been taken in order to defend this human right. For example: that this right is entailed by the extant right to domestic freedom of movement (Carens, 2013: 237–245), that it is instrumental in promoting a more fundamental subsistence right that can be held by prospective migrants (Huemer, 2010; Carens, 2013: 234–235; see generally, Wilcox, 2009: 817–819), and the fact that it would promote our essential interest in being able to make important personal decisions and contribute to our political communities (Oberman, 2016). As I will explain in the next section of this chapter, these arguments do not entail that the state must allow *all* prospective immigrants to enter and settle inside of its territory. For as Michael Huemer puts the matter:

¹⁸ Other philosophical arguments in favour of open borders include, for example: libertarian arguments that claim that a system of closed borders violates a citizen's property right to invite foreigners onto her land (see Carens, 1987: 253); that a democratic theory of political legitimation entails a system of open borders (Abizadeh, 2008); that a system of open borders is entailed by the right to emigrate (Cole, 2000); that utilitarianism and Rawlsian liberal egalitarianism entail open borders (Carens, 1987).

Few would question the state's right to exclude at least some potential migrants. For example, the state may deny entry to international terrorists or fugitives from the law. The interesting question concerns the vast majority of other potential immigrants—ordinary people who are simply seeking a new home and a better life. Does the state have the right to exclude these ordinary people? (Huemer, 2010: 430)

As we have already noted, arguments for open borders are meant only to develop a *presumptive case* in favour of unrestricted international migration. This means that open border theorists can claim, without any inconsistency, that it can be all-things-considered morally permissible to deny entry and settlement to *some* (perhaps risk-imposing) prospective immigrants. Those who deny this, and argue that there are no circumstances under which it is all-things-considered morally permissible for the state to deny entry and settlement to prospective migrants, defend what is typically called a commitment to *no borders* or *borders abolitionism* (see Alldred, 2003; Sharma, 2003; Wright, 2003; Walters, 2006; Anderson et al., 2009; Nyers, 2010; Walia, 2013; BurrIDGE, 2014; for a discussion of this position, Bauder, 2015: 400).¹⁹

3.2. Border enforcement and the open versus closed borders debate

The philosophical literature relating to immigration ethics covers a broad range of topics (see generally Wellman, 2024). However, there is no denying that most of the ink within this literature has been spilled by those writing in the context of open versus closed borders debate. Philosophers, as we just saw, have had a lot to say about the general conditions under which it is all-things-considered morally permissible for a legitimate state to unilaterally enforce its territorial and/or political borders. But it is not until quite

¹⁹ It is important to emphasise a further distinction: to the contrary of open border theorists who typically operate in broadly liberal frameworks, so-called no border theorists tend to emerge from critical or radical theoretical traditions such as anarchism, critical theory, and anti-capitalism—and tend to interrogate the legitimacy of state authority and broader social, political, and economic structures in ways that differ from open borders theorists. This does not mean that open border theorists fully endorse all state practices, as both positions can involve critical assessments of state power. But it does suggest that a key distinction between these positions lies in the underlying philosophical traditions and approaches to political legitimacy that inform their respective arguments.

recently that philosophers have started to pay attention to the various institutions of border enforcement that either are used, or that could in principle be used, by these states to enforce their borders (Mendoza, 2015; Lister, 2020; Arnaiz, 2024). José Jorge Mendoza explains:

In debating the ethics of immigration philosophers have tended to put aside questions of enforcement. In doing so philosophers have not done anything out of the ordinary. After all, philosophy typically brackets questions of enforcement, at least initially, when attempting to determine who is entitled to certain rights and who is bound by certain duties. The reason for this bracketing rests on the not-so-outlandish assumption that what a right or duty *ought to be* is distinct from *how* that right or duty is to be exercised or guaranteed. In this regard, the ethics of immigration has not proved to be an exception: whether a political community *ought* to have the right to control immigration is taken to be a separate question from *how* a political community goes about enforcing this right (Mendoza, 2015: 73–74).

In the article from which this passage is quoted, Mendoza argues that this is a problematic way to frame the relationship between border enforcement and the open versus closed borders debate. In his words, “the issue of enforcement does matter in determining the presumptive rights or duties associated with immigration.” (Mendoza, 2015: 74). I am sympathetic to this line of reasoning. However, I do not need to commit myself to it in order to analyse the moral status of immigration detention in this dissertation. The important point for me—and this is something that I will emphasise time and again throughout this dissertation, most forcefully in Chapter Five—is that regardless of the reasons why “philosophers have tended to put aside questions of enforcement,” the fact of the matter is that both closed border theorists and open border theorists are committed to the use of border enforcement in at least some circumstances. The immediate corollary of this is that people on both sides of the open versus closed borders debate, regardless of the particular arguments that they use to substantiate their positions, need to consider the moral status of border enforcement. In other words: the moral status of border enforcements, including, but not limited to, immigration detention, cannot be determined by simply appealing to the substantive positions defended in the open versus closed borders debate. I will now explain this point in more detail.

Consider the role of border enforcement under a system of closed borders, for example. In the previous section of this chapter, it was explained that a closed border theorist is someone who maintains that a legitimate state holds the right to exclude. I mention this again here because it might be thought, at a first pass, that if a legitimate state does in fact hold the right to exclude, then there is very little that remains to be said about the moral status of border enforcement—be it the moral status of immigration detention, or an altogether different institution of border enforcement such as a non-custodial measure. The reasoning here is simple. Earlier in this chapter I explained that, *ceteris paribus* and within certain limits, rightsholders are morally permitted to enforce their rights (see Thomson, 1990: 105–122). This is important for our current discussion because a closed border theorist could correctly point out that it is in virtue of administering a system of border enforcement that a legitimate state is able to determine who enters and settles inside its territory—and, in so doing, is able to enforce its right to exclude. This might be taken to imply the moral status of border enforcement, such as immigration detention, is fully determined by the state’s antecedent right to exclude. If this is correct, the pertinent question becomes whether the state holds this putative right. But notice the following problem with this line of reasoning.

It is incontrovertible that rights are generally enforceable. This entails that a legitimate state is morally permitted to administer *some* form of border enforcement in order to enforce its right to exclude. However, there are obvious moral limits on the forms which that border enforcement can take. And this follows straightforwardly from the fact that there are obvious moral limits on the means through which rightsholders are, *in general*, permitted to enforce their rights. Here is an example to illustrate this point. I have a property right over the computer I am using to type out this sentence; this entails, *inter alia*, the correlative duty that you and all other people do not use my computer without my consent. But imagine now that while I am working on a communal table in the library one day, I see the person sitting opposite me reach over to try and take the computer out of my reach. They need it to write their own dissertation, or so we can imagine. It goes without saying that, in this case, I would be *morally permitted* to enforce my property right over my computer by, for example, moving it out of their reach, telling them to stop, or even pushing their hand away. But what is equally clear is that, in this same case, I would be *morally prohibited* from enforcing this same right by maiming them so that they were no longer able to use their hands to grab my computer. One explanation for this is that if I were to do so, I would violate a standard

proportionality constraint (and, presumably, a standard necessity constraint). And this is reflected in the fact that rightsholders, like me, are permitted to enforce their rights *ceteris paribus and in certain limits*.

So it is with border enforcement and the right to exclude. For the reasons already provided, this right entitles a legitimate state to administer some form of border enforcement. But despite this, nobody writing within the current philosophical literature seriously believes that a legitimate state is morally permitted to enforce its right to exclude by shooting would-be migrants dead upon arrival, for instance.²⁰ And this is because the costs of doing so (i.e., killing a would-be migrant) would be disproportionate to the benefits which are thereby accrued (i.e., enforcing the right to exclude). What this demonstrates is that arguing in favour of closed borders is only half of the job done: a closed border theorist still needs to explain what forms of border enforcement the state is morally permitted to use in order to enforce this right. I do not mean to suggest that this cannot be shown. The point is, rather, that in order to show that it is the case, a closed border theorist cannot just appeal to the right to exclude. If they were to do so, they would be engaging in circular reasoning. What they must instead do is appeal to some sort of consideration that is conceptually independent from the right to exclude. This dissertation helps identify these conceptually-independent considerations in relation to the moral status of immigration detention.

Turning now to the other side of the open versus closed borders debate, it might be thought that a commitment to open borders supports a type of abolitionist argument against border enforcement. The reasons for this are two-fold. First: as I have already explained, an open border theorist is someone who maintains that there is a presumptive case in favour of unrestricted international migration. This presumptive case, at least in the current literature, is often spelled out in terms of there being a human right to unrestricted international migration. And this right—again, as already explained—is normally understood as a universal negative moral claim-right that is held against all states to not prevent those who wish to enter and settle inside their territory from being free to do so. Second: border enforcement, such as immigration detention, is designed to inhibit the ability of a would-be migrant to freely cross or remain inside the borders of whichever state is administering it. And it is tempting to think that, in virtue

²⁰ Although some people outside of the philosophical literature unfortunately contest this—such as Donald Trump, who has suggested shooting migrants in the leg to slow them down (see, <https://www.bbc.com/news/world-us-canada-49901878>).

of inhibiting cross-border movement, border enforcement infringes this human right. After all: the state has a correlative duty to not prevent those who wish to enter and settle inside its territory from doing so—and it can be argued that by administering border enforcement, the state fails to discharge this duty.

If this line of reasoning is sound, then the moral status of border enforcement can be determined by reference to the open versus closed borders debate. The question, then, becomes whether prospective migrants do in fact hold the human right to unrestricted international migration. But notice the following problem. It is uncontroversial that even our strongest human rights can be suspended or outweighed by sufficiently strong countervailing considerations—whether it is a countervailing right, or countervailing normative reason that is unattached to a specific right. As James Griffin (2008: 76) expresses the point, “human rights are resistant to trade-offs, but not completely so.” This has not been lost on open border theorists. There is, for instance, widespread agreement among open border theorists that even under a system of fully open borders, the state would be *at least* morally permitted to exclude would-be migrants who constitute a serious risk to public health, social order, or national security. Consider the following quotes, as evidence of this point (see generally Seglow, 2005: 324–325; Carens, 2013: 174–179):

National security is a crucial form of public order. So, states are clearly entitled to prevent the entry of people (whether armed invaders or subversives) whose goal is the overthrow of just institutions ... A more realistic concern is the sheer size of the potential demand. If a rich country like the United States were simply to open its doors, the number of people from poor countries seeking to immigrate might truly be overwhelming, even if their goals and beliefs posed no threat to national security or liberal democratic values. Under these conditions, it seems likely that some restrictions on immigration would be justified under the public order principle (Carens, 1987: 260).

States also often prohibit people with significant criminal records from entering as immigrants. There is obviously a public interest here, although the concern is public safety and the maintenance of law and order rather than national security. The use of this criterion is not unreasonable, so long as some attention is paid to context. For example, some states may use

the criminal law to repress political dissent, and democratic states should be very wary about reinforcing that practice by refusing admission to those so convicted (Carens, 2013: 177)

Few would question the state's right to exclude at least some potential migrants. For example, the state may deny entry to international terrorists or fugitives from the law. The interesting question concerns the vast majority of other potential immigrants—ordinary people who are simply seeking a new home and a better life. Does the state have the right to exclude these ordinary people? (Huemer, 2010: 430)

No one engaged in the philosophical debate endorses immigration policies exactly as they stand; rather, all participants are in agreement that many existing immigration restrictions and practices are unjust. In addition, although it is frequently, if misleadingly, cast as a debate between advocates of closed borders and proponents of open borders, practically everyone in the philosophical literature agrees that there are *some* contexts in which it is permissible to exclude *some* prospective entrants, and that there are *some* practices of exclusion which are always, or almost always, impermissible (Fine, 2016: 126).

Though some borders are easier to cross than others—or at least, easier for some people to cross—the presumption in the modern world is that “thou shall not cross” without proper authorization. Only a few borders come close to being absolutely shut, but none are fully open. The purpose of borders is to keep people out: to deny them membership of the state, or to limit their rights when they do enter, or to bar them from physical entry altogether. The ethical issue at stake is the matter of how closed or open those borders should be: who should be allowed in and who kept out? (Kukathas, 2016: 252)

To be clear: these quotes, along with the arguments in which they are instantiated, leave much unsaid. For example, much will hinge on whether the concept of risk is understood as a statistical generalisation or in terms of individualised data (see generally Colyvan, Regan & Ferson, 2001). Likewise, it would

still need to be determined what counts as a “serious” risk of harm in this context; which forms of border enforcement ought to be used to mitigate that risk of harm; and, given that risks of harm cannot be fully eliminated, the level of risk that the state ought to accept as tolerable in its immigration admissions and settlement programmes. But these questions notwithstanding, the general point is that a commitment to open borders does not entail anything decisive about the moral status of border enforcement. An open border theorist, as we just saw, still has to explain how the state ought to administer border enforcement in relation to risk-imposing would-be migrants. In its small way, this dissertation helps develop such an explanation on behalf of open border theorists by focusing on the moral status of immigration detention.

3.3. Border enforcement and immigration detention

The upshot of the discussion in the preceding subsection is this: the moral status of border enforcement cannot be fully determined by appealing to the substantive positions defended in the open versus closed borders debate. And what this means, in practical terms, for this dissertation is that in order to determine the moral status of immigration detention, we need to look beyond considerations relating to either the right to exclude (as defended by closed border theorists) or the human right to unrestricted international migration (as defended by open border theorists). The following four chapters of this dissertation will explore these considerations at length. But for the moment, and in this current subsection of the chapter, I will review the philosophical literature in this field. I will begin by reviewing what philosophers have had to say about the ethics of border enforcement in general, and then look at the ethics of immigration detention specifically. In so doing, my purpose is not to give a *comprehensive* review of this literature—but, rather, to review it to the extent needed to make sense of the arguments that are developed later on.

In the context of a review of the philosophical literature on border enforcement, Matthew Lister notes that while “the normative literature on immigration has grown both in size and sophistication over the last thirty or so years ... specific focus on the enforcement of immigration law, and the distinctive moral questions that this raises, is a relatively new development” (Lister, 2020: 1). This is correct. But despite being a relatively new development in the field of immigration ethics, philosophers have rapidly engaged with a broad range of topics relating to border enforcement, which include: the effect of border enforcement policies on the citizens and authorised residents in the state that has enacted those policies

(Carens, 2013; Mendoza, 2017; Reed-Sandoval, 2022; Lister, 2024); the duties of non-residents to obey immigration laws and policies in transit or receiving states (Hidalgo, 2016; Yong, 2018; Huemer, 2019); the conditions under which it is morally permissible to resist, or engage in civil disobedience in regard to, (potentially unjust) immigration laws and border enforcement policies (Hidalgo, 2015; Spina, 2016; Bertram, 2018; Lister, 2018); the conditions under which it is morally permissible to administer border enforcement (Song, 2021; Ip, 2022; Arnaiz, 2024; Gerver, Lown & Duell, 2023; Sager, 2024); and, how *crimmigration*—which is the legal process through which civil or administrative immigration law has become asymmetrically incorporated with criminal law—affects border enforcement (Mendoza, 2020).

In the context of this rapidly growing literature, philosophers have only just started to consider the moral status of immigration detention specifically (see Silverman, 2014; Sager, 2018, 2024; Hillier-Smith, 2020: 304–305, 2024: 32–33; Bauböck, 2024: 58; Somin, 2024: 69; Bender & Silverman, 2024). There is no doubt that this growing body of research constitutes an important first step in understanding the moral status of immigration detention. But the issue with this research is that it tends to either make only a passing reference to immigration detention in the context of a more general discussion of forced migration or the right to exclude (in which case the moral status of immigration detention is left largely undetermined), or it discusses its moral status only in regard to immigration detention policies that are gratuitously harmful and obviously unjust (in which case we are left wondering whether a less harmful form of immigration detention would constitute a just form of border enforcement). An example of the former of these two issues can be found in one of Joseph Carens' remarks about the incentives that can motivate forced migrants to apply for political asylum. Here, he writes that:

... the opportunity to work while one's claim is being considered is itself a powerful incentive to apply for asylum even for people with little hope of success. One could reduce this incentive by detaining asylum claimants but that is very expensive. Even more important, it conflicts with the democratic commitment to human freedom which makes it hard to justify lengthy pre-determination detention, simply as a method for deterring asylum seekers (Carens, 2013: 212).

In a similar manner, David Miller wrote the following when discussing the incentive structure that can drive irregular immigration among voluntary migrants:

If inward mass migration by those who are not refugees is something to be discouraged, what steps can European states legitimately take to deter migrants from entering the borders of the European Union? ... all sides recognize that any ship that encounters a boat full of migrants in imminent danger of drowning has a humanitarian duty at least to take them on board and escort them to dry land. However, it seems likely that the prospect of being rescued in this way provides an incentive to migrants to embark on unsafe journeys, and that when states break the link between rescue and access to their territory—as the Australian government has done by adopting a policy whereby migrant boats are either towed back to their point of embarkation or their occupants are assessed in off shore detention centres, with those qualifying for refugee status placed in third countries—the stream of boats rapidly dries up, and with it the loss of life (Miller, 2018: 171).

For an example of the latter of the two aforementioned issues, we can consider the passage from Bradley Hillier-Smith quoted below. This passage occurs in the context of a more general discussion of whether the border enforcement policies used by liberal democratic states in response to refugee flows count as instances of doing harm or allowing harm. Here, Hillier-Smith writes that:

In an arrangement between European Union (EU) member states and Libya, refugees attempting to find safety in Europe are returned to indefinite and arbitrary detention in appalling conditions in centers on the Libyan coast (that are funded by EU states including the UK). Overcrowding and lack of sanitation have led to starvation, disease (in particular tuberculosis), and death. Refugees, including children, face grievous maltreatment in the centers: being raped, beaten, abused, starved, and even traded as slaves. Documented footage depicts the torture, showing refugees being burned, maimed, and electrocuted. A Somali man recently self-immolated and died of his wounds in protest against his incarceration, maltreatment, and

conditions in the Triq al Sikka detention center. This is a testament to how unimaginably unbearable and hopeless conditions can be. Had he not been detained, this man was eligible for asylum in the EU, including the UK.

Detention is an instance of doing harm. Without the forced detention, such refugees were eligible and thus would have claimed and likely been granted asylum in EU states. Placing refugees in these detention centers therefore *makes* refugees worse off in aspects of their well-being (physical and mental health, subsistence, liberty, physical security, including freedom from rape and torture) and *causes* them to be in an undeniably harmful state of affairs where such aforementioned aspects of their well-being are worse than they would have been had such detention not obtained (Hillier-Smith, 2020: 304).

Passages, such as the three just quoted, raise more questions than they answer. In regard to the passage quoted from Joseph Carens, for example, we are left wondering whether the state is morally permitted to administer immigration detention if the immigrant detainees are not detained for a “lengthy” amount of time. In regard to the passage quoted from David Miller, we are left wondering whether immigration detention does in fact deter irregular voluntary migration in the way that he assumes. We can, likewise, wonder about the sorts of harms that the state would need to impose onto its extant immigrant detainee population in order to produce these putative deterrent effects—and whether, in virtue of these harms, an immigration detention policy that produced these putative deterrent effects would violate a standard proportionality constraint. Finally: in regard to the passage quoted from Bradley Hillier-Smith, we are left wondering whether the harms that he cites could be mitigated or eliminated by policy or legislative reforms—and whether, if these reforms were enacted, would cease to be an instance of doing harm and perhaps even become a morally permissible way for the state to enforce its territorial or political borders.

In their different ways, all four of the chapters that follow directly address these sorts of issues. These chapters explore whether the state is morally obligated to place strict limits on the length of time that a would-be migrant can be detained in immigration detention, whether immigration detention is an effective deterrent against irregular migration, the harms or costs that would need to be imposed on the extant immigrant detainee population in order to produce these deterrent effects, the considerations that

can morally justify those harms or costs, whether the harmful nature of immigration detention warrants reform or abolition, and how immigration detention compares to other forms of border enforcement—such as non-custodial measures like bail, parole, and recognisance release orders. By exploring these sorts of issues, this dissertation tells a more complete story of the moral status of immigration detention. There are still questions about its moral status that need to be explored and possibly answered, of course. But the four chapters that follow build on this existing philosophical literature to strengthen and enrich our understanding of the conditions under which it is permissible to administer immigration detention.

4. Conclusion

This chapter provided some helpful context and background information for the following four chapters. We began by explaining what immigration detention actually is. After doing so, we defined three other concepts that will play an important role in the following four chapters: immigration, normative reasons, and moral rights. The chapter ended with a brief review of the philosophical and non-philosophical literature in this field. This section of the chapter started by reviewing the literature in the open versus closed borders debate. It then explained why the moral status of immigration detention cannot be fully determined by appealing to substantive positions that have been defended within the context of that debate. Finally, it reviewed the current literature relating to the ethics of border enforcement and immigration detention.

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Chapter Two

Immigration Detention and the Right to Freedom of Movement

Abstract: Immigration detention is one of the most pervasive forms of contemporary border enforcement. But it has so far received very little attention from philosophers and social scientists who are otherwise interested in the ethics of immigration. The purpose of this paper is to make headway on analysing the moral status of this under-theorised form of border enforcement. It starts by granting that legitimate states hold the moral right to unilaterally determine who is able to enter and settle inside of their territory, and then proceeds to develop a presumptive case against immigration detention. It is argued that under certain minimal conditions that are perfectly consistent with a commitment to closed borders, and which are normally satisfied in the real-world, immigration detention harms the immigrant detainees by infringing their right to freedom of movement. In this context, the right to freedom of movement is understood as a positive moral claim-right that an immigrant detainee could hold against the state to be released into the community on a non-custodial measure—such as bail, parole, or a recognisance release order.

Keywords: immigration detention; detention; freedom of movement; non-custodial measure; border enforcement.

1. Introduction

Let us grant to the closed border theorist that legitimate states hold the moral right to unilaterally control who enters and settles inside of their territory. We will call this the *right to exclude*.¹ It might be thought that if we grant to the closed border theorist that states do in fact hold the right to exclude, then there is little that remains to be said about the moral status of border enforcement. Rights are enforceable, after

¹ Unless it is otherwise mentioned: any further reference to ‘the state’ and ‘the right to exclude’ should be understood to mean *legitimate liberal democratic states* and the *moral right to exclude*, respectively. I intentionally leave open which set of interests ground the right to exclude, as well as the criteria of legitimacy that should be used, since these issues do not affect our analysis.

all (Thomson, 1990: 105–123). And it is by administering a dynamic system of border enforcement that states are able to control who can enter and settle inside of their territory—and, in so doing, are able to enforce their right to exclude. But while the fact that rights are enforceable entails that states are morally permitted to administer *some* form of border enforcement, there are obvious moral limits on the forms which that border enforcement can take. Nobody seriously thinks that shooting would-be migrants dead upon arrival is a morally permissible way for the state to control its borders, for instance. What this tells us is that arguing in favour of the right to exclude is only half of the job done: the closed border theorist still has to explain what forms of border enforcement the state can permissibly use to enforce that right.

Border enforcement can and does take enumerable forms. But in what follows, we are going to develop a presumptive case against what has become one of the most pervasive forms of contemporary border enforcement: immigration detention. This is the form of administrative detention that is designed to effectuate immigration-orientated goals, such as the identification and removal of irregular migrants. It will be argued that under certain minimal conditions that are perfectly consistent with a commitment to closed borders, and which are normally satisfied in the actual-world, immigration detention will harm the immigrant detainees by infringing their right to freedom of movement. I will begin, in the following section of this paper, by making some important cursory remarks about immigration detention and the content and scope of the right to freedom of movement. The goal of this section is to situate our analysis of immigration detention in the broader philosophical literature, and to reject two *prima facie* plausible ways that we might try to show that immigration detention infringes the right to freedom of movement. Section Three develops a presumptive case against immigration detention, while Section Four responds to three objections that can be raised against it. Section Five summarises our main findings and suggests areas for future research on this topic. By the end of this paper, it will be clear that immigration detention is, at best, a *pro tanto* harmful form of border enforcement—and, at worst, all-things-considered morally impermissible. In either case, the upshot is the same: the state has a moral reason to enforce its right to exclude with another form of border enforcement, such as a dynamic system of non-custodial measures.

2. Immigration Detention and the Right to Freedom of Movement

There are numerous ways that immigration detention can, and, in many real-life cases, often does, harm the immigrant detainees. But as we have explained, the purpose of this paper is to develop a presumptive case against immigration detention that focuses on the way that it can harm the immigrant detainees by infringing their right to freedom of movement. The main motivations for developing a presumptive case against immigration detention that focuses on this particular harm are two-fold. First: as we will explain later in the paper, it is unlikely that this harm can be ameliorated by enacting policy or legislative reform. Second: virtually every contemporary closed border theorist has acknowledged that there is a right, and perhaps even a human right, to freedom of movement (Walzer, 1983: 31–52; Blake, 2004, 2013; Miller, 2005, 2016; Wellman, 2008: 153; Pevnick, 2011: 81–86; Brock & Blake, 2015: 114). What this means, in more practical terms, is that if immigration detention does infringe the right to freedom of movement of the immigrant detainees, then this is something that, by their own lights, closed border theorists ought to care about. The difficult task for us, though, will be to understand this right in a way that is consistent with our commitment to closed borders; our presumptive case against immigration detention must only rely on premises that closed border theorists are willing to accept.² In light of this, we will now consider two ways that closed border theorists often understand the right to freedom of movement. We will show that, despite first appearances, neither way of understanding this right can ground our presumptive case.

Consider, first, that most closed border theorists acknowledge that there is the right to *domestic freedom of movement* (Walzer, 1983: 35–37; Blake, 2004: 228–229; 2013; Miller, 2005: 364, 2016: 23–24; 2018: 53–55; Pevnick, 2011: 83–85; Brock & Blake, 2015: 114–115; Wellman, 2016: 87–88). This is a negative moral claim-right that people hold against the state to not prevent them from freely moving inside of its territorial borders. Of course, this right is neither perfectly general nor absolute. It does not,

² For example: open border theorists often understand the right to freedom of movement as a *right to unrestricted international migration* (Carens, 2013: 236–252; Oberman, 2016). If the right to freedom of movement is understood in this way, there is a straightforward way in which immigration detention infringes it: it stops would-be migrants being able to freely enter the state when it is administered pre-admission, and, likewise, stops would-be migrants being able to freely remain inside the state when it is administered as an adjunct to removal. But this line of argument is obviously inimical to our commitment to closed borders.

for example, entitle people to trespass. But under normal circumstances, it entitles people to freely travel within and in between the different cities, neighbourhoods, regions, and so forth, of the country in which they live. This is important because when the state detains a would-be migrant in immigration detention, it utilises a combination of coercion (such as laws that criminalise and prohibit absconding) and prison-like architecture (such as barred windows, high fences, and locked doors) in order to ensure they cannot abscond. And the immediate corollary of this is that an immigrant detainee might want to visit a specific city or region in the state that is detaining them, or might want to visit their friends and family members in some neighbourhood or other, but they are, instead, forced to remain inside the immigration detention centre until the state decides to release them. When the state treats its citizens in this way—by detaining them pre-trial or in mandatory quarantine, for instance—we often say that it has infringed their right to domestic freedom of movement (even if this is all-things-considered morally permissible). And so it is tempting to think, by analogy, that this is also true for the would-be migrants in immigration detention.

But tempting or not, there is a problem with this line of reasoning. While immigration detention can, in theory, be administered in regard to any would-be migrant, in practice it is only irregular migrants who are detained by liberal democratic states (Silverman & Nethery 2015: 3–4). These are people who have migrated outside the regulatory norms of the sending, transit, or receiving state. And, in most real-life cases, they are asylum seekers who are apprehended at the border for their irregular entry (and who are detained pre-admission while the state confirms their identity and decides whether their application for political asylum is admissible) or voluntary migrants who are apprehended for overstaying their visa or for committing an offence that rendered their extant visa invalid (and who are detained as an adjunct to criminal trial or removal). This matters for the following reason. While most closed border theorists acknowledge that there is a right to domestic freedom of movement, they will generally resist attributing this right to irregular migrants. In some cases, this is made explicit. For example, David Miller (2018: 55) specifically writes of “citizens” holding this right. But in any case, it would be strange, and, perhaps, logically inconsistent, to maintain that states hold the right to exclude (and that would-be migrants have the correlative duty to not irregularly immigrate)—but that if a would-be migrant evades border security and irregularly enters the state, they acquire the right to freely travel inside of its territory (and that the

state is duty-bound to not stop them). The upshot of this is that, given our commitment to closed borders, it is hard to see how immigration detention could infringe this right to domestic freedom of movement.

Understanding the right to freedom of movement in terms of the freedom to move inside of the state does not, therefore, help us develop a presumptive case against immigration detention. But suppose that we instead understand this right in terms of the freedom to *leave* the state in which we are a resident. Most closed border theorists, after all, acknowledge that there is the *right to emigrate* (even though they disagree with one another about its content, scope, and the interests that ultimately ground it, see Walzer, 1983: 39–40; Miller, 2005: 197, 2018: 110; Pevnick, 2011: 97–99; Brock & Blake, 2015: 111; Wellman, 2016: 81–86). And, unlike the right to domestic freedom of movement that we considered just a moment ago, there is no in principle reason for closed border theorists to deny that this right is held by irregular migrants. This is because the interests that closed border theorists usually cite as the ground of this right apply to everyone, regardless of their migration status (see e.g., Pevnick, 2011: 88–98; Wellman, 2016; Miller, 2018: 51). I mention this here because it is tempting to argue that immigration detention infringes the right to emigrate when it is administered pre-departure and in a way that stops a would-be emigrant being able to leave the state in which they were irregularly residing. Here we can imagine the following sort of case: an irregular migrant is apprehended for either overstaying their visa, or for committing an administrative offence that invalidated their extant visa. The state detains them in immigration detention as an adjunct to removal. And although this irregular migrant would prefer to immediately return home, the state keeps them detained in immigration detention for the full duration of their removal proceeding.

In a case such as this, the state has clearly inhibited this irregular migrant's ability to emigrate. But this is not, in itself, sufficient to ground a presumptive case against immigration detention. Here we can make two observations. First: given our commitment to closed borders, it is reasonable to think that this irregular migrant forfeited their right to emigrate because of their irregular migration status. This is because the state is entitled to enforce its immigration law—which, in our hypothetical case, is achieved by conducting a formal removal proceeding and possibly imposing relevant administrative sanctions on the irregular migrant prior to their departure. And under normal circumstances, this cannot be done once

the irregular migrant has left its territorial jurisdiction.³ Second: even if you disagree with this and think that, in our hypothetical case, the state *did* infringe the irregular migrant's right to emigrate, this putative rights infringement was not a consequence of them being detained. In order to demonstrate this, imagine a scenario in which the state had released this irregular migrant on a non-custodial measure as an adjunct to their removal: they would *still* be unable to emigrate. And the reason for this is that, in most real-life cases, a condition of being released on a non-custodial measure is that one needs to remain inside of the territorial jurisdiction of the state that is effectuating the removal order. The corollary of this is that even if the irregular migrant in our hypothetical case travelled to an airport or bus station, they would not be eligible to board a bus or flight to travel abroad. This highlights that even if the state has infringed their right to emigrate, this is the product of their *removal proceeding* rather than the result of being *detained*.

What these considerations show is that the right to emigrate cannot ground a presumptive case against immigration detention. But we are on the right track, though. Understanding the right to freedom of movement in terms of the freedom to *leave* a designated spatial location is a plausible way to ground our presumptive case against immigration detention. But instead of focusing on the freedom to emigrate, we should instead focus on the freedom to leave the immigration detention centre where one is detained while remaining inside of the territorial jurisdiction of the state. If you recall our earlier discussion, we explained that the state uses coercion and prison-like architecture to ensure that an immigrant detainee cannot abscond. And in the following section of this paper, it will be argued that under certain minimal conditions that are both perfectly consistent with a commitment to closed borders, and which are usually satisfied in the real-world, this combination of coercion and prison-like architecture infringes their *right to freedom of exit*. This is the positive moral claim-right that an immigrant detainee can hold against the state to be temporarily released on a non-custodial measure (such as bail, parole, or a recognisance release order) while it conducts their asylum, court, or removal proceeding. As we will explain, this right to freedom of exit is distinct from the right to emigrate because it does not entitle a would-be migrant to freely exit the territorial jurisdiction of the state. It is, in addition to this, distinct from the

³ There is, in addition to this, an interesting question about the extent to which the state can regulate emigration without thereby infringing the namesake right (see generally Brock & Blake, 2015). I leave this question aside in response to spatial constraints.

right to domestic freedom of movement insofar as it only entitles a would-be migrant to move in a very restricted area of the state.

3. A Presumptive Case Against Immigration Detention

There are different strategies that one can adopt in order to show that a person or a group of people hold a right of some description. In what follows, we are going to adopt what is often referred to as an *indirect* or *instrumental* strategy for grounding a right. This strategy will involve us showing that an immigrant detainee holds the right to freedom of exit because affording them this right is the most reliable way to protect an important and uncontroversial right which they have already been shown to hold. As David Miller explains, those who adopt an instrumental strategy attempt to show that a hitherto unrecognised right is “instrumental to *other* human rights that have already found a place on the canonical list. Unless this new right is recognised, the argument goes, these other rights will not be properly realised, or will be insecure” (Miller, 2016: 15). This is, for example, the strategy that is adopted by open border theorists who have argued that there is a right to unrestricted international migration because the freedom to cross state borders is instrumental to protecting our subsistence rights (see generally Wilcox, 2009: 117–119).

In order to get this instrumental strategy off the ground, then, what we first need to do is specify an important and uncontroversial right which the immigrant detainees have already been shown to hold. There will, no doubt, be many rights that fit this description.⁴ But in what follows, we are going to focus on the fact that we all hold *the right to enjoy a minimally-decent standard of mental and physical health*. For the sake of brevity, we will refer to this as ‘the right to health’ (bearing in mind that there are other health-related rights that often go by this same moniker). This is to be understood as a universal negative moral claim-right that is held against all other agents, including the state, to not stop us from being able to enjoy the lowest possible level of physical and mental health that is needed to live a minimally-decent life. Spatial constraints unfortunately stop us being able to fully spell out what this means. But we can

⁴ As one referee suggests, the right to freedom of exit will presumably also be instrumental to protecting important components of our economic rights, educational rights, and rights to family life and reunification. I leave these rights aside in the following discussion due to spatial constraints. But they highlight that our presumptive case against immigration detention is expandable.

assume that this right to health entails, perhaps *inter alia*, the modest correlative moral duty to not force people to live under conditions that have a high likelihood of causing or exacerbating serious and long-lasting mental or physical health-related disorders. This is because it is very difficult for a person to live a minimally-decent life, plausibly construed, if they are burdened with poor health for a prolonged time.

Building on this last point, it is quite difficult to deny that there is a right to health so understood. The first point worth mentioning here is that this is a very *important* right. This is evidenced by the fact that having a certain baseline level of good mental and physical health is a precondition for being able to enjoy the different goods that make a life worth living and being able to exercise our other rights (see generally Nussbaum, 1997). The second point worth mentioning is that this right is also *uncontroversial*. On the one hand, it is an extremely modest health-related right—especially when it is compared to other health-related rights that are codified in international law, such as the human right to enjoy *the highest attainable standard of mental and physical health*. On the other hand, the correlative moral duty to not cause or exacerbate serious and lasting mental or physical health-related disorders is far less demanding than the positive moral duty to guarantee government-assisted healthcare for those who require it. Yet this more demanding positive duty is commonly attributed to health-related rights in the philosophical literature (see Rumbold, 2015). Even more to the point of this paper, this right is uncontroversial among closed border theorists. On the small number of occasions where closed border theorists have discussed health-related rights, their remarks are broadly consistent with our claim about the immigrant detainees holding the right to health (see Walzer, 1983: 31–52; Pevnick, 2011: 86–87; Miller, 2016: 52, 61, 117).

Bearing all of this in mind, in what follows we will take for granted that the immigrant detainees hold the right to health so understood. What we now need to do is explain why affording the immigrant detainees a right to freedom of exit is the most reliable way for the state to protect this antecedent right. Here we can note the following. There is a large body of empirical research, which has been conducted over a broad range of times, locations, and jurisdictions, that has consistently shown that being detained in immigration detention for as little as two-weeks (Cleveland & Rousseau, 2013) to three-months (see Silverman & Nethery, 2015; Bosworth, 2016: 21) greatly increases the risk of developing a host of long-term mental health disorders. For the sake of brevity, let us say that immigration detention is *protracted* when it exceeds this upper three-month threshold. At the population level, these mental health disorders

commonly include: appetite disorders, clinical depression, feelings of hopelessness, generalised anxiety disorder, paranoid delusions, post-traumatic stress disorder, psychosis, a variety of sleep disorders, and suicidal ideation (for excellent reviews of this research see Bosworth, 2016; von Werthern et al., 2018; Mares, 2021). Additional research has shown that these mental health disorders increase the risk of self-harming and suicide during detention (Bosworth, 2016; von Werthern et al., 2018; Hedrick et al., 2020).⁵ This wealth of empirical research is morally-important because it shows that if the state detains a would-be migrant in immigration detention for a protracted length of time, it will infringe their right to health. This is because, if you remember, this right entails the correlative moral duty to not force people to live in conditions that have a high likelihood of causing or exacerbating long-lasting health-related injuries.

3.1. Option one: Minor reform measures

All of this raises a question of what the state ought to do if immigration detention becomes protracted. One option is for the state to enact a set of minor reform measures that are designed to mitigate the risk of developing the aforementioned mental health disorders and related physical injuries. For example: the state could increase the availability and efficacy of the healthcare inside of the immigration detention centres. It could also enact a series of “preventative measures” that are designed to preserve and restore the mental and physical health of the immigrant detainees. These preventative measures could include, for example, increasing the size of the immigration detention centres in order to provide the immigrant detainees with better opportunities to exercise their freedom of movement while they are being detained.

⁵ This empirical research has important implications for the detention of children: not only are children at much greater risk of developing these mental health disorders and related physical injuries, but experiencing any one of them can lead to significant developmental delays (see Australian Human Rights Commission, 2014; von Werthern et al., 2018; Hedrick et al., 2020; Mares, 2021). This is important because children often form a sizeable percentage of the people detained by liberal democratic states, and it suggests that our presumptive case against immigration detention carries extra weight when it is applied to the detention of children. As a related matter, the detention of children raises important moral questions that bear on the topic of this paper. For example: we might wonder if it is morally permissible for the state to detain unaccompanied children who pose a sufficient health or security risk, or, similarly, what should happen to the detained children whose parents pose a risk of harm. Although these are interesting questions that relate the moral status of immigration detention, I leave them aside due to spatial constraints.

The state could likewise enact a dynamic programme of recreational, educational, and spiritual activities designed to maintain or improve the overall wellbeing of the immigrant detainees. These sorts of minor reform measures would produce immigration detention centres that functioned similarly to a minimum-security prison. This would mark a modest shift in how immigration detention is currently administered.

Enacting these sorts of minor reform measures would in general be a good thing for the state to do. But the issue is that even if these reforms were successfully enacted, they would not reliably protect the right to health of the immigrant detainees. The reason for this is two-fold. First: the inability to freely exit the immigration detention centres is one of the primary causes of the aforementioned mental health disorders (Coffey et al., 2010; Australian Human Rights Commission, 2014; Patler et al., 2021). Second: minor reform measures do not provide the immigrant detainees greater opportunities to exit the centres in which they are detained. These reforms are, instead, designed to make this lack of freedom of exit as pleasant as possible. And the corollary of this is that, for all the good they do, these minor reforms will, by design, fail to mitigate one of the main causes of the poor health of the immigrant detainees.⁶ As the popular saying goes: a gilded cage is still a cage. And to borrow the words of one immigrant detainee, “if they make all the walls or fence with gold, there is nothing different, there is nothing changed, prison is prison ... still this system keeps me in detention for no reason” (quoted in Coffey et al., 2010: 2073).

3.2. Option two: Major reform measures

What our discussion in the preceding subsection of this paper suggests is that a more efficacious reform measure would be one that somehow increased the freedom of exit available to the immigrant detainees. It is difficult to know in advance what these major reform measures would look like. But I suspect that they would produce immigration detention centres that functioned in a similar manner to an open prison.

⁶ As an important aside: the current empirical research makes clear that these mental health disorders are caused by the absence of freedom of exit *simpliciter*, rather than the inability to exit certain types of immigration detention centres—such as those in which the detention conditions are especially nasty (see generally Patler et al., 2021: 2). This shows that minor reform measures will fail to mitigate the risk of developing these mental health disorders across the full range of immigration detention policies.

The criminologist, John Pratt, provides an oft-cited example of what this can look like in his description of Nordic open prisons. He writes:

Here, fences, walls and other barriers are reduced to a minimum. Sometimes, there are none at all. There are no bars on windows and, in some, prisoners lock their own doors. After the prisoners finish work or classes, they are free to walk around the prison grounds and sometimes into local communities. Many of those serving short sentences in open prisons are allowed to continue with their previous employment. In one open prison near Stockholm, there is a car park for the prisoners so that they may commute to work in the morning, returning in the evening. If they are going to be delayed, they can telephone ahead and a meal will be left out for them (Pratt, 2008: 122–123).

Thus we can imagine, for example, a situation where immigrant detainees were permitted to freely leave the immigration detention centres during the day, being required to return only at night in order to meet a reasonable curfew. Although we cannot be certain in advance of the relevant empirical data, it would not be surprising if an open-prison-like immigration detention centre were able to provide the immigrant detainees with an adequate opportunity to exercise their freedom of exit—and that, because of this, were able to mitigate *one* of the main factors that cause the aforementioned mental health disorders. But there are at least two key drawbacks to these major reform measures that ought to be taken into consideration.

The first key drawback is this: these major reform measures are not *modally robust* in the sense that will soon be explained. And what this means, in practical terms, is that even in a best-case scenario, these major reform measures will not be a *reliable way* for the state to protect the right to health of the immigrant detainees. Here is what I mean by this. We mentioned just a moment ago that the inability to freely leave the immigration detention centres is one of the primary causes of the aforementioned mental health disorders. The corollary of this is that if this is the *only* factor that has caused these mental health disorders, then these major reform measures *will* protect the right to health of the immigrant detainees. But real-life is not as simple as this. Multiple international studies have shown that these mental health disorders are caused by a confluence of factors that tend to emerge and operate in conjunction with one

another. At the population level, these factors commonly include: living in overcrowded and unhygienic detention centres, experiencing shock and humiliation at being treated like criminals by the immigration officers, feeling disempowered by the experience of being subject to a legal proceeding over which they have little control, not knowing how long they will be detained, and facing a heightened risk of physical and sexual assault from guards and fellow detainees while they are inside of the immigration detention centre (see Coffey et al., 2010; Cleveland & Rousseau, 2013; Bosworth, 2016; Cleveland et al., 2018).

This is important because there is good reason to believe that these additional factors would be present inside of an open-prison-like immigration detention centre. Allow me to explain why this is the case. There is strong empirical evidence which shows that the carceral conditions inside of open prisons, especially those that are administered in the Nordic states, are less harmful than the carceral conditions found inside of closed prisons elsewhere in the liberal democratic world (see e.g., Pratt, 2008; Pratt & Eriksson, 2011; Crewe et al., 2023; Humphreys, 2023). The people who are incarcerated inside of these open prisons tend not to experience the likes of overcrowding, unhygienic living conditions, hostility from the prison staff, and significant risks of physical and sexual assault—all of which can be common features of closed prisons elsewhere (see generally Beckett & Goldberg, 2022). These prisoners, rather, tend to experience relatively high standards of material comfort and a relaxed prison atmosphere. And these carceral conditions, together with the historically low incarceration rate inside of the Nordic states, is what criminologists mean when they refer to the so-called “penal exceptionalism” of the Nordic states and compare it to the “penal excess” elsewhere (Savelsberg, 1994; Lappi-Seppälä, 2007; Pratt, 2008).

In light of the positive carceral conditions which tend to be found inside of these open prisons, it is admittedly tempting to think that this “exceptionalism” would likewise be present inside of an open-prison-like immigration detention centre. That is to say, it is tempting to think that a would-be migrant who is detained inside of an open-prison-like immigration detention centre would experience a similarly high standard of material comfort and a similarly relaxed atmosphere to criminals who are incarcerated inside these open prisons. If this were correct, the state would *not* infringe the right to health of a would-be migrant if it detained them inside of an open-prison-like immigration detention centre for a protracted length of time (i.e., because the material conditions inside of these centres would, at least by hypothesis, mitigate *all of* the main factors that would otherwise cause the aforementioned mental health disorders).

But notice the following problem with this line of reasoning: the positive carceral conditions which tend to be found inside open prisons are the product of broad cultural and historical factors that are uniquely present inside the states that have decided to opt for this form of incarceration, rather than any physical or structural feature of the open prison itself. Insofar as these factors are not present in the immigration-context, and this is something we will consider in a moment, there is strong reason to think that an open-prison-like immigration detention centre will lack the “exceptionalism” found inside of an open prison.

Consider Nordic open prisons, as a case-in-point. In his oft-cited work on this topic, John Pratt argued that “the roots of Scandinavian exceptionalism are to be found in the highly egalitarian cultural values and social structures of these societies” (Pratt, 2008: 120). Part of what Pratt meant by referring to egalitarianism in the passage just quoted is that the people who have been incarcerated inside of these prisons have, historically, been citizens of the state that is incarcerating them—and, for this very reason, have retained nearly all of the same legal rights as their non-incarcerated compatriots. More importantly, however, Pratt identifies a deeply-embedded egalitarian social ethos which is marked by a low tolerance for social hierarchies and the view that prisoners are full members of the moral and political community in which they are incarcerated. The upshot of this egalitarianism is that, in these societies, incarceration is understood as punishment solely through the loss of freedom of movement. Prison life is otherwise designed to mirror conditions outside: legal rights are largely maintained, hierarchies between staff and inmates are minimal, and the ultimate goal of incarceration is to rehabilitate the prisoners and reintegrate them into society—which is achieved by making prison life as “normal” as possible (Mathiesen, 1974).

And here is the crucially important point: the egalitarianism that produces the “exceptionalism” found inside of these open prisons is not present in an immigration-related context. First: to the contrary of the people who have historically been incarcerated inside these open prisons, the would-be migrants who are liable to be detained inside of an open-prison-like immigration detention centre are not citizens of the state that is liable to detain them. What this means, in practical terms, is that they will lack many of the legal rights that are held by the citizens of the state that is liable to detain them—and that, in turn, the state will not be bound by the correlative legal duties that it holds towards its extant citizens. Second: there is no deeply-embodied egalitarian social ethos directed towards these would-be migrants. On the

one hand, there is an extremely *high tolerance* for social hierarchies when it comes to immigration (see generally Carens, 1987: 252; 2013: 226–227; Hayter, 2001; Balibar, 2004; Sharma, 2003, 2005, 2006).

This high tolerance for social hierarchies is, at least in large part, demonstrated by many of the immigration laws and policies that are enacted throughout the liberal democratic world. As a brief list, just consider, for example, that there are highly-selective criteria of admission that often prioritise high-skilled labourers, migrants are granted fewer legal rights than citizens, and certain institutions of border enforcement, including immigration detention, tend to disproportionately target migrants who emigrate from countries that are deemed to pose a risk of harm—typically due to political instability, economic deprivation, or cultural differences from the state to which they are immigrating. On the other hand, the would-be migrants who are liable to be detained inside of these open-prison-like immigration detention centres are, in general, not seen as full members of the moral and political community in the state that is liable to detain them. This is demonstrated by the fact that, inside these states, there is no shortage of popular and political discourse that frames these migrants as a dangerous, deviant, disease-ridden, and “othered” population that is a threat to the transit or receiving state (see Pickering, 2001; Taylor, 2021).

Given that neither facets of this egalitarianism are present in an immigration-related context, it is highly likely that an open-prison-like immigration detention centre would lack the “exceptionalism” that characterises Nordic open prisons. In other words: despite being structurally and physically similar to an open prison, the material conditions inside of these open-prison-like immigration detention centres would, in all likelihood, fail to reflect the material conditions in Nordic open prisons. There would likely still be overcrowding, unhygienic living conditions, hostility from the prison staff, and significant risks of physical and sexual assault faced by the immigrant detainees. And although being able to freely leave an open-prison-like immigration detention centre during the day would provide the immigrant detainees with a momentary respite, these harmful material conditions would probably still await them on return. The corollary of this is that an open-prison-like immigration detention centre, despite giving immigrant detainees increased freedom of exit, would fail to mitigate the factors that can cause the aforementioned mental health disorders—and, in consequence of this, would not reliably protect their right to health.

In response to this, it could be objected that the state ought to enact a series of additional reforms that are designed to mitigate these additional problems. This is, of course, much easier said than done.

But the more fundamental problem is that if the state were to enact these additional reforms, it would seriously inflate the already exorbitant cost of administering immigration detention. And this speaks to the second drawback of these major reform measures: immigration detention is an incredibly expensive form of border enforcement. Although the numbers can vary between jurisdictions, the cost of detaining a single adult in immigration detention normally ranges from approximately US\$100 per day to slightly over US\$200 per day—whereas the cost of releasing them on a non-custodial measure is a mere fraction of this (for a good comparison of these costs see Edwards, 2001: 85; Sampson, 2015: 11; Marouf, 2017). This is important because being released from immigration detention, either on a non-custodial measure or unconditional community release, has a strong, positive correlation with improved mental health (see Coffey et al., 2010; von Werthern et al., 2019: 11; Mares, 2021: 1626). And the upshot of all this is that even if the state is able to protect the right to health of a would-be migrant by detaining them inside of an open-prison-like immigration detention centre, it is not a *cost-effective* way to achieve this outcome.

Here is why this matters. In most contemporary liberal democratic states, immigration detention is primarily funded through tax revenue. Because of this, the extant political members of the state whose income was appropriated through taxation in order to fund these open-prison-like immigration detention centres will have a strong and legitimate complaint against the state: that it is spending their tax dollars on a form of border enforcement that is significantly more expensive, yet no more effective in protecting the right to health of the immigrant detainees, than its primary policy alternative (i.e., being released on a non-custodial measure). According to this line of complaint, the state should administer the most cost-effective form of border enforcement that can still reliably protect the right to health of the immigrant detainees—and then use the tax dollars that would otherwise be spent on immigration detention to fund social welfare programmes or protect social goods that generally improve livelihoods of these political members. Non-custodial measures satisfy this description. And the upshot of this is that even if an open-prison-like immigration detention centre is able to protect the right to health of the immigrant detainees,

the state will wrong its extant political members by administering these reformed immigration detention centres rather than administering their comparatively cheaper, and equally-efficient, policy alternative.⁷

3.3. Option three: *The right to freedom of exit*

In light of this, we will now make the following suggestion: the most reliable way for the state to protect the right to health of these immigrant detainees is to afford them *the right to freedom of exit*. The content of this right can be stated in conditional form: if a would-be migrant is detained in immigration detention for a protracted length of time, then, because of the high risk that they will develop the aforementioned mental health disorders or related physical injuries, they will hold a positive claim-right against the state to be temporarily released on a non-custodial measure inside of an area, and for a length of time, that is sufficient to preserve or restore their mental or physical health—and, hence, protect their right to health. If it helps, you can think of this as a kind of limited “mental health release” (as can happen in the context of incarceration).⁸ And while we will not press the point, it is very likely that this right can be reliably protected by releasing would-be migrants into a relatively small area of the state—such as the city limits in which the immigration detention is located. The corollary of this, though, is that if a would-be migrant detained for *less than* three-months, then they will *not* hold the right to freedom of exit. This is because the conditions that are needed to generate this right are not satisfied.⁹ Having now made this suggestion, we will now quickly explain why this is the most reliable way for the state to protect their right to health.

⁷ In response to spatial constraints, I have intentionally left aside the interesting question of whether this response extends to populations who decide, on the basis of a democratic vote, to administer and reform a network of open-prison-like immigration detention centres—even though it would be prohibitively costly compared to a network of non-custodial measures. This speaks to the more general philosophical question of whether a liberal democratic state is all-things-considered morally permitted to engage in a practice whose costs outweighs its benefits, so long as the decision to do so accords with the will of the majority.

⁸ Notice that I have framed this as a *positive* right to be released on a non-custodial measure, rather than a *negative* right to not be detained. The reason for this is that, given our commitment to closed borders, the state is entitled to enforce its immigration law—and if a would-be migrant is released into the community without the legal oversight afforded by non-custodial measures, there is a higher risk that they will abscond into the community and not comply with their asylum, court, or removal proceeding.

⁹ This means that the presumptive case I develop here does not apply to all real-life cases of immigration detention. In Canada, for example, the majority of immigrant detainees are detained for only brief periods—often measured in days or weeks, rather

Here we can note three related considerations. First: affording the immigrant detainees the right to freedom of exit is the most reliable way for the state to mitigate the complete set of factors that cause the aforementioned mental health disorders and related physical injuries. This is because it will provide would-be migrants with the most expansive and modally-robust option to exit the immigration detention centres (and, in so doing, avoid the aforementioned structural problems that they would otherwise face). Second: because non-custodial measures are an incredibly cheap form of border enforcement, affording would-be migrants the right to freedom of exit is a *politically reliable* initiative in the sense that it will receive minimal push-back from voters and their representatives concerned with the use of tax revenue. Third: affording the immigrant detainees the right to freedom of exit is the most reliable way to protect them from being exploited by the state and the immigration officers who work in the detention centres. Here is what I mean by this. It has already been explained that open-prison-like immigration detention centres afford the immigrant detainees the *freedom* to temporarily enter the community. But notice that these immigrant detainees will not have the *right* to do so. This is important because in an open-prison-like immigration detention centre, freedom of exit will remain something that the state could *grant* to a would-be migrant—rather than something that is *morally owed* to them. And given the aforementioned power imbalances, there is a serious possibility that the state will refuse to grant them this freedom for an arbitrary reason—or for no reason at all. By contrast, holding the right to freedom of exit entails that the state is duty-bound to temporarily release these would-be migrants into the community. This means that the state needs a particularly strong countervailing normative reason in order to keep them detained. And this creates a kind of ‘moral barrier’ that minimises the risk of exploitation vis-à-vis being released.

If we are correct about all of this, then the would-be migrants who are detained in immigration detention for a protracted length of time hold a right to freedom of exit for purely instrumental reasons. This is a novel conclusion. But more importantly, it emerges from relatively uncontroversial premises that are perfectly consistent with a commitment to closed borders. After all: we are not arguing that the

than months. But even in states like Canada, where average detention periods remain short, the argument offered here provides a principled basis for maintaining strict limits on detention duration and for resisting policy developments that would extend the length or normalisation of custodial confinement. I thank one of the examiners for pressing me on this matter.

state is morally required to afford a would-be migrant permanent residency or citizenship after releasing them into the community on a non-custodial measure. Our argument instead entails the far more modest claim that, under certain minimal conditions, the state has a correlative moral duty to temporarily release a would-be migrant on a non-custodial measure once their detention becomes protracted. And this does not mean that the state cannot then remove these would-be migrants from its territory in the future if, for example, their application for political asylum is deemed inadmissible, if they commit an administrative offence or criminal offence invalidates their visa, or after their removal order is finalised. We should, therefore, understand non-custodial measures as a kind of temporary “holding mechanism” for a would-be migrant that the state ought to use to enforce its right to exclude at a future point of time (if it decides to do so).¹⁰ Also observe that what emerges from all this is a presumptive case against immigration detention: if the state does not temporarily release a would-be migrant on a non-custodial measure when their detention becomes protracted, it will, in doing so, harm them in virtue of infringing their right to freedom of exit.

4. Responding to objections

The preceding section of this paper developed a presumptive case against immigration detention. In this section, we will respond to three objections that could be raised against it.

4.1. Proves too much

It could be objected that our presumptive case against immigration detention proves too much. Here we can note two related points. First: towards the beginning of this paper, we argued that everybody holds

¹⁰ It could be objected that what is missing from this discussion are the risks that the state wished to protect itself from in virtue of administering a system of immigration detention. More specifically: it could be argued that we need to know whether non-custodial measures are efficient, not just in relation to one goal (i.e., protecting the right to health of the immigrant detainees), but, rather, in relation to the full range of legitimate goals that the state wants its border enforcement system to protect. Spatial constraints prevent us from delving into this matter. But let us note, in relation to this objection, that pilot trials conducted over a range of jurisdictions have repeatedly shown that non-custodial measures achieve an 80% to 99.9% compliance rate with the relevant legal proceedings (see Edwards, 2011; Marouf, 2017). This is comparable to those achieved by immigration detention.

the right to health. Second: insofar as other forms of administrative detention, such as pretrial detention and mandatory quarantine, have a propensity to cause and exacerbate the aforementioned mental health disorders, the people who are detained in these other forms of administrative detention for a protracted length of time will hold the right to freedom of exit. And one might object that this “proves too much” in the sense that it places a very significant limitation on the conditions under which the state is morally permitted to administer, not just immigration detention, but administrative detention more generally.

Insofar as this is a bullet for us to bite, then we ought to bite it hard and without regret. Liberal democratic states tend to be very trigger-happy when it comes to administrative detention. These states tend to use different forms of administrative detention as their first line of recourse, rather than as a last resort, when it comes to dealing with administrative offences or risks of harm that are present inside of their territory. And this strikes me as being deeply problematic insofar as those forms of administrative detention have a propensity to harm the detainees by, *inter alia*, increasing the likelihood that they will develop the aforementioned mental health disorders and related physical injuries. Restricting the use of administrative detention is, for this reason, a generally good thing for the state to do. The upshot of this is that if our presumptive case against immigration detention generalises to other types of administrative detention, this ought to be hailed as a feature, rather than lamented as a bug, of that presumptive case.

4.2. Rights forfeiture

Earlier in this paper, we explained that while immigration detention could, in principle, be administered in relation to any would-be migrant, in practice it is only ever irregular migrants who are detained. This is important because, in some jurisdictions, irregular migration can be a criminal offence. In these cases of criminal wrongdoing, the state administers immigration detention as a form of pretrial detention. And this could lead one to object that although would-be migrants *normally* hold the right to freedom of exit if their detention becomes protracted, these irregular migrants forfeited that right by committing a crime.

This objection correctly identifies that criminal wrongdoing is a ground for the forfeiture of our rights (see Thomson, 1990: 348–372). But the problem is that it misidentifies which right is forfeited in cases that involve criminal wrongdoing. As we explained earlier in this paper, it is plausible that these irregular migrants will forfeit their *right to emigrate*. This is because the state has the right to prosecute

them, and this right cannot normally be enforced outside of its territorial jurisdiction. But these irregular migrants will not, however, forfeit their right to freedom of exit. And this becomes clear when we reflect on pre-trial detention more generally. In regard to this last point, consider that when a person is charged with a criminal offence in a non-immigration-related case, this will trigger the criminal proceeding and will provide the state with an initial moral justification for detaining them pretrial. But whether the state is justified in detaining them for a protracted length of time will depend on whether they pose a sufficient flight risk or security risk (Duff, 2024). And insofar as immigration detention is administered as a form of pretrial detention, then the same will be true of it. The operative question, then, is whether an irregular migrant poses a sufficient flight risk or security risk—not whether they committed a crime.¹¹ If they do pose such a risk, then *ceteris paribus* it is all-things-considered morally permissible to detain them. But this is consistent with the fact that we have just raised a *presumptive case* against immigration detention.

4.3. *Voluntary departure*

If you recall, there are two other groups of irregular migrants who are normally detained in immigration detention: asylum seekers who are detained pre-admission in the context of an asylum proceeding, and voluntary migrants who are detained as an adjunct to removal for overstaying their visa or committing an administrative offence that rendered their visa invalid. Unlike the irregular migrants who are detained as an adjunct to criminal proceeding, these irregular migrants have the power to end their detention by opting for *voluntary departure*: although they can proceed with their asylum or removal proceeding and indefinitely prolong their detention, they are able to voluntarily return home at their own expense. This is important because it can be objected that the option of voluntary departure protects the right to health. After all: the health-related disorders that we have considered stem from being detained for a protracted length of time. But, here, an irregular migrant *can* freely exit the immigration detention centres in which they are detained. They can opt for voluntary departure! And if they decide not to, any adverse effects

¹¹ Although we will leave this question to be answered in future research, much of the current empirical research indicates that, on the population level, irregular migrants do not pose a greater health risk (see Barnett & Walker, 2008) or security risk (Miles & Cox, 2014; Bove & Böhmelt, 2016) compared to the extant political members of the state to which they are immigrating.

to their health are regrettable, but are, nevertheless, of their own doing. In other words: they do not hold the right to freedom of exit because the option for voluntary removal has protected their right to health.

The problem with this objection is that while there is a sense in which the option for voluntary removal provides these irregular migrants with a tangible “exit option” through which they can exit the immigration detention centres, the decision-space that is made available to them is far too impoverished to speak of the state having protected their right to health. Here is what I mean by this. In real-life cases where an asylum or removal proceeding is protracted, the state should not force an immigrant detainee to choose between either proceeding with their asylum or removal proceeding or protecting their health by opting for voluntary departure. This is most clear in the case of forced migration: a would-be asylum seeker has a strong and legitimate interest in being able to pursue their asylum proceeding and possibly contest the decision that is made by the state, given the significant and imminent risks of harm that are present in their home country. And while it is somewhat less obvious, a similar claim can be made about the voluntary would-be migrants who are detained as an adjunct to removal: they have a similarly strong and legitimate interest in being able to pursue their removal proceeding and possibly contest the decision made by the immigration judge, given that removal can seriously harm them (e.g., by the social stigma of being deported, the financial costs, the fact that they may be liable to illegal re-entry provisions, etc.).

In response to this: it could be argued that, in addition to providing a detained voluntary migrant with the option for voluntary removal, the state ought to expedite its asylum and removal proceedings so that they last for less than three-months. But here we run into two additional problems. First: although expediting these proceedings minimises the risk of developing the health-related injuries considered in this paper, it increases the risk of a miscarriage of procedural justice insofar as the state will have much less time to obtain and consider the relevant evidence. For this reason, it is doubtful that the state ought to expedite its asylum and removal proceedings. Second: even if this is incorrect, it is important to keep in mind the oft-cited philosophical adage that *ought implies can*. If the state can expedite its asylum or removal proceedings so that they take less than three-months to finalise, and if this can be done without being procedurally unjust, then this is what the state ought to do. But the issue here is that, in the actual-world, the state cannot normally expediate these proceedings. This can be due to any number of reasons. When it comes to an asylum proceeding, for instance, the issue is often that there is no straightforward

way to establish the identity of the would-be asylum seeker and assess their claim for political asylum. In the case of removal proceedings, the problem is, instead, there is often a massive backlog of removal orders and a dearth of immigration judges. To simply respond that the state ought to expedite its asylum and removal proceedings so that they take less than three-months, though true in a theoretical sense, is not informative since it is not normally a feasible option in the real-world. We instead need to determine what the state ought to do in the real-world, given these real-world constraints. And, here, we return full circle to the claim of the paper: the immigrant detainees ought to be granted the right to freedom of exit.

5. Conclusion

This paper developed a presumptive case against immigration detention. It was argued that under certain minimal conditions that are both perfectly consistent with a commitment to closed borders and normally satisfied in the real-world, immigration detention will harm the immigrant detainees by infringing their right to freedom of movement. While this presumptive case imposes a moral limit on the circumstances under which it is morally permissible to enforce the right to exclude, it does not entail that this right to freedom of exit is absolute. And what this means, in practical terms, is that this right can be outweighed by sufficiently weighty countervailing considerations. Perhaps, as we suggested in passing earlier, these countervailing considerations could be grounded in risk management. If so, future research could tease out the different sorts of risks that can be present in the context of irregular migration and the frequency at which they occur. Another option, which has become popular in our political discourse, is to attempt to morally justify immigration detention on the grounds that it is an effective deterrent against irregular migration. Finally: immigration detention often shares structural similarities with criminal punishment, even though it is *de jure* a form of administrative detention. And it would be interesting to see whether the considerations that morally justify criminal punishment also morally justify immigration detention. Regardless of the approach that we take, these are all interesting directions for future research. And the hope is that by developing a presumptive case against immigration detention, this paper has taken steps to analysing the moral status of this important, and yet under-theorised, form of border enforcement.

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Chapter Three

Immigration Detention and Deterrence

Abstract: All throughout the liberal democratic world, governments are relying on deterrence arguments in order to provide a moral justification for immigration detention. These arguments maintain that, on the overall balance of normative reasons, immigration detention is morally justified because it is a cost-effective way to deter irregular migration. Despite the growing popularity of deterrence arguments in public discussions of immigration detention, they have only started to receive attention from philosophers and social scientists who are interested in the ethics of border enforcement. This paper contributes to this emerging research in three ways. First: it outlines the general structure of a deterrence argument. Second: it argues that deterrence arguments are *prima facie* plausible and also compatible with a range of substantive positions defended in the migration ethics literature. Third: it explains that, despite being *prima facie* plausible, deterrence arguments lack robust empirical support. While this last point does not entail that deterrence arguments are unsound, it does provide us with a reason to refrain from endorsing them.

Key words: border control, border enforcement, deterrence, immigration detention, irregular migration.

1. Introduction

For most of its history, immigration detention has been used in a limited capacity and by a small number of transit and receiving states. But in response to a confluence of factors, it has since become one of the most pervasive forms of border enforcement administered throughout the liberal democratic world (see Cornelisse, 2010; Flynn, 2018). This proliferation of immigration detention would not be concerning if

the practice of detaining would-be migrants was a relatively benign way for these states to enforce their borders. But the problem with immigration detention is that it is *not* benign; there is a high probability that it will impose predictable and significant costs onto the immigrant detainees. And, in virtue of these probable costs, the state needs a strong normative reason in order to be morally justified in administering immigration detention. This paper will take a close look at a potential source of moral justification that has become increasingly popular in public discussions of immigration detention: deterrence arguments. These arguments maintain that, on the balance of normative reasons, immigration detention is morally justified because it is a cost-effective way to deter irregular migration. We will begin, in the following section of the paper, by defining our terms and outlining the general structure of a deterrence argument. Section Three argues that deterrence arguments are *prima facie* plausible and compatible with a range of substantive positions defended in the immigration ethics literature. Section Four explains that, despite being *prima facie* plausible, deterrence arguments lack robust empirical support. Although this does not entail that deterrence arguments are *unsound*, it gives us a *strong reason* to refrain from endorsing them.

2. Background: Immigration Detention and Deterrence

This section of the paper provides some important background information. We will start by explaining what immigration detention is. After doing so, we will define the concept of deterrence and then outline the general structure of a deterrence argument. The information contained in the following subsections will help structure our discussion of immigration detention and deterrence in the remainder of the paper.

2.1. What is immigration detention?

Immigration detention is not defined in international law. This has led to a plurality of definitions having been advanced in the current literature (see Silverman & Massa, 2012; Turnbull, 2017). Although these definitions often emphasise different features of immigration detention, and, as a result of this, tend to diverge from one another in subtle ways, they tend to converge on the understanding that immigration detention is the state sanctioned practice of detaining would-be migrants in order to achieve migration-related goals—such as facilitating identification and removal, for example. While any would-be migrant could in theory be detained in immigration detention, in practice it is only ever irregular migrants who

are detained. These are people who have migrated outside the regulatory norms of the sending, transit, or receiving state. And, in most real-life cases, they are either asylum seekers who are apprehended for irregular entry (and detained while the state confirms their identity and decides whether their application for asylum is admissible), or voluntary migrants who are apprehended for overstaying their visa or for committing an offence that rendered it invalid (and detained as an adjunct to removal or criminal trial).

2.2. The general structure of a deterrence argument

Deterrence occurs when the risk of a sanction imposed by one party convinces a different party to refrain from performing an action (Stafford & Warr, 1993; Nagin, 2013). In a more precise terminology: A is deterred from performing an action ϕ just in case a third-party imposes a cost on the commission of ϕ , such that, in light of the risk of incurring this cost, ϕ -ing is no longer perceived by A to be the utility-maximising decision.¹ By imposing a cost on the commission of ϕ , that third-party has, in effect, altered the incentive structure of the decision-space that is available to A in order to reduce the chances of them ϕ -ing in the future.² One of the interesting features of deterrence is that it can generate both motivating

¹ As one examiner notes, there is an important distinction between the motivation for a deterrence-based law or policy. First: a deterrence-based law or policy can be motivated by what is in the best interest of the person or people who are being deterred. A paradigmatic example here is the use of fines in order to encourage people to wear seat-belts. Second: a deterrence-based law or policy can be motivated by what is in the best interest of the people who would be impacted by the action of another person, if they are not deterred. This is most common in criminal law, where the state uses the threat of criminal sanction (i.e., punishment) for the good of society as a whole—rather than for the good of the people who receive the punishment. Deterrence-based justifications for immigration detention can be framed in either way: some political discourse frames deterrence vis-à-vis immigration detention as a paternalistic measure that is intended to protect migrants from the risks of harm associated with irregular immigration (i.e., humanitarian justifications), while other discourse frames deterrence as a way to protect members of the receiving state from the harms of irregular migration (e.g., threats to national security and public health risks). In this paper, I examine both framings without assuming that either is defensible. Making this distinction explicit shows why the proportionality constraints relating to these arguments can differ in accordance with the underlying deterrence-based motivation (for a good discussion of deterrence in the context of immigration detention, see Hosein 2019: 78–103).

² As one examiner notes, it is analytically useful to distinguish between cases in which immigration detention is administered as a deterrent, and cases in which it is administered as part of the removal process. In practice, however, these two forms of

and normative reasons for action. It is, for example, well-documented that the goal of deterring irregular migrants has *motivated* many contemporary liberal democracies to administer immigration detention in some capacity. This is evidenced by the fact that the deterrence of irregular migration is one of the main policy objectives of immigration detention in those states (Hassan, 2000; Pickering, 2001; Pickering & Lambert, 2002; Leerkes & Kox, 2017; Ryo, 2019b). But what is of interest to us, though, is the question of whether the deterrence of irregular migration *morally justifies* the practice of immigration detention. Here we are asking whether these putative deterrent effects can generate a normative reason that makes it all-things-considered morally permissible for the state to administer immigration detention. And this question brings us back to the deterrence arguments that were mentioned at the beginning of this paper.

There is a small body of empirical research that has documented the way that these arguments have been used in real-life discussions of immigration detention (Pickering & Lambert, 2002; Pickering & Webber, 2014; Silverman & Nethery, 2015; Little & Vaughan-Williams, 2016; McKay, Hall & Lippi, 2017; Eades, 2019). And one of the things that has been made explicit by this empirical research is that, in the context of these real-life discussions, deterrence arguments take the form of a cost-benefit analysis or a utilitarian calculation. Here is one way to understand the structure of these arguments. A plausible deterrence argument begins by acknowledging that the state has a strong moral reason to not administer immigration detention, given that it will likely impose a set of significant and predictable costs onto the immigrant detainees if it decides to do so. This follows from the fact that, under normal circumstances, there is always a *pro tanto* moral reason to refrain from harming another person (see Shiffrin, 2012). Of course, these harms can differ in both their severity and the frequency at which they occur. For example: most real-life immigration detention policies place significant constraints on the freedom of movement of the immigrant detainees (Edwards, 2001)—while, in the most egregious cases, the centres in which these migrants are detained are hotbeds of serious human rights abuses (see Silverman & Nethery, 2015; Patler & Golash-Boza, 2017). The strength of the moral justification that must be provided for a specific

detention often overlap. Detention undertaken ostensibly for removal purposes can still produce, and sometimes is intended to produce, deterrent effects. For example: the publicization of removal operations, or the visibility of detention conditions, may serve to signal the risks of irregular migration. For this reason, my discussion does not sharply separate these two practices.

immigration detention policy will, no doubt, track the severity of the harms that the immigrant detainees might incur while they are being detained. But these differences notwithstanding, the more general point is that a plausible deterrence argument will acknowledge that immigration detention has to be justified.

Having acknowledged this much, a deterrence argument then proceeds to maintain that the state has a stronger normative reason to deter irregular migration into its territory. In most real-life cases, this is framed as a humanitarian moral reason to deter irregular migration (due to the high likelihood that an irregular migrant will be exploited, killed, or otherwise injured prior to their arrival) (see McKay, Hall & Lippi, 2017; Peterie, 2017).³ But other options abound. There are, for example, real-life cases where it is argued that the state has a moral reason to deter irregular migration due to the purported health and security risks that are posed by irregular migrants.⁴ Likewise, there are other cases in which it is argued

³ In June 2012, for example, the Canadian Minister for Citizenship, Immigration, and Multiculturalism, John Kenney, defended the government's introduction of mandatory detention on the grounds that it deterred irregular maritime migration. Kennedy argued that "every year, thousands of people die in smuggling operations around the world. We need to send a message to the potential customers of smuggling syndicates: 'Don't pay a smuggler to come to Canada—you're putting your life in jeopardy. Try to come a different way, a legal way'" (quoted in Silverman & Nethery, 2015: 5). Similarly: in March 2015, the Australian Prime Minister, Tony Abbott, told reporters that "Australians are sick of being lectured to by the United Nations, particularly, given that we have stopped the boats, and by stopping the boats, we have ended the deaths at sea ... [stopping the boats is the] most humanitarian, most decent, the most compassionate thing you can do" (quoted in the *BBC News*, "Abbott: Australia 'sick of being lectured' on migration," 9 March 2015. Accessible online at <https://www.bbc.com/news/world-australia-31792442>). As one examiner notes, deterrence-based immigration detention policies can have the counterproductive effect of discouraging people who hold a moral right to migrate from exercising that right. This is particularly salient in the case of refugees—but it may also be relevant to people seeking family reunification, work, or study opportunities. In such cases, the state's attempt to prevent harm through deterrence paradoxically exposes rights-holders to greater risk, either by compelling them to remain in dangerous conditions in their state of origin or by pushing them toward more hazardous routes of migration. This highlights a self-undermining aspect of humanitarian-based deterrence arguments: the claim that the state should act to prevent harm cannot coherently justify policies that foreseeably increase the vulnerability of the very individuals the state aims to protect.

⁴ For example: in 2001, the former Australian Minister for Defence, Peter Reith, said that the deterrence of irregular migration is desirable because international criminal groups use asylum seekers as "pipeline for terrorists to come in and use your country as a staging post for terrorist activities" (quoted in McKay, Hall & Lippi, 2017: 180). Likewise: the Maltese Minister for Home

that the state has a moral reason to deter irregular migration because it has a right to unilaterally enforce its territorial borders.⁵ There are, no doubt, numerous ways to deter irregular migration. But immigration detention, so the argument goes, is the most efficient way to produce these deterrent effects. The upshot of this is that, despite the costs that will probably be imposed onto the immigrant detainees, immigration detention is morally justified on the overall balance of normative reasons. In other words, it is all-things-considered morally permissible for the state to administer immigration detention in virtue of the net-benefits which are supposedly accrued by effectively deterring irregular immigration into its territory.

3. Taking Deterrence Arguments Seriously

This is both an interesting and *prima facie* plausible way to provide a moral justification for immigration detention. The first point that is worth mentioning here is that we commonly appeal to deterrent effects in order to morally justify other forms of detention—such as criminal incarceration, for example. This, of course, does not mean that deterrent effects can *ipso facto* justify immigration detention. But it does, however, help to illustrate that we are dealing with a familiar line of argument.⁶ Even more to the point: deterrence arguments make both an empirical claim and a normative claim. The empirical claim is that immigration detention is an effective deterrent against irregular immigration, while the normative claim

Affairs argued that the national immigration detention policy was the “only way of safeguarding national security” and that it was necessary in order to ascertain that irregular migrants were not terrorists (quoted in Mainwaring & Silverman, 2017: 25).

⁵ For example: in 2013, the Australian opposition leader, Tony Abbott, said that we ought to deter irregular migration because “this is our country, and we will decide who comes here” (quoted in McKay, Hall & Lippi, 2017: 184). This echoed the former Australian Prime Minister, John Howard, who, in response to a sudden rise in the rate of irregular maritime migration, defended the use of immigration detention by arguing that “we will decide who comes to this country and the circumstances in which they come.” The full transcript of this speech is available online: <https://pmtranscripts.pmc.gov.au/release/transcript-12332>

⁶ The comparison to criminal punishment highlights an uneasy tension between deterrence-based rationales for administering immigration detention and its ostensibly non-punitive intent. As one examiner notes: if the state were to concede that deterrence is among the genuine purposes of immigration detention, then the practice of detaining would-be migrants would fall squarely within the normative and legal domain of punishment. This would trigger a range of procedural and substantive constraints—most prominently, due-process protections that irregular migrants do not ordinarily possess—thereby calling into question the permissibility of existing detention regimes.

is that these putative deterrent effects generate a moral reason that is strong enough to provide the state with a moral permission to administer immigration detention. This section of the paper argues that both of these claims are *prima facie* plausible, and compatible with a range of substantive positions defended in the immigration ethics literature. The upshot is that we ought to take deterrence arguments seriously.

Let us begin by considering the normative claim that is made by a deterrence argument. At least *prima facie*, it is plausible that liberal democratic states have a moral reason to deter irregular migration as long as certain baseline conditions are satisfied. In order to illustrate this, consider, as a case-in-point, the popular claim that these states have a *humanitarian moral reason* to produce these deterrent effects. It is no secret that irregular migration is dangerous. Each year, countless people are exploited, killed, or seriously injured while attempting to irregularly migrate to a liberal democratic state. It is also difficult to deny that preventing exploitation, death, and serious injuries is generally a good thing to do. And the corollary of these two points is that if these states can minimise the number of would-be migrants who are exploited, killed, or seriously injured each year by deterring them from irregularly migrating, then, so long as these deterrent effects are produced without violating a standard proportionality or necessity constraint, it is, once again, difficult to see why they would not be morally obligated to do this. To take an illustrative example, you might think that these states are duty-bound to consider the claims of forced migrants who irregularly enter their territory—and, when it is appropriate to do so, grant them political asylum. As Joseph Carens (2003: 101) has explained, a reason for this could be that “if asylum seekers are denied entry and sent back, the state is directly involved in what happens to them. Those seeking to harm them could not do so if the destination state did not return them.” Let us assume that this is correct.

The important point for us is that even if we accept that the state holds this moral duty towards the forced migrants who irregularly enter their territory, this does not entail that they lack a humanitarian moral reason to deter them from irregularly migrating in the first place. This is because these two moral considerations track causally-independent risks of harm. As we have already explained, it is *prima facie* plausible that the state has a humanitarian moral reason to deter irregular migration because, by acting on that moral reason, it will minimise the number of people who would otherwise risk being exploited, killed, or injured while irregularly migrating. But this is perfectly compatible with maintaining that, in cases where immigration detention fails to produce these deterrent effects, the destination state will gain

a new moral duty to consider the claims of the irregular forced migrants who have entered its jurisdiction and potentially grant them political asylum. This is because this new moral duty, to refer back to Carens, is grounded in the risks of harm that these irregular forced migrants would face if they were repatriated. And there is no reason to think that the risks of harm associated with repatriation nullifies or supersedes the risks of harm that are faced by prospective irregular migrants before arriving in the destination state. To express this point in a slightly different way: from a pure risk mitigation standpoint, the best policy option is the one that mitigates the most risks of harm. When it comes to irregular forced migration, this is achieved by the combination of deterring irregular migration *and* enacting a generous asylum policy.

Risk management is another *prima facie* plausible way to defend this normative claim. The idea here is three-fold. First: that on the population level at least, irregular migrants pose a serious antecedent risk to national security or public health in the state to which they are migrating.⁷ Second: that the state to which they are migrating has a strong moral reason to mitigate the risks of harm associated with these irregular migrants. One way to understand this is in terms of the special moral duties or responsibilities that states hold towards their extant political members. As Joseph Carens explains, “our fellow members are the ones whose needs and interests have to be the primary focus of those entrusted with the political power of the community. That will remain true whether we have open borders or not” (Carens, 2013: 275). And the corollary of this is that when it comes to irregular migrants who pose a serious antecedent risk to national security or public health, that state ought to prioritise the interests that its extant political members have in not being subjected to that risk of harm over the interests that the risk-imposing would-

⁷ Two footnotes in one. First: in order for this version of a deterrence argument to be sound, it is crucial that the concepts of a health risk and a security risk are not understood in such an expansive manner that they can be used to justify any migrant who seeks admission. For example: it would be impermissible to for the state to deter all Muslim irregular migrants on the grounds that their religious beliefs increase the probability that they pose a serious risk to national security (see generally Carens 2013: 175–179). Second: the extent to which irregular migrants pose a health or security risk can, and does, vary between jurisdictions (see Salehyan & Gleditsch, 2006; Barnett & Walker, 2008; Miles & Cox, 2014; Bove & Böhmelt, 2016). For this reason, you might want to reiterate the central claim of this argument as a conditional proposition: *if* irregular migrants pose a serious risk to public health or national security, *then* it is *prima facie* plausible that the state has a reason to mitigate that risk of harm by administering a deterrence-based immigration detention policy. I have left both of these points aside due to spatial constraints.

be migrants have in being able to enter its territory. Third: that a deterrence-based immigration detention policy is the best risk mitigation strategy in these sorts of cases. The reason for this is that although the state could mitigate these risks of harm by detaining a risk-imposing irregular migrant in administrative detention post-arrival (such as mandatory quarantine or some form of community detention), deterrence is far more effective because it ensures that the risk of harm remains completely outside of its territory.

In response to this, it could be objected that the special responsibilities that states hold towards their extant political members cannot be discharged at the expense of the human rights of non-members. This is important for two reasons. First: it could be argued, in line with much of the contemporary open borders literature, that the freedom to cross state borders is a fundamental human right (Huemer, 2010; Carens, 2013: 236–254; Oberman, 2016). Second: that a deterrence-based immigration detention policy violates this right by disincentivising one of the methods through which people can cross state borders. But here is the problem. For the reasons that have been given, it is plausible to think that, when it comes to would-be irregular migrants who do *not* pose a risk to public health or national security, a deterrence-based immigration detention *will* violate this human right. But this is not the case when it comes to risk-imposing irregular migrants. And this is because they will have either *forfeited* that right (in cases where they pose a serious risk to national security) or because it has been *outweighed* by countervailing reasons relating to risk management (in cases where they pose a risk to public health). This does not strike me as being particularly controversial. It is, after all, widely accepted among open border theorists that even under a system of fully open borders, the state would be at least morally permitted to exclude any would-be migrant who posed a serious health or security risk (see e.g., Seglow, 2005; Huemer, 2010; Carens, 2013: 276–277; Fine, 2016: 126; Kukathas, 2016: 252). And the upshot is that a commitment to open borders does not refute a risk-based deterrence argument, but, rather, limits the cases in which it applies.

Deterrence arguments will, of course, become far more controversial if it is argued that the state has a moral reason to deter irregular migration because it has a right to unilaterally enforce its territorial borders. But even here, we can note two important considerations. First: even though it is controversial, this version of a deterrence argument nevertheless relies on a plausible and widely-accepted view in the ethics of immigration literature (see Fine, 2013). It is not as though closed border theorists are defending a fringe view in the literature. And what this means, in practical terms, is that this version of a deterrence

argument would still need to be taken seriously by those of us who are interested in the moral status of immigration detention. Second: it is plausible that *if* the state holds the right to unilaterally control its territorial borders, *then* it will have a moral reason to deter irregular migration. The reasons for this are two-fold. On the one hand: irregular immigration infringes this right insofar as it undermines the ability of the state to unilaterally enforce its territorial borders. Second: *ceteris paribus* and within certain limits, rightsholders are morally permitted to enforce their rights (Thomson, 1990: 105–123). This is important because deterring irregular migration is a pre-emptive way for the state to determine who can enter and settle inside its territory—and, in so doing, enforce its right to unilaterally control its territorial borders.

I mention all of this simply to highlight that the normative claim made by a deterrence argument is *prima facie* plausible. To be sure, this does not entail that this claim is *true*. But we will leave that as a matter that is to be determined in future research on this topic, resting content with having only shown that this claim should be taken seriously by those who are interested in the ethics of border enforcement. In what follows, we will, instead, focus on the empirical claim that is made by this argument. There are two reasons for this. First: this claim is *prima facie* plausible, given a standard theory of rational choice. What I mean by this is that the potential costs of being held in immigration detention will, in principle, alter the incentive structure of the decision-space that is available to a would-be migrant—the effect of which being that, due to the risk of incurring those costs, irregular migration will cease to be the utility-maximising decision for them.⁸ Second: even though this claim is *prima facie* plausible, there is a body of social scientific research in which it is argued that would-be irregular migrants do not engage in this sort of rational-choice-theoretic reasoning—and, hence, that in practice they are not deterred by the risk

⁸ The use of rational-choice theory in migration research has been subject to longstanding debate. Critics argue that it can overemphasise individual utility-maximising behaviour, understate structural and social constraints, and neglect the role of aspirations, capabilities, and broader socio-political factors (see e.g., Massey et al., 1993; de Haas et al., 2020; de Haas, 2021). Nonetheless, I employ a rational-choice-theoretic model here as a heuristic tool to clarify the decision-making dynamics underlying migration and immigration deterrence. While it does not capture all relevant social, political, or structural migratory factors, it provides a useful analytic framework for illustrating how prospective migrants might respond to policy interventions, including immigration detention. This approach is therefore adopted with the acknowledgement of its limitations and with reference to complementary frameworks that emphasise structural and aspirational determinants of migration.

of being detained in immigration detention (see e.g., Ryo, 2019b: 241–246). An upshot of this is that in order to defend a deterrence argument, one would need to adduce statistically significant evidence that showed that immigration detention did, in fact, produce these putative deterrent effects.⁹ But, as we will explain in the following section of this paper, adducing evidence of this sort is far easier said than done.

4. A Look at the Evidence

In the small body of social scientific research and accompanying ‘grey literature’ that has been produced on this topic, it is generally acknowledged that there is either no evidence, or else very limited evidence, which shows that immigration detention is an effective deterrent against irregular migration (Edwards, 2001: iii, 1; Sampson, 2015: 3; Mainwaring & Silverman, 2017: 30; Silverman & Lewis, 2017; Hartley, Anderson & Pedersen, 2018: 578; Ryo, 2019a: 109; 2019b: 237). Those writing on this topic, however, have generally left the reasons for this absence of evidence unspecified. And what this means is that we cannot determine, on the basis of that research alone, whether this lack of evidence is a serious problem for a deterrence argument. It would not, for example, be a very serious problem if it was the result of a lack of interest in this topic and could be resolved with some basic statistical modelling. In light of this, we will now consider the two primary sources of data that could *in principle* provide evidence in support of these deterrent effects. By exploring the challenges that are involved in obtaining these data, we will

⁹ Several points of clarification. First: in this paper, I assume a probabilistic conception of evidence such that a consideration *c* constitutes evidence in favour of a proposition or hypothesis *p* just in case the probability of *p* being true conditional on *c* is greater than its unconditional probability. Second: evidence comes in degrees, corresponding to the probability of *p* being true conditional on *c*. While I will not press the point, I take it that a relatively high standard of evidence is required to justify an immigration detention policy on deterrence-based grounds: weak, disputed, or highly hypothetical claims are insufficient to support substantive normative conclusions. For this reason, unless it is otherwise mentioned I will use the term ‘evidence’ to mean statistically significant evidence. Third: on the level of general principle, the burden of proof ought to fall on the state to show that this standard of evidence has been met. This is due to the fact that it is the party responsible for imposing the potential harms associated with immigration detention. Finally: modal evidence is relevant in this context (i.e., claims about possible scenarios in which immigration detention might deter). But such evidence must be treated cautiously and weighted less heavily than robust empirical evidence, given that it provides only limited probabilistic support for policy justification.

demonstrate that it is *in practice* incredibly difficult to adduce that evidence. Given the scope and scale of these challenges, this current lack of evidence in favour of these deterrent effects is incredibly robust.

4.1. Irregular migration stocks and flows

A natural place for us to begin is by considering the stock and flow of irregular migration into the states that administer immigration detention. An *irregular migration flow* refers to the number of people who have irregularly entered or exited a state during a specified period of time, while an *irregular migration stock* is an estimate of the total number of people who irregularly reside inside of a state at a particular point in time (Kraler & Reichel, 2011: 99–103). The reason that this is a natural place for us to begin is that it might be possible to establish a statistical relationship between the enactment of an immigration detention policy and the irregular migration stock or flow in the state that enacted it. Here is an analogy. A lot of early social scientific research on criminal deterrence attempted to measure the deterrent effects of criminal sanctions by evaluating the statistical relationship between crime rates in geographic units, typically states, and the likelihood and the severity of the relevant sanction (see generally Logan 1982; Nagin, 2013). This was based on the understanding that criminal sanctions could be said to deter crime insofar as there is a consistent negative relationship between crime rates in the relevant geographic unit and some measure of the risk and severity of the relevant sanction. And this is important for us because the deterrent effects of immigration detention could be measured in an analogous way. In simple terms: immigration detention could be said to deter irregular migration insofar as there is a consistent negative relationship between the risk and the severity of an immigration detention policy and the stock or flow of irregular migration in the state that has enacted it. But the problem, as we will now explain, is that in practice it is incredibly hard to evaluate whether there is any such relationship between those variables.

A large part of the problem here is that despite ongoing efforts to improve data collection, our understanding of the scope and scale of irregular migration remains limited (Koser, 2010; Jandl, 2011). There is, for instance, no authoritative source on the number of migrants worldwide who possess an irregular migration status—and the sources that are available on this front provide vastly different estimates that are normally generated from fragmented and out-of-date sources of information. To make matters even worse, many contemporary liberal democratic states do not keep comprehensive and up-

to-date records of their own irregular migration stocks and flows—and, in the small number of cases where such records are kept, the data that are contained therein are not normally made available to the general public. What this means, in more familiar terms, is that we do not currently have the data that are needed to *directly* establish the statistical relationship between the enactment of an immigration detention policy and the stock or flow of irregular migration in the state that enacted it. And the upshot of this is that, at present, irregular migration stocks and flows do not provide us with evidence in favour of the deterrent effects of immigration detention due to an absence of relevant data. There is, of course, no in principle reason why these data cannot be obtained in future research on this topic. But the crucial point is that there are large conceptual and methodological challenges involved with directly measuring, collecting and interpreting data on irregular migration—which future research would need to overcome.

Consider, first, the challenges that are involved in directly measuring irregular migration stocks. The first point that needs to be considered is that irregular residents are a so-called *hidden population*. A population is *hidden* when no sampling frame exists, so that the size and boundaries of the population are unknown, and where public acknowledgement of membership in that population can be threatening because membership involves stigmatised or illegal behaviour (Heckathorn, 1997: 174). One of the key upshots of this is that because irregular residence is stigmatised, and, in some jurisdictions, is a criminal offence, irregular residents will be generally unwilling to communicate with the government authorities, non-profit groups, or academic researchers because of the risk that it could lead to them being detected, apprehended, and subsequently removed from the state in which they have been residing (Koser, 2010: 183). Different statistical models have been developed in order to overcome these challenges, and, thus, provide an accurate measurement of irregular migration stocks (for a review of these methods see Jandl, 2011). Although many of these statistical models could in principle corroborate a deterrence argument, in practice they do not offer much insight. This is best shown by considering three of the most popular models of this kind: multiplier methods, capture-recapture methods, and methods of self-identification.

Multiplier methods are probably the most common approach to determining the scope and scale of hidden populations. These methods are predicated on the idea that the size of the unknown total of a hidden population can be directly calculated from the size of a known subtotal of that population by the

use of an appropriately estimated multiplier. Here is an example.¹⁰ Suppose that you want to determine the number of heroin users within a jurisdiction. There is a pre-existing dataset that details the number of heroin users in that jurisdiction who were in treatment the previous year ($n = 100$). You then construct a survey, which is disseminated to a sample of heroin users in that jurisdiction, and find on the basis of that survey data that a quarter of them were in treatment during the previous year. In order to determine the total number of heroin users in that jurisdiction, you would then multiply the registered treatment population in that pre-existing dataset by that multiplier of four obtained from that survey. This yields the result of 400 heroin users in that jurisdiction. The simplicity of this method is part of its appeal. But in order for this method to yield an accurate result, two conditions must be satisfied. First: the underlying indicator (e.g., heroin users in treatment, apprehended illegal residents) must be reliable and positively correlated to the estimated variable (i.e., total heroin users, total illegal residents). Second: the multiplier needs to be statistically-grounded. Both of these conditions are satisfied in the heroin-user case detailed earlier. But they are extremely hard to satisfy in regard to real-life datasets of irregular migration stocks.

There are several reasons for this. First: it is very challenging to find an appropriate underlying indicator relating to irregular migration stocks. In many cases, this is because the relevant data are not publicly available. And even when such data are publicly-available, some of the most common sources of aggregate apprehensions conflate stocks and flows—and are, therefore, unsuitable for the application of a multiplier method (see Jandl & Kraler, 2006). The upshot of this is that multiplier methods will be inefficacious until states release the data that is needed to establish the appropriate underlying indicator, which is something which researchers have virtually no influence over. Second: apprehension data are dependent on the intensity of law enforcement in the relevant jurisdiction. And one important upshot of this is that any multiplier used in this context need to account for the time and the risk-dimension of the indicator (Jandl, 2011: 55). Third: the most significant challenge for the multiplier method relates to the process of determining an appropriate multiplier. In the earlier example about heroin users, for example, the multiplier was established on the basis of survey data. But it is, of course, exceptionally difficult to

¹⁰ I borrow this example from the *World Drug Report*, published by United Nations Office on Drugs and Crime. The report can be accessed online at the following link: https://www.unodc.org/pdf/research/wdr07/WDR_2007.pdf

conduct a broad-based survey of irregular residents given the aforementioned lack of a sampling frame. This worry is compounded by the fact that an irregular migrant might have incentives to not participate in a broad-based survey that could produce a multiplier, which are not present for heroin users (e.g., the increased risk of apprehension and removal). In order to get around this challenge, most of the existing research in this field have derived their multipliers from “expert opinions” or other subjective methods (Jandl, 2008: 55). But the issue with this approach is that it is unsuitable for a statistical analysis because it is not statistical—and, in virtue of this, cannot be verified, reproduced, or evaluated in other works.

Capture-recapture methods are a slightly more sophisticated approach to determining the scope and scale of hidden populations (see Jandl, 2011: 58–59). These models have a longstanding history in population biology, where they have been used by researchers to estimate wild animal populations. This type of statistical modelling can, in essence, be understood as an advanced multiplier method where the multiplier is determined on the basis of a repeated sampling of a single population. Here is one example. Suppose that you want to determine the stock of fish in a local pond. You begin by capturing a random sample of 1,000 fish from that pond, marking them, and then releasing them back into that pond. Then, sometime in the future, you return to that same pond and capture another random sample of 1,000 fish and find that 100 of them are marked (i.e., recaptured). On the basis of this information, you could infer that the 1,000 originally-marked fish constitute 10% of the total population—meaning that the total fish population in that pond is 10,000 members (i.e., by multiplying the original sample of 1,000 fish by the multiplier of 10 derived from the recaptured population). Most of the studies that use capture-recapture methods to determine irregular migration stocks rely on probabilistic modelling, rather than this classic marking technique (see Jandl, 2008: 29–30). But the reasoning that grounds these probabilistic models is, in essence, the same. And what is so important about the case just provided is that it elucidates three conditions that need to be satisfied for any sort of capture-recapture method to produce accurate results.

The first condition is this: the chance of getting captured must remain constant over the period of study at the population level, and, in addition to this, must not increase for a specific individual after a previous capture. This condition is satisfied in the hypothetical case presented above. But it is difficult to satisfy in a migration context. One thing to consider here is that the probability of being caught may vary over time due to changes in law enforcement practices, policies, and the intensity of surveillance.

For example: if there is a sudden increase in immigration raids or inspections in the relevant jurisdiction, then the capture probability could rise. The probability of an individual migrant being recaptured could, likewise, change after their initial capture. As a case-in-point: a previously apprehended migrant might become more risk-averse and hence alter their behaviour to avoid being recaptured. This could result in a lower probability of being apprehended. The second condition is this: the population must be generally constant over the period of study. This is, again, satisfied by the hypothetical fish population. But there are two reasons to doubt that this is the case in regard to irregular migration stocks. First, apprehended irregular migrants are usually removed from the relevant jurisdiction. Second, that same population will be affected by additional irregular migration flows into that jurisdiction. The third condition is this: the risk of being captured must be the same for all members of the population being studied. This condition is likely satisfied in our hypothetical case, given that fish do not have the ability to adapt their behaviour to avoid (re-)capture. But this is not the case when it comes to humans. The probability that an individual migrant is (re-)captured may, for instance, depend on their risk attitudes and the visibility of their work.

The last model that we will consider are *methods of self-identification* (see Jandl, 2011: 60–61). In general terms, methods of self-identification attempt to measure irregular migration stocks by relying on the number of irregular residents who make their presence known to the state at their own discretion. There are different types of data that can be factored into a method of self-identification. But it is most common for researchers to refer to data that are obtained through large-scale regularisation programmes or general amnesties. Here is an example of how this works. Suppose that at time t_1 , the state administers a nationwide general amnesty for all irregular migrants living in its territory. This amnesty allows them to apply for legal residence without fear of being deported. In this scenario, it is possible to estimate the irregular migration stock within that state by referring to the number of applications that are submitted during the programme. For example: imagine that 100,000 people apply for amnesty, but that previous research has shown that approximately 30% of irregular residents do not come forward (perhaps due to fear or lack of knowledge). By applying this adjustment, we could estimate that the irregular migration stock in that state is approximately 143,000 people (i.e., 100,000 applications divided by 0.70). At time t_2 , a second amnesty is administered in that same state. This time, 80,000 people apply. Using that same 30% non-participation estimate, we could determine that the irregular migration stock within that state

sits at approximately 114,286 people (i.e., 80,000 applications divided by 0.70). By comparing these two figures, we could make inferences about the rate of change in irregular migration stock in that state.

This hypothetical example helps to show that methods of self-identification could, in principle, be used to measure irregular migration stocks. The worry is that, in practice, it is very difficult to utilise these methods with a high degree of accuracy. There are several reasons for this. First: a lack of robust and comprehensive data is a pertinent concern. Consider, for example, that according to the calculations of Ferruccio Pastore (2008: 116) and the OECD (2004), approximately four million regularisations were granted in Western Europe between 2000 and 2008. In many of these states, however, these amnesties did not occur in the context of large-scale or nationwide regularisation programmes—but were, instead, granted on a case-by-case basis where the data is not publicly-available (Biffi, 2012: 32). Second: even when there is access to the data obtained from nationwide general amnesties, there are contextual factors that make the interpretation of such data rather tricky. The conditions that are usually attached to general amnesties, for example, mean that not all irregular residents are eligible to apply for a regularisation of their migration status. There are, in addition to this, real-life cases in which the number of applications in a general amnesty have been inflated because people applied more than once or because non-residents from neighbouring states filed an application (some of these cases are discussed in Jandl, 2008: 35–36). Third: there will be some irregular residents who do not apply for a general amnesty, even though they are eligible to do so. In the hypothetical example above, we stipulated that 30% of the irregular residents in the state would not apply for amnesty. But when dealing with real-life datasets, this non-participation estimate must be statistically grounded and not simply assumed. And the worry is that, because irregular residents are a hidden population who have strong incentives to avoid researchers and the government alike, it is very difficult to ground this non-participation estimate through (say) surveys or focus groups.

In having written all of this, I do not mean to suggest that researchers *cannot* use these statistical models to determine irregular migration stocks. There are, after all, a small number of studies that have done exactly this to varying degrees of success (for a good review of these studies see Jandl, 2011: 55–71). The point is, rather, that there are some *very significant methodological challenges* that are involved in deploying each of the statistical models that we have considered within this subsection of the paper. And the upshot of this is that corroborating a deterrence argument requires a whole lot more than simply

pointing towards an irregular migration stock and how it might have been affected by the enactment of an immigration detention policy. But what about irregular migration flows? Is the data here more easily accessible? The first point worth mentioning here is that in comparison to the sizeable body of research that has attempted to measure irregular migration stocks with the statistical models we have considered, there is little research that has sought to do the same for irregular migration flows (for a good review of this research see Kraler & Reichel, 2011). One of the most common approaches is to extrapolate border apprehensions with a simple multiplier, using an estimated ratio of border apprehensions to successful non-detected irregular entrants. We will consider this approach in the following subsection of this paper.

4.2. Border apprehensions

Border apprehension records are one of the most common proxies for irregular migration flows in both the historical and contemporary research in this field (see Espenshade, 1995; Koser, 2010; Alden, 2018). In order for a variable to be a good proxy, it must have a close—but not necessarily linear—relationship with the variable for which it is a stand-in. And thus when it comes to border apprehensions, the thought is that a correlation of this sort exists because border patrol officers apprehend a statistically significant percentage of the total number of would-be migrants who attempt to irregularly enter their jurisdiction. If we assume for the time being that this is correct, it follows that by referring to the appropriate border apprehension records we could, in principle, measure the extent to which the enactment or rescindment of an immigration detention policy correlated with an alteration in the flow of irregular migration in the relevant jurisdiction. In practice, however, it is very difficult to conduct this sort of analysis. One reason for this is that some states do not release publicly-available border apprehension records. But the deeper worry is that even when such records are publicly-available, the data contained therein can be unsuitable for analysis because, for instance, it mixes irregular migration stocks and flows or does not account for recidivist apprehensions where a single irregular migrant is apprehended and released multiple times.¹¹

¹¹ As a case-in-point: data on border apprehensions and irregular immigration in the European Union (EU) used to be collected by the Centre for Information, Discussion, and Exchange on the Crossing of Frontiers and Immigration (CIREFI). The CIREFI data on “apprehensions of aliens illegally present” did not, however, distinguish between apprehensions of irregular migrants

These concerns might vary in relevance depending on the specific dataset that is being analysed. And so it is, for this reason, interesting to instead consider cases in which (i) there are publicly-available border apprehension records that account for recidivist apprehensions and distinguish between irregular migration stocks and flows, and (ii) there is a strong positive correlation between border apprehensions and the enactment or the rescindment of an immigration detention policy within the relevant jurisdiction and during the relevant time period. Here is an example. For several decades now, Australian politicians and political commentators have asserted that immigration detention has effectively “stopped the boats” of asylum seekers and economic migrants who would otherwise irregularly cross the maritime border (Pickering & Webber, 2014). At least *prima facie*, this assertion appears to be corroborated by the data released by the Department of Home Affairs and its predecessors: maritime border apprehensions and irregular maritime arrivals have repeatedly fallen in the wake of immigration detention policies being enacted—and, in addition to this, have repeatedly increased immediately after those detention policies have been rescinded (see Phillips & Spinks, 2012, 2013). This is exactly the sort of correlation that one would expect to see if these policies produced the deterrent effects that are attributed to them. But there are, however, several methodological challenges that would need to be overcome in order to show that these sorts of correlations, regardless of whether they are produced, constitute the evidence we are after.

The first challenge is this: although border apprehensions are a very common proxy for irregular migration flows, they may not always be a good proxy for it (Espenshade 1995: 546; Alden, 2018: 485). One of the key reasons for this is that a decline in the number of border apprehensions can be interpreted in two ways: as evidence that border enforcement measures, such as immigration detention, effectively deterred irregular migration in the relevant state (i.e., because in virtue of these putative deterrent effects there are fewer irregular migrants who are liable to be apprehended) or as evidence that these measures have not effectively deterred irregular migration (i.e., because the flow of irregular migration has either remained constant or increased over time, while irregular migrants have improved their techniques for avoiding detection and apprehension). This is not an academic distinction. There are real-life, historical

who were *already present* in the EU and those that occurred *at or near the borders* of an EU member state. In consequence of this, these data mixed irregular migration stocks and flows—and, therefore, were rendered unsuitable for a multiplier method.

cases in which border apprehension records have misrepresented irregular migration flows because the irregular migrants have evaded border security (see Alden, 2018: 483). And the upshot of this is that in order to determine whether a decline in border apprehensions is representative of a decline in irregular migration flows (and, hence, whether it is a good proxy for it), we need to compare the relevant border apprehension records against a measure, or credible estimate, of the number of irregular migrants who successfully entered the state without being detected or apprehended at the border. Multiplier methods are the most common way that researchers have attempted to do this. But the key methodological issue, as we saw in the previous subsection of this paper, is that there is no simple way to ground the multiplier in a statistical basis rather than an “expert opinion.” Probably for this reason, much of the extant research on this topic has shied away from citing the source of the multiplier (Kraler & Reichel, 2011: 106–107).

The second challenge is this: even though a decline in border apprehensions could be plausibly explained by positing that the enactment of an immigration detention policy deterred irregular migration in the relevant jurisdiction, it could, at the same time, be explained by plausible competing hypotheses. For example: an observed decrease in border apprehensions could be the result of weakened push factors and pull factors (i.e., because weakened migration drivers would minimise the number of people willing to irregularly migrate). To make matters worse, even if a decline in the number of border apprehensions can be plausibly attributed to the deterrent effects of *border enforcement* as opposed to weakened push or pull factors, it would be incredibly difficult to show that *immigration detention* was the primary cause of that decline. Consider that in the actual-world, immigration detention is almost always administered in conjunction with other forms of border enforcement—such as incarceration, interdiction, or removal. And the corollary of this is that even if the use of immigration detention has a strong positive correlation with a decline in the number of border apprehensions in the state that is administering it, in the absence of further data this decline cannot be straightforwardly attributed to the deterrent effects of immigration detention specifically rather than the deterrent effects of one of these other forms of border enforcement.

In response to this: it might be objected that these two challenges could in principle be resolved by appealing to additional data—such as the reliable testimony of irregular migrants, for example. Here is one way to understand this objection. Let us imagine a hypothetical case where a group of researchers conduct a broad-based survey or series of interviews whose purpose is to identify the decision-making

process of the people who are deciding whether to irregularly migrate. On the basis of the data obtained through these surveys or interviews, the researchers find that a statistically significant percentage of the study participants had originally planned to irregularly migrate to a specific destination state—but that, after learning of the risk of being detained in immigration detention, decided to not do so. If we assume that their testimony is reliable, it would be evidence that the observed change in border apprehensions was caused by the deterrent effects of immigration detention—instead of weakened push or pull factors, or the deterrent effects of other forms of border enforcement. This is because it would provide a reliable, first-hand account of how the risk of being detained reduced the expected utility of irregular migration in their specific case. But here is the catch. Even though this sort of interview data or survey data would, in principle, overcome the challenges just described (and, in so doing, provide evidence in favour of the deterrent effects of immigration detention), in practice these data would be incredibly difficult to obtain.

There is a small body of social scientific research and associated ‘grey literature’ that has sought to assess the deterrent effects of immigration detention on irregular migration by appealing to this kind of testimonial data (Richardson 2010; Wise Strategic Communications, 2010; Fleay et al., 2015; Hiskey et al., 2018). What these studies have repeatedly found is that when these migrants are interviewed and asked about their decision-making process, they repeatedly explain that it was, or that it appeared to be, in their best interest to irregularly migrate because of the risks of harm (i.e., the push factors) that were present in their home country. As one asylum seeker explained in an Australian study, “I didn’t bother about how long I would be in detention. I just get to Australia to save my life” (Fleay et al., 2015: 65–66). The problem, however, is that in all of the studies just cited, the researchers have only interviewed people who have *already made the decision to irregularly migrate* (i.e., the study participants are being interviewed in immigration detention after having been apprehended for irregular entry in a receiving state, or while living in a transit state in the context of a broader irregular migration journey that will culminate in them irregularly entering a receiving state).¹² In doing so, these researchers have introduced

¹² To be clear, I am not denying that this body of research can be important for understanding the phenomenology of migration. For example: there is a sizeable literature in anthropology, sociology, and geography that conducts fieldwork in sending states and provides insights into the first-personal experience of migration and border enforcement (see de Genova, 2005; Khosravi,

a sampling bias into their datasets by virtue of selecting on the dependent variable: they have sought to assess the deterrent effects of immigration detention by focusing entirely on cases in which immigration detention has evidently *not* deterred people from irregularly migrating. In order to establish the deterrent effects of immigration detention, these researchers would, instead, need to expand their sample size by interviewing *prospective* irregular migrants in their countries of origin and determining whether *they* are deterred by the risk of being detained. The problem, though, is that this is incredibly difficult to do.

There are multiple reasons for this. Perhaps most obviously, there are significant logistical and safety concerns involved in conducting fieldwork in the remote or politically unstable regions in which prospective forced irregular migrants are generally located. For this reason, much of the research in this area is conducted in so-called countries of first asylum. But the worry here is that the migrants in these countries have already started their migration journey, which introduces the sampling bias noted in the last paragraph. Even if researchers are able to conduct fieldwork in these remote or politically unstable regions, significant language and cultural barriers will normally exist between those researchers and the prospective migrants whom they are interviewing. In consequence of this, researchers typically need to rely on a translator in order to interview the study participants. And this can, in turn, affect the cogency of the interview data (see generally Oliver et al., 2005; Bucholtz, 2007: 801; Kalocsányiová & Shatnawi, 2022). In addition to all of this, it would be very difficult to obtain a representative sample of prospective migrants being interviewed—especially in regions that have diverse migration drivers or varying levels of information about the immigration detention policies in the states to which they intend to immigrate. To be absolutely clear, there is no in principle reason why these challenges could not be overcome. But the *possibility* of such research does not alter the fact that, at present, these challenges remain an obstacle to acquiring testimonial data that could corroborate the empirical claim made by a deterrence argument. And this speaks to the more general problem that, regardless of which way we turn, we are stonewalled in our attempts to adduce empirical evidence in favour of the deterrent effects of immigration detention.

2010; Menjivar & Kanstroom, 2013; Anderson, 2014; Tazzioli, 2020). But given the sampling bias discussed in the main body of text, these texts cannot on their own establish the causal effectiveness of detention as a deterrent policy.

5. Responding to an objection

The preceding section of this paper made two related claims. First: that the consensus view in the current literature is that there is either no evidence, or else very limited evidence, which shows that immigration detention is an effective deterrent against irregular immigration. Second: that in practice, it is incredibly difficult to adduce evidence in favour of these putative deterrent effects due to the swath of conceptual and methodological challenges that we have considered at length. The combination of these two claims does not entail that deterrence arguments are unsound. We must, after all, be open to the possibility that future research could either overcome the challenges that we have considered or conduct new statistical modelling on our existing irregular migration datasets. But despite this, we might, nevertheless, wonder about the epistemic attitude that we ought to hold in relation to these arguments. Should we reject these arguments outright, given how difficult it would be to overcome these challenges in practice? Or should we adopt a more modest epistemic attitude towards them, perhaps remaining agnostic while we attempt to develop new statistical models that could provide us with the evidence that is currently lacking? We might even think that we still have reason to endorse deterrence arguments, despite everything that has been mentioned in the foregoing discussion. The answer to these questions will, in a crucially important sense, depend on the null hypothesis that we ought to hold towards the empirical claim that is made by a deterrence argument. And this is best seen if we consider an argument that could be raised against us.

Earlier in this paper, we noted that the empirical claim made by a deterrence argument is *prima facie* plausible given a standard theory of rational choice. To reiterate this point in simple language: the potential costs of being detained in immigration detention will, in principle, alter the incentive structure of the decision-space that is available to a would-be migrant. And the effect of this is that, in principle, irregular migration will cease to be the utility-maximising decision for them due to the risk of incurring these costs. If we assume that these would-be migrants are utility-maximisers, then they will be deterred from irregularly migrating in light of these prospective costs. This is important because we use rational choice theory in order to accurately explain human behaviour in contexts that are completely unrelated to irregular migration and border enforcement (such as, for example, criminal behaviour and economic behaviour). And it could be objected that insofar as rational choice theory paints an accurate picture of human behaviour more generally, we are justified in believing that immigration detention is an effective

deterrent against irregular immigration despite the current lack of evidence and the swath of conceptual and methodological challenges that we considered in the previous section of this paper. This is because, to use the language of Bayesian epistemology, we are setting our priors relative to this standard rational-choice-theoretic explanation of human behaviour—rather than anything specific to irregular migration or immigration detention. Because we are setting our priors in this way, they will remain unaffected by lack of evidence in favour of these deterrent effects and the swath of challenges that we have explored.

This is an interesting objection. It would be a mistake to deny that, everything else being equal, this standard rational-choice-theoretic explanation of human behaviour gives us a reason to believe that immigration detention is an effective deterrent against irregular migration. To draw a helpful analogy: there is no robust empirical data which shows that the use of medieval stocks and pillories is an effective deterrent against crime. But despite this dearth of data, it is plausible to think that such deterrent effects *would be* produced given that the risk of incurring these sanctions would reduce the expected utility of criminal behaviour in the relevant jurisdiction. And if this standard rational-choice-theoretic reasoning is plausible in the context of these medieval criminal punishments, then why is it not likewise applicable when it comes to immigration detention and irregular migration? The answer to this question, and hence the best way to push back against this objection, is to highlight that there are important countervailing considerations that provide us with a reason to update our priors when considering the putative deterrent effects of immigration detention on irregular migration—which might not be present in other contexts, such as, for example, the deterrent effects of medieval criminal punishments such as stocks and pillories.

For one thing: as we explained earlier in this paper, there is a body of social scientific literature where it is argued that would-be migrants do not engage in standard rational-choice-theoretic reasoning when deciding whether or not to irregularly migrate. There are multiple reasons for this.¹³ Perhaps most

¹³ For example: in addition to the considerations discussed in the main body of text, there is a body of social scientific research in which it is argued that prospective irregular migrants are generally unable to conduct a relevant cost-benefit analysis because of their risk attitudes and the conditions of acute stress and anxiety under which they are migrating (see generally Ryo, 2019). More generally, immigration detention is unlikely to be a deterrent if the cost of not immigrating is very high (e.g., for refugees) or if the cost of being detained is significantly lower than the benefits of migrating (e.g., if the probability of detention is low). A further point to note is that much of the social scientific research in this area has argued that irregular migrants tend to arrive

commonly, would-be migrants will often lack the *opportunity* to conduct a relevant cost-benefit analysis because of the circumstances under which they irregularly migrate. For instance: one study focusing on irregular migration among Pakistani families in Karachi found that, in three cases where a female family member irregularly migrated, the decision to do so was made by exclusively her male relatives (Koser, 2011). Similarly: in a study that was conducted by Richardson (2010: 10), it was found that, for 25 of the 27 participants, the decision to irregularly immigrate to Australia was made by the people smugglers who transported them rather than by the migrants themselves. And this is congruent with the far larger body of research which shows that people smugglers are often pivotal in deciding the final destination for irregular migrants (Koser & Pinkerton, 2002; Gilbert & Koser, 2006; Zimmermann, 2009; Valenta & Thorshaug, 2012; Fleay et al., 2015). In addition to this, there will be certain would-be migrants who lack the *capacity* to be able to conduct a relevant cost-benefit analysis.¹⁴ This is certainly true of infants, some young children, elderly people with dementia, and people who have severe cognitive disabilities. Even among those who have this capacity, the conditions of acute stress and anxiety under which they irregularly migrate can inhibit their ability to conduct a relevant cost-benefit analysis (Ryo, 2019: 245).

I mention all of this for the following reason. If we take this standard rational-choice-theoretic explanation of human behaviour as our null hypothesis when considering the putative deterrent effects of immigration detention, then, as we have already explained, we will not need to update our priors in response to the current absence of evidence or the swath of conceptual and methodological challenges that we have explored. But we will, however, need to update our priors in response to this body of social scientific research in which it has been shown that would-be migrants do not, in practice, engage in this

in their destination state with minimal knowledge of its asylum policies (Barsky, 2000; Havinga & Bocker, 1999: 49; Doornbos et al., 2001: 23; Robinson & Segrott, 2002: 46; Gilbert & Koser, 2006: 1209; Day & White, 2002: 22, 25) or the fact that they are liable to be detained in immigration detention (Gilbert & Koser, 2006; Richardson, 2010; Wise Strategic Communications, 2010; Farsight, 2015, 2016; Fleay et al., 2015). If these findings are sound, they are relevant to our discussion for the simple reason that a person cannot be detained by the risk of a sanction of which they are ignorant. The problem, however, is that the authors of these studies have tended to select on the dependent variable in the manner discussed earlier in this paper—and, for this reason, we will leave any further discussion of these studies aside because of concerns about the cogency of their data.

¹⁴ The extent to which people who belong to these groups is, of course, subject to change across time and between jurisdictions.

rational-choice-theoretic reasoning when deciding whether to irregularly migrate. The reason for this is simple enough. This social scientific research provides evidence that is directly relevant to the question of whether immigration detention is an effective deterrent against irregular migration—and, as a general rule, it is rational to update our priors when we encounter new evidence that is relevant to the subject-matter under consideration. There would, for example, be something strange about a person who refused to update their priors about the likelihood that it will rain when they see dark storm clouds roll overhead. And there would, in an analogous sort of manner, be something strange about us refusing to update our priors about the putative deterrent effects of immigration detention in light of this social scientific data.

How we ought to update our priors is a question that we will leave for future research on this topic, as it will presumably depend on whether these data can be replicated in future studies with larger and more diverse sample sizes. But for the time being, and at a bare minimum, it strikes me as reasonable to assign a roughly equal probability to (i) the standard rational-choice-theoretic explanation of human behaviour, which implies that immigration detention will deter irregular migration in virtue of reducing its expected-utility, and (ii) the aforementioned body of social scientific research, which suggests that prospective migrants do not, in practice, conduct this rational-choice-theoretic reasoning when they are deciding whether to irregularly migrate. To be absolutely clear, this still does not entail that deterrence arguments are unsound. But if we are correct about how we have responded to this objection, it follows that we have a strong reason to refrain from endorsing deterrence arguments until additional data-driven research decisively tilts the balance of probabilities vis-à-vis these deterrent effects one way or the other.

6. Conclusion

All throughout the liberal democratic world, governments are relying on deterrence arguments in order to provide a moral justification for immigration detention. These arguments maintain that, on the overall balance of normative reasons, it is all-things-considered morally permissible for the state to administer immigration detention because it is a cost-effective way to deter irregular immigration. But despite the growing popularity of these arguments, they are only just starting to receive attention from philosophers and social scientists who are interested in border enforcement. This paper contributed to this emerging body of literature in three ways. First: it outlined the general structure of a deterrence argument. Second:

it argued that deterrence arguments are *prima facie* plausible and compatible with a range of substantive positions defended in the immigration ethics literature. Third: it explained that despite being *prima facie* plausible, deterrence arguments lack robust empirical support. Here we did two things. On the one hand, we explained that the consensus view in the current literature is that there is either no evidence, or very little evidence, showing that immigration detention is an effective deterrent against irregular migration. On the other hand, we considered two sources of data that could, in principle, provide evidence of these deterrent effects—and we showed that, in practice, there are significant conceptual and methodological challenges that make it incredibly hard to adduce the evidence needed to support a deterrence argument. To be sure: neither this absence of evidence, nor the conceptual and methodological challenges that we have noted, entail that a deterrence argument is *unsound*. The important point is, rather, that overcoming these challenges is a herculean task. And the corollary of this is that we have a strong *reason* to refrain from endorsing deterrence arguments until these challenges are resolved and new evidence is adduced.

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Chapter Four

Immigration Detention and Deterrence: A Response to Ryo

1. Introduction

All throughout the liberal democratic world, governments defend their use of immigration detention on the grounds that it is an effective deterrent against irregular migration. But does immigration detention actually produce these deterrent effects? In an earlier contribution to this journal, Emily Ryo has argued that three conditions must be jointly satisfied in order for these deterrent effects to be produced: would-be migrants must know that immigration detention is administered as a sanction for irregular migration, must be able to conduct a relevant cost-benefit analysis, and must determine, on the basis of a relevant cost-benefit analysis, that irregularly migrating is not the utility-maximising decision for them in virtue of the risk of being detained in immigration detention. By appealing to a set of social-psychological and behavioural economics data, Ryo argues that these three deterrence conditions are not normally satisfied in the real-world. Ryo describes her analysis as a “call and a road map” to researchers who are interested in the relationship between immigration detention and deterrence (Ryo, 2019: 237).¹ And the purpose of this paper is to take up this call by providing evidence for, as well as pushing back against, several important parts of Ryo’s excellent analysis. This will be done in four main stages. Section Two provides a quick overview of the three deterrence conditions that Ryo introduces. I have deliberately left aside any mention of how deterrence has become an important policy goal of immigration detention in the United States and elsewhere, since this is discussed at length by Ryo (2019: 238–240). Section Three examines whether the three conditions are satisfied in the actual-world. Section Four touches on the

¹ Note that all further references to this article will be listed in parentheses in the main body of the text.

normative question of whether the deterrence of irregular migration, specifically among asylum seekers, is desirable. Section Four concludes. By highlighting the places in which Ryo's analysis both succeeds and goes awry, this paper makes an important contribution to the emerging research on immigration detention and the extent to which it deters irregular migration.

2. Background Information

There is a growing body of empirical research that has examined whether immigration detention deters irregular migration (see e.g., Edwards, 2001: iii, 1; Sampson, 2015: 3; Mainwaring & Silverman, 2017: 30; Silverman & Lewis, 2017; Hartley, Anderson & Pedersen, 2018: 578; Ryo, 2019). The consensus view that is expressed in this research is that there is no statistically significant evidence, or very limited evidence, in favour of these putative deterrent effects. Those who defend this consensus view normally make two related claims. First: that if immigration detention did, in fact, deter irregular migration, then we should see a decrease in border apprehensions when an immigration detention policy is enacted. This is because, in virtue of these putative deterrent effects, there will be fewer migrants who are liable to be apprehended for attempting to irregularly enter the state. Second: that in general, we do not see border apprehensions decrease when an immigration detention policy is enacted. To quote Alice Edwards, who is the current United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "migration has been increasing regardless of governmental policies on detention. Except in specific individual cases, detention is generally an extremely blunt instrument of government policy-making on immigration" (Edwards, 2001: 1). If this consensus view is correct, the governments that defend their detention policies on deterrence-based grounds must be either irrational, dishonest, or just ignorant of the data relating to immigration detention and deterrence.

The problem with much of this existing research, however, is that border apprehension records are not an accurate guide to determining whether immigration detention deters irregular migration. This is because even the most accurate border apprehension records are unable to account for the number of irregular migrants who entered the state without being detected or apprehended at the border. What this means, in more practical terms, is that although a decrease in border apprehensions *could* be attributed to the putative deterrent effects of immigration detention, it could also be attributed to the fact that the

irregular migrants have simply improved their techniques for avoiding detection and apprehension. This is a well-known problem (Espenshade, 1995: 546; Alden, 2018: 485). And it brings us to what is so novel and important about Ryo's recent article on immigration detention and the deterrence of irregular migration. Unlike much of this earlier research, Ryo does not appeal to border apprehension records in order to examine whether immigration detention does, in fact, deter irregular migration. She instead modifies an earlier model of criminal deterrence that was developed by the criminologists, John Darley and Paul Robinson (2004), so that it applies to deterrence in the context of immigration detention. In doing so, she confirms what I called the 'consensus view' at the beginning of this section of the paper.²

In their earlier model of criminal deterrence, Darley and Robinson contend that three conditions must be jointly satisfied in order for criminal law to deter crime. They proceed to argue that, in the real-world, these three conditions are not normally satisfied. In their words, "our claim is not that criminal law formulation can never influence behaviour but rather that the conditions under which it can do so are not typical" (Robinson & Darley, 2004: 173). These deterrence conditions are summarised in the three bullet points, immediately below:

- *Rational choice condition.* The target population of would-be criminals must be able to conduct a relevant cost-benefit analysis in order to arrive at a utility-maximising decision about whether to commit a crime or not. This condition is grounded in the concept of deterrence itself, i.e. that a person A is deterred from performing an action ϕ just in case a third-party imposes a cost on

² It is important to distinguish between two claims concerning rational-choice accounts of migration, such as that which is presented by Ryo. First: there is the topic of which empirical conditions need to be satisfied for prospective migrants to make a rational choice about their decision to migrate—and whether those conditions are, in fact, generally satisfied in the real world. Second: even if those conditions are not satisfied at the population level, there might be particular circumstances in which individual migrants are nonetheless be able to make rational choices about their decision to migrate. My engagement with Ryo focuses on the first claim: the adequacy of her empirical generalisations about migrants' informational environments and decision-making capacities. While some migrants might make fully rational choices—and this is a point that I emphasise in the paper—this does not undercut the broader point that many prospective migrants operate under significant informational and structural constraints such as those identified by Ryo in her paper.

the commission of ϕ , such that, in light of the risk of incurring this cost, ϕ -ing is no longer the utility-maximising decision for A.

- *Legal knowledge condition.* The target population of would-be criminals must have knowledge of the criminal law that applies in their jurisdiction. This is because a would-be criminal cannot conduct a cost-benefit analysis of whether to commit a crime if they do not know which actions are crimes in their jurisdiction and what costs (i.e. criminal sanctions) are imposed in response to the commission of those crimes.
- *Perceived net cost condition.* After having conducted a relevant cost-benefit analysis, the target population of would-be criminals must conclude that the utility-maximising decision is to act in accordance with the law. This condition is again grounded in the concept of deterrence itself.

Ryo reformulates these deterrence conditions so that they apply in the context of immigration detention and irregular migration. She then presents a set of social-psychological and behavioural economics data in order to argue that none of these conditions are satisfied in the real-world. The upshot of this is that, according to her analysis, immigration detention does not deter irregular migration. Before I consider her arguments and the data that she presents, however, three important points of clarification are needed. First, Ryo focuses on whether immigration detention deters irregular migration among asylum seekers in the United States. Whether immigration detention deters other groups of irregular migrants, such as economic migrants, for instance, is therefore orthogonal to her analysis. Keeping in line with this, unless it is otherwise mentioned any further reference to ‘irregular migrants’ in this paper should be understood as referring to asylum seekers specifically. Second, all of these deterrence conditions *must* be satisfied in order for these irregular migrants to be deterred. If a single condition is not satisfied, then immigration detention will fail to deter irregular migration. In other words, these deterrence conditions are examples of what philosophers call *necessary conditions*. Third, it might seem odd that Ryo has adapted a model of criminal deterrence—given that immigration detention is *de jure* a form of civil detention. But despite its official legal construction, there is a significant overlap between immigration detention and criminal detention. As Ryo explains, “immigration detention takes place in jail or jail-like facilities, confinement conditions are often worse than criminal incarceration, and immigrant detainees themselves experience

their detention as a form of punishment. This feature of detention is precisely why some policymakers believe prospective migrants will fear—and thus will be deterred by—detention” (p. 241). This overlap makes it appropriate for Ryo to use the model of criminal deterrence developed by Darley and Robinson.

3. Immigration Detention and Deterrence

This section of the paper carefully examines the three aforementioned deterrence conditions. It is argued that although Ryo is correct when she claims that the Perceived Net Cost Condition is not satisfied, she is mistaken about the other two deterrence conditions. First: the Rational Choice Condition is satisfied in virtue of irregular migrants having the capacity to engage in a process of practical reasoning. Second: whether the Legal Knowledge Condition is satisfied will ultimately depend on the demographic makeup of the irregular migrant population. Because these three deterrence conditions are necessary conditions, the fact that the Perceived Net Cost Condition is not satisfied entails that immigration detention, at least in the context of the United States, does not in fact deter irregular migration. Although Ryo reaches the correct conclusion about the putative deterrent effects of immigration detention, this section of the paper will show that the reasoning which she uses to reach that conclusion is, at times, mistaken.

3.1. The Rational Choice Condition

The Rational Choice Condition is this: in order for immigration detention to deter irregular immigration, the target population of irregular migrants must be able to conduct a relevant cost-benefit analysis. This is because a relevant cost-benefit analysis is the mechanism by which they are able to determine whether irregular migration is the utility-maximising decision. Most irregular migrants are able to conduct cost-benefit analyses in other domains of their lives. This is evidenced by the fact that, once human beings reach a certain stage in their cognitive development, we become able to weigh various costs and benefits against one another in order to determine how we ought to act. This process is sometimes referred to as *practical reasoning*. The corollary of this is that we need some sort of *reason* that explains why migrants cannot conduct a cost-benefit analysis specifically in the context of their decision to irregularly migrate. If no such reason can be adduced, then we should assume, by default, that the Rational Choice Condition

is satisfied. Ryo would seem to accept this. She adduces three reasons that are meant to explain why the Rational Choice Condition is not satisfied. I will now consider and reject each of these reasons in turn.

The first reason that Ryo adduces relates to the risk attitudes of people who decide to irregularly migrate. Here she writes:

First, given that “migration decisions are inherently risky,” there is likely a differential selection into migration based on individuals’ risk tolerance. Research on internal and international migration provides empirical evidence of this selection process, indicating that migrants tend to be more risk-tolerant than non-migrants. These findings are important because studies on risk-taking suggest that risk-tolerant or risk-seeking individuals are more likely to underestimate actual risks involved in an activity (p. 244).

Ryo is correct to note that there are empirical studies showing that migrants tend to be more risk-tolerant and risk-seeking than non-migrants (Jaeger et al., 2010; Balaz & Williams, 2011; Clark & Lisowski, 2017). But it is unclear what these risk attitudes are meant to entail for the Rational Choice Condition.

One interpretation of the passage that is block-quoted above is that insofar as irregular migrants are risk-seeking or risk-tolerant, then they will be more likely to *undervalue* the risks associated with irregular migration—judged relative to those who are risk-averse. This is akin to saying, as a simple analogy, that people who play Russian Roulette tend to be disproportionately risk-tolerant or risk-seeking compared to people who do not play this game—and that, in virtue of their risk attitudes, the people who play Russian Roulette tend to value their life less compared to the people who do not play this game. But notice the following two problems. First, it is unclear where we should draw the appropriate baseline. After all, it is just as easy to make the counter-argument that risk-averse people *overvalue* the risks that are involved with irregular migration (or that, as an analogy, people who do not play Russian Roulette falsely believe that their life has more value than it actually does). Second, even if we could draw the appropriate baseline, the fact that risk-seeking and risk-tolerant irregular migrants “overvalue” the risks involved with irregular migration will, at best, only show that their risk attitudes have affected the *content* of their cost-benefit analysis rather than their *ability* to conduct a cost-benefit

analysis. Consider that, as a general rule, we do not maintain that people who perform risky activities—such as driving a motorbike—do so only because they are unable to weigh the costs and benefits relating to those activities. We instead say that their decision to perform those activities is a product of their risk attitudes. And this very same reasoning applies in the context of the risky decision to irregularly migrate.

The second interpretation of the passage block-quoted above is that insofar as irregular migrants are risk-seeking or risk-tolerant, they will be more likely to *not identify* the risks that are involved with irregular migration. This is akin to saying, as an analogy, that people who play Russian Roulette tend to be disproportionately risk-tolerant or risk-seeking compared to people who do not play this game—and that, in virtue of their risk attitudes, they are more likely to think that a revolver holds eight bullets rather than six. If this were true, Ryo would be correct about irregular migrants with these risk attitudes being unable to satisfy the Rational Choice Condition. But the problem is that this interpretation is not supported by the current empirical research on decision-making and risk. In all of the studies that Ryo cites, for example, the authors explain that their findings only corroborate the hypothesis that migration decisions depend on risk attitudes. To my knowledge, this is consistent with the research more generally.

The next reason that Ryo adduces is grounded in the observation that “migration is typically a household decision” (p. 245). Here she writes:

Although deterrence theory assumes individual decision-making, research shows that migration is typically a household decision. For example, migrants do not seek to maximize individual income as much as they seek to manage risks on the part of their households to deal with missing markets for capital, credit, and insurance. Recognizing that migration decisions are collective household decisions is important for at least two reasons. First, insofar as a given migrant is seeking to maximize her family’s welfare instead of only her individual welfare, the risks that such a migrant is willing to assume may be much greater than [the] risks that a migrant who is thinking only of her own welfare. Second, studies show that individual decision-making, including offender decision-making, is altered in many ways by the presence of others and by small group dynamics. For example, decisions made by groups are generally more extreme than

the decisions made by individual members (a phenomenon known as “group polarization”) (p. 245).

Again, Ryo is correct to note that there is a body of empirical research which suggests that international migration is a household rather than individual decision (see Massey et al., 1993). But the problem is that this empirical research does not show that irregular migrants do not satisfy the Rational Choice Condition. Consider, first, that even if international migration is a household decision, this will only change the reference class for the relevant cost-benefit analysis. As opposed to determining whether individual people satisfy the Rational Choice Condition in isolation from their family members, we instead need to determine whether they satisfy this deterrence condition in the context of having consulted with their family. So long as they take an active role in this consultation and in the decision to irregularly migrate, then, even if this affects the content of their cost-benefit analysis, they will still have satisfied the Rational Choice Condition. Second, Ryo writes that “individual decision-making, including offender decision-making, is altered in many ways by the presence of others and by small group dynamics.” But observe, once again, that even if this is true, it will only show that the presence of others affects the *content* of a cost-benefit analysis. Third, Ryo writes that “insofar as a given migrant is seeking to maximize her family’s welfare instead of only her individual welfare, the risks that such a migrant is willing to assume may be much greater than [the] risks that a migrant who is thinking only of her own welfare.” But the research that she cites can easily support a counter-argument: insofar as a migrant is seeking to maximise her family’s welfare instead of only her individual welfare, the risks that such a migrant is willing to assume may be much *smaller* compared to the risks which are assumed by a migrant who is seeking only to maximise their own welfare. This is because they are making a decision that could incur significant costs for those family members. Consider, for example, that if an irregular migrant who financially supports their family were killed or seriously injured *en route*, then their death would have a large financial (as well as emotional) impact on their dependants.

The final reason that Ryo adduces is grounded in the contextual factors surrounding the decision to irregularly migrate. Here she writes:

... there are many contextual factors that may complicate the decision-making process of prospective migrants. Although dangers of the journey to the U.S. may be generally well known (for instance, dehydration, heat, cold, assault, death), prospective migrants may be unable to fully appreciate these dangers *ex ante* under conditions of acute or chronic stress to which they are subject in their countries of origin. Individuals fleeing their countries due to poverty or violence are likely under substantial cognitive, physiological, or psychological stress. Research on the effects of stress and emotions on decision-making find that stress and certain types of emotions can deteriorate overall decision-making performance through a variety of mechanisms (p. 245).

In order to reject this final reason, we do not need to contest that contextual factors such as anxiety and stress *can* adversely affect decision-making in the manner suggested in the passage block-quoted above. The important point here is that even when these contextual factors are present, it is doubtful that their presence precludes the ability to conduct a relevant cost-benefit analysis. It strikes me as reasonable to infer that the experience of anxiety and stress, for example, are expressive of the fact that these irregular migrants recognise the potential costs of remaining in the sending state (i.e. they recognise the relevant push factors) and that they are able to input these potential costs into their relevant cost-benefit analysis. After all, they are experiencing anxiety and stress *because* they are aware of the costs that are associated with “poverty and violence” (to use two of Ryo’s examples). Even more to the point: Ryo’s claim that “prospective migrants may be unable to fully appreciate these dangers *ex ante* under conditions of acute or chronic stress to which they are subject in their countries of origin” is inconsistent with the claim she makes later in her paper about prospective irregular migrants being far more driven by a desire to escape the push factors in the sending state than they are dissuaded to emigrate due to the risk of being detained in immigration detention. (I discuss the latter claim in Section 3.3. of this paper). The upshot of all this is that the three reasons that Ryo has adduced do not establish that irregular migrants cannot conduct a relevant cost-benefit analysis. In light of this, we should adopt the default position and conclude that the Rational Choice Condition is satisfied.

3.2. *The Legal Knowledge Condition*

The Legal Knowledge Condition is this: in order for immigration detention to deter irregular migration, the target population of irregular migrants need to know that irregular migration carries the risk of being detained in immigration detention. This is because a person cannot be deterred by the risk of a sanction of which they are ignorant. It is important to be mindful of the fact that this target population of irregular migrants live outside the territory of the state to which they are immigrating (compare this to would-be criminals, who normally reside inside of the state in which they plan to commit a crime). And what this means, in practical terms, is that knowledge about immigration detention has to transcend state borders in order for the Legal Knowledge Condition to be satisfied. In other words: relevant information about immigration detention needs to be *transmitted from* the destination state, and then *received by* the target population of irregular migrants prior to their arrival in that state. Ryo argues that there are two reasons why knowledge about immigration detention is not successfully transmitted across state borders. If this is correct, the Legal Knowledge Condition will not be satisfied. Let us now take a look at those reasons.

The first reason relates to the *sources* of the legal knowledge. Ryo argues that information about immigration detention normally comes from two main sources—both of which fail to provide irregular migrants with the knowledge that is needed to satisfy the Legal Knowledge Condition. On the one hand, transit and receiving states play an important role in disseminating information about their immigration detention policies. Consecutive governments in the United States, for example, have collaborated with the governments of El Salvador, Guatemala, and Mexico to launch *awareness campaigns* that are designed to inform migrants of the dangers associated with irregular migration as well as the fact that they could be detained in immigration detention if they are apprehended (Ryo, 2019: 242–243). Similar awareness campaigns have been deployed by other liberal democracies (for an excellent review article on this, see Pagogna & Sakdapolrak, 2021; Cham & Trauner, 2023). Ryo writes that “no studies have assessed the impact of these campaigns” (p. 243). And she then proceeds to list several reasons why, in the absence of hard data that suggests the contrary, we ought to believe that these awareness campaigns are generally ineffective. In her words:

But high levels of governmental distrust in these countries suggest that many individuals might discount or reject the messages contained in these campaigns. Exacerbating this situation are competing counter-messages disseminated by human smugglers who may provide inaccurate or misleading legal information designed to incentivize migration. It is also possible that these types of awareness campaigns can increase rather than decrease migration, consistent with tax noncompliance studies that show that publicizing the “tax gap” makes salient the prevalence of noncompliance, provoking a higher incidence of tax cheating (p. 243).

But this does not accord with the current research. According to one recent review article, for example, there were seventeen peer-reviewed journal articles from 2010 to 2020 that focused on the nature or the effectiveness of these awareness campaigns (Pagogna & Sakdapolrak, 2021). The authors of this article explain that while the effectiveness of awareness campaigns is highly contested in the current research, there are some studies that indicate that the effectiveness of these campaigns tracks the regional, historical, and political contexts in which they are deployed. The upshot of this is that while Ryo is too quick in writing-off awareness campaigns as being ineffective, the evidence is, nevertheless, inconclusive. In consequence of this, we ought to reserve our judgement about whether these awareness campaigns are effective until further empirical research on this topic has been conducted.

This brings us to the second main source of information about immigration detention. Here Ryo explains that information about immigration detention could also come from past and current irregular migrants. But the problem with this information source, according to Ryo, is two-fold. She writes that:

First, past and current migrants themselves may not have accurate information about the law. In my study of long-term immigrant detainees, I found that many detainees lacked even the most basic knowledge about procedural and substantive aspects of U.S. immigration law, as well as crucial facts about their own legal cases. Second, insofar as detention and deportation is stigmatized in some communities abroad or in the U.S., past and current migrants are unlikely to be forthcoming with family and friends about their personal experiences with, and knowledge about, the U.S. legal system (p. 243).

But neither of these problems are sufficient to show that the Legal Knowledge Condition is not satisfied. Consider, first, the claim that irregular migrants themselves might not have accurate information about the law. This would be a problem if the Legal Knowledge Condition required knowledge of procedural and substantive aspects of immigration law. But, it does not. As Ryo explains, “legal knowledge for the purposes of this discussion refers to a basic understanding about whether certain conduct is permitted or prohibited under the criminal law, and the legal sanctions associated with violating that law” (p. 241). As I will explain later in this subsection, there are empirical studies which show that irregular migrants possess this sort of non-technical knowledge of the law. Second, I do not want to deny that deportation and detention *can* be stigmatised among migrant groups in the way that Ryo suggests. But the problem here is that Ryo does not provide sufficient evidence to support her claim; the studies that she cites, for example, only show that *deportation* (rather than *immigration detention*) is stigmatised among migrant groups in the United States (see Roberts et al., 2017; Schuster & Majidi, 2017). Furthermore, studies from outside of the United States clearly show that irregular migrants do, in fact, successfully receive information about immigration detention from other irregular migrants (Richardson, 2010; Fleay et al., 2016). Taking all of this together, we can now conclude that focusing on the potential sources of legal knowledge is not a successful way to show that the Legal Knowledge Condition is not satisfied.

This brings us to the second reason that Ryo adduces, which instead relates to the *recipients* of the legal knowledge. Here, Ryo pays close attention to the fact that there are multiple obstacles that can limit the successful transmission of knowledge about immigration detention. In her words, “challenges to knowledge transmission in this context may include language barriers, cross-country differences in legal systems and legal cultures, and the lack of access to modern communication technology such as the Internet for individuals residing in rural or impoverished areas” (p. 242). She then writes that “these transmission challenges are likely to be magnified in a rapidly evolving policy landscape shaped not only by federal statutes but also executive orders, court decisions, and state laws related to enforcement” (ibid). At least on the face of it, it is plausible that these sorts of challenges or obstacles *could* limit the successful transmission of knowledge about immigration detention. But the fact that it is *plausible* does entail that it is *true*. And, hence, the operative question here is whether the claims that Ryo makes about

these ‘transmission challenges’ are corroborated by the empirical evidence. While Ryo does not provide any evidence in support of her claims, they are, nevertheless, largely congruent with existing research.

Consider, first of all, that there are multiple international studies that show that asylum seekers normally arrive in a transit or receiving state with little knowledge of its asylum policies (for a review of this research see Richardson, 2010: 10). In regard to their pre-arrival knowledge of immigration detention specifically, the findings between studies have varied dramatically. Consider the following data, for example:

- A study conducted by Richardson (2010) analysed the pre-arrival knowledge of immigration detention among asylum seekers from Afghanistan, Iran, and Iraq who irregularly migrated to Australia. It was found that none of the participants had a detailed pre-arrival knowledge of Australia’s immigration detention policy prior to their arrival. Furthermore: some of the participants from Afghanistan did not even know, prior to arrival, of the existence of a country called Australia. The little information that these asylum seekers possessed was, moreover, shaped by factors such as their access to mass media, their education, literacy, nationality, religious background, and whether they lived in an urban or rural setting in their home country.
- A study by Wise Strategic Communications (2010) analysed the knowledge of Australian immigration policy among would-be Hazara asylum seekers in Afghanistan. On the basis of 50 interviews and 10 focus groups, the report found that “only a few Hazaras realise that migrants also face a risk of repatriation and detention by the Australian authority.”
- An earlier study conducted by Gilbert and Koser (2006) looked at pre-arrival knowledge among asylum seekers from Afghanistan, Colombia, Kosovo, and Somalia in the United Kingdom. It found that 21 of the 87 participants knew pre-arrival of the risk of being detained in immigration detention.
- A study conducted by the non-profit organisation, Farsight studied the attitudes of 199 people in southwestern Iran who declared an interest in emigrating (2015). Most of the participants explained that they knew about Australia’s immigration detention policy and that there was a

risk of being detained on arrival. Similar data was found in their later study of Iranian migration to the United Kingdom (Farsight, 2016).

- A study by Fleay et al. (2016) examined pre-arrival knowledge of Australia's immigration detention policy among Hazara asylum seekers who were living in Australia and in transit in Indonesia. It was found that while pre-arrival knowledge of Australia's immigration detention policy was limited among Hazara asylum seekers who successfully irregularly migrated to Australia, those living in transit in Indonesia had extensive pre-arrival knowledge of immigration detention in Australia.

These findings show that *some* asylum seekers know, prior to their arrival in the destination state, that irregular migration carries the risk of being detained in immigration detention. However, it is also clear that whether an asylum seeker possesses this legal knowledge depends on a number of factors—which can include their religion, education, wealth, access to communication technologies, and whether they lived in an urban or rural setting prior to emigrating. The corollary of these points is that whether the Legal Knowledge Condition is satisfied depends on the demographic makeup of the relevant irregular migrant population. If most of this population have emigrated from a poor or rural area, for example, then it can be inferred, as a robust and reliable empirical generalisation, that the Legal Knowledge Condition is not satisfied. But if, by contrast, most of this population have emigrated from urban areas or have access to modern communication technologies such as a smartphone with internet access, it can be inferred, as a robust and reliable empirical generalisation, that the Legal Knowledge Condition has been satisfied. An increasing number of the asylum seekers who are, at present, irregularly entering the United States have emigrated from the Northern Triangle states of Honduras, Guatemala and El Salvador. Further research, however, is needed in order to establish their education, wealth, access to communication technologies, and whether they lived in a rural or urban area prior to emigrating.

3.3. The Perceived Net Cost Condition

The Perceived Net Cost Condition is this: the target population of irregular migrants need to determine, on the basis of a cost-benefit analysis, that irregular migration is not the utility-maximising decision for

them. This is because, according to a standard rational choice framework, a rational agent will perform the action that maximises expected individual utility. And the corollary of this is that a sanction cannot deter a person from performing an action unless that action, in virtue of the risk of incurring the relevant sanction, ceases to be the utility-maximising decision for them. Ryo argues that the Perceived Net Cost Condition is not satisfied. This argument is substantiated by the first-hand testimony of asylum seekers, who, when interviewed and asked about their decision to irregularly migrate, consistently explain that risk of being detained in immigration detention is outweighed by the risk of harm that is present inside of the sending state (due to the relevant push factors) (Fleay et al., 2016; Hiskey et al., 2018; Morrissey, 2018; Ryo, 2019: 247). As Ryo explains, these asylum seekers are much more driven by their desire to “leave the devil they know” than they are dissuaded to irregularly migrate because of the possible risks that may await them—which includes, of course, the risk of being detained in immigration detention.³ This is largely consistent with the first-hand testimony of asylum seekers documented outside of the United States (see e.g., Edwards, 2001; Richardson, 2010; Fleay et al., 2016). In light of this testimony, it would appear that Ryo is correct about the fact that the Perceived Net Cost Hurdle is not satisfied. Because the deterrence conditions are necessary conditions, it follows that immigration detention (at least in the United States) does not deter irregular migration among asylum seekers. The corollary of this, though, is that there is a higher chance that immigration detention will deter irregular migration when these strong push factors are not present. This is because, in the absence of these push factors, it is likely that irregular migration will not be the utility-maximising decision in virtue of the dangers of irregular migration and the risk of being detained.

4. The Fiscal and Human Costs of Deterrence

The preceding section of this paper argued that immigration detention does not deter irregular migration among asylum seekers in the United States. This is because all three of the deterrence conditions must be satisfied in order for immigration detention to produce these deterrent effects, and yet the Perceived Net Cost Condition is not satisfied due to the strength of the push factors that are present in the sending

³ See Ryo, 2019: 247. The quotation is originally found in the work of Hiskey et al., 2018: 430.

state. But let us imagine, simply for the sake of argument, that we are mistaken about all of this. Imagine that these asylum seekers are able to conduct a relevant cost-benefit analysis, know prior to their arrival that irregular migration carries the risk of being detained in immigration detention, and also determine, through a relevant cost-benefit analysis, that irregularly migrating is not the utility-maximising decision in virtue of the risk of being detained in immigration detention. If this were the case, then immigration detention would, in fact, deter irregular migration. And this hypothetical state of affairs can motivate us to consider whether deterring irregular migration among asylum seekers is a *desirable* policy objective.

Towards the end of her paper, Ryo touches on several reasons why deterrence is an undesirable policy objective. The first reason is that immigration detention is an incredibly expensive form of border enforcement. Here she explains that “in fiscal year 2018, the federal government is projected to spend over \$3 billion, or \$8.43 million per day, on immigration detention” (p. 248). According to more recent figures that have been released by the Department of Homeland Security (2024): in the fiscal year 2024, the federal government is projected to spend an average of \$157.20 per day for every adult detained in immigration detention. By comparison, estimates from the Department of Homeland Security indicate that the cost of administering a so-called *alternative to detention programme* is only \$8 per person, per day.⁴ Similar figures can be adduced for most other contemporary liberal democratic states (Edwards, 2001: 85; Sampson, 2015: 11). Although Ryo does not make this explicit, the upshot of these figures is that immigration detention is a *fiscally undesirable* way to deter irregular migration. Tax revenue would, instead, be better spent producing these deterrent effects through the far cheaper alternative to detention programmes (assuming they can produce these deterrent effects, which is something that would need to be determined within empirically-minded, data-driven research on this topic in the future).

The second reason that Ryo provides is that deterring irregular migration among asylum seekers has “negative social and political consequences ... not only to detainees themselves, but to U.S. citizens and American society as a whole” (ibid). She elaborates on this somewhat in a corresponding footnote, in which she simply writes that using immigration detention to deter irregular migration among asylum

⁴ Immigration and Customs Enforcement. *Alternatives to Detention Statistics* (2023). Accessible online at the following link: <https://www.ice.gov/features/atd#:~:text=The%20daily%20cost%20per%20ATD,is%20around%20%24150%20per%20day>

seekers facilitates “intergenerational and international diffusion of distrust about the U.S. legal system and the rule of law” (ibid). But I will deliberately leave aside any further mention of this second reason due to the lack of additional information about what Ryo means. In the remainder of this paper, I would like to instead focus on the fact that the deterrence of irregular migration is a *morally undesirable* policy objective. There are two ways in which this is the case. On the one hand: because of the strength of the relevant push factors, the costs of being detained in immigration detention will need to be significantly increased if they are to have any chance of deterring asylum seekers from irregularly migrating. But in virtue of increasing the human costs of immigration detention in this way, the very practice of detaining asylum seekers will become unjust. As Ryo explains, “one can imagine extreme enforcement strategies designed to inflict maximum human suffering that will most certainly ensure behavioural changes, but such strategies are bound to violate fundamental moral principles, not to mention legal standards” (ibid).

But this is only half of the story. On the other hand, it is important to be mindful of the fact that these deterrent effects will *indirectly harm* the asylum seekers who have not themselves been detained. Here it is helpful to reflect on what will likely happen to these asylum seekers if they are deterred from irregularly migrating. Observe, for example, that these deterrent effects will not magically improve the living conditions in the sending state. The push factors are still in place. And an upshot of this is that if these asylum seekers remain inside of the sending state because they have been deterred from irregularly migrating, then they will, in effect, be forced to remain inside of a geographical location in which they face a significant and imminent risk of harm. This follows from the fact that they are *forced migrants*. Here is another way to think about it: even if the state that produced these deterrent effects did not cause these push factors to emerge or to remain present over time, it will, nevertheless, indirectly harm these asylum seekers by limiting the means through which they are able to emigrate—and, thereby, reach a location in which they are safe from the risk of harm that caused them to become forced migrants in the first place. This highlights that the decision to administer immigration detention intersects with the moral (and legal) duties that transit and receiving states hold towards asylum seekers. And the practical import of this is that, in addition to the aforementioned direct human costs that are required to produce these deterrent effects, deterrence is a morally undesirable policy objective insofar as it violates these duties. To summarise all of these thoughts with a quote from Ryo, “in short, there are practical, legal, and moral

limits to increasing the costs of migration” (ibid). And these different costs should motivate us to second guess whether deterring asylum seekers from irregularly migrating is in fact a desirable policy outcome.

5. Conclusion

Does immigration detention deter irregular migration among asylum seekers in the United States? This paper answered this question by responding to an earlier contribution to this journal that was written by Emily Ryo. Following a brief introduction, Section Two provided an overview of Ryo’s analysis. Here it was explained that Ryo makes two key claims. First, there are three conditions that must be satisfied in order for immigration detention to produce these deterrent effects. Second, none of these conditions are satisfied in the real-world. Section Three explained that although Ryo is correct about the Perceived Net Cost Condition not being satisfied, she is mistaken about the other conditions: the Rational Choice Condition is satisfied in virtue of asylum seekers having the capacity to engage in a process of practical reasoning, and whether the Legal Knowledge Condition is satisfied depends on the demographic make-up of the relevant asylum seeker population. The upshot of this section is that although Ryo reaches the right conclusion about immigration detention failing to deter irregular migration among asylum seekers in the United States, the reasoning that she uses to reach that conclusion is, at times, mistaken. Section Three touched on the normative question of whether deterrence is a good or desirable policy objective. By highlighting the places where Ryo’s analysis succeeds and goes awry, this paper marks an important contribution to the emerging research on immigration detention, deterrence, and irregular migration.

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Chapter Five

Immigration Detention: The Case for Contingent Abolitionism

Abstract: This paper contributes to the emerging literature on the moral status of immigration detention. It begins by explaining that one of the wrong-making features of the practice of immigration detention is that it is a *prima facie* infringement of the right to not be detained. It proceeds to ask whether, in light of this wrong-making feature, the practice of immigration detention can be justified. First: this paper considers and rejects a series of arguments that attempt to morally justify the practice of immigration detention. Second: it develops a novel argument relating to risk management. The essence of this argument is that it is all-things-considered morally permissible to detain a migrant in immigration detention if they pose a serious risk of harm that cannot otherwise be feasibly mitigated. This paper concludes by explaining that the conditions under which this justification can be given are not normally satisfied in the actual world. And this, or so it is argued, ought to motivate us to become ‘contingent abolitionists’ in regard to the practice of immigration detention.

Key words: abolition; border enforcement; closed borders; deterrence; immigration detention; open borders

1. Introduction

It is no secret that immigration detention is harmful. When we look around the liberal democratic world and consider the many immigration detention policies that have been administered since the turn of the century, we consistently find the immigrant detainees experiencing harms that would make even the most strident closed border theorist recoil in horror. Common among these harms are, for example, the long-term mental health disorders that are both caused and exacerbated by time spent in immigration

detention, the rampant physical and sexual assault of both children and adults that occurs inside of the immigration detention centres, the widespread self-harming and suicides, the squalid living conditions, the forced hysterectomies, and the children that are often separated from their parents at the border and detained among adults they do not know (see Silverman & Nethery, 2015; Patler & Golash-Boza, 2017).

This list of harms could be significantly expanded. But as it now stands, this list is sufficient to illustrate that the current manner in which liberal democratic states administer immigration detention is deeply morally problematic. For even if we assume, in line with our current international law and much of the closed borders literature, that legitimate states hold the right to unilaterally determine who enters and settles inside of their territory, given the severity of these harms and the frequency at which they occur, it is evident that this right cannot be permissibly enforced by way of immigration detention in its current form. The human cost is simply too great. But this should not prevent us from taking a step back and analysing the moral status of the *practice* of immigration detention.¹ We can still reasonably ask, for example, what an overall just institution of immigration detention would look like and whether there would be a place for it alongside the other forms of border control that are administered throughout the liberal democratic world. This is a very important question, given the frequency at which immigration detention is administered. And, as I will explain throughout this paper, this question cannot be answered by appealing to established views in the open versus closed borders debate or the ethics of incarceration.

¹ What do I mean by this distinction between the practice of immigration detention and our real-life institutions of immigration detention? Here an example might help. It could be plausibly argued that the institution of criminal incarceration in the United States is overall unjust in virtue of the disproportionate harms that it imposes onto the prison inmates and the fact that minority groups are disproportionately incarcerated for racially-motivated reasons. But this does not entail that the practice of criminally incarcerating certain people is, in itself, unjust—i.e., so long as this practice satisfies a relevant sort of retributivist principle or utilitarian calculus, for example. If this is correct, we would be *contingent abolitionists* about criminal incarceration: we would maintain that while there is a possible world in which criminal incarceration is overall just, that possible world is not the actual world (see Boonin, 2008). In this paper, I am making an analogous point in regard to the practice of immigration detention. In doing so, I will show that the considerations that justify immigration detention do not, ipso facto, justify other forms of detention.

In terms of its structure, this paper will proceed in four main steps. I will begin, in the following section of the paper, by providing some important context and background information. After defining immigration detention and reviewing the literature in this field, I will explain that one of the key wrong-making features of the practice of immigration detention is that it *prima facie* infringes the right to not be detained. This motivates me to ask whether, in light of this wrong-making feature, the practice of immigration detention can be morally justified given a commitment to liberal democratic principles. Section Three considers and rejects a set of popular arguments that try to morally justify the practice of immigration detention. Section Four develops an argument of my own. The essence of this argument is that it is all-things-considered morally permissible to detain a migrant in immigration detention if they pose a serious risk of harm that cannot otherwise be feasibly mitigated. I conclude by explaining that while risk management can justify highly idealised practices of immigration detention, it fails to justify immigration detention in the actual-world because of the risk profiles of most migrants. And this, or so I argue, ought to motivate us to be ‘contingent abolitionists’ about the practice of immigration detention.

2. Understanding immigration detention

This section of the paper provides important context and background information. The first subsection explains what immigration detention is. The following two subsections review the literature and argue that the practice of immigration detention *prima facie* infringes the right to not be detained, respectively.

2.1. What is immigration detention?

Immigration detention is not defined in international law. This has led to a plurality of definitions having been advanced in the current literature (see Silverman & Massa, 2012; Turnbull, 2017). Although these definitions often emphasise different features of immigration detention, and, as a result of this, tend to diverge from one another in subtle ways, they tend to converge on the understanding that immigration detention is the state sanctioned practice of detaining people in order to achieve immigration-orientated

goals—such as facilitating their identification and removal, for example.² While anyone could in theory be detained in immigration detention, in practice the state tends to administer immigration detention in regard to migrants who are thought to be in breach of immigration law (Legomsky 1999: 536; Silverman & Massa, 2012: 679). In most real-life cases, these are either asylum seekers who are apprehended for suspected irregular entry (and who are detained while the state confirms their identity and assesses their application for asylum) or voluntary migrants who are apprehended for visa overstaying or on suspicion that they committed an offence that would render their visa invalid (and who are detained as an adjunct to removal or trial) (Silverman & Nethery, 2015: 24–26). Most of these migrants are detained inside of a purpose-built immigration detention centre. But, in some cases, immigration detention occurs inside of a so-called *alternative place of detention*, such as a jail or a hotel. Regardless of where immigration detention occurs, though, it is *de jure* a completely administrative rather than criminal form of detention.

2.2. Literature review

This paper contributes to the growing body of philosophical research in the field of immigration ethics. While early contributions in this field primarily focused on the conditions under which a legitimate state is morally permitted or obligated to enforce its territorial borders (see Wilcox, 2009; Fine, 2018), more recent work has started to examine the normative issues that relate to border control (see Lister, 2019). A variety of topics have been addressed in this literature. But what is of particular importance for this paper, given that it defends a form of abolitionism with regard to the practice of immigration detention, is the distinction between *reformist* and *abolitionist* approaches to borders and border control.³

² In this paper, I use the term *migrant* as a shorthand for individuals who are subject to immigration detention—this includes those who are suspected of breaching immigration law, regardless of whether their legal status has been formally adjudicated. I acknowledge that, in some cases, immigration detention has been applied to citizens and permanent residents. Whether such cases are deliberate policy or administrative overreach is an important question, however it falls outside the scope of this paper.

³ The distinction between reformist and abolitionist approaches to border control that I employ in this section draws heavily on Lukas Schmid's (2022) helpful typology. Schmid introduces this framework to map two dominant strands in contemporary debates over border ethics. My use of the terminology follows his in broad outline, though my subsequent discussion extends and adapts the distinction to situate immigration detention within this wider debate.

Reformist approaches generally argue that while the institutions of border control that are currently used by liberal democratic states are unjust in virtue of violating some sort of normative standard like respect for human rights, such institutions could, at least in theory, be brought into alignment with the standards of justice via reform (Mendoza, 2017; Cohen, 2020; Schmid, 2022). In contrast, abolitionist approaches maintain that the harms associated with border control are somehow inherent to its structure (Jones, 2017; Sager, 2020). Hence while reformists seek to repair border institutions, abolitionists call for their dismantling.

This paper departs from this extant research on border control in two crucially important ways. First: whereas much of that research focuses on the moral status of border control in general, this paper focuses on the moral status of the practice of immigration detention. By adopting this narrow focus, this paper conducts a fine-grained analysis that sidesteps, for the sake of argument, more general questions regarding the legitimacy of territorial borders and the process through which those borders are enforced. But with that being said, the argument developed in this paper has important implications for this more general research on border control: if I am correct in arguing that the practice of immigration detention is morally justified under certain conditions, for instance, then full-blown abolitionist critiques of border control appear to be overstated. Second: the paper offers a position that strikes a middle ground between these reformist and abolitionist views. Like abolitionist critics, I have already acknowledged that many of the immigration detention policies currently administered by liberal democratic states are unjust due to the disproportionate harms imposed onto the immigrant detainees. But by focusing on the practice of immigration detention, this paper challenges the idea that there is anything *inherently unjust* about the practice of detaining migrants. For this reason, and similarly to many reformist positions, I acknowledge that immigration detention can in principle be morally justified—even if, in practice, it tends not to be.⁴

⁴ As an anonymous referee notes: the contingent abolitionism defended in this paper bears important similarities to reformist approaches insofar as it acknowledges that immigration detention could, in principle, be morally justified under the right conditions. In this respect both views reject the claim—common among traditional abolitionists—that immigration detention is inherently unjust. However, the contingent abolitionism that I defend in this paper departs from those reformist views in terms of (i) what it identifies as the conditions that must be satisfied for immigration detention to be just, and (ii) the policy and legislative implications that it entails. In regard to the first point: risk management tends not to play the foremost role in

By adopting this approach, this paper also directly engages with, and differs from, the current philosophical literature on the moral status of immigration detention. In one of the first major analyses of the moral status of immigration detention, for example, Stephanie Silverman (2014) primarily focused on whether the risk of absconding can morally justify the detention of irregular migrants. This paper is consistent with her paper insofar as it focuses on the risk of absconding. However, it contextualises that risk in a broader risk management framework that focuses on threats to public health, national security, and public order vis-à-vis local crime rates. Like Mathew Lister (2019: 3), I argue that “the detention of migrants who pose a clear and immediate danger to the population can be justified in straightforward ways.” But I expand on this sentiment by distinguishing between the types of dangers that can be posed by such migrants, engaging with the relevant empirical literature, and noting conceptual difficulties in this area—such as whether a risk assessment should utilise individualised data or statistical generalisations. More importantly, and in contrast to Lister, I situate my risk management argument as the endpoint of a broader evaluative discussion that considers and rejects several other potential moral justifications for immigration detention. Bradley Hillier-Smith (2020, 2025) discusses whether immigration detention is an instance of doing harm or allowing harm to the immigrant detainees. However, his analysis focuses on real-life immigration detention policies and not the practice of immigration detention. David Miller (2016: 171a) briefly considers whether sea rescue operations incentivise irregular maritime migration, and whether offshore immigration detention—such as Australia’s policy—might counteract this effect. But unlike my treatment of deterrence-based arguments, he does not engage with the empirical data or assess whether deterrence is desirable. Finally, Adam Hosein (2019: 78–103) evaluates the moral status of immigration detention through the lenses of proportionality and necessity. These concepts underpin my own analysis, and in this respect his account

reformist arguments. In regard to the second point: while reformists typically maintain that the harms of immigration detention could be ameliorated through institutional reform, the contingent abolitionism that I defend in this paper maintains that the conditions needed to justify immigration detention cannot be satisfied through policy or institutional reform given that the state cannot control the risk profiles of prospective migrants. Thus while I share the reformists’ openness to the possibility of just immigration detention, my arguments ultimately support abolition, rather than reform, in practice.

supports the arguments developed in this paper. At the same time, my discussion of deterrence and rights forfeiture substantiates his arguments—particularly as it relates to proportionality in the context of lesser-evil and liability-based justifications for detention.

2.3. *Why should we care about immigration detention?*

There are numerous ways that immigration detention can, and, in many real-life cases, often does, harm the immigrant detainees. As a provisional distinction we can say that some of these harms, such as those that were listed at the start of this paper, are contingent properties that attach to many of the institutions of immigration detention that are currently administered by liberal democratic states.⁵ What I mean by this is that there is no in principle reason why immigration detention *must* involve family separation or high rates of physical and sexual assault, for example (even if there are socio-historical reasons that can explain why these harms tend to emerge in the context of immigration detention, see e.g., Shelby, 2016). And an important corollary of this is that although the risk of incurring these sorts of harms will impact the moral status of those existing institutions of immigration detention, those harms could, nevertheless, be ameliorated to some degree by appropriate legislative or policy initiatives. In other words: the sorts of harms listed at the beginning of this paper might be taken to call solely for the reform, as opposed to the abolition, of immigration detention. But as the title of this paper suggests, my goal here is to defend a form of abolitionism about the practice of immigration detention. And in order to achieve this goal, it is necessary to identify a harm that is somehow *inherent* to the practice of immigration detention—and that, because of this, cannot be fully ameliorated by policy or legislative reform. There might be multiple

⁵ By describing these harms as “contingent properties” of immigration detention, I do not mean to dismiss the structural nature of violence in border regimes. As people like Schmid (2022) and Valdez (2022) argue, such harms often reflect deeper systems of racialised exclusion and state coercion. My claim is simply that there is no *a priori* reason why immigration detention must involve specific harms like family separation or sexual abuse—even if these harms are widespread and structurally embedded. This distinction illustrates that, beyond these contingent harms, the practice of immigration detention is morally troubling due to the non-trivial constraints it imposes on freedom of movement. This kind of conceptual analysis is crucial to the contingent abolitionist strategy I pursue here, and parallels the approach taken by philosophical prison abolitionists such as Boonin (2008).

harms that fit this description. But in what follows, I will focus on how the very practice of immigration detention harms the immigrant detainees in virtue of, *prima facie*, infringing the right to not be detained.

Here is what I mean by this. When the state detains somebody in immigration detention, it uses prison-like architecture (such as high fences that are topped with razor wire, locked doors, and extensive surveillance) and other forms of coercion (such as informal threats of retaliation, and laws that prohibit or criminalise absconding) in order to ensure that they cannot freely leave the centre in which they are being detained. An immigrant detainee generally cannot, for example, simply pack up their belongings, walk out the front door of an immigration detention centre, and, in so doing, end their detention. They are, instead, forced to remain inside of the immigration detention centre—unable to freely leave it—for a length of time that is determined by the state that is administering their detention. And in cases where a migrant does manage to escape from the centre in which they were being detained, the state has the discretionary power to call on border enforcement agencies, as well as federal or local law enforcement agencies, to capture and return them to the immigration detention centre from which they have escaped. The upshot of this is that when a migrant is detained in immigration detention, the state coercively limits their freedom of movement to the confines of the immigration detention centre. And this, it would seem, is a function of what it *means* for them to be detained. After all: if these migrants *could* freely leave the immigration detention centre, they would not in fact *be* detained. They would, instead, be held under a non-custodial measure. In other words: these non-trivial constraints on their freedom of movement are inherent to the practice of immigration detention—and hence, for this very reason, cannot be eliminated without thereby replacing immigration detention with an altogether different form of border control.

I mention this because there is a straightforward sense in which these non-trivial constraints on their freedom of movement are harmful. A *harm* is ordinarily understood by philosophers in terms of a setback to somebody's interests (Huemer, 2010). And what is important here is that when we read the testimony of the immigrant detainees, it becomes clear that being unable to freely exit the immigration detention centre sets back their interests: they consistently explain that they would prefer to be released into the community while the state conducts their asylum, court, or removal proceeding—and yet, due to the aforementioned prison-like architecture and other forms of coercion, the state actively prevents the immigrant detainees from furthering this interest by keeping them locked inside of an immigration

detention centre (for examples of this testimony, see e.g., Coffey et al., 2010; Australian Human Rights Commission, 2014; Turnbull, 2017; Bosworth, 2019). To the extent that there is a moral reason to not harm another person, the state will need to somehow morally justify its decision to detain these migrants in immigration detention.⁶ But on a more fundamental level, the practice of immigration detention can be understood as not just harming the immigrant detainees simpliciter—but as, rather, harming them in virtue of *prima facie* infringing a claim-right that they hold against the state. Following Michael Huemer (2010: 431–432), I will say that an action (or a policy, a law, an institution, and so on) counts as a *prima facie rights infringement* just in case, under normal circumstances, it infringes somebody’s claim-right.

Consider the act of killing another person, for example. It is uncontroversial that we all hold a right to life. At a minimum, this right entails the correlative duty that other people do not kill us. There can be extenuating circumstances where killing another person does not infringe their right to life. This will occur when, for example, that right is forfeited or waived (e.g. in cases of permissible self-defence and euthanasia, respectively). But under normal circumstances, which is to say cases that do not involve rights forfeiture or waiver, the act of killing another person will infringe their right to life. So it is with immigration detention. We each hold the right against all other people, including the state, that they do not detain us. This is evidenced by our international law (Edwards, 2001), and also by the fact that we need a very strong *reason* to detain somebody—and that, in cases where somebody is falsely detained, they are owed some kind of *compensation*. On a more basic level, just imagine a case where the state detained a person without a trial and without having any evidence that they broke the law or that they posed a serious risk of harm. We would certainly describe the state as infringing that person’s right to not be detained. And the immediate corollary of this is that immigration detention is a *prima facie* rights infringement: under normal circumstances, by which it is meant cases that do not involve forfeiture or waiver, being detained inside of an immigration detention centre infringes this right to not be detained.

⁶ As one anonymous referee correctly notes, this harm is not limited to the fact that most immigrant detainees prefer release. More fundamentally, immigration detention constitutes a serious infringement of personal autonomy in virtue of restricting a person’s capacity to choose from a meaningful range of life options. I have bracketed detailed discussion of this autonomy-based harm due to spatial constraints, but its presence is fully compatible with the rights-based argument developed below.

This does not entail that it is all-things-considered morally impermissible for the state to detain a migrant in immigration detention. Rights can be outweighed, after all. And given the balance of reasons, it might turn out, in certain cases, that it is all-things-considered morally permissible for the state to infringe the right of a migrant to not be detained (i.e., just as we might say that, on the balance of reasons, the state is morally permitted to detain someone who poses a serious health risk in mandatory quarantine even though this will infringe their right to not be detained). But the gravamen of a prima facie rights infringement is that it shifts the burden of moral justification onto those who are responsible for the relevant action. Michael Huemer explains:

The claim that an action is a prima facie rights [infringement], then, is not a very strong claim. It does not entail that the action is wrong all things considered ... But nor is the claim entirely without force: to accept that an action is a prima facie rights [infringement] has the effect of shifting a normative presumption. It becomes the burden of those who advocate the act in question to identify the special exculpatory or justificatory circumstances that make what tends to be a wrongful rights [infringement] either not a rights [infringement] in this case, or a justified rights [infringement]. Those who oppose the act in question need only rebut such efforts (Huemer, 2010: 431).

The implications for immigration detention are clear. Immigration detention is a form of detention. And I have taken this to mean that it constitutes a prima facie rights infringement. The upshot of this is that anyone who wants to defend immigration detention as a morally permissible form of border control are saddled with a burden of moral justification: they must show either (i) that the immigrant detainees have waived or forfeited their right to not be detained, or (ii) that while the immigrant detainees did not waive or forfeit that right, it was, nonetheless, outweighed by a sufficiently weighty countervailing right or set of countervailing normative reasons. If they are unable to successfully discharge this burden of moral justification, then it will be all-things-considered morally impermissible for the state to detain a migrant in immigration detention. This would be a devastating conclusion for anyone who defends immigration detention, given the frequency at which it is currently administered. The following two sections of this

paper will consider a set of arguments that are meant to discharge this burden of moral justification. I will begin by rejecting a set of popular arguments—and then develop a positive argument of my own.

3. Responding to existing arguments

This section of the paper considers and rejects four arguments that attempt to morally justify the practice of immigration detention. Some of these arguments are unsound, while others collapse into a more basic argument relating to risk management. I will develop that argument in the next section of this paper.

3.1. The open versus closed borders debate

Let us begin by looking towards the open versus closed borders debate. Consider, first, the way in which the defender of immigration detention might try to leverage the closed borders literature. At the risk of oversimplifying a diverse range of views, a closed border theorist maintains that a legitimate state holds the right to unilaterally determine who is able to enter and settle inside of its territory. This is ordinarily referred to as the *right to exclude*. It is admittedly tempting to think that if a legitimate state does in fact hold the right to exclude, there is very little that remains to be said about the moral status of the practice of immigration detention (see Arnaiz, 2024). After all, rightsholders are morally permitted to enforce their rights (see generally Thomson, 1990: 105–122). And the defender of immigration detention could correctly point out that it is in virtue of administering a system of border control that a legitimate state can determine who enters and settles inside its territory—and, in so doing, is able to enforce its right to exclude. Now, it goes without saying that there are some people who deny that a legitimate state holds the right to exclude. But one does not need to be an open border theorist in order to reject this argument. The reason for this is that even if a legitimate state does in fact hold the right to exclude, it does not follow that this right can be permissibly enforced by way of administering immigration detention. Let me explain.

It is incontrovertible that rights are enforceable. But the problem with this first line of argument is that although the fact that rights are enforceable entails that a legitimate state is morally permitted to administer *some* form of border control, there are obvious moral limits on the forms that border control can take. These moral limits are well-articulated in the philosophical literature (see e.g., Mendoza, 2015;

Sager, 2017; Hosein, 2019; Lenard, 2023). However, it is worth quickly spelling out what they mean for immigration detention specifically. Here is one way to think about it. Nobody writing within the current philosophical literature seriously believes that a legitimate state is morally permitted to enforce its right to exclude by shooting a migrant dead upon arrival, for example.⁷ This is because the costs of doing so (i.e., killing someone) are disproportionate to the benefits which are thereby accrued from doing so (i.e., enforcing the right to exclude). And what this demonstrates is that arguing in favour of closed borders is only half of the job done: the defender of immigration detention still needs to show that immigration detention is a morally permissible way for the state to enforce its right to exclude. I am not suggesting that that this cannot be shown. The point is, instead, that in order to show that it is the case, the defender of immigration detention must engage in a task that is functionally equivalent to the task that is being completed in this paper: weighing countervailing reasons and rights against one another. By appealing to the closed borders literature, then, the defender of immigration detention only manages to push their burden of moral justification back a step—rather than successfully discharge it altogether.

But what about the open borders literature? Are the arguments that have been developed on this side of the open versus closed borders debate relevant to the moral status of the practice of immigration detention? At the risk of once again oversimplifying a diverse range of views, an open border theorist is someone who maintains there is a presumptive case in favour of unrestricted international migration. This presumptive case has been spelled out in different ways. But multiple open border theorists write of there being a human right to unrestricted international migration (Huemer, 2010; Carens, 2013: 236–254; Oberman, 2016). This right is normally understood as the universal negative moral claim-right that is held against all states to not prevent those who wish to enter and settle inside of their territory from being able to freely do so (see Miller, 2016b). It has already been explained that immigration detention, similarly to any other form of border control, is designed to inhibit the ability of migrants to freely cross state borders. And in light of this, it is tempting to think that a commitment to open borders supports a

⁷ Although some people outside of the philosophical literature unfortunately contest this, such as Donald Trump who suggested shooting migrants in the leg in order to slow them down (see, <https://www.bbc.com/news/world-us-canada-49901878>).

backdoor abolitionist argument against immigration detention: after all, by inhibiting cross-border movement, immigration detention seems to infringe the human right to unrestricted international migration. But the move from open borders to abolitionism about immigration detention is far too hasty.

It is uncontroversial that even our strongest human rights can be suspended and outweighed by sufficiently weighty countervailing considerations. As James Griffin (2008: 76) puts the matter, “human rights are resistant to trade-offs, but not completely so.” This has not been lost on open border theorists. There is, for instance, widespread agreement among open border theorists that even under a system of fully open borders, the state would be *at least* morally permitted to exclude any migrant who poses a significant risk to public health or national security (see e.g., Seglow, 2005; Huemer, 2010; Carens, 2013; Fine, 2016: 126; Kukathas, 2016: 252). This is because the normative reasons that are generated by that risk of harm outweigh the countervailing moral reasons that count in favour of allowing the risk-imposing migrants to exercise their human right to unrestricted international migration. In cases that involve a risk-imposing migrant, it is, therefore, incumbent on the state to consider which forms of border control can be permissibly utilised to facilitate the exclusion of those migrants. Immigration detention is, of course, one form of border control that could be administered in this capacity. And this highlights that a system of open borders does not, in itself, entail abolitionism in regard to immigration detention.⁸ If anything, a commitment to open borders seems to gesture towards a more fundamental argument to do with risk management—which I will develop later in this paper.

3.2. Deterrence

The discussion so far has shown that questions regarding the moral status of the practice of immigration detention are, in an important sense, independent of the more general open versus closed borders debate. This is part and parcel of the fact that open border theorists and closed border theorists are, in different

⁸ Notice that this is consistent with the fact that immigration detention would likely be used more sparingly under a system of open borders. My point is simply that many open borders theorists still acknowledge the permissibility of some forms of border control in certain (exceptional) cases. The argument developed here asks whether detention can be morally justified even when such baseline permission for border control is granted.

ways, both committed to the use of border control in at least some cases. So, in light of this observation, let us now take a step back and repeat the question with which I opened: what, if anything, can morally justify the practice of immigration detention? One answer to this question that is frequently championed in real-life discussions of border control is that the practice of immigration detention is morally justified on the grounds that it is an effective deterrent against irregular migration (see Pickering & Weber, 2014; Hartley, Anderson & Pedersen, 2019; Ryo, 2019). The content of these arguments can change over time and jurisdiction. But these arguments are normally grounded in the idea that transit and receiving states have a strong humanitarian-based moral reason to deter irregular migration into their territory (because of the high likelihood that irregular migrants will be exploited, die, or suffer serious injury prior to their arrival) and that this moral reason outweighs the right to not be detained. Observe that deterrence-based arguments accept that the practice of immigration detention infringes the right to not be detained. The purpose of these arguments is, instead, to show that this rights infringement is all-things-considered morally permissible in virtue of the net-benefits that are accrued through these putative deterrent effects.

Let us begin by considering the empirical question of whether immigration detention effectively deters irregular migration. It may come as a surprise, but we actually know very little about the decision-making process undertaken by irregular migrants prior to arriving in a transit or a receiving state (Koser & McAuliffe, 2013; Ryo, 2019). And this, alone, is enough to make us raise an eyebrow at a deterrence-based argument. But the more pressing concern for the defender of immigration detention relates to the current *balance of evidence* pertaining to this empirical question about deterrent effects. The first point that is worth noting here is that, in the small body of social scientific research and accompanying ‘grey literature’ that has been produced on this topic, it is generally acknowledged that there is no significant evidence to support the claim that immigration detention effectively deters irregular migration (see e.g., Edwards, 2001; Fleay et al., 2016: 70; Gammeltoft-Hansen & Tan, 2017; Ryo, 2019). As the migration theorists, Cetta Mainwaring and Stephanie Silverman (2014: 30), have aptly explained, “although states commonly justify detention on the grounds that it acts as a deterrent and is necessary due to security concerns, there is little evidence that either of these goals are achieved through detention.” To be clear, this absence of evidence does not entail that immigration detention *does not* deter irregular migration. That is a separate, and far stronger, empirical claim—which would need to be corroborated by empirical

evidence of its own. But what is worrying for the defender of immigration detention is that it is hard to see how they can adduce the evidence that is needed to corroborate these deterrence-based arguments.

A large part of the problem here is that there is only very limited data about the scale and scope of irregular migration on the domestic and the international level. There is, for example, no authoritative source on the global population of irregular migrants—and, to make matters worse, most contemporary liberal democracies do not keep comprehensive and up-to-date records of their own irregular migration stocks and flows (Koser, 2010). Among the states that do keep these records, the data contained therein are not normally made available to the general public. Here is why this is important. At least in principle, immigration detention could be said to deter irregular migration insofar as there is a consistent negative relationship between the enactment of immigration detention policies and the rate of irregular migration into the states enacting those policies. This is because the corresponding decline in irregular migration into those states could be plausibly explained by the putative deterrent effects of immigration detention. But the issue for the defender of immigration detention is that this statistical relationship cannot, at the moment, be *directly evaluated* given the lack of relevant data on irregular migration. In response to this, it could be argued that this statistical relationship could still be *indirectly evaluated* with a reliable proxy measure (see generally Jandl, 2011; Kraler & Reichel, 2011). Granted. But the issue here is that the data that are obtained with these proxies cannot straightforwardly corroborate a deterrence-based argument.

Take irregular border apprehensions, as a case-in-point. Some of the most robust data on this front comes from the recent study by Bazzi et al. (2021), which analysed the deterrent effects of migrant sanctions implemented under the United States Border Patrol's Consequence Delivery System between 2008 and 2012. Using administrative records on border apprehensions from nearly one million Mexican nationals, they exploited plausibly random variation in the rollout of those sanctions in order to estimate their deterrent effects. The study found that the sanctions reduced the 18-month reapprehension rate for male migrants by 4.6 to 6.1 percentage points, off of a baseline recidivism rate of 24.2 percent, implying that sanctions account for 28 to 44 percent of the observed decline in recidivist apprehensions. This data is indirect evidence that border control deters irregular migrants from certain demographics. However, it is imperative to exercise caution when trying to extrapolate such data in order to establish the deterrent effects of immigration detention. The reasons for this are two-fold. First: this data does not disaggregate

to specific forms of border control, meaning that any observed deterrent effects cannot be attributed to immigration detention specifically. Second: even if the data was disaggregated in this way, it would be hard to attribute these deterrent effects to the fact that the practice of immigration detention *prima facie* infringes the right to not be detained—and not the myriad other harms that can accompany immigration detention. To be absolutely clear, I do not mean to suggest that these challenges cannot be overcome in future research. But by that same token, until these challenges are in fact overcome, and until detention-specific evidence is adduced, we ought to be apprehensive about endorsing deterrence-based arguments.

At this point, the defender of immigration detention could rightly object that none of this shows that deterrence cannot *in principle* morally justify the practice of immigration detention. The problems that I have raised, at best, only show that these arguments are not corroborated by the empirical evidence and that it is difficult to see how this could change. This is fair—although it is not a particularly glowing commendation of a deterrence-based argument. And it pushes us to think about whether these deterrent effects, if they were produced, would justify the practice of immigration detention. Here it is helpful to reflect on the aetiology of the harms relating to irregular migration and on whether deterrence is a good thing for the target irregular migrant populations.⁹ First, the claim that deterrence is necessary to prevent the harms typically associated with irregular migration overlooks a crucial fact: that much of this harm is the result of the policies enacted by the states seeking to justify immigration detention. These states contribute to the dangers of irregular migration by, for example, closing off safe and legal pathways, erecting restrictive barriers, and neglecting their humanitarian obligations—such as providing rescue or assistance during transit (see generally Lister, 2019). Second, deterrence effectively confines would-be migrants to their country of origin. This is especially troubling when irregular migration intersects with forced migration, as deterrence in such cases might not prevent harm but rather redirect it. By deterring irregular migration in such cases, immigration detention risks swapping the dangers of the journey for the often more immediate and serious risks of harm faced at home—such as persecution and violence. Both of these considerations undermine the purported humanitarianism of deterrence-based arguments.

⁹ As an important aside that I have bracketed due to spatial constraints, humanitarian justifications for deterrence often obscure the structural violence of immigration enforcement by portraying it as necessary and benevolent (see generally, Valdez 2020).

3.3. Rights forfeiture

Earlier in this paper, it was explained that although immigration detention can in theory be administered in relation to anybody, in practice it is irregular migrants who tend to be detained (Silverman & Nethery, 2015: 24–26). This is important because a defender of immigration detention could rightly note that, in certain cases, and in certain jurisdictions, irregular migration is a criminal offence. In the United States, for example, the *Violent Crime Control and Law Enforcement Act of 1994* made it a criminal offence for a non-citizen to attempt to irregularly re-enter the United States if they have already been convicted of at least three enumerated misdemeanours.¹⁰ Additional legislation has criminalised a host of actions that are typically associated with irregular migration, which include: driving over the speed limit while fleeing from an immigration checkpoint,¹¹ entrepreneurship fraud,¹² failing to cooperate with a removal order,¹³ knowingly making a false claim of United States citizenship for any one of several designated reasons,¹⁴ marriage fraud,¹⁵ and using false documents so as to avoid employer sanctions laws.¹⁶ In light of this, one might argue that it is all-things-considered morally permissible to detain an irregular migrant in immigration detention if they have been charged with a criminal offence in the relevant jurisdiction. This is because they forfeited their right to not be detained in consequence of their criminal wrongdoing.

This argument correctly identifies that criminal wrongdoing is a ground for the forfeiture of our rights (see Thomson, 1990: 348–372). But the problem for a defender of immigration detention is that this argument can be interpreted in either of two ways—both of which bode ill for them. According to one interpretation, the defender of immigration detention is arguing that, in cases that involve criminal

¹⁰ United States Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (§ 130001(b), 8 U.S.C. § 1326(b)(1) (2000)).

¹¹ See, Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009, Div. C (codified as amended in scattered sections of 8, 18 U.S.C.), § 108, 18 U.S.C. § 758 (2000).

¹² See, Immigration Act of 1990 § 121(b)(3), 8 U.S.C. § 1325(d) (2000).

¹³ See, IIRIRA § 307, 8 U.S.C. § 1253 (2000).

¹⁴ See, IIRIRA § 215, 18 U.S.C. § 1015(e)-(f) (2000).

¹⁵ See, Immigration Marriage Fraud Amendments of 1986 § 2(d), 8 U.S.C. § 1325(c) (2000).

¹⁶ See, Immigration Reform and Control Act (IRCA) of 1986, § 103(a), 18 U.S.C. § 1546(b) (2000).

wrongdoing, it is all-things-considered morally permissible for the state to issue immigration detention *as a form of criminal detention in response to the crime for which the migrants are charged*. There is an important sense in which the argument will make a category mistake, if it is interpreted in this way. Towards the beginning of this paper, if you remember, I explained that immigration detention is *de jure* a purely administrative, as opposed to criminal, form of detention. But the simple fix for this category mistake, though, is to argue that the state ought to entrench immigration detention in criminal procedure so that it becomes *de jure* a purely criminal rather than administrative form of detention. If immigration detention were to be reformed in this way, then the immigrant detainees would become legally entitled to the procedural protections and constitutional and sub-constitutional safeguards that ordinarily apply in a criminal setting (e.g., the standard rights to due process, an attorney, a speedy and public trial, etc.).

At least *prima facie*, you might think that the practice of immigration detention would cease to be morally problematic if it were to be entrenched in criminal procedure. After all, the state frequently detains people for violations of its criminal law in other contexts. Consider, as a point of analogy, that if you are caught climbing Half Dome at Yosemite National Park without a permit, you can be charged with a criminal offence. Suppose that you do just this and the police apprehend you. You claim that you have a permit for climbing Half Dome, but that you don't have it on you at the moment. The police then criminally detain you (for a length of time that is not unreasonably long) in order to determine whether you do, in fact, have a permit. It turns out you do not; you were lying all along. And, in consequence of this, you are charged with a criminal offence and prohibited from re-entering Yosemite National Park. Admittedly, the fact that the police have criminally detained you in this case does not itself seem morally impermissible. And the defender of immigration detention might press on this exact point: insofar as an immigrant detainee is afforded the appropriate legal safeguards and procedural protections, why would their detention be any more morally problematic than your detention in the case above? The two appear to be analogous—and if the practice of criminally detaining people in other contexts is morally justified, why is this not true of the practice of criminally detaining irregular migrants in immigration detention?

As a first step towards answering this question, it is important to focus on the nature of the laws that underpin the cases on each side of this analogy. It is widely accepted in the philosophical literature that whether it is morally permissible for the state to enforce a criminal law—and, as a possible corollary

of this, whether those who are in its jurisdiction have a duty to obey those laws and whether they forfeit their rights in virtue of failing to discharge that duty—depends, in large part, on whether those laws are just (see generally Brownlee, 2012; Hidalgo, 2015, 2018; Shelby, 2016). This much seems correct as a general principle, even if there is room for disagreement about what counts as justice in particular legal contexts. And notice that this general principle has some important implications for the analogy at hand. In the case where you climb Half Dome at Yosemite National Park without a permit, for example, it is morally permissible for the police to criminally detain you because the law requiring would-be climbers to obtain a permit is presumptively just (i.e., because it ensures public safety, stewardship of a common good, fair and equal access, and so on). And so the challenge for the defender of immigration detention is to show that the analogy holds in this regard: that the aforementioned laws which criminalise actions associated with irregular migration are just in the same way. The justice of these laws cannot be assumed without begging the question. And if these laws are actually unjust, it is morally impermissible to detain those who violate them even if their detention is procedurally embedded in the criminal justice system.

But here the defender of immigration detention runs into a major problem. Even if it is assumed that a legitimate state holds the right to exclude, meaning that they would be entitled to enact and enforce a robust body of migration law, the *specific laws* that are being considered at present—i.e., the laws that criminalise actions usually associated with irregular migration—are nevertheless presumptively unjust. One reason for this is that these criminalised immigration laws, together with the process of criminally detaining people in immigration detention, are part of a broader legal process known as *crimmigration*. This is the process by which administrative immigration law has become incorporated into criminal law (see Stumpf, 2006; Legomsky, 2007). And while spatial constraints prevent a comprehensive dive into this topic, there is a growing body of philosophical and jurisprudential research in which it is argued that crimmigration is unjust because it has a corrosive effect on the administration of justice and because it is inimical to liberal democratic values such as due process, freedom from unreasonable government search and seizure, police overreach, and fairness in punishment (see Chacón, 2009; Hernández, 2014; Mendoza, 2020). In addition to these procedural issues, in practice these criminalised immigration laws disproportionately target certain groups of migrants—such as women, people of colour, and people who have emigrated from a developing country. And this is important because a just system of immigration

law cannot place a greater burden on some people rather than others due to ascriptive traits like ancestry, ethnicity, gender and race (see Mendoza, 2017: 109; Lister, 2019; also see generally Motomura, 2014).¹⁷

The upshot of these considerations is that this first interpretation of the forfeiture argument runs into a dead end: even if immigration detention is entrenched in criminal procedure and becomes *de jure* a criminal form of detention, it will be an unjustified response to criminal wrongdoing because the laws that are being broken are presumptively unjust. But how about the second interpretation of this forfeiture argument? Does it fare any better? The second interpretation of this argument understands the defender of immigration detention as arguing that, in these cases of criminal wrongdoing, the state is all-things-considered morally permitted to administer immigration detention *as a form of administrative detention that is used as an adjunct to criminal procedure*. What I mean by this italicised phrase is that the state is morally permitted to detain an irregular migrant in an administrative setting throughout the criminal trial in which they are involved. Immigration detention would, therefore, come to serve a legal function that is similar to remand or pre-trial detention (see generally Gilman, 2016). And an immediate corollary of this is that immigration detention would become subject to the same standards that determine when remand or pre-trial detention is morally permissible: the fact that an irregular migrant is charged with a criminal offence could provide an initial moral justification for detaining them in immigration detention,

¹⁷ Even if we assume, simply for the sake of argument, that the relevant immigration laws are substantively just and that the immigrants who breach them are legally culpable, the rights-forfeiture argument for immigration detention still encounters a deeper problem. While I do not have the space to fully address this point, it strikes me that the mere acts of irregular entry or visa overstaying do not constitute the kind of rights-violating wrongdoing that can plausibly ground the forfeiture of the right not to be detained. The reason for this is two-fold. First: the forfeiture of this right presupposes that the immigrant has wronged others in a way that makes restricting their freedom of movement a matter of justice—as in cases of violent crime, for example. Second: under normal circumstances, irregular immigration does not involve a comparable infringement of the rights of others (even though it might, by hypothesis, infringe the state's right to exclude). This is important because it suggests that criminally detaining migrants who are suspected of violating a criminal law relating to visa overstaying or irregular entry would violate a standard principle of proportionality due to (a) the significant harms of being detained, and (b) the minimal harms that are associated with violating these laws. I recognise, however, that this is a substantive point over which philosophers disagree—but, as already noted, spatial constraints unfortunately prevent a full discussion here (but for an excellent discussion of proportionality within this context see Hosein, 2019: 78–103). I thank an anonymous referee for pressing me on this matter.

but it cannot morally justify detaining them for a protracted length of time. The decisive factor here is not whether the irregular migrant has been charged with a criminal offence, but is, instead, whether they pose a significant flight risk or security risk that cannot be otherwise mitigated—and the fact that they were charged with a criminal offence may or may not be an indication of this.¹⁸ If the immigrant detainee does not pose any such risk of harm, the state ought to release them on a non-custodial measure such as bail, parole, or a recognisance release order. But if any such risk of harm is present, then, *ceteris paribus* and in certain limits, the state is morally justified to temporarily detain them in immigration detention.

4. Contingent abolitionism

But notice where this has left us. Flight risks and security risks are not unique to criminal wrongdoing. And they are likewise not the only morally-relevant risks that can emerge in the context of international migration. Also relevant are risks to public health, for example. The defender of immigration detention is, therefore, far better served by altogether bypassing any mention of criminal wrongdoing and instead focusing on the moral reasons that are generated by these risks of harm when they emerge. This suggests a final line of argument: it is all-things-considered morally permissible for the state to detain a migrant in immigration detention if that migrant poses a sufficient health or security risk that cannot otherwise be feasibly mitigated.¹⁹ Later in this section of the paper, I will distinguish between two types of risks to national security—risks of violent crime, and risks of terrorism. I will also purposely leave aside any further mention of flight risks because these sorts of risks do not, in themselves, generate a moral reason in favour of immigration detention. Flight risks are, instead, morally-relevant only insofar as the migrant who absconds into the community poses a serious antecedent risk to public health or national security.

¹⁸ A quick note on terminology: I use the term *flight risk* to denote the risk that an individual will abscond into the community or evade legal proceedings, regardless of the means through which they do so.

¹⁹ This formulation implies a basic proportionality and necessity principle, both of which underpin much of the analysis in this paper. I leave these concepts undefined, largely because the key argument developed here is consistent with a range of plausible interpretations of each. For a helpful discussion of how these principles apply to immigration detention, see Hosein (2019).

One important feature and strength of this line of argument is that it straightforwardly falls out of a standard one-dimensional model of normative reason strength. We are all familiar with the process of weighing countervailing normative reasons against one another. And one of the virtues of appealing to risk management as a moral justification for immigration detention is that it takes seriously both the interests of the immigrant detainees and those of the extant members of the state that is administering their detention. What is meant by this is that although a migrant has a right against being detained (and hence the state has a moral reason or correlative duty to not detain them in immigration detention), the political members of the state that is administering the relevant immigration detention policy have a similarly strong interest in not being subjected to a risk of harm that is being posed by that migrant (and hence the state has a moral reason to mitigate that risk of harm, if it is feasible). The argument sketched gives space for these competing interests. And, importantly, it does not presume that the moral reasons or duties generated by one of those interests must, in principle, outweigh those generated by the other.

There is a further question of how these countervailing moral reasons should be weighed against one another. And, here, some context-sensitivity is presumably warranted. There are, for instance, going to be cases in which the harm that is being posed by a migrant is so trivial that, regardless of how many extant political members are at risk of experiencing it, the moral reasons generated by that risk of harm cannot morally justify detaining them in immigration detention (e.g., if a migrant has the common cold or a small history of non-violent felonies). But there will be other cases where the harm being posed by a migrant is so egregious that there is no doubt whatsoever that the state is morally justified in detaining them (e.g., if a migrant carries a highly contagious and lethal disease, or if they have an extensive history of violent felonies). In order to conduct these comparative analyses in a non-arbitrary manner, we can appeal to one of the many comparative normative principles developed in other philosophical contexts. This could include, for example, the non-consequentialist principles which have been developed in the recent work on limited aggregation, as well as standard principles of proportionality and necessity.

Notwithstanding these tricky details, however, this context-sensitivity is another good-making feature of risk management in that it produces the correct results in a set of highly idealised hypothetical cases—such as those that are listed in the parentheses above. But notice that this comes at a grave cost. Although producing the correct results in a set of idealised hypothetical cases is a good-making feature

of risk management, a serious and important question for an applied moral and political philosopher is whether, and to what extent, risk management could morally justify immigration detention in less-than-ideal real-life cases. And here it is crucially important to consider whether, or to what extent, prospective and settled migrants pose serious risks to public health or national security. Consider the following data:

1. *Terrorism*. There are three large-N studies that have analysed the effects of migration on terrorism in the destination state. First: Bove and Böhmelt (2016) reported spatial-econometric analyses of immigration and terrorist attacks in 145 states between 1970 and 2000, finding that increases in migrant inflows are associated with fewer terrorist attacks. Second: Forrester et al. (2019) used bilateral migration data for 170 countries—including data on South–South migration—from 1995 to 2015, and found no evidence that migration led to increased rates of terrorism in the destination states. Third: Dreher, Gassebner and Schaudt (2020) examined migration from 183 origin to 20 OECD states in a dyadic setting. They found that a larger number of foreigners leads to more terrorist activity in the host state. But they attributed this to scale effects of larger populations—and concluded that increases in foreign populations have no greater impact on terrorism than equivalent increases in domestic populations, thus showing that immigration does not pose a disproportionate security threat. Four additional large-N studies analysed the relationship between terrorism and forced migration. Polo and Wucherpfennig (2019) found that refugee inflows are linked with terrorism only when refugees emigrate from communities with ties to transnational terrorist groups. Choi and Salehyan (2013) used data from 154 states, taken between 1970–2007, and found that states that host refugees are more likely to experience terrorist activity. Similarly, Milton, Spencer, and Findley (2013) used a dyadic framework to argue that refugee flows can significantly increase transnational terrorism that occurs in the host state. However, a recent replication study by Shaver et al. (2025), that used updated UNHCR data, found only partial support for these two findings—thereby casting doubt on their soundness and their generalisability.

2. *Crime rates.* Research on the relationship between crime and immigration has primarily been conducted in the United States. A meta-analysis of fifty-one U.S. studies that were published between 1994 and 2014 found that immigration was significantly associated with lower crime rates, although the strength of the association was modest (Ousey & Kubrin, 2018). This is consistent with data from Australia (Sydes, 2017), Canada (Jung, 2020; Zhang, 2014), Chile (Leiva et al., 2020), Italy (Fasani et al., 2019), Spain (Alonso et al., 2008), Sweden (Sarnecki et al., 2025), the United Kingdom (Ignatans & Matthews, 2017), and broader Europe (Nunziata, 2014)—all of which show that high rates of immigration have been associated with stable or even declining rates of crime.

3. *Health risks.* Most of the literature in this area has focused on communicable diseases of public health significance among refugee and asylum seeker populations. In a review of 51 studies on this topic, Eiset & Wejse (2017) found high rates of latent tuberculosis (TB), active TB, and hepatitis B in forced migrant populations. These health conditions were attributed to poor living conditions during and after migration—and while there can be high transmission in the migrant populations, the authors found minimal risk of spread to the autochthonous population in the host state. A large-scale epidemiological review by Proença et al. (2020) likewise found that the risk of TB is disproportionately elevated among forced migrant populations due to factors like journey conditions, poor pre-migration healthcare, and crowded living environments. The authors argue that this risk can be effectively mitigated by treatment. Taha, Durham & Reid (2023) conducted a global systematic review and meta-analysis examining prevalence of TB, hepatitis B, hepatitis C, and HIV among refugees and asylum seekers. Although they found a higher rate of these conditions in the migrant populations compared to hosts, they noted a high heterogeneity and limited risk of spillover if proper screening and treatment protocols are adopted. These three meta-studies all gesture towards the same conclusion: risks to public health typically associated with migration are largely contingent on public health infrastructure, as opposed to being inherent to migration itself. Furthermore: spillover

to populations is negligible when screening, quarantine, and treatment protocols are in place—meaning that immigration detention is neither an effective, nor necessary, tool for managing or mitigating these risks of harm.

What is the upshot of the data contained in these three numbered points? I have already acknowledged that risk management can, in theory, morally justify the practice of immigration detention. But the issue for the defender of immigration detention is that in the actual world, only a small minority of prospective and settled migrants do, in fact, pose a risk to public health or national security in the host country that is serious enough to morally justify their detention. A lesson to be drawn from this is that the conditions that would, counterfactually, morally justify the practice of immigration detention do not usually obtain in the real-world. What this means, in more practical terms, is that in most real-life cases, it is all-things-considered *morally impermissible* for the state to administer immigration detention because the people who are liable to be detained therein do not pose a serious risk of harm that cannot otherwise be feasibly mitigated. This motivates a form of contingent abolitionism about the practice of immigration detention.

There is an important sense in which theory ought to inform policy. And in regard to this point, I will note three important considerations. First: when conducting the risk assessment of a migrant who is liable to be detained in immigration detention, it is incumbent upon the state to show that a sufficient risk of harm is present. There are two reasons for this. The first reason is that due to significant language and cultural barriers, along with an insufficient knowledge of the legal system in the state to which they are immigrating (Ryo, 2019), most migrants would find it prohibitively difficult to establish to the satisfaction of the state that they do not pose a serious risk of harm. This can be contrasted with the fact that virtually every contemporary liberal democratic state has an abundance of technological and economic resources that are needed to conduct these risk assessments. The second reason is that, on the level of general principle, the burden of proof ought to fall onto the state because it is the party that is responsible for imposing the potential harm of immigration detention on the migrants who are liable to be detained. As John Stuart Mill (1869/1963: 2) wrote in a slightly different context, “the burden of proof is supposed to be with those who are against liberty ... the a priori assumption is in favour of freedom.” And insofar as policy-makers are concerned, what this amounts to is a *presumption against*

the use of immigration detention. In other words: policy-makers in contemporary liberal democratic states should assume that immigration detention is morally unjustified, until there is data for a specific case that proves otherwise.

Second: there is a question of how the state ought to conduct its risk assessment. Is it permitted to rely on statistical generalisations while conducting its risk assessments, for instance, or must it instead rely on individualised data relating to the migrant? For example: is it morally permissible for the state to detain a migrant who has emigrated from a state or region that has a high likelihood of its members carrying a contagious disease, even if there is a lack of individualised evidence showing that this specific migrant is in fact a carrier of that disease (e.g., detaining West Africans upon arrival during the Ebola epidemic)? Here I will note in passing that although it is preferable to conduct a risk assessment based on individualised evidence insofar as this minimises the chance of unjustified detention, individualised risk assessments can be prohibitively costly and strain resources during times of significant increases in irregular migration—such as the 2015 European Migrant Crisis, for example. How the state ought to balance these competing values must be sensitive to real-world considerations. But given that migration crises are relatively infrequent, and given also that the practice of immigration detention is a *prima facie* rights infringement, under normal circumstances the state is morally obligated to conduct individualised risk assessments if the cost of doing so is not prohibitively high.²⁰ This allows that, in times of crisis, the state is permitted to deploy statistical generalisations in its immigration-related risk assessments.

Finally: there is a question concerning the location in which a risk-imposing migrant ought to be detained after the state has conducted its risk assessment. Here, there are two considerations that should be quickly noted. On the one hand: towards the outset of this paper, I explained that most liberal democratic states have developed vast networks of immigration detention centres. Most of these centres operate at capacity or over-capacity because immigration detention is currently administered as a first, rather than as a last, resort. But suppose that these states instead followed my recommendation and

²⁰ As one anonymous referee observes, these migration crises are occurring with increasing frequency due to a variety of global factors. My use of the phrase *relatively infrequent* refers not to the absolute number of large-scale migration events, but to the fact that they represent exceptional spikes in irregular arrivals relative to a given state's baseline capacity or historical intake.

accepted the presumption against the use of immigration detention. Their vast network of immigration detention centres would quickly start to operate vastly under-capacity—which is due to the fact that, as I have already explained, most irregular migrants do not pose a sufficient risk of harm. On the other hand: due to the exorbitant cost of operating even a single immigration detention centre, the state would have a very strong self-interested pecuniary reason to abolish its vast network of immigration detention centres and instead detain the small number of risk-imposing migrants in an “alternative place of detention” such as a jail or hotel. In doing so, the state could take the capital that would otherwise be spent building and maintaining its vast network of immigration detention centres and redirect it towards resolving its most pressing domestic political issues. This illustrates that contingent abolitionism about immigration detention is one of those happy cases where morality coincides with prudence. Not only is it in the best interest of irregular migrants that transit and receiving states abolish immigration detention in the way that I have suggested; it is, likewise, in the best interest of the state and its political members. This is a surprising conclusion, given where we started. But is, nevertheless, a happy conclusion indeed.

5. Conclusion

The goal of this paper was to delineate the conditions under which the practice of immigration detention can be morally justified. I found that although risk management could morally justify highly idealised practices of immigration detention, it cannot morally justify real-world practices due to the risk profiles of most migrants—and this, or so I have argued, should motivate us to become ‘contingent abolitionists’ in regard to the practice of immigration detention.

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Appendix A

Three papers unrelated to immigration detention are included in Appendix A. These papers were written and published during my PhD candidature, and they are included in accordance with Section 15 of the Australian National University Thesis by Compilation Procedure. The first two papers included in this Appendix were co-written with Professor Colin Klein of the Australian National University Department of Philosophy and the following members of the Australian National University School of Computing: Tuan Dung Nguyen, Georgiana Lyall, Alasdair Tran, Minjeong Shin, Lexing Xie, and Ziyu Chen. I am the sole author of the final paper included in this Appendix. The citations for these papers are as follows:

- Nguyen, T. D., Lyall, G., Tran, A., Shin, M., Carroll, N. G., Klein, C., & Xie, L. (2022, May). Mapping topics in 100,000 real-life moral dilemmas. In *Proceedings of the International AAAI Conference on Web and Social Media 17*: 699–710.
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