

**Refugee Repatriation and  
Consent  
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# Abstract

Over the past decade, NGOs and government agencies have helped millions of refugees repatriate to their countries of origin, providing them free flights, travel documentation, and modest stipends. This thesis considers when such repatriation assistance is morally permissible. Drawing on original data from East Africa, I distinguish between six sets of cases, which require six distinct policies. In the first set, refugees choose to return because they are unjustly detained by the government. In such cases, NGOs should avoid helping with return if their actions causally contribute to the government's detention policy. In the second set of cases, refugees are not detained, but return to a country they know little about. In such cases, both NGOs and government agencies have duties to inform refugees of the risks of returning. If they fail to inform refugees of the risks, they are engaging in a form of wrongful immigration control. In the third set of cases, refugees regret returning and, based on this, NGOs and government agencies can predict that future refugees will likely also regret returning. I develop a novel theory of when future regret is a reason to deny a service, and apply this theory to the case of repatriation. In a fourth set of cases, refugees are paid a great deal of money to repatriate, and would not have returned had they not been paid to leave. I argue that paying refugees to repatriate is only permissible when conditions are safe in countries of origin. In a fifth set of cases, parents repatriate to high-risk countries with their children. I argue that parents, in general, do not have a right to live in a country unsafe for their children, and NGOs and government agencies should refuse to help with such returns. In a final set of cases, refugees of a minority ethnicity are provided generous assistance to leave, while refugees of the majority ethnicity are not. I argue that such discriminatory assistance is permissible only when third parties remain unharmed.

# Declaration

I certify that the thesis I have presented for examination for the MPhil/PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

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I declare that my thesis consists of 86,898 words.

Mollie Gerver

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# Chapter 1

## Introduction

At 7:12 pm on March 13th, 2012, a man started screaming on Kenya Airlines flight 101. Two British Border Control officers shoved him forcefully into his seat, handcuffing him. “Mugabe will kill me!” he cried out.

The woman sitting to my left looked concerned. “Don’t worry,” an officer told her, “they always stop screaming when the flight lifts off.” The man in handcuffs heard this, and said, “I will continue screaming until you get me off this flight.” The border officer shook his head. “Trust me,” he told the woman next to me, “they always stop screaming.”

The man threatened self-harm, but nobody responded, so he instead threatened to scream the entire flight and, as a last resort, threatened to defecate in his seat. Officials eventually unlocked his handcuffs, and escorted him off the flight.

Everyone relaxed.

While this event had transfixed the passengers, a similar incident unfolded moments later, but appeared to pass without notice. A second man, wearing no handcuffs, started making a low moaning noise. He was sitting

between two unarmed individuals, one holding a clipboard, the other saying, “It will be fine.” He did not believe them, and was eventually escorted off the flight.

Around the world, refugees often flee their home countries and, upon reaching safe states, cannot access residency status, work visas, or social services. Some are forced into detention, where they are told when to eat, drink, shower, sit and stand. They are not deported, but instead find their lives too difficult to stay, so seek help repatriating to the countries they fled from. Various humanitarian agencies, hoping to help, pay for their flights home, arranging their travel documentation, at times accompanying them on the journey. In 2012 alone, the UN helped 526,000 refugees repatriate to Côte d’Ivoire, Iraq, Afghanistan, Sudan, and dozens of other countries of origin.<sup>1</sup> While the screaming man on my flight was likely being deported, the second man was likely repatriating, escorted by civilians working for an NGO.<sup>2</sup>

These NGOs struggle to determine whether they ought to help with returns. In interviews I conducted with organizational staff members in 2011, they explained that return was better for refugees than staying in indefinite detention. Assisting with return also upheld the value of choice, providing an option that refugees would otherwise not have. Nonetheless, the staff members were hesitant as to whether their actions were morally permissible, given the involuntary nature of the return.

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<sup>1</sup>UNHCR “Displacement in the 20th Century Challenge” in UNHCR Global Trends 2012 available at [http://www.unhcr.org.uk/fileadmin/user\\_upload/pdf/UNHCR\\_Global\\_Trends\\_2012.pdf](http://www.unhcr.org.uk/fileadmin/user_upload/pdf/UNHCR_Global_Trends_2012.pdf).

<sup>2</sup>At the time, all repatriation in the UK was organized by Refugee Action, a refugees-rights NGO. See International Organization of Migration (IOM), “Return and Reintegration,” <http://unitedkingdom.iom.int/return-and-reintegration>.

In an attempt to better understand this dilemma, I conducted fieldwork over the course of a year in East Africa, the Middle East, and South-east Asia, interviewing 160 refugees and migrants who had repatriated, or were about to repatriate, from Israel. I chose to focus on their cases partly because the NGOs in Israel claimed to be especially ethical when helping with return, even while the government continued to detain refugees. I wished to find out if they had truly succeeded in ensuring a morally permissible return in the midst of unjust background conditions. Initially, there were reasons to believe they had. Unlike the UN, NGOs in Israel had the resources to interview each refugee to ensure they were not coerced into returning. NGOs also had resources to travel regularly to countries of origin, finding out about the conditions refugees faced after returning, and relaying this information to refugees still in Israel, to ensure they were informed about conditions. Importantly, they took no government funds, relying on private donors alone, to avoid acting as an arm to the government's immigration goals. Some were also active in lobbying for a more just refugee policy, and so refused to assist with any returns that were the result of this unjust policy, such as helping refugees return from detention.

I quickly learned, while in South Sudan in 2012, that many refugees had returned to avoid detention, despite the NGOs' best efforts to only help with voluntary returns. But even if refugees were returning involuntarily, NGOs' actions may have been ethically permissible, assisting escape a life of detention in Israel. A dilemma remained despite the NGOs' best of intentions and resources. As such, the case illustrates the depth of the dilemma, and the need for philosophical analysis.

In the following section I explain why we ought to focus on this dilemma concerning assisted return, rather than focusing on deportations alone. In

Sections 2 and 3 I describe the broader context of global repatriation, and the case of Israel in particular. In Section 4 I describe six normative puzzles that arise in repatriation, which this thesis attempts to resolve.

## 1.1 Why Focus on Voluntary Return?

Focusing on the question of voluntary return is essential partly because it is empirically relevant. Tens of millions of refugees and migrants have repatriated over the past decade alone,<sup>3</sup> but we know little about the conditions before and after repatriation. Such returns are also philosophically relevant. It is especially difficult to establish what NGOs and the UN ought to do. While the government is often acting wrongly when threatening a refugee with detention or deportation,<sup>4</sup> perhaps NGOs are permitted to help with such returns. An assisted coerced return may be better than an unassisted deportation, or a life in detention. Nor is it clear that helping with uncoerced return is always permissible. Even if a refugee is returning without any coercion, it might still be wrong to help a person take a risk to their lives, however voluntary their choice may be. The criteria for when repatriation is wrong is different than the criteria for when deportation is wrong.

This thesis establishes such criteria. In doing so, I shall avoid committing myself to a particular theory as to who states can legitimately deport or detain. Instead, I aim to consider whether, in cases where nearly all

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<sup>3</sup>UNHCR, “Displacement in the 20th Century Challenge,” 2012.

<sup>4</sup>Megan Bradley, *Refugee Repatriation: Justice, Responsibility, Redress*, Cambridge: Cambridge University Press 2014; Katy Long, *The Point of No Return: Refugees, Rights, and Repatriation*, Oxford: Oxford University Press 2013; Lauren Fouda, “Compulsory Voluntary Repatriation: Why Temporary Protection for Sudanese Asylum-Seekers in Cairo Amounts to Refoulement,” *Georgetown Journal on Poverty Law* 10(3)(2007):511.

agree that deportation or detention is wrong, helping with repatriation is morally permissible.

Of course, there is much debate over when deportation is wrong, and this may, by extension, impact when we believe repatriation is wrong. I shall assume, for simplicity, that deportation is wrong when individuals' lives will be at immediate risk if they return, whether from violence or extreme poverty. There is an increasing consensus regarding this claim in both philosophy and state policies. Joseph Carens and David Miller, though strongly disagreeing on who states can exclude, agree that deporting migrants is wrong when their lives will be at immediate risk, regardless of whether they have fled hunger or persecution.<sup>5</sup> States are similarly recognizing that those fleeing hunger or general violence deserve protection, even when they are not fleeing persecution.<sup>6</sup> For simplicity, I shall call all individuals "refugees" if their lives will be at immediate risk if they return, regardless of why.

Though I assume deportations are wrong to any life-threatening conditions, this assumption is not central to my general argumentation. My goal is not to consider who deserves protection but whether, if someone deserves protection, it is also wrong to help them repatriate.

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<sup>5</sup>David Miller, "Immigration: The Case for Its Limits" in (eds.) A. Cohen and C. Wellman. *Contemporary Debates in Applied Ethics*, Malden, MA: Blackwell Publishing 2005: 202; Joseph Carens, "Aliens and Citizens: The case for open borders," *The Review of Politics* 49(2)(1987):251-273.

<sup>6</sup>European Council on Refugees and Exile, *Complimentary Protection in Europe*, July 2009; Alexander Betts, "Survival Migration: A New Protection Framework," *Global Governance* 16(2010): 361-382; Ruma Mandal, "Protection Mechanisms Outside of the 1951 Conventions ('Complimentary Protection')," *Legal and Protection Policy Research Series*, UNHCR 2005.

## 1.2 What Occurs in Repatriation?

Voluntary repatriation is often enthusiastically embraced by governments, who hope to avoid deporting anyone if possible,<sup>7</sup> while still decreasing the number of refugees within their borders. Repatriation has a ring of legitimacy, especially if organized by separate humanitarian organizations, or a separate wing of the government uninvolved in deportations. Those who help with such returns may not agree with the government's sentiment, but they argue that, if refugees have few rights, then helping with return is better than doing nothing at all.

Some agents helping with return have referred to their activities as "repatriation facilitation."<sup>8</sup> I shall adopt this term, referring to all who help with return as "repatriation facilitators." Their activities vary, but generally include paying for transport back to countries of origin, at times providing a stipend and arranging travel documentation, and occasionally accompanying migrants and refugees during the journey. They are non-armed actors, and distinguish themselves from the border officials who handcuff individuals on flights, or the doctors who inject psychiatric drugs into those who resist.<sup>9</sup> I am interested in those holding clipboards and pens

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<sup>7</sup>The reasons a government may not want to deport are varied. In Israel's case, various international aid packages and trade benefits are conditional on general human rights in the country. Deportations may be a point against Israel's human rights record, which can impact its trade status. See "Implementation of the European Neighbourhood Policy in 2009: Progress Report Israel," Brussels, 12/05/2010 ([http://ec.europa.eu/world/enp/pdf/progress2010/sec10\\_520\\_en.pdf](http://ec.europa.eu/world/enp/pdf/progress2010/sec10_520_en.pdf)) and "Justice, Freedom and Security" section in individual country progress reports: [http://ec.europa.eu/world/enp/documents\\_en.htm#3](http://ec.europa.eu/world/enp/documents_en.htm#3).

<sup>8</sup>UNHCR, "Voluntary Repatriation: International Protection," 1996: Chapter 3, Section 1.

<sup>9</sup>Leanne Weber and Sharon Pickering, "Exporting Risks, Deporting Non-Citizens," pp. 110-128 in (ed.) Francis Pakes, *Globalization and the Challenge to Criminology*. Abingdon, UK: Routledge 2013 and Liz Fekete, "Europe's Shame: a report on 105 deaths linked to racism or government migration and asylum policies," European Race

rather than guns or needles.

Some of these facilitators are part of the government, such as the head of the Assisted Voluntary Return (AVR) Unit in Israel's Ministry of Interior. He, like others involved in return, insisted on his neutral status. "I'm not involved in deportations at all," he explained, "I want them to leave Israel happy."<sup>10</sup> In addition to such immigration officials, government-employed social workers may assist unaccompanied minors return to their countries of origin.<sup>11</sup> Judges may have a role in determining if an adult can repatriate, if the adult has a mental illness and lacks the capacity to make decisions on their own behalf.<sup>12</sup> In addition to state-employed repatriation facilitators, there are non-governmental organizations (NGOs), and intra-governmental organizations (IGOs) like the International Organization of Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR).<sup>13</sup> In the United States, some hospitals also pay private companies to facilitate repatriation.<sup>14</sup>

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Bulletin, London: Institute of Race Relations.

<sup>10</sup>Interview with Assisted Voluntary Return (AVR) official, Tel Aviv, 7 August 2013.

<sup>11</sup>The practice of welfare services assisting in repatriation of migrants dates back to at least the first half of the 20th century in the United States. See Norman Humphrey "Mexican Repatriation from Michigan: Public Assistance Historical Perspective," *Social Service Review* 15(3)(1941):497-513. In Israel, social workers accompanied minors to the flight for repatriation.

<sup>12</sup>For a contemporary discussion on social workers' roles in helping asylum seekers, See Ravi Kohli, "Social work with unaccompanied asylum-seeking young people," *Forced Migration Review* 12(2002):31-33. See High Court of Justice 4845/12, ASSAF, The Hotline for Migrant Workers and the Association of Civil Rights in Israel vs. The Ministry of Interior and the Ministry of Welfare.

<sup>13</sup>Alex Betts, Gil Loescher, and James Milner, *UNHCR: The Politics and Practice of Refugee Protection, Second Edition* Abingdon, UK: Routledge, 2012.

<sup>14</sup>Philip Cantwell, "Relevant 'Material': Importing the principles of informed consent and unconscionability in analyze consensual medical repatriations," *Harvard Law and Policy Review* 6; Lori A Nessel, "The Practice of Medical Repatriation: The Privatization of Immigrant Enforcement and Denial of Human Rights," *Wayne Law Review* 55(2009):1725-1756; Mark Kuczewski, "Can Medical Repatriation be Ethical? Establishing Best Practices," *American Journal of Bioethics* 12(9)(2012):1-5.

### 1.3 Repatriation from Israel

While such repatriation facilitators are common globally, repatriation was uncommon in Israel until 2010, when a small number of South Sudanese refugees began returning home to Juba with the help of an NGO.

Most who returned knew little about the region they were repatriating to, having fled as children decades prior during the Second Sudanese Civil War, fought primarily between the northern Sudanese government and the southern Sudanese opposition forces. Throughout the 1980s and 1990s they had arrived in Egypt, where they received refugee status, but grew up facing severe xenophobic attacks at work, on the street, and outside of UN offices. In 2005, a Comprehensive Peace Agreement (CPA) was signed in Sudan, allowing for a referendum for an independent South Sudan in 2011, but many were hesitant to return until independence day arrived.

The same year as the 2005 CPA, Egyptian police opened fire on protesters sitting in front of the UN offices, killing fifty-three refugees,<sup>15</sup> and encouraging eleven youths to pay smugglers to take them across the Sinai desert, and up to the border fence with Israel.<sup>16</sup> They crossed through a small opening and into Israeli territory, where they were granted temporary residency permits. Others soon followed and, though an unknown number were immediately deported back to Egypt, hundreds were allowed to stay when sympathetic border soldiers refused to deport them, instead driving them to the Negev desert in the south of Israel, dropping them off at a bus station, and telling them to find organizations that assisted refugees.

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<sup>15</sup>Michael Slackman, "After Cairo Police Attack, Sudanese Have Little but Rage," 3/1/06. New York Times.

<sup>16</sup>Galia Sabar and Elizabeth Tsurkov, "Israel's Policies Towards Asylum Seekers, 2002-2014," Istituto Affari Internazionali Working Paper 2015.



Kind strangers at the bus station would help. Nyandeng, who arrived in Israel when she was a teenager in 2007, remembers her first day:

At the station, an Ethiopian woman came and asked what we were doing there....She bought me and my siblings and mother food and gave us money to take the bus to Jerusalem and said we should call her if we had no place to go and we would stay with her. We took a taxi and my mother told the driver to take us to a church – it didn't matter which one. He took us to a guest house and there was a man there, at reception. My mother told him we needed help. Without thinking he gave us a room for free with food.<sup>17</sup>

Soon after, Nyandeng and her younger sister and brother began attending school, and her mother found a job at one of the dozens of hotels that began employing East African refugees as cleaners. They rented an apartment in Naharia, a town in the north of Israel, but as the months passed they failed to gain any official residency status. There were 1,000 other asylum seekers in the country by 2007 and, like them, Nyandeng's mother could not legally work. Within a year the High Court of Justice ordered the government to provide temporary residency status to all asylum seekers, and allow them to apply for refugee status. The government partially complied, handing them three-month visas, and instructing police to not arrest East African refugees who were working, but never establishing an official Refugee Status Determination (RSD) procedure.

By 2010 there were approximately 1,200 southern Sudanese nationals in the country, and approximately 35,000 other asylum seekers, all of whom had crossed over from Egypt since 2005, most originally from Eritrea and Sudan. No claims for asylum were heard, so none were recognized as

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<sup>17</sup>Interview with Nyandeng, Entebbe, 9 May 2013.

refugees, their legal status remaining in limbo.<sup>18</sup> Given their precarious position, in 2010 some southern Sudanese nationals wished to return home.

A charity based in Jerusalem, called the International Christian Embassy (ICE), offered to help, paying for their flights, arranging travel documentation, and providing a stipend worth \$1,500. The organization worked with officials in the United Nations High Commissioner for Refugees (UNHCR) and the Hebrew Immigrant Aid Society (HIAS), a refugee rights organization.<sup>19</sup> Several dozen individuals returned, they found jobs, and the project was deemed a success. Another NGO, Operation Blessing International (OBI) took over the project in 2011, still working with HIAS and UNHCR. When OBI took over, many Darfur refugees also wished to repatriate. They, too, accepted OBI's free flight to Juba, paying for their own buses or flights to Khartoum, and then from there to Darfur. By 2012, OBI and HIAS had helped 900 individuals repatriate.

A year after South Sudan gained independence in 2011, the Israeli government announced that return to South Sudan was safe, as the country was no longer part of Sudan. OBI continued helping with return, and the Ministry of Interior also set up its own repatriation program, called Operation Returning Home (ORH).<sup>20</sup> It was supposedly voluntary, but the Ministry threatened to detain anyone who stayed.<sup>21</sup> In response, South Sudanese activists organized protests, and raised a court petition, but it was rejected by the court, and all were ordered into detention.<sup>22</sup>

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<sup>18</sup>Gilad Nathan, "The Policy Towards the Population of Infiltrators, Asylum Seekers, and Refugees in Israel and European Countries," Israel Knesset Research and Information Center 2012: 13 (Hebrew).

<sup>19</sup>Interview with HIAS Director, Jerusalem, 12 December 2012.

<sup>20</sup>Laurie Lijnders, "Deportation of South Sudanese from Israel," Forced Migration Review 2013(44).

<sup>21</sup>Interview with AVR official, Tel Aviv, 7 August 2013.

<sup>22</sup>Administrative Petition (Jerusalem) 53765-03-12: ASSAF vs. Ministry of Interior

“It was so strange,” one aid worker recalls. “When refugees found out they would be detained, they just stopped protesting, all at once. They went out, bought the nicest clothes, and boarded the flight back.”<sup>23</sup> After return, at least twenty-two individuals were killed or died of a disease within a year, representing at least 2% of returnees.<sup>24</sup> When I travelled to South Sudan in December 2013, civil war broke out two days later, and I learned of an additional five who were killed, representing 3.7% of my sample of 134 returnees to South Sudan.<sup>25</sup> The exact mortality rate was likely higher, as I never reached the most insecure areas, and most returnees were never contacted by any researchers or aid workers after returning.

Many of the staff members helping with return were uncertain if their actions were ethical. Based on the data I collected, they faced six normative puzzles, prevalent not only in the case of Israel, but in repatriation globally.

## 1.4 Six Puzzles

The first type of puzzle concerns coercion. Refugees who are returning to avoid detention are coerced into their decision. We might suppose NGOs should not assist with their return, given its involuntary nature, but perhaps assistance is justified if the alternative is for refugees to remain in indefinite detention. In Chapter 3 I describe the global prevalence of this puzzle, and attempt to resolve it, before addressing a second type of case,

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(7.6.12); Laurie Lijnders, “Deportation of South Sudanese from Israel,” *Forced Migration Review* 44(2013): 66.

<sup>23</sup>Interview with Sharon, ASSAF volunteer, Tel Aviv, 2013.

<sup>24</sup>Yuval Goren, (Hebrew) ‘Aid organizations: Over 22 refugees expelled to South Sudan die within the first year’ 5/6/2012. <http://www.nrg.co.il/online/1/ART2/477/197.html>.

<sup>25</sup>Interview with Matthew, Juba, 4 January 2014; Interview with Simon in IDP camp, Juba, 4 January 2014; Interview with Gatluak, Juba, 4 January 2014.

relating to information. Many refugees are uninformed about their countries of origin, and UNHCR officers and NGOs know little about the countries they are helping refugees return to.<sup>26</sup> As I will demonstrate in Chapter 4, it is not clear who, if anyone, has a duty to find information about the risks of repatriating and so unclear who is culpable for uninformed repatriation.

Many refugees are fully informed about the risks of returning but, after return, regret their choices.<sup>27</sup> In such cases, perhaps the UN, NGOs and governments should stop facilitating return if future regret is likely. But this claim is controversial. In general, we often have a right to services, even if we are likely to regret them. When I book a flight to an unsafe country, the airline company is not required to consider whether I will regret my decision, and when a woman requests an abortion, a doctor does not consider if she will regret her choice before performing the abortion. In Chapter 5 I will argue that, though regret is not usually a reason to deny a service, it sometimes is, including in cases of repatriation.

In Chapter 6 I address cases concerning money. Government agencies often provide generous stipends to encourage refugees to repatriate, often using no coercion at all. We might suppose that paying refugees to repatriate is a justified form of immigration control, because the choice to return is completely voluntary. Yet, given the risks in a refugee's country of origin, it is not clear if it is morally permissible to encourage refugees to risk repatriation.

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<sup>26</sup>Michael Barnette, *The International Humanitarian Order*, Abingdon, Oxon: Routledge; Myron Weiner, "The Clash of Norms: Dilemmas in Refugee Policies," *Journal of Refugee Studies* 11(4):433-453.

<sup>27</sup>UNHCR Briefing Note, "Iraqi Refugees Regret Returning to Iraq, Amid Insecurity," 19/10/10.

In all of the cases above, those returning include parents whose children will be put at risk in their countries of origin. It is not clear if states or NGOs should assist with such return, an issue I shall address in Chapter 7.

The final puzzle concerns migrants whose lives will not be at risk if they repatriate. In a range of cases, governments provide generous return assistance to unwanted ethnic minorities, fulfilling the racist preferences of society, and also helping minorities who are eager to return home. It is not clear if such racism is wrong, if those who receive the assistance wish to repatriate, and feel grateful for the assistance they receive.

In describing the above puzzles, I will draw upon the interviews I conducted in South Sudan, Ethiopia, Uganda, and other countries of origin, where former refugees described to me why they arrived in Israel, their reasons for returning from Israel, and the conditions they faced after returning. These interviews help demonstrate the nuanced differences between cases, creating a more precise understanding of when and how NGOs and officials should assist with repatriation.

Unfortunately, in drawing upon actual interviews to describe and resolve moral puzzles, there is a major methodological concern. In the next section I will argue that real-world cases, due to their complexity, can be difficult to utilize for establishing general moral principles and guidelines. A particular methodological approach can overcome this difficulty.

# Chapter 2

## Methodology

In normative theory, philosophers often draw upon simple examples, often from fiction, to highlight a given intuition. Simple examples are useful because, if we intuit a wrong has occurred, we can be fairly certain which feature explains this intuition. In one famous example concerning negligence, a parent leaves his baby in a bathtub, is distracted, and the baby drowns. We know we are disturbed by the parent being distracted, or the baby drowning, or both,<sup>1</sup> because there is little else occurring in the case. Similarly, when asked if we would push a man to his death in a trolley example, we can be fairly certain pushing the man to his death disturbs us,<sup>2</sup> because there are few other features in the case. The fewer features, the easier it is to determine, or at least suspect, the wrong-making features of the case.

Non-fiction cases do not have this advantage. The more complex a case, the more difficult it is to know why we react a particular way. Consider

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<sup>1</sup>Douglas Husak, “Negligence, believe, blame, and criminal liability: The special issue of forgetting,” *Law and Philosophy* 5(2011):199-218.

<sup>2</sup>Judith Jarvis Thomson, “The Trolley Problem,” *The Yale Law Journal* 94(6)(1984):1395-1415.

an example raised by Michael Sandel. He describes a South African government policy to help save the black rhino population from extinction. In this policy, the government allows wealthy hunters to fly into South Africa and pay locals for the right to kill black rhinos for trophy hunting. This encourages locals, who receive the money, to preserve the black rhino population, so that more wealthy hunters come to hunt, and pay money to do so. Some may hold the intuition that this policy is morally impermissible, or possibly impermissible.<sup>3</sup> But it is not clear which property in the case explains this intuition. Perhaps one is concerned because black rhinos are high-level sentient creatures, or the hunters are rich, or the hunters are paying money to kill, or the locals must sell hunting rights for an income, or that they profit from killing rhinos. It may be one of these properties, some of these properties, or all properties that disturb us.

Because it is difficult to know which properties explain an intuition in complex cases, many philosophers use simple fiction. But as a result of using fiction, we limit the range of properties we consider. Some wrongs are complex; they only occur when multiple features are present. We will never explore complex wrongs if we limit ourselves to simple cases.

In this chapter, I propose a method of systematizing intuitions in the face of complex cases.

In the following Section 1 I argue that we can adopt comparative methods, common in the social sciences, to better determine which property or properties in a complex case explains a given intuition. We can then formulate principles that are consistent with these intuitions. I provide an example of such a methodology using a single complex case of immigration

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<sup>3</sup>Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets*, New York: Farrar, Straus and Girouz 2013.

control.

In Section 2, I show how conducting in-depth qualitative interviews can increase the range of properties we consider. This allows us to determine more intuitions we might otherwise not be aware of, and raise puzzles we might otherwise not consider. This, in turn, can help us formulate more precise and robust principles. To demonstrate this methodology, I will present cases of three women I interviewed, describing how they help us formulate principles. In Section 3 I will then describe my general sampling methods for the larger project on repatriation.

Before beginning, a brief note on my assumptions.

I assume that, when we formulate principles, it is better if these principles are consistent with our intuitions about specific cases. If our principle claims it is permissible to push a man to his death to save five lives, that is a point against this principle if we do not have that intuition. I shall not attempt to provide a justification for this stance. Instead, I shall consider how, if we do accept this stance, we can better systematize the intuitions we have, to better ensure they are consistent with the principles we formulate.

I use the word “intuition” to refer to feelings that arise regarding the actions of individuals in cases. There are two such types of intuitions that concern me. The first type is a feeling that arises from what I call “Obvious Cases,” where our intuition is that a wrong has clearly taken place, and no amount of considerations and thought would likely change our mind. For many, the feeling that it would be wrong to push a man onto a train track to stop a train might be considered such an intuition. The second type of intuition is that arising from “Difficult Cases,” where our intuition is that we do not know, or are not confident, whether a wrong has taken place, and we feel we are facing a moral dilemma that needs resolving.



For an example of how we use Obvious Cases, imagine we wish to establish under which conditions causing another human to die is wrong. We might start with a working principle: “It is wrong to intentionally cause someone to die.” We might then come up with a counter-example to this principle. Imagine a doctor who, with the consent of a patient, agrees to stop life-saving surgery. Technically, the doctor’s act of omission lead someone to die. If we feel this is not wrong, we might then refine the principle, perhaps changing it to: “It is wrong to intentionally commit an active act (as opposed to an omission) that leads someone to die, without their having consented to this act.” We may then find other obvious counter-examples, to further change and refine the principle. Similarly, consider the rule, “Murderers should be imprisoned for life.” We might come upon a case of a minor who has murdered, and feel she should not sit in prison for life. We would then modify the principle to, “Murderers should sit in prison for life if they are adults.” As before, we may refine the rule further, if we think of new counterexamples, possibly further narrowing the number of people who should sit in prison for life.

Such a process of considering multiple examples is necessary, because we cannot be certain a given principle is plausible based on one or two examples alone. Even if a principle is plausible in one case, we might realize the principle was counter-intuitive in other cases, and so in need of revising.<sup>4</sup> More specifically, a range of Obvious Cases can clarify which property or properties creates a wrong-making feature, and so clarify the types of actions we ought to avoid. We cannot be certain it is always

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<sup>4</sup>James Wilson, “Internal and External Validity in Thought Experiments,” *Proceedings of the Aristotelian Society* 137th Session, 2(116)2015/2016; David Thacher, “The Normative Case Study,” *American Journal of Sociology* 111(2006)1631–76; Shelly Kagan, “The Additive Fallacy,” *Ethics* 99(1)(1988):5-31, p. 18

wrong to cause another person to die, and always right to implement a given punishment, if we have not considered all cases where we cause a person to die, and all cases where a person receives a given punishment. In this sense, the more Obvious Cases we consider, including both complex and simple cases, the more corroborated our principles become. This is not to claim that all principles must generalize to all cases. It is to claim that, if we have a principle we claim generalizes to at least many cases, we must consider these many cases, rather than one or two alone.

In contrast to Obvious Cases, in Difficult Cases we cannot decide what actions should be taken. Perhaps we come upon a case of a minor, aged sixteen, who has murdered many people. We are uncertain if she should receive the sentencing of an adult or a minor. We must resolve the case, in order to have a more precise action-guiding principle concerning criminal justice. To resolve the case, we might appeal to various principles which, in turn, must be consistent with intuitions about Obvious Cases. For example, we might appeal to a general principle that holds minors should not be responsible for their actions. To corroborate this principle, we must ensure it is consistent with our intuitions about Obvious Cases involving how we treat children in other spheres, such as in education, voting, and driving. We would not want to claim that minors are never responsible for their actions like adult, as this would likely conflict with our intuitions about at least some cases, such as minors driving. Nor would we want to claim they are always held responsible like adults, as this would likely conflict with other intuitions we have in other spheres. Whatever general principle we do arrive at could then be applied to the Difficult Case of the sixteen year old who has murdered many people.<sup>5</sup>

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<sup>5</sup>When discussing Obvious and Difficult Cases, I focus on cases intended to elicit

In focusing on intuitions about cases, I do not refer to the general intuitions that a definition or principle is a plausible one. You might, for example, just intuit that murder is defined as “causing someone to die,” without thinking of a particular case. Rather, I limit my discussion to intuitions about specific cases. Similarly, I do not refer to a strong feeling that arises only after thorough deliberation. I refer to the types of feelings that we have prior to deliberation, or despite it, like the feeling that it would be wrong to push an innocent man to this death, or the feeling that it is difficult to determine if a judge should ever try a sixteen year old as an adult.<sup>6</sup>

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intuitions. I put aside other types of cases, such as illustrations intended to demonstrate what we mean by a concept. For example, if I wish to explain what I mean by “manslaughter” I might describe a person who has killed someone while driving under the influence of alcohol. The example is not intended to demonstrate any intuition. It is to explain what the concept of manslaughter refers to. My discussion in this chapter puts such cases aside.

<sup>6</sup>Some may object to the claim that all intuitions matter, claiming that only considered intuitions matter, arrived at following extensive and rational deliberation. After all, a supporter of slavery in a slave-owning society may support the practice because she has not thought about its implications, or deliberating about the value of freedom and liberty. However, limiting our intuitions to those which are thoroughly considered would likely still lead to some seemingly objectionable intuitions: a very brilliant slave-owner, who has deliberated about the ethics of slavery, may very well judge that slavery is right.

Some may raise another objection: because individuals do not agree on intuitions, then we ought not appeal to intuitions in formulating principles. Because the slaveowner’s intuitions clash with my own, and we cannot both be right, we cannot be certain that either of us are right. More generally, there is no reason to believe an intuition that a judgement is correct is an indication that this judgement is objectively correct. Instead, some argue, we should appeal to facts that are true apart from our intuitions, such as logic, utility, and rationalism. See, for example, R. Brandt, *A Theory of the Good and the Right*, Oxford: Oxford University Press 1979. There are two possible responses to this objection. First, we have little choice but to appeal to intuitions on some level. Even if we were to determine principles based on how rational and logical they are, we would still be relying on the intuition that rational and logical thought brings us to correct judgements. Second, even if we do not know whether our intuitions are correct, we do know that we could never accept principles that conflict with some of our deeply-held intuitions about certain cases. Just as I believe  $2+2=4$ , and would reject a mathematical axiom that was produced by a mathematician who intuited that  $2+2=5$ , I would reject a principle produced by a slave-owner who intuited that slavery is right. Intuitions are

Finally, when formulating a principle, I assume it is preferable to appeal to intuitions that a broad audience could accept. Of course, individuals have very different intuitions about some Obvious Cases, and a single individual may have different intuitions at different points in their lives or even times of day.<sup>7</sup> Some may believe the sixteen year old should clearly be tried as an adult, while others believe she should clearly not, while others believe this is a Difficult Case that needs resolving. We can still attempt to formulate principles that are as consistent as possible with the intuitions we do agree on. It may be that all agree that a sixteen year old who kills only a small number of people should not be placed in prison for life, viewing this as an Obvious Case. We might also agree about a sub-set of cases where she kills a large number of people, such as a sixteen year old who is very immature, and so should not be tried as an adult. If we agree about a sub-set of Obvious and Hard Cases, then we can attempt to use the Obvious Cases to formulate principles relevant for the Hard Cases. In this sense, we can formulate principles consistent with at least some intuitions.

Though my assumption is that we can corroborate principles by ensuring they are consistent with intuitions, I hope the methodology I present will appeal to those who are slightly more sceptical about the importance of intuitions. Some claim that intuitions are only important if they can be explained by appealing to a higher order-principle, such as Kant's categorical imperative, or Rawlsian or Scanlonian contractualism, or the Golden Rule, or Utilitarianism. Yet, those who attempt to formulate these higher-order principles often appeal to intuitions, at least partially. Rawls does

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valuable because they help us determine the principles we can accept. And I assume it is important to determine the principles we can accept.

<sup>7</sup>Jeff McMahan, "Moral Intuition," in (eds.) Hugh LaFollette and Ingmar Persson, *The Blackwell Guide to Ethical Theory*, p. 105.

this explicitly,<sup>8</sup> as does Parfit when he attempts to show how Kantian principles can be reformulated to be consistent with intuitions about hypothetical cases.<sup>9</sup> Even those who do not explicitly appeal to intuitions still use them,<sup>10</sup> as when Peter Singer asks if you should save a drowning baby in a pond, thereby ruining your expensive suit. If you think you should, argues Singer, you should also sacrifice wealth to save a poor person on the other side of the globe.<sup>11</sup> He uses his baby-in-a-pond example to persuade you to accept his claims, even if he thinks that intuitions have little normative force.

Therefore, intuitions have some role to play in a range of theories. This has implications for our choice of examples. Complex examples are less useful if they cannot tell us which property our intuition is responding to. If we do not know why killing rhinos may be wrong, the example is less helpful for determining what principles may be wrong. It could be wrong to create a market for killing to save future lives. It could be wrong to kill endangered animals, regardless of whether there is a market. It could be wrong to kill in general, regardless of which living being is being killed. It could be wrong to use a living being as a means to an end, even if it does not involve killing. Knowing what bothers is necessary to know what principles we should revise, but we struggle to know what bothers us in

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<sup>8</sup>John Rawls, *At Theory of Justice*, Cambridge, MA: Harvard University Press 1971 and 1999.

<sup>9</sup>Derek Parfit, *On What Matters*, Oxford: Oxford University Press 2011.

<sup>10</sup>Ernest Sosa, "Experimental Philosophy and Philosophical Intuition," *Philosophical Studies* 132(2007): 99-107; Many ethicists are, as Robert Audi labels them, "intuitivists;" they use intuitions to appeal to claims without viewing themselves as "intuitionists," in the sense of viewing intuitions as foundational. See Robert Audi, *The Right in the Good: A Theory of Intuition and Intrinsic Value*, Princeton: Princeton University Press 2004. See p. 24-25. For a similar argument, see Francis Kamm, *Intricate Ethics: Rights, Responsibilities and Permissible Harm*, New York: Oxford University Press 2007: 417.

<sup>11</sup>Peter Singer, *The Life You Can Save: Acting Now to End World Poverty*, London: Picador 2009.

complex cases.

We could choose simple examples instead; but then we might overlook intuitions that only arise in complex cases. It may be that every feature in the black rhino example creates a wrong in combination, but no one feature is wrong on its own. It seems complex cases are necessary, but it is not clear how to use them.

## 2.1 Comparative Case Selection for Normative Theory

One way to utilize complex cases is to adopt a comparative method. More specifically, in order to know what properties explain an intuition, we should compare similar cases, where all is similar except for one or several properties, or all is different except for one or several properties. When our intuitions change from one case to the next, we can be fairly certain that this change in intuition can be explained by the change in a given property or properties, assuming all else is equal.

Philosophers already seem to employ this technique for fictional examples, though not explicitly. Consider, for example, trolley cases. In Philippa Foot's original case, a "driver of a runaway tram. . . can only steer from one narrow track on to another; five men are working on one track and one man on the other; anyone on the track he enters is bound to be killed."<sup>12</sup> You must decide if the driver should steer the tram onto the track with five people, killing them, or the track with one, killing only him. Most would say he should steer the train onto the track with only one man.

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<sup>12</sup>Philippa Foot, "The Problem of Abortion and the Doctrine of the Double Effect" in *Virtues and Vices*, Oxford: Basil Blackwell 1978.

In an example by Thomson, a third party sees the train, which will continue going on the first track and kill the five, unless you can throw a switch and change the train from one track to another, killing one man on the other track.<sup>13</sup> You might feel this is a difficult case that is not easy to resolve. If so, the change in intuition from Foot's case is likely related to the fact that you are a third party. For, that is the only property which has changed.

In the third trolley case, also by Thomson, you also see a runaway trolley about to run over and kill five workers on the track. In this case, there is no other track the train can switch to. You happen to see a man looking down from above the track. You are a train expert, so you know that if you push him onto the track it will stop the train, killing him but saving five lives.

Thomson assumed that many would feel it was wrong to push the man.<sup>14</sup> We can be fairly certain it is the man being pushed which changes our intuition from the previous case, because that is the only property which has changed from the previous case. We can then consider why it is wrong to push the man. I shall not delve into this debate. My point is merely that continuity between cases, except for small changes, helps us determine the wrong-making feature of a given case.

You might think the simplicity of trolleys makes them easy to compare. But Thomson's trolley cases are not so simple. If you recall, she specifies that you are a trolley expert. She also specifies that you just happened, by chance, to see the large man. These details, I believe, make the cases more similar to each other and to Foot's example. If you are an expert,

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<sup>13</sup>Thomson 1984: 1395-1415.

<sup>14</sup>Thomson 1984: 1407.

your certainty of success is close to 100%, just like Foot's driver who is deciding whether to switch tracks, or Thomson's other example where you can throw a switch. If you just happened to see the large man, your decision must be quick and not premeditated, just like the driver in Foot's example. When Thomson's cases are paraphrased today, these details are often left out,<sup>15</sup> but they are essential. The more similar examples are, except for one property, the more we can be certain that our intuitions are responding to this property.

We can adopt this method in cases that are more complex. Imagine we are considering a principle of justice, the *1000 Lives Principle*: *it is just to harm one person if it saves at least 1,000 lives*. We want to see if this principle is consistent with our intuitions, and so concoct a case where we must decide whether to push a man to stop the train, causing him to become paralysed, and saving 1,000 lives. If we feel that pushing the man is morally permissible, we do not yet know if the *1,000 Lives Principle* is true in general, or just in some cases, such as when a man becomes paralysed from pushing him. To know the strength of the principle, or how it might be revised, we would need to know which property our intuitions are responding to: the method of harming the one man, the harm imposed on him, the number of lives saved, or an interaction between two or all of these properties.

To see which property in the complex case explains an intuition, we can create other complex cases that vary along the properties: the method of killing the one person (pushing the man versus a pulling a switch),

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<sup>15</sup>For example, See Daniel Statman, "Targeted Killings: Fairness and Effectiveness" in (eds.) Claire Finkelstein, Jens David Ohlin, and Andrew Altman, *Targeted Killings: Law and Morality in an Asymmetrical World*, Oxford: Oxford University Press 2012 and Wikipedia Entry: "Trolley Problems," accessed on 24 October 2014.



the lives saved (more or less than 1,000), and the harm imposed on him (killing him versus paralysing him). Assuming the properties are binary – an assumption I shall later remove – this leads us to consider  $2^3=8$  possible cases, representing possible variations along the three binary properties.

We could start by comparing two cases where the man is pushed to save 1,000 lives. In one he is killed and the other he is paralysed.

Table 2.1: Trolleys 1 and 2

Trolley 1	Kill by pushing	1 harmed to save 1,000	killed
Trolley 2	Kill by pushing	1 harmed to save 1,000	paralysed

You might think it is wrong to push the man when he is killed, but permissible if he is paralysed. In other words, two properties – the fact that he is pushed and the fact that he is killed – may be interacting to explain the intuition that an act is impermissible. One way to help determine if this interaction effect arises is to consider whether you have the following intuitions: in cases where you observe the man being pushed and killed you usually think the act is impermissible; in cases where the man is pushed and merely paralysed you usually feel the act is permissible; in cases where the switch is pulled and the man is killed you usually feel the act is permissible; and in cases where the switch is pulled and the man is paralysed you usually feel the act is permissible. Of course, it is unlikely you would feel the interaction effect between pushing and killing is absolute: it is unlikely that only pushing which leads to killing is impermissible. But you might still reach the conclusion that, when both are present, they tend to elicit

a feeling that a wrong has occurred compared to when only one or neither are present.

To see if this is the case, you might start by comparing the following two scenarios. In both, a man is harmed to save 1,000 lives, he is killed in both, but in one he is pushed onto the track, and in the other he is killed by pulling a switch.

Table 2.2: Trolleys 3 and 4

Trolley 3	Kill by pushing	1 harmed to save 1,000	killed
Trolley 4	Kill by switch	1 harmed to save 1,000	killed

If you think that it is wrong to push the man and kill him to save 1,000 lives, but right to pull the switch, and also right to push him if he is merely paralysed, then the *1,000 Lives Saved Principle* should be modified to specify the way the one man is killed and the harm imposed. It might read: *To save 1,000 lives, it is permissible to push a man and paralyse him, permissible to pull a switch and kill him, but wrong to push him and kill him.* Of course, you may wish to abstract out more, and formulate two general principles, one regarding direct harm and another regarding proportionality. But this, too, would require you to look at more examples where an act leads to killing versus other harms, and where the number of lives saved varies, using the same comparative method.

These fictional examples, though slightly more complex, still only have three fixed binary properties, requiring us to look at only eight possible

cases. The real world has far more properties. This can result in the need to look at hundreds of thousands or even millions of cases, to see if an act seems intuitively wrong when the properties change. For us to really know if the *1,000 Lives Saved Principle* stands, we would need to consider cases where 999 lives are saved, 1,001 lives are saved, and so forth. If you felt that even paralyzing the man was wrong, you would need to consider cases where the man was not paralysed, but had his leg broken, or left pinky broken, and so forth.

If a principle can only be validated by ensuring it is consistent with our intuitions, and we only know it is consistent with our intuitions by considering all possible variations, then we would struggle to find the time to truly validate a principle.

This problem is apparent in immigration ethics. Consider the *Principle of Non-Refoulement*, found in international refugee law. This principle can be expressed as: *It is wrong for the state to deport a person to their country of origin if their lives will be at immediate risk after returning.*

You might look at actual cases of immigration control to formulate this principle so it is specific and consistent with our intuitions. Consider, for example, the case of immigration control in Israel:

In December 2013 Israel passed an anti-infiltration law, which required all asylum seekers, including the refugees amongst them, to stay in an enclosed detention facility in the desert. The state refused to recognize any asylum seekers as refugees, including those fleeing from Darfur and Eritrea.<sup>16</sup> It also provided \$3,500 to any asylum seekers agreeing to repatriate to their

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<sup>16</sup>Mollie Gerver, "The Role of Non-Governmental Organizations in the Repatriation of Refugees," *Philosophy and Public Policy Quarterly* 31(1)(2014): 1-13; Reuven Ziegler, "No Asylum for 'Infiltrators': the Legal Predicament of Eritrean and Sudanese Nationals in Israel," *Immigration, Asylum, and Nationality Law* 29(2)(2015): 173-191.

country of origin. Since 2014 at least 2,200 have returned,<sup>17</sup> including many with children who were born and raised in Israel.<sup>18</sup> After returning, many were forced to flee persecution or found themselves homeless, living in life-threatening poverty.

All of these migrants and refugees were not deported in the traditional sense. They were threatened with detention, or paid to leave, or both. If you feel this policy was not just, you might want to revise the *Principle of Non-Refoulement*. The new formulation would read:

*It is wrong to deny someone the option of applying for refugee status, and to*

- 1. detain them or*
- 2. deport them or threaten them with deportation and/or*
- 3. pay them to leave.*

But we cannot be certain this principle is valid based on one complex case alone. For, we do not know which property or properties in the case is explaining a given intuition. The wrong-making feature could be that asylum seekers feared detention; or that they were paid to leave; or that they left to low-income countries; or that some were likely refugees, and so forth, or an interaction between two or more of the properties in the case. If we found ten properties that we suspected explained our intuitions, we would need to consider  $2^{10}=1,024$  cases to know the impact of each given property on its own, and the impact of interactions between properties. Indeed, the real number of properties is infinite. Each migrant arrived in

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<sup>17</sup>IRIN News, “African migrants in Israel face “voluntary” return or detention,” Downloaded on 12 July 2015 from <http://www.irinnews.org/report/99712/african-migrants-in-israel-face-voluntary-return-or-detention>.

<sup>18</sup>Interview with Muhamad, Addis Ababa, 9 June 2014.

Israel for different reasons, some fleeing war and others fleeing poverty and others fleeing both. Each migrant worked in a specific job upon reaching Israel. Each was told something slightly different as they signed on a dotted line, agreeing to accept cash to leave Israel. And for a given migrant, each one of these experiences is made up of a sequence of smaller events, rich in details, from the thoughts that crossed their mind as they were offered cash to repatriate, to the fear felt as they boarded a flight. If the properties are infinite, so are the possible variations. We could not consider all possible cases in our lifetime.

We could limit the number of properties, focusing on those we hypothesize create a possible wrong, such as the properties relating to detention, deportation, money, and so forth, ignoring other properties. But even if we limit the number of properties we consider to those we hypothesize determine our intuitions, we are likely to often come up with at least ten or more binary properties. This still forces us to consider over 1,000 cases that vary along these properties, possibly far more than we have time to consider.

## 2.2 How to Select Cases

Before addressing a methodological solution to this problem, I would like to briefly respond to a related problem. Some might claim that my entire approach, of reformulating principles whenever they conflict with an intuition about a new case, would force us to sacrifice moral philosophy more generally. If we must modify principles in light of new intuitions that arise in every new case we consider, then our principles would become extremely complex, possibly growing every time we were exposed to a new

case. And if every new property in a new case would completely change a principle, then this would also change the moral evaluation of all other acts whose permissibility is based on this principle. It would be difficult to say anything general about morality at all.

This would be a problem if it turned out that, every time we considered a new case, we learned about an intuition that clashed with our principles. I assume this is highly unlikely, and that most cases will not yield intuitions that conflict with our principles. The result of considering thousands of cases is not that a principle would change every time, but that a principle might change some of the time. My concern is that, because a principle might change, we cannot be certain it is valid until looking at thousands of cases.

This problem has three possible solutions. We could reject the view that principles must be consistent with all intuitions that arise in every case, and instead conclude that principles are merely contributory.<sup>19</sup> This would mean that, if we establish a principle, and find a counter-example where the principle seems impermissible to follow, then the principle still stands, but is merely not decisive in that particular counter-example. If so, then we needn't consider every possible example before establishing a principle. For example, imagine I claim there is an *Anti-Encouragement Principle*: It is wrong to encourage others to risk their lives, which is why refugees should not be paid to repatriate to danger. You come up with a counter-example against my so-called principle: Just last week I hired a security guard to accompany me on a treacherous terrain, thereby encouraging her to risk

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<sup>19</sup>Jonathan Dancy, "Moral Particularism," in (ed.) Edward N. Zalta, *The Stanford Encyclopedia of Philosophy* (Fall 2013 Edition), <<http://plato.stanford.edu/archives/fall2013/entries/moral-particularism/>>.

her life. It seems, intuitively, that I acted permissibly. If principles are merely contributory, this example of the security guard is not a counter-example against the *Anti-Encouragement Principle*. The example is merely a case where the principle is not decisive. Perhaps another principle, such as a *Principle of Informed Consent*, is decisive in this instance. The guard consented to protect me, and I compensated her duly, and she was aware of the risks, and so forth, making it morally permissible for me to pay her to protect me, even if this encouraged her to risk her life. We might come up with the same conclusion regarding payments to refugees. One reason not to pay them is that it is wrong to encourage others to risk their lives, but this reason may not be decisive if refugees are not in detention, and informed about the risks of repatriating. When we formulate a contributory principle, we needn't consider over 1,000 cases because we needn't claim a principle must be decisive in over 1,000 cases.

This approach is not helpful. Even if we accept that principles are only contributory, we must still consider whether a principle is decisive in a given case. To consider when a principle is decisive, we must consider a plausible general rule as to the contexts that makes a principle decisive.<sup>20</sup> This requires us to look at a range of cases. For examine, if I claimed that my principle was decisive whenever a vulnerable individual was paid, but not an empowered individual like a security guard, I would need to validate this general claim. This would require me to consider a range of cases where an agent was vulnerable and paid to risk their lives, and not vulnerable and paid to risk their lives, varying along properties that

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<sup>20</sup>Jonathan Dancy, "Moral Particularism," in (ed.) Edward N. Zalta, *The Stanford Encyclopedia of Philosophy* (Fall 2013 Edition), <<http://plato.stanford.edu/archives/fall2013/entries/moral-particularism/>>.

may impact our intuitions, such as the extent of vulnerability, the type of vulnerability, the cause of the vulnerability, and so forth. This would require considering far more cases than we have time to consider.

There is a second possible solution to this problem. We could adopt a type of Moral Particularism, and reject moral principles altogether. This would entail looking at a given case, in all its complexity, and focusing on the various properties of that particular case. If properties exist that create decisive reasons to act a certain way in a particular case, then we ought to act that way. If an asylum seeker is in prison and paid to repatriate to a war zone, the fact that he is in prison and returning to a war zone are reasons enough to view the government's policy as impermissible. Importantly, even if we conclude this for Israel's policy, this needn't mean that, every time a person's options are constrained and they are paid to risk their lives, it is wrong to pay them. Reasons to act one way in one case needn't create reasons to act the same way in another case.<sup>21</sup> If we can create a rule for one case without applying it to all cases, we needn't ensure our rules are intuitive in all cases.

This solution is helpful for cases where there is at least one clearly decisive reason to act a particular way. If a refugee is detained and paid to leave to a warzone, we can conclude they have been wronged because they were detained and returning to a warzone, and create a rule for similar cases of detention. However, particularists may still be forced to consider potentially thousands of cases when faced with more difficult dilemmas, such as a refugee who is not in detention and paid to repatriate to a high-risk country. To consider if it is permissible to pay refugees to take such

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<sup>21</sup>Jonathan Dancy, *Ethics Without Principles*, Oxford: Oxford University Press 2004: p. 7.



risks, particularists must consider what sorts of risks create reasons to refrain from payments. This might require considering cases where the risks are moderate, extreme, and very extreme; known, unknown, or partially known; risks to life, or limb, or happiness; and so forth. If there are over ten possible properties that are relevant, particularists would need to look at thousands of cases to determine the particular context where risks create decisive reasons to not pay refugees to repatriate. For example, perhaps payments should only be avoided if refugees are returning to known and extreme risks to life, but not if they are returning to known and extreme risks to limb, or partially known and extreme risks to life. Perhaps the precise context where payments should be avoided is more complex, involving a specification not only of the extent of risks, but the likelihood that refugees will later regret their decision, or will have their freedom undermined. If certain reasons only arise in quite particular contexts, we may only realize this upon looking at thousands of varying contexts, more than we have time to consider.

A final solution would be to concede that, regardless of whether one is a particularist or a generalist, or believes principles are absolute or contributory, we can never be certain that a principle is plausible or a reason decisive until looking at more cases than we have time to consider. The most we can do is find evidence that confirms a given principle, or evidence that a reason is decisive. We should therefore adopt a method of selecting cases that provides the strongest evidence of a principle's plausibility or a reason's decisiveness. One such method, I argue, is to select a random sample out of the domain of cases that vary along the hypothesized relevant properties. If, for example, there are ten binary properties we hypothesize explain our intuitions, and so 1,024 possible cases to consider, we can

randomly select a segment of these 1,024 cases. If the principle<sup>22</sup> seems consistent with intuitions that arise in these randomly selected cases, the principle is corroborated, even if never completely confirmed. If the principle seems counter-intuitive in at least one randomly selected Obvious Case, we ought to revise the principle, or at least consider revising the principle, if we can do so without it conflicting with intuitions about other randomly selected Obvious Cases.<sup>23</sup>

Psychologists and sociologists adopt this approach when using what they call “experimental vignettes.” In such experiments, subjects are given a series of fictional stories, each slightly different, to determine their opinions. In one study, subjects were asked if they believed different immigrants should be allowed to stay in the country. Some immigrants in the stories were male, others female; some had a criminal history, others did not; and so forth. Experimenters then examined these answers to determine if subjects were more likely to support a given type of migrant staying,<sup>24</sup> such as a migrant with a criminal history, or a migrant with a lower income, or a migrant with a particular criminal history and income. When complex vignettes are used in this manner, then each vignette has dozens of properties, and so there are often millions of possible variations. There are an insufficient number of subjects to test all possible variations. Rather than showing all cases to all subjects, experimenters randomly select some

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<sup>22</sup>I shall assume, from here on, that principles are relevant for normative theorizing, though all that I write is consistent with a particularist approach. Simply replace “principle” with “decisive reasons” if you are a particularist.

<sup>23</sup>If there is no principle that seems consistent with all intuitions, then I concede we have a problem, and should either keep trying, or at least establish the most plausible principles, even if it remains imperfect.

<sup>24</sup>Christiane Atzmüller and Peter M. Steiner, “Experimental Vignette Studies in Survey Research,” *Methodology* 6(3)(2010): 128-138.

cases.<sup>25</sup> If subjects tend to answer a given way whenever a property is present, even though each case is randomly different in other ways, this is strong evidence that the property is important in explaining a given intuition. If subjects are far more likely to answer a given way whenever two variables are present, but not when each variable is present on its own, this is evidence that the two variables interact to explain an intuition.

Moral and political philosophers can take a similar approach. When there are more than three or four properties that we strongly suspect explain our intuitions in various cases, philosophers can randomly select properties, evenly distributing them across cases, except for one or more properties they hypothesize impacts intuitions. If this property of interest is always correlated with a given intuition that a wrong has taken place, even when all other properties vary randomly, this is strong evidence that the property is important in determining if a wrong has taken place, or if a wrong may have taken place. Similarly, if the presence of two or more properties is always correlated with a given intuition, but never when these properties are present on their own, this is evidence that the properties interact to explain a given intuition.

To see how this is done, imagine we look at the case of returns from Israel, and hypothesize which properties, or groups of properties, are important. Some are most likely not; if we happen to know the colour of the hat the pilot wore as he flew the plane, this is less likely to impact our intuitions, and so we can put this aside, focusing on other properties that are more likely to explain our intuitions about various cases.<sup>26</sup> I noted

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<sup>25</sup>David Heise, *Surveying Cultures: Discovering Shared Conceptions and Sentiments*, New Jersey: John Wiley and Sons 2010.

<sup>26</sup>Some may feel that, if we are already selecting properties we suspect are important, then there is no need to randomly select properties, as we already have a sense of what

that some migrants had children who had grown up in in Israel. We can call this the Settled Property. We suspect that it may partly explain our intuition that a wrong has occurred. We also hypothesize that nine other properties also explain our intuition that a wrong has occurred. For example, some migrants were detained; some were refugees; some were paid money to leave, and so forth.

We can then create two sets of fictional cases to determine if the Settled Property at least partly explains our intuitions that a wrong has occurred. In the first set there is no settled property, and in the second there is. In both sets, half of each set includes cases where a random sample of the other nine properties are present, but not all. The other half of each set includes the absence of these same properties.

If we only randomly select two other properties unrelated to settlement, in addition to the settled property, then we would look at  $2^3=8$  cases. For example, we might compare cases that – in addition to the settled property – also differ in whether a migrant feared detention and whether she was returning to a very poor country. This might involve comparing the following two sets:

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matters. However, though we may hypothesize that a property might matter, we can better corroborate its importance by observing how we react when it is present alongside other properties. Given that we cannot observe all cases varying along all properties, we ought to randomly select a segment of such cases.

Table 2.3: Settlement, detention, and poverty

Feyise has <u>settled</u> in Israel but <b>fears detention</b> and is returning to a <b>poor</b> country.	Mulugeta has <u>not settled</u> in Israel and <b>fears detention</b> and is returning to a <b>poor</b> country.
Seid has <u>settled</u> in Israel but <b>fears detention</b> and is returning to a <b>wealthy</b> country.	Siduk has <u>not settled</u> in Israel and <b>fears detention</b> and is returning to a <b>wealthy</b> country.
Hani has <u>settled</u> in Israel and does <b>not fear detention</b> and is returning to a <b>poor</b> country.	George has <u>not settled</u> in Israel and does <b>not fear detention</b> and is returning to a <b>poor</b> country.
Biruk <u>settled</u> in Israel and does <b>not fear detention</b> and is returning to a <b>wealthy</b> country.	Celine has <u>not settled</u> in Israel and does <b>not fear detention</b> and is returning to a <b>wealthy</b> country.

Imagine we look at the first column, where the migrants all settled in Israel. In all of these cases we feel the policy is wrong or a difficult case, even though the cases are different from each other with regards to two other properties. We then look at the second column and feel that no

wrong has taken place in any of them, or a lesser wrong, even though the cases are different from each other with regards to these two other properties. This is evidence that settling in Israel explains our intuition that the return policy was wrong. We might then modify the *Principle of Non-Refoulement*, claiming that it is wrong to forcibly facilitate return of a migrant who has settled in a country.

When selecting or creating cases to compare, it is important that no property is correlated with the property of interest. This would undermine our ability to determine if there was evidence that a property was explaining a given intuition on its own. For example, if we looked at cases where refugees were both in detention and also paid to leave, we might intuit that a wrong occurred in all of these cases, but we do not know if our intuitions are only reacting to detention, or payments, or both, or an interaction between the two. To know whether our intuitions are responding to the payments, we must look at cases where refugees are not living in detention and paid to leave. To know whether our intuitions are responding to detention and not payments, we must look at cases where refugees are in detention, and not paid to leave. To know if there is an interaction effect, we need to look at cases where both properties are present, and see if our intuitions are different compared to cases where only one of each property is present.

Eight is a small number of cases to look at. Even if we look at another set of eight, totalling sixteen cases, we are still overlooking many properties. Most notably, I have not specified who amongst these migrants are refugees whose lives will be at risk if they return. To further corroborate a principle, we would need to randomly select more cases, and make more comparisons, better understanding which properties are causing an intuition. But if there

is a limit to the number of cases we can look at, then we should at least randomly select varied cases, rather than a single complex case alone.

Until now, I have essentially argued that complex cases can be compared in a similar way to how trolley cases are compared, with the only difference being that we randomly select complex cases, because there are too many possible variations to choose from. There is another important difference between trolleys and complex cases. In the real world, each property can take on more than one value. While there is only one way of throwing a switch in a trolley case, there are many ways of settling in a country for a migrant. A migrant can have children, live there many years, have many friends, build a business, and so forth. The choice of how we define “settled in a country” may impact our intuitions.

For example, let us say we look at cases where migrants settled in the country in that they had children and lived there many years, and cases where they did not settle in the country, in that they never had children and only lived there a short while. Imagine that, after comparing cases, we conclude that settling in a country is not a reason to grant a migrant residency rights. We can still zoom into the property, and see if particular types of settling impact our intuitions. Some may have lived fewer years in the country, but started a family. Others may have started no family, but lived many years in the country. There are now new binary properties: the Family Property, describing if they started a family, and the “years” property, describing if they lived many years in the country. We can then determine the impact of each property on its own. We can first compare cases where migrants started a family, and cases where they did not. As before, the other properties will be evenly distributed in both sets and no property will be correlated with the Family Property. Importantly, the

other property related to long-term settlement – the number of years in the country – should also be evenly distributed and not correlated with the Family Property.

After determining the impact of the Family property on our intuitions, we can determine the impact of the Years property. As before, we must ensure that all other properties, including the Family property, are evenly distributed and not correlated with the Years property.

We may still find that neither property leads us to believe that settling in a country impacts whether a person should be permitted to stay. We can zoom in once more. For migrants who have families in the country, we might feel differently about those with children who have lived enough years in the country to know the language fluently and integrate culturally.<sup>27</sup> Every time we zoom in, we can make similar systematic case comparisons. When we formulate principles, we can then specify which types of features create a wrong, or a difficult case, and which do not.

I shall follow this general spirit throughout the thesis, making comparisons between complex cases, rather than looking at single complex cases on their own. For example, in Chapter 4 I will discuss agencies who misinformed refugees they helped return. In each case, which I learned about in fieldwork, agencies misinformed refugees in different ways. Some told wrong information, and others told no information. Some agencies were NGOs, and others were government bodies. Some failed to provide infor-

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<sup>27</sup>You might feel that it would be wrong to make comparisons between children, claiming that children who speak the language fluently should stay, but not children who have yet to master the language. This meta-intuition can also be incorporated into a comparative approach. You can compare philosophical acts of comparing children, and philosophical acts that involved no such comparisons. If you consistently believe this approach is intuitively morally wrong, then that is a point against this approach, which will impact the final principles formulated.



mation that was easily available, others failed to provide information that was difficult to obtain. By comparing cases that varied along all of these properties, and more, I could better determine if a particular property, or a number of properties, was creating a distinct wrong, better corroborating a particular formulation of a principle or guideline.

In using this method, I will not only rely on real-life cases I learned about from interviews, but also fictional cases, where several properties are different from the real-life ones, except for one or two properties that are similar. This will help establish if a given property or properties seems to be a wrong-making feature in general, helping formulate a principle for difficult cases in repatriation. For example, it is unclear if NGOs are blameworthy when unwittingly giving refugees false information about their countries of origin. I will raise fictional examples of a car salesman unwittingly giving false information to a customer, and a doctor unwittingly giving false information to a patient. These examples will help establish when it is blameworthy to unwittingly give false information in general, and not just in the context of repatriation. This, in turn, will help me formulate a general principle for when giving false information is wrong, helping determine when NGOs are blameworthy for giving false information to refugees.

It is important to note that, in the methods I present, the interaction effects between properties cannot be confirmed. Nor can we be certain that a property or properties explain an intuition. However, if we intuit a particular way whenever a combination of properties is present, but not when these properties exist on their own, this would be evidence in support of the claim that the interaction between the properties explains our intuition. This, in turn, would be evidence for or against the plausibility of a given principle. If a principle claims that an act is permissible whenever

this combination of properties is present, but our intuitions say otherwise, then we should revise the principle. And once we revise the principle, we can better determine how to act in difficult cases, where we are not quite certain what ought to be done.

## 2.3 Fieldwork for Philosophy

One way to make comparisons, as is done above, is to read about complex cases in newspapers or literature, and then create fictional cases that vary along key properties in the complex case. There is a disadvantage to looking at existing cases from newspapers and literature. Such cases may capture only a narrow range of properties, and so a narrow range of possible intuitions. This, in turn, may lead to principles that would seem counter-intuitive, had we considered a broader range of cases. At the very least, the principles we formulate may be overly-specific, relevant for only some cases, while ignoring others.

This is a risk for debates on immigration, a field that focuses overwhelmingly on poor individuals who are forcibly blocked from entering or staying in wealthy countries. Within the field of immigration ethics, three properties are often left the same:<sup>28</sup>

1. Force is used in immigration control.
2. Migrants or refugees are vulnerable, in that their lives will be at risk if they return home.

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<sup>28</sup>Matthew Gibney, "Is Deportation a Form of Forced Migration?" *Refugee Survey Quarterly* 32(2)(2013):116-129; Liz Fekete, "The Deportation Machine: Europe, Asylum, and Human Rights," *Race and Class* 47(1)(2005):64-78.

3. Migrants are forced to leave wealthy states, or never enter them.<sup>29</sup>

If we only look at cases that vary along these three properties, we may conclude that it is wrong to force an individual to leave a country if her life will be in danger, largely consistent with the *Principle of Non-Refoulement* as I formulated it above.

By only focusing on cases of return from wealthy countries, it remains unclear whether poor countries act wrongly when deporting refugees, when these countries cannot afford to absorb them. Similarly, by only focusing on cases where a state uses force to encourage a migrant to return home, it remains unclear when states act wrongly if they pay a migrant to leave, or if they omit information on the risks of returning, leading migrants to repatriate.

To expand the range of cases we consider, we can conduct fieldwork, listing additional complex cases to better distinguish between properties. To briefly demonstrate how this is possible, consider the following three women I interviewed in Israel and South Sudan.

The first woman, Ajouk, had grown up in Cairo, her parents having fled southern Sudan during the Second Sudanese Civil War in the 1980s. In 2007 Ajouk felt unsafe, and so paid smugglers to take her across the Sinai Desert and into Israeli territory, where she received a visa to work, but no access to any benefits, such as national healthcare. In 2010 a staff member

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<sup>29</sup>For philosophers focusing on cases involving these three properties, see: David Miller, "Immigration: The Case for Its Limits" in (eds.) A. Cohen and C. Wellman. *Contemporary Debates in Applied Ethics*, Malden, MA: Blackwell Publishing 2005: 193–206; Matthew Gibney, *The Ethics and Politics of Asylum*, Oxford: Oxford University Press 2004; Alexander Betts, "Survival Migration: A New Protection Framework," *Global Governance* 16(2010): 361-382; Joseph Carens, "Aliens and Citizens: The case for open borders," *The Review of Politics* 49(2)(1987):251-273 Javier Hidalgo, "Resistance to Unjust Immigration Restrictions," *Journal of Political Philosophy* 23(4)(2015):450-470.

from an NGO approached her. Working with the Israeli government, the NGO told her it was safe to return to South Sudan, assuring her there were job opportunities and healthcare. She returned to South Sudan, where she found no free healthcare, job opportunities, or security, especially after the outbreak of the South Sudanese Civil War in 2013. Today, she regrets she returned.<sup>30</sup>

I also interviewed Saeda, who fled Ethiopia to Sudan as a young girl with her parents. She failed to find protection in Sudan, so eventually travelled to Israel in the early 2000s, where she asked for humanitarian protection from the Israeli government. She was given a residency visa, but no right to work, and feared homelessness. In 2013 a civil servant told her that, if she returned to Ethiopia, she would receive \$3,500. She accepted the offer and returned, uncertain if the money would be sufficient for her to survive.<sup>31</sup>

In 2013 I interviewed Grace, whose parents fled South Sudan for Uganda in the 1980s, before she was born. The Ugandan government gave her and her family land for farming, and Grace grew up helping on the farm and excelling in school, eventually receiving the top marks in her class. In 2011 the Ugandan government revoked her parents' land, claiming it was safe in South Sudan, despite the UN's claims that it was still insecure.<sup>32</sup> They returned, feeling they had no choice. Grace now works in her mother's teashop in South Sudan, unable to continue her studies. I met her during the first week of the South Sudanese Civil War, on a dirt road next to a

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<sup>30</sup>Interview with Ajouk, Aweil, South Sudan, 2 April 2012.

<sup>31</sup>Interview with Saeda, Tel Aviv, Israel 29 July 2014.

<sup>32</sup>"Emergency Relief Coordinator Press Briefing on South Sudan," 2/2/12. Downloaded on 13 July 2015 from <https://docs.unocha.org/sites/dms/Documents/ERC%20press%20remarks%20South%20Sudan%202%20Feb1012.pdf>.

military base, where soldiers were firing on each other, occasionally onto civilians walking by. She does not feel safe.<sup>33</sup>

I found six properties in these cases that I suspected impacted my intuitions as to whether a wrong had taken place:

1. Money paid
2. Force used against migrants, including detention
3. Poverty or violence in country of origin
4. Benefits denied (including healthcare and land)
5. Wealth of expelling state
6. Extent of misinformation

The first three were found in the news story I paraphrased earlier, and so were not new for me when interviewing Ajouk, Saeda, and Grace. But I learned about the last three properties from the interviews.

To consider if these three properties were wrong-making features, I created fictional cases that varied along these and other properties. I first considered whether misinformation was a wrong-making feature, the last property listed. I then randomly selected two additional properties: the property relating to detention (2) and the property relating to the poverty of the country a migrant was returning to (3). This allowed me to compare two sets of four fictionalized cases, one with misinformation and one without, each set varying along the two randomly selected properties, as seen in Table 2.4 on the following page.

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<sup>33</sup>Interview with Grace, Juba, South Sudan, 2 January 2014.

Table 2.4: Misinformation, detention, and poverty

<p>Feyise was <u>misinformed</u> but <b>fears detention</b> and is returning to a <b>poor</b> country.</p>	<p>Mulugeta was <u>not misinformed</u> and <b>fears detention</b> and is returning to a <b>poor</b> country.</p>
<p>Seid was <u>misinformed</u> but <b>fears detention</b> and is returning to a <b>wealthy</b> country.</p>	<p>Siduk was <u>not misinformed</u> but <b>fears detention</b> and is returning to a <b>wealthy</b> country.</p>
<p>Hani was <u>misinformed</u> and does <b>not fear detention</b> and is returning to a <b>poor</b> country.</p>	<p>George was <u>not misinformed</u> and does <b>not fear detention</b> and is returning to a <b>poor</b> country.</p>
<p>Biruk was <u>misinformed</u> and does <b>not fear detention</b> and is returning to a <b>wealthy</b> country.</p>	<p>Celine was <u>not misinformed</u> and does <b>not fear detention</b> and is returning to a <b>wealthy</b> country.</p>

If you feel that a wrong has taken place in all of the four cases in the left-hand column, but not in the right-hand column, this is evidence that misinforming migrants is wrong even in the absence of detention in the host country and poverty in the country of origin.

However, you may not have very different intuitions in the left-hand set, as compared to the right-hand. This might be because you feel misinforming a migrant makes little difference if they are also coerced into leaving, or are returning to extremely poor countries. We can make other comparisons, controlling for more properties I learned about from the interviews. I shall address such cases in Chapter 4, when discussing misinformation.

There is another type of comparison we may wish to make. Rather than comparing every possible variation along three properties, we can compare two very complex cases to determine if a given property has normative force on its own, even when no other wrong-making features are present. For example, to see if misinformation impacts our intuitions on its own, we can compare the following two cases:

<p>Immigration officials in a wealthy country <u>misinformed</u> Fuad about the conditions in Canada, a <b>wealthy country of origin</b> that Fuad wants to return to. He was <b>never offered any money, no force</b> was used against him, and he continued to be <b>eligible for state benefits</b> prior to returning.</p>	<p>Immigration officials in a wealthy country did <u>not misinform</u> Miriam about conditions in Canada, a <b>wealthy country of origin</b> she wants to return to. She was <b>never offered any money, no force</b> was used against her, and she continued to be <b>eligible for state benefits</b> prior to returning.</p>
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Table 2.5: Fictional Canada comparison

No force is used in both cases, no money is paid, no benefits are with-

drawn, and the migrants are returning to a wealthy country. The only difference is that the first migrant is misinformed, and the second one is not. Some may feel that if a civil servant provides intentionally false information to a migrant from Canada, as in the first case, this is wrong, or possibly wrong, compared to the second case. If one felt this way, this would be evidence that misinforming can be wrong even in the absence of other wrong-making features. But if we feel there is no wrong in either of the two cases, then it may be that misinforming a migrant is not, on its own, very problematic.

We can then compare two more complex cases, one with a migrant who is misinformed and returning to a poor country, and the other with a migrant who is not misinformed and returning to a poor country:

<p>Immigration officials in a wealthy country <u>misinformed</u> Joseph about the conditions in Burundi, a <b>poor country of origin</b>. He was <b>never offered any money, no force</b> was used against him, and he continued to be <b>eligible for state benefits</b> in the wealthy country prior to returning.</p>	<p>Immigration officials in a wealthy country did <u>not misinform</u> Mary about conditions in Burundi, a <b>poor country of origin</b>. She was <b>never offered any money, no force</b> was used against her, and she continued to be <b>eligible for state benefits</b> in the wealthy country prior to returning.</p>
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Table 2.6: Fictional Burundi comparison

If you believe there is a wrong occurring in the first case with Joseph,



and not the second with Mary, this is evidence that there is something distinctly wrong about misinforming a migrant returning to a poor country, even when other properties suggest no wrong has taken place.

Another important property I learned about through fieldwork was that migrants were paid to leave, as occurred with Saeda. To determine if payments may be wrong, even in the absence of misinformation and other potentially wrong-making properties, we can compare eight simple fictional cases for comparison. All in the first set involve payments to leave, while all in the second set do not. Other properties, such as the poverty in the country-of-origin, are randomly distributed across both sets.

Feyise was <u>paid</u> , <b>misinformed</b> and is returning to a <b>poor country</b> .	Mulugeta was <u>not paid</u> , but <b>misinformed</b> and is returning to a <b>poor country</b> .
Seid was <u>paid</u> and <b>misinformed</b> and is returning to a <b>wealthy country</b> .	Siduk was <u>not paid</u> but <b>misinformed</b> and is returning to a <b>wealthy country</b> .
Hani was <u>paid</u> and does <b>not misinformed</b> and is returning to a <b>poor country</b> .	George was <u>not paid</u> but <b>not misinformed</b> and is returning to a <b>poor country</b> .
Biruk was <u>paid</u> and <b>not misinformed</b> and is returning to a <b>wealthy country</b> .	Celine was <u>not paid</u> and <b>not misinformed</b> and is returning to a <b>wealthy country</b> .

Table 2.7: Payment comparisons

As with misinformation, I also zoomed into this property. I learned that there were different ways of giving money. Some were told they must leave within a month to receive money, and were required to decide relatively quickly. Others were told they could decide over the course of a year, or more, and there was no deadline. To begin considering whether the deadline could explain any intuitions I might have about a given case, I compared two sets of cases, as seen below. In the first set there is a deadline, and in the second there is no deadline.

Feyise was paid with a deadline, was <b>misinformed</b> and is returning to a <b>poor</b> country.	Mulugeta was paid without a deadline, was <b>misinformed</b> and is returning to a <b>poor</b> country.
Seid was paid with a deadline, was <b>misinformed</b> and is returning to a <b>wealthy</b> country.	Siduk was paid without a deadline, was <b>misinformed</b> and is returning to a <b>wealthy</b> country.
Hani was paid with a deadline, was <b>not misinformed</b> and is returning to a <b>poor</b> country.	George was paid without a deadline, was <b>not misinformed</b> and is returning to a <b>poor</b> country.
Biruk was paid with a deadline, was <b>not misinformed</b> and is returning to a <b>wealthy</b> country.	Celine was paid without a deadline, was <b>not misinformed</b> and is returning to a <b>wealthy</b> country.

Table 2.8: Deadline comparisons

If you feel there is a wrong occurring in all of the cases on the left, but not all of the cases on the right, this is evidence that a deadline is relevant for determining if payments are permissible. As before, we may also wish to compare complex cases, such as the two below:

<p>Immigration officials in a <b>wealthy</b> country told Sara that she would <b>receive \$3,500</b> if she returned to Uganda, a <b>poor</b> country, <u>within a week</u>. She was <b>not misinformed, no force</b> was used against her, and she <b>could access state benefits</b> in the wealthy country prior to returning.</p>	<p>Immigration officials in a <b>wealthy</b> country told Stephen that he would <b>receive \$3,500</b> if he returned to South Sudan, a <b>poor</b> country, <u>whenever he wished to</u>. He was <b>not misinformed, no force</b> was used against him, and she <b>could access state benefits</b> in the wealthy country prior to returning.</p>
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Table 2.9: Complex deadline comparison

If you feel that Sara was wronged, but feel Stephen was not, this suggests that payments with a deadline are a distinctly wrong form of immigration control. If you feel that no injustice has occurred against either migrant, this is evidence that the limited time frame for paying someone to leave is not an independent wrong-making feature.

Fieldwork is not always necessary. We could create fictional cases from our own imagination alone. But fieldwork helps broaden the range of fictional cases our imagination might conceive of. Once I realized how much variety there was in payment schemes to encourage return, I could then consider further hypothetical payment schemes, such as the possibility that refugees receive continuous funds after return, or the possibility that refugees could later re-enter the host country that paid them to leave. Looking at a broader range of cases that actually exist helps us consider

a broader range of cases that might exist, allowing us to consider more intuitions, and to better test our existing principles, making them more robust and precise.

## 2.4 Fieldwork on Repatriation

Throughout the thesis, I have selected cases that have the advantages of the comparative methods described above. Though I do not merely consider intuitions, and provide arguments as to why I reach certain conclusions, I strived to compare similar cases, with certain key differences. This helped determine which differences might create reasons for various actions.

To select cases that were sufficiently varied, I conducted varied fieldwork, interviewing a range of refugees who repatriated from Israel, and learning about difficult cases concerning repatriation. While I do not explicitly spell out a full range of comparisons, as in this chapter, I strived to select cases that could be easily compared because certain properties remained consistent, and others changed.

In comparing cases, I primarily start by examining Difficult Cases, where we are not quite certain what ought to be done, and then draw upon Obvious Cases from fiction to help determine what ought to be done. My goal is to establish whether a range of Difficult Cases ought to be resolved differently because of their different properties.

Most non-fiction cases were selected from the interviews I conducted in Israel, South Sudan, Ethiopia, and Uganda.<sup>34</sup> In each interview, migrants explained to me precisely why they reached Israel, what they experienced

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<sup>34</sup>For an overview of the steps taken to ensure an ethical research process, See Appendix A. For the dates and locations of all interviews, see Appendix B.

in Israel, why they decided to return to East Africa, who helped them return, and what their conditions were after returning. To ensure I had a broad array of cases, I travelled to a variety of towns within countries, and spoke to both those living in urban and rural areas, in both safe and unsafe regions.

My first set of interviews took place between 2008 and 2010, when I spoke to NGO staff members in Israel who helped with return, and twelve refugees living in Israel, one of whom was interested in returning. I later travelled to Juba, Aweil, and Wau in South Sudan in March and April 2012, interviewing 27 individuals after they returned from Israel to South Sudan. Soon after I arrived in Juba, the Israeli government announced that all were required to repatriate.<sup>35</sup> Almost all remaining South Sudanese nationals in Israel returned by the summer of 2012, a large number via NGOs. I travelled to East Africa again to interview these new returnees, first conducting fieldwork in Kampala and Entebbe in 2013, as many had migrated to these cities shortly after returning to South Sudan. While there, I interviewed thirty returnees, the majority children. In August 2013 I again travelled to Israel to interview a government official who was facilitating return,<sup>36</sup> and NGO staff members assisting individuals return as of 2013.

On December 13th, 2013 I travelled to South Sudan a second time, interviewing those who had stayed in South Sudan after returning in the summer of 2012. On December 15th civil war broke out, and I stayed for six

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<sup>35</sup>For the text of the letter sent to South Sudanese, see PIBA "A Call for the people of South Sudan,"31/01/11, <http://www.piba.gov.il/SpokesmanshipMessagess/Documents/2012-2192.pdf>. Downloaded 2/1/2015.

<sup>36</sup>Interview with head of Voluntary Return Unit, Tel Aviv, 28 July 2013.

more weeks, interviewing 61 returnees who stayed in Juba, including one of the twelve subjects I had already interviewed in 2010 in Israel, before he returned. Roughly half the interviews were conducted with Nuer citizens forced by Dinka militias to flee their homes to the UN's Internally Displaced Persons (IDP) camp. In June 2014 I travelled to Ethiopia, interviewing nine returnees from the Nuer tribe who had fled or migrated to Gambella, a town situated along the border with South Sudan.

In total, I interviewed 126 returnees to South Sudan, and learned of the conditions of eight additional returnees, representing approximately 11% of the roughly 1,200 South Sudanese nationals who returned by 2012.

To select these subjects, I arrived in each country and called two to five contacts provided to me by repatriation facilitators, volunteers, and friends in Israel. I then used a snowball methodology to interview their acquaintances, their acquaintances' acquaintances, and so forth, until all links were exhausted. After each interview, I coded responses for subjects' reasons for returning, including detention or threats to deportation in Israel. I also coded the interviews for properties related post-return conditions, including whether they had access to food, income, medical care, education, and shelter, and whether they were again displaced. Finally, I recorded the number of subjects who, after return, died from illness, ethnic-based killings, or cross-fire during the war.

I could not obtain a full list of phone numbers of those who returned and, even if I had, I would not have been able to interview a random sample of this list, as I could not access extremely remote areas. Nonetheless, I strived to interview a diverse range of subjects. I specifically strived to counteract survivorship bias, which arose because I was less able to learn about those who were killed, partly because they could not answer their cell phones,

and partly because they were more likely to have returned to insecure areas I could not reach. To counteract this bias, I travelled extensively within each town, and the surrounding rural areas, to meet with returnees who did not have access to a secure healthcare, a cell phone, or a close tarmac road. During the war, I also conducted interviews in and around both UN IDP camps in Juba, including one in the Jebel neighbourhood, where ethnic cleansing and fighting were especially widespread. And though I could not interview those who were killed, I attempted to establish a mortality rate. When I learned of a subject who was killed, and who I would have met had they survived, I included them in the sample of 134 subjects whose conditions I could confirm.<sup>37</sup>

In addition to interviewing South Sudanese subjects who returned, I interviewed a smaller sample of other refugees and migrants who repatriated during the same period, via a distinct NGO called the Center for International Migration and Integration (CIMI). This NGO worked with a special Voluntary Return unit set up in the Ministry of Interior.<sup>38</sup> The sample included a family of four who had repatriated in 2012 to Sudan, and then fled to Ethiopia; two Eritrean refugees who had accepted “resettlement” to Ethiopia from Israel; a father and his eight year old daughter who repatriated to Ethiopia; and three migrants who repatriated to Nigeria, two to Guinea, one to the Philippines, and fourteen to Thailand. These cases are in many ways different than the cases of repatriation to South Sudan, but have certain important similarities – most notably the level of misinformation they received – and so provide useful comparisons to the cases

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<sup>37</sup>I did not include those I learned about only because they had died, as this would bias my sample in opposite direction, over-representing those who had died.

<sup>38</sup>Interview with CIMI Director, Jerusalem, 22 September 2011



of repatriation to South Sudan.

One might suppose that we cannot rely on the responses of those who returned. They may have misrepresented how much they were coerced to return, how misinformed they were, and how difficult their conditions were after returning, especially if they were not satisfied with their choice to return. My method of sampling strived to mitigate this possibility. Because I interviewed individuals living in a diverse range of countries and regions, a significant portion were very satisfied with their return, but still recall being coerced into returning, being misinformed, and later fleeing their homes after returning. If even these individuals recall similar challenges to those who regretted repatriating, this provides stronger evidence as to the accuracy of such testimonials. I also witnessed conditions described by respondents, such as overcrowding, unhygienic latrines, food availability, and soldiers firing into IDP camps. As such, I could corroborate the responses of many interviewees regarding these conditions.

This original data on repatriation from Israel is central to this thesis. However, I situate it within the broader range of repatriation cases. The case of Israel is not unique because of the dilemmas NGOs faced. What was unique was the NGOs' greater financial investment to avoid these dilemmas. If such extraordinary measures failed to succeed, this highlights the depth of the problem and the need for an ethical analysis.

## **2.5 Conclusion**

For those who are concerned about the widespread use of trolleys and babies in bathtubs, there is an urgent need to find complex examples from the real world. But if we want our examples to be as useful as fiction, we

need an effective method of selecting and comparing them. We also need fieldwork to learn about new cases, expanding the range of cases to include those we would not imagine on our own.

This need is especially apparent in immigration ethics. Philosophers and social scientists focus overwhelmingly on the use of force in immigration control, rather than assistance in repatriation. Focusing on the latter raises considerations we might otherwise overlook, and difficult cases we might otherwise ignore. In the following section, I shall raise the first difficult case I learned about, concerning a man named George.

# Chapter 3

## Coercion\*

As George was followed home, a policeman stopped him from behind.

“Pack your belongings,” the policeman ordered, informing him he had a week to return to South Sudan or be detained indefinitely in Israel.

George had originally fled South Sudan for Egypt during the Second South Sudanese War in the 1980s. He failed to find secure protection in Egypt and so crossed the Sinai Desert in 2008, entering Israeli territory with the help of smugglers. Like 60,000 other asylum seekers who had crossed over, George could not apply for refugee status or legally work as of 2012.<sup>1</sup>

As the policeman drove away, George called OBI. He asked for help returning to South Sudan, and was given a free flight home and travel documentation. By 2012, nearly all South Sudanese in Israel had repatriated via similar means.

It is against international law to indefinitely detain asylum seekers with-

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\* *This chapter is based on a forthcoming publication. See Mollie Gerver, "Refugee Repatriation and the Problem of Consent," *British Journal of Political Science*.*

<sup>1</sup>Interview with George, Juba, 2 January 2014.

out first establishing if they are refugees.<sup>2</sup> What is less obvious is whether humanitarian organizations should help individuals return to avoid such detention.

The UN claims it should.<sup>3</sup> Over the last decade, it has assisted 7.2 million refugees repatriate, many from detention.<sup>4</sup> They help because, even if governments detain refugees,<sup>5</sup> the UN is using no coercion itself, and is helping refugees obtain freedom through repatriation.<sup>6</sup> It is analogous, one could claim, to civil servants clandestinely helping individuals flee persecuting regimes. During the Rwandan Genocide and the Holocaust, such civil servants were celebrated as helping individuals escape injustices.<sup>7</sup> Of course those who fled were coerced; that is why it was commendable to help them.

Yet, unlike fleeing from danger to safety, refugees who return home may be trading one injustice for another. In this case, “repatriation facilitators,” including NGOs and UN agencies, cannot normally justify their actions by appealing to the outcomes of return. In this eventuality, NGOs have

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<sup>2</sup>B. S. Chimni, “From Repatriation to Involuntary Repatriation: Towards a Critical History of Durable Solution to Refugee Problems,” *Refugee Survey Quarterly* 23(3)(2004); Michael Barnett, “UNHCR and the Ethics of Repatriation,” *Forced Migration Review* 10(2001):31-34.

<sup>3</sup>Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics*, Cornell: Cornell University Press 2004: 75.

<sup>4</sup>UNHCR, “Displacement: The New 21st Century Problem,” *UNHCR Global Trends* 2012, p. 17.

<sup>5</sup>Matthew Gibney, “Is Deportation a Form of Forced Migration?” *Refugee Survey Quarterly* 32(2) (2013): 116-129.

<sup>6</sup>Repatriation assistance usually involves the paying for transport home when refugees lack the funds to do so, and the arranging of travel documentation. There is also, in some cases, the provision of food aid during the first year after return. See UNHCR Handbook - *Voluntary Repatriation: International Protection*, Geneva: 1996.

<sup>7</sup>Lee Anne Fujii, *Killing Neighbours: Webs of Violence in Rwanda*, Ithaca: Cornell University Press 2009; Bo Lidegaard, *Countrymen: How Denmark's Jews Escaped the Nazis*, London: Atlantic Books 2013.

justified their assistance by reference to refugees' consent.<sup>8</sup> But it is unclear if there is consent, given the presence of coercion.

In the following section I will describe one version of this dilemma, which I shall call the "Coercion Dilemma." These are cases where facilitators help with coerced returns without causally contributing to the coercion. In Section 2 I will then address "Causation Dilemmas," where facilitating return does causally contribute to coercion.

Before proceeding, it is necessary to precisely state the aims and clarify the assumptions of this chapter to avoid misunderstanding about the highly contentious questions addressed.

I shall consider whether facilitators are morally permitted to assist with return, rather than whether they are legally permitted to do so.<sup>9</sup> The refugees under consideration are primarily those who the UN claims should not be forcibly returned, but instead given asylum or the opportunity to apply for refugee status. These are individuals whose lives will likely be at risk from persecution if they return. Using the UN definition permits discussion of the UN's facilitation dilemmas according to the UN's own standards. In a similar vein, I use the definition of coercion provided by the International Organization of Migration (IOM), a major global repatriation facilitator. According to IOM, coercion occurs when one is repatriating to avoid detention, but also when one lacks basic necessities if they stay, such as food or shelter.<sup>10</sup> More specifically, I assume states unjustly coerce

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<sup>8</sup>NGOs in Israel explicitly justified their actions on these grounds. See Mollie Gerver, "Is Preventing Coerced Repatriation Ethical and Possible? The case of NGO repatriation of South Sudanese in Israel," *International Migration* 53(5)(2015):148-161.

<sup>9</sup>UNHCR Handbook - *Voluntary Repatriation: International Protection*, Geneva: 1996.

<sup>10</sup>See Glossary on Migration, IOM, 2004, p. 34. [http://publications.iom.int/bookstore/free/IML\\_1\\_EN.pdf](http://publications.iom.int/bookstore/free/IML_1_EN.pdf). This definition of coercion is consistent with a range of

refugees to leave if they have the capacity to provide basic services to refugees within their territory, but refuse to.<sup>11</sup>

Though I mostly focus on refugees fleeing persecution, I will at times discuss individuals fleeing general violence, food insecurity, and a lack of medical care. As noted in the introduction, I assume that coercing such “survival migrants”<sup>12</sup> to leave is morally impermissible if the state has the capacity to accept such individuals, and if accepting these migrants is the only way to ensure that they obtain basic human rights. This claim is supported not only by philosophers who believe in open borders, such as Joseph Carens,<sup>13</sup> but also by those who defend states’ right to exclude immigrants, such as David Miller, Matthew Gibney, and even some states themselves.<sup>14</sup> As such, it serves as a “minimal ethical standard,” determining when the state should not deport,<sup>15</sup> while still leaving open the question of who repatriation facilitators should help return. As noted in the Introduction, I will refer to individuals as “refugees” even if their return is unsafe for reasons related to general violence or food insecurity, rather than persecution.

Though I make the above assumptions throughout the chapter, one may accept my general conclusions, while still disagreeing on who deserves

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philosophical approaches. See Scott Anderson, “Coercion” in (eds.) Edward N. Zalta *The Stanford Encyclopedia of Philosophy*, (Summer 2015 Edition) URL = <<http://plato.stanford.edu/archives/sum2015/entries/coercion/>>“Coercion,” Stanford Encyclopaedia of Philosophy, 2011.

<sup>11</sup>When very poor states lack the resources to support refugees, then wealthier states may have a duty to provide these funds. If they do not, then they may be viewed as the agents coercing refugees to leave.

<sup>12</sup>Alexander Betts, “Survival Migration: A New Protection Framework,” *Global Governance* 16(2010): 361-382.

<sup>13</sup>Carens 1987 *ibid*.

<sup>14</sup>Miller 2005 *ibid*: 202; Gibney 2004 *ibid*; Betts 2010 *ibid*.

<sup>15</sup>Javier Hidalgo, “Resistance to Unjust Immigration Restrictions,” (Forthcoming) *Journal of Political Philosophy*.

asylum. My goal is not to settle the debate about whom states should protect, but to resolve the dilemma of who should be helped to return by the aforementioned organizations, if governments are coercing individuals to leave.

## 3.1 The Dilemma

Coercion Dilemmas occur when NGOs and UN agencies are faced with a choice. They can either help with return, or watch refugees face confinement in camps, detention, or an inability to access basic necessities. I will first describe this dilemma, and then consider how we might resolve it.

### 3.1.1 Describing the Dilemma

In 1991 two million Kurdish refugees fled Iraq, most hoping to reach Turkey. They reached a mountainous area separating the two countries, but Turkish officials refused to grant them entrance. While current theorists focus on the Turkish policy, there was also an ethical dilemma for NGOs: they could do nothing, forcing refugees to stay in the mountains, or help them return to Iraq, and risk being killed.

Within four days, 1,500 died from exposure, the rest uncertain what would happen if they stayed. Like in Israel, no NGOs claimed that the Turkish government's response was morally permissible. But helping with return seemed preferable, because the Turkish government refused to change its policy regardless.<sup>16</sup>

One might suppose that such Coercion Dilemmas are not relevant when

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<sup>16</sup>Katy Long, *The Point of No Return: Refugees, Rights, and Repatriation*, Oxford: Oxford University Press 2013: 107.

claims for asylum are heard in wealthier countries, where genuine refugees are given residency rights and freedom. Yet, even when claims are heard, strict evaluation criteria mean many refugees are denied refugee status, especially those fleeing life-threatening poverty.<sup>17</sup> They are then detained and wish to repatriate. Some do, with the help of NGOs, and end up again displaced or killed after return.<sup>18</sup> Even if one believes that states have acted legally according to a strict definition of international law, it seems unlikely they are acting ethically, and so it remains unclear whether NGOs should assist with such returns.

A similar dilemma is also found when states lack the capacity to accept refugees. In such cases, states may both deny refugees the right to work, and also lack the means to provide them aid to survive. This was the case between 1982 and 1984 when Djibouti both denied refugees work visas, and also reduced their rations, compelling many to return to Ethiopia.<sup>19</sup> More recently, the Tanzanian government gave refugees the choice between living in camps or returning to Burundi without access to basic necessities.<sup>20</sup> Similarly, the Ugandan government has revoked land from South Sudanese refugees, and refugees in both Uganda and Kenya are often confined to

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<sup>17</sup>Richard Black and Saskia Gent, "Sustainable Return in Post-Conflict Contexts." *International Migration* 44(3)(2006): 15-38; Brad K Blitz, Rosemary Sales, and Lisa Marzano, "Non Voluntary Returns? The Politics of Return to Afghanistan," *Political Studies* 53: 182-200.

<sup>18</sup>Richard Black and Saskia Gent, "Sustainable Return in Post-Conflict Contexts." *International Migration* 44(3)(2006): 19.

<sup>19</sup>Jeff Crisp, "The Politics of Repatriation: Ethiopian refugees in Djibouti, 1977-1983", *Review of African Political Economy* 30(1984).

<sup>20</sup>US Department of State IDIQ Task Force Order No. SAWMMA13F2592, "Field Evaluation of Local Integration of Former Refugees of Tanzania, " 2014. See p. iii for summary of findings; See, also a report from Refugee International, cited by the IRIN news agency, on strict confinement to camps, available at <http://www.irinnews.org/report/49519/east-africa-special-report-on-repatriation-of-burundian-refugees>.



camps, limiting their freedom.<sup>21</sup> In such cases, we may feel that poor states are not blameworthy for failing to provide aid to refugees, but there is still a background injustice if wealthier countries could provide this aid to poorer states, and refuse to, thereby compelling refugees to leave.<sup>22</sup> In such cases, it remains unclear whether NGOs and the UN should help with return.

As noted, the current academic discussions focus almost entirely on state injustices,<sup>23</sup> but the few scholars who do discuss the ethics of UNHCR repatriation tend to assume that a coerced return is, by definition, impermissible.<sup>24</sup> Their position is that UNHCR has a “repatriation culture” and uses a distorted definition of “voluntariness,” where a refugee in detention is considered sufficiently free to consent to return.<sup>25</sup> This critique is incomplete. Though the definition of voluntariness is skewed and the culture of repatriation problematic, UNHCR may be helping with involuntary returns because doing nothing is far worse.

When OBI began its repatriation program in 2010, the Israeli government had yet to detain a significant number of refugees, and had yet to prevent them from working, but OBI was still facing a Coercion Dilemma.

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<sup>21</sup>James Hathaway, *The Rights of Refugees Under International Law*, Cambridge: Cambridge University Press 2005: 380.

<sup>22</sup>Khalid Koser and Richard Black, “The End of the Refugee Cycle? Editorial Introduction in (eds.) Khalid Koser and Richard Black, *The End of the Refugee Cycle? Refugee Repatriation and Reconstruction*, p. 2-17; B. S. Chimni, “From Repatriation to Involuntary Repatriation: Towards a Critical History of Durable Solution to Refugee Problems,” *Refugee Survey Quarterly* 23(3)(2004): 65.

<sup>23</sup>Megan Bradley, *Refugee Repatriation: Justice, Responsibility and Redress*, Cambridge: Cambridge University Press 2014; Long 2013 *ibid*; Megan Bradley, “Back to Basics: The Conditions of Just Refugee Return,” *Journal of Refugee Studies* 21 (3)(2008): 285-304.

<sup>24</sup>Barnett 2001 *ibid*.

<sup>25</sup>Barnett and Finnemore 2004: 75; Barbara Harold-Bond, “Repatriation: Under What conditions is it a Durable Solution for Refugees?” *African Studies Review* 32(1)(1989):41-69.

At the time, refugees were denied legal residency, a small number were detained, and all were uncertain if they would be deported in the near future.<sup>26</sup> They could not apply for refugee status<sup>27</sup> and, even if they could, their claims would likely be denied, as Israel provides refugee status to only 0.25% of applicants.<sup>28</sup>

Though conditions were difficult in Israel, returning to South Sudan entailed significant risks. The country was part of Sudan until 2011, and had only recently emerged from a war which began in 1983, fought mainly between southern Sudanese opposition forces, and the ruling northern Sudanese forces.<sup>29</sup> From 1991, the southern Sudanese forces had split into two opposing groups, one mainly from the Dinka ethnic group, and the other mainly from the Nuer ethnic group.<sup>30</sup> When South Sudan eventually achieved independence from northern Sudan in 2011, a coalition government was formed in Juba, comprised of members from both Nuer and Dinka groups, but the president stifled dissenting voices.<sup>31</sup> Inter-ethnic violence continued into 2012, with thousands of civilians killed that year alone.<sup>32</sup>

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<sup>26</sup>Christian Mumras, (Hebrew) “The activities of Israel to Promote the Return of South Sudanese Asylum Seekers” in (ed.) Tally Kritzman-Amir, *Where Levinsky Meets Asmara: Social and Legal Aspects of Israeli Asylum Policy*, Jerusalem: Van Leer Institute 2015.

<sup>27</sup>Christian Mumras, (Hebrew) “The activities of Israel to Promote the Return of South Sudanese Asylum Seekers” in (ed.) Tally Kritzman-Amir, *Where Levinsky Meets Asmara: Social and Legal Aspects of Israeli Asylum Policy*, Jerusalem: Van Leer Institute 2015.

<sup>28</sup>Ziegler: 181.

<sup>29</sup>The Second Sudanese Civil war lasted from 1983 until 2005, leaving approximately 2 million dead from the both the war itself, and the consequences of the war, including famine and disease. For a more complete background on the history of South Sudan, see Anders Breidlid, Avelino Androga and Astrid Kristine Breidlid, *A Concise History of South Sudan: New and revised edition*, Kampala, Uganda: Fountain Publishers 2014.

<sup>30</sup>International Crisis Group, “South Sudan: Jonglein – ‘We have always been at war,’” Africa Report 221, 22 December 2014.

<sup>31</sup>Douglas Johnson, “Briefing: The crisis in South Sudan,” African Affairs 113(451)(2014):300-309.

<sup>32</sup>Judith McCallum and Alfred Okech, “Drivers of Conflict in Jonglei State,” Human-

As a result of the instability, the country lacked basic services, including food security and healthcare.<sup>33</sup>

Given that Israel let South Sudanese work in 2011, and given the conditions in South Sudan at the time, many refugees stayed in Israel. Consider, for example, Vanessa, who explains why she had initially left South Sudan, and why she did not accept OBI's help to return in 2011:

I am from Unity State, and we fled the war to . . . Khartoum when I was a young girl. Later, I married there, and had four kids, and crossed into Israel, via Egypt, in 2007. I was in prison for half a year, but then released, so decided to stay. It was good. I worked, at first, in the Renaissance hotel in Tel Aviv. The kids went to school.<sup>34</sup>

But others wished to return, such as Joseph:

My state is Lega State. . . I was born in Khartoum in 1982, but came back to South Sudan from 1995 until 2000, so I was familiar with Juba. I went to Egypt in 2000, and in 8 August 2005 I went to Israel. . . I went to prison for one year, and after one year they released us. I worked in a hotel, but could not get an ID, or legally start a business. So I saved \$20,000. I was in touch with my family in Juba, and so asked for help returning.<sup>35</sup>

Joseph was one of the first refugees to return. At the time, many human rights organizations opposed OBI's assistance, claiming Joseph and others had few rights, and so their return was involuntary.<sup>36</sup> In response, OBI hired a refugee rights organization called the Hebrew Immigrant Aid Society (HIAS) to interview each refugee, asking them, "Why do you want

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itarian Exchange Magazine 57 (May 2013).

<sup>33</sup>Médecins Sans Frontières (MSF) "South Sudan: Violence against healthcare" 1 July 2014. <http://www.msf.fr/actualite/publications/south-sudan-conflict-violence-against-healthcare>.

<sup>34</sup>Interview with Vanessa, 25 December 2013, Juba.

<sup>35</sup>Interview with Joseph, 10 April 2012, Juba.

<sup>36</sup>Interview with HIAS Director, Jerusalem, 11 December 2012; Mumras 2015 *ibid*.

to return?” If an individual said they were only returning to avoid detention, their return was viewed as involuntary and not supported.

In total, OBI and HIAS helped roughly 900 individuals return between 2009 and 2012. Once an asylum seeker left Israel they could not re-enter Israeli territory.<sup>37</sup> But OBI and HIAS were convinced that this choice, though irreversible, was entirely voluntary.

OBI’s intentions seemed genuinely humanitarian. It was a Christian humanitarian organisation with a strong history of providing food, shelter, and medical assistance to all denominations in developing countries.<sup>38</sup> It had never, until 2010, been involved in repatriation. Nor had HIAS, a humanitarian organization founded in 1881 to assist Jews fleeing pogroms in Russia and Eastern Europe, and which later focused on helping non-Jewish refugees, resettling 3,600 refugees from Vietnam, Cambodia, and Laos into the United States.<sup>39</sup> HIAS said it opposed repatriation in other contexts, refusing to assist with repatriation from Kenya due to the risks involved.<sup>40</sup> In Israel it made an exception, as it could conduct individual interviews to ensure there was no coercion.

In total, out of the 126 subjects I interviewed, 67 returned because they thought life was better in South Sudan, rather than only to avoid difficult

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<sup>37</sup>Interview with HIAS Director, *ibid*.

<sup>38</sup>See: <http://www.ob.org/frequently-asked/>. Some subjects believed that OBI was a Christian Zionist organization, and was motivated to help the Israeli government decrease the number of refugees in Israel. I found no actual evidence, however, of these motivations. Nonetheless, further research on this topic is warranted, to help clarify OBI’s possibly hidden motivations. If OBI had ulterior religious or political motives, then it was perhaps exploiting refugees, encouraging return to promote its own values, rather than refugees’ wellbeing and rights. I put it aside for now. For, even if OBI was completely humanitarian, and only intending to help refugees, there is still a major ethical dilemma as to whether they should have provided such return.

<sup>39</sup><http://www.hias.org/history>.

<sup>40</sup>HIAS Kenya, Protection Intervention. Downloaded from <http://hiasafrica.org/interventions/Protection-Interventions/> on 6 December 2015.

conditions in Israel. However, there was a marked distinction between those who returned prior to and after 2012.

That year, thousands of Israeli citizens marched through the streets of Tel Aviv, calling for the expulsion of African asylum seekers, described by the Prime Minister as “flooding the country”<sup>41</sup> and by one politician as a “cancer to the body.”<sup>42</sup> Legislation was passed to detain asylum seekers,<sup>43</sup> and all South Sudanese were told they must return or face imprisonment,<sup>44</sup> with the exception of those who had medical problems. Vanessa describes life during this period, and why she changed her mind about staying in Israel:

Every day started with a mess. You go outside and they tell you, “Go back to your country! Why are you here? Your country has money! Go home!”

In June they took my husband’s visa and said, “We will not give you a new visa.” We were left without work for two months. I said “What? What will I do...?” So I thought, “I will say thank you to God that we are healthy and go back.”

Vanessa called OBI, which eventually agreed to help her return.<sup>45</sup> Hundreds of others soon followed. Of those I interviewed, thirty-seven returned to avoid detention, and thirty-six returned partially or wholly because they

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<sup>41</sup>Harriett Sherwood, “Israelis Attack African Migrants During Protest Against Refugees,” *The Guardian*, 24/5/12.

<sup>42</sup>Ephraim Yaar, and Tamar Hermann. 2012, “Peace Index – May 2012” Downloaded on 3 October 2014 from [http://en.idi.org.il/media/602071/Peace%20Index-May%202012\(1\).pdf](http://en.idi.org.il/media/602071/Peace%20Index-May%202012(1).pdf).

<sup>43</sup>Law for the Prevention of Infiltration (Crimes and Jurisdiction (Amendment No 3 and Temporary Order) 5772-2012 (Amendment 3).

<sup>44</sup>Population, Immigration, and Border Authority of Israel, “A Call for the people of South Sudan” (31/01/11) <http://www.piba.gov.il/SpokesmanshipMessagess/Documents/2012-2192.pdf>.

<sup>45</sup>Interview with Bol, Juba, 21 December 2013; Interview with Nathaniel, Juba, 14 December 2013; Interview with Vanessa, *ibid*.

could no longer work, fearing they would lack access to basic necessities if they stayed. Fourteen left because they feared deportation.

It is not immediately clear whether OBI's first policy of refusing coerced returns was better than its second policy of supporting such returns. Neither was more principled than the other. It may seem ethical to only help with voluntary returns, but this would force refugees to stay in detention. The case demonstrates that the dilemmas of repatriation cannot easily be avoided even when working independently from the government, and even with the best of intentions and resources.

### 3.1.2 Resolving the Dilemma

To resolve this dilemma, we must address a pressing question: whether refugees can truly give their consent when faced with coercion. In many cases outside the sphere of repatriation, consent may very well be valid even if there are only injurious alternatives. A patient is perfectly capable of giving consent to life-saving surgery, even though the alternative to surgery is death. As such, some philosophers argue that cases of "third party coercion" are also cases of valid consent.<sup>46</sup> Imagine that Abbey threatens to shoot Babu if he does not buy Cathy's watch. Cathy sells Babu her watch because she does not want him shot by Abbey. Babu's consent seems valid for Cathy, even if not for Abbey. Of course, Cathy would have an obligation to later give back the money to Babu once the threat has subsided, but Cathy has not wronged Babu at the time of the transaction and, if she cannot later undo the transaction, then she has not wronged

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<sup>46</sup>Franklin G. Miller and Alan Wertheimer, "Preface to a Theory of Consent Transactions: Beyond Valid Consent" in (eds.) F Miller and A Wertheimer *The Ethics of Consent: Theory and Practice*, Oxford: Oxford University Press, 2009: 94.

Babu, even though his consent was under duress. One could similarly argue that refugees' consent is valid for repatriation facilitators, even if it is not valid consent for the government.

However, according to a number of theories, consent would be invalid for Cathy if she could easily persuade Abbey to put her gun down.<sup>47</sup> Cathy should do this, instead of selling her watch. In other words, Cathy's duty is to get Abbey to stop threatening Babu, and therefore Babu's consent is not valid for Cathy. This approach is consistent with the Good Samaritan principle, which holds that agents should help those in great need, if they easily can. If there is nothing that Cathy can do, then Babu's consent is perfectly valid for her, but not if she can easily help stop Abbey's violent threat.

With repatriation to dangerous countries, we may ask if a facilitator can easily raise money for basic necessities and legal aid to avoid detention. If instead it raises money for repatriation, then it fails to honour the Good Samaritan principle. Of course, basic necessities may be an ongoing cost, while repatriation is one-off. But if a refugee lacks necessities after they have returned, it is unclear if the repatriation facilitator can simply ignore their needs. If they owed them this aid before return, an action absolving them of this duty without alleviating the need seems unethical.

In some cases, it might be far from costless for NGOs or the UN to try and stop coercive policies. We might, then, suppose that the Good Samaritan principle does not apply, as this principle relates to costless or low-cost actions. But there are two reasons why organizations may face more demanding duties than individuals like Cathy, and so be required to invest

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<sup>47</sup>Joseph Millum, "Consent Under Pressure: The Puzzle of Third Party Coercion," *Ethical Theory and Moral Practice* 17(1)(2014): 113-127.

more time and effort in helping prevent coercive conditions. Humanitarian organizations were created precisely to protect vulnerable populations, and so should be held to a higher standard in protecting these populations. This may translate to special duties, such as lobbying for policy changes; providing legal aid; and raising money for necessities. Demanding costly duties from Cathy, by contrast, could infringe on her right to a personal life. While organizational staff also have a private life, they have voluntarily agreed to allocate an insulated portion of their lives to the goals of the organization, so their personal lives are not infringed.

Some organizations may also have costly duties because they have significant power.<sup>48</sup> When an agent has power, they have a greater ability to help others, and so may have greater duties to help.<sup>49</sup> For example, a doctor on a flight may have a duty to save a life, because she can more easily do so, even if this is difficult for her. Similarly, Medicines Sans Frontiers (MSF), during a famine, may have a duty to widely publicize the famine, because it is more able to do so.<sup>50</sup> If repatriation facilitators have a greater ability to publicize the plight of refugees, and lobby for the end of coercive conditions,<sup>51</sup> they should take these actions, even if they are more difficult than only helping with repatriation.

There are situations where repatriation facilitators do work hard to end coercive conditions, but fail to create any change. In such cases, assisting

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<sup>48</sup>Jennifer Rubenstein, "The Misuse of Power, Not Bad Representation: Why it is besides the point that nobody elected Oxfam," *Journal of Political Philosophy* 22(2)(2014):218.

<sup>49</sup>Diane Jeske Diane Jeske, "Special Obligations," *Stanford Encyclopaedia of Philosophy* 2014 and Francesco Orsi, "Obligations of Nearness," *The Journal of Value Inquiry* 42(2008):1–21.

<sup>50</sup>Michael Barnett, "Humanitarianism, Paternalism, and UNHCR," in (eds.) Alex Betts and Gil Loescher, *Refugees in International Relations*, Oxford: Oxford University Press 2011.

<sup>51</sup>Barnett 2011 *ibid*.



with return may be legitimate. For example, when Kurdish refugees were trapped between Iraq and Turkey, NGOs tried and failed to persuade the Turkish government to provide them asylum. More refugees were likely to die from exposure, and so NGOs acted ethically when helping with their return. Similarly, had OBI and HIAS worked hard to end detention, but failed, perhaps helping with return would have been legitimate, so long as South Sudanese nationals were aware of the risks.

This conclusion is predicated on the assumption that repatriation does not itself causally contribute to coercion. If there is such a causative link, then further considerations become relevant, which I will now address.

## 3.2 Causation Dilemma

Causation Dilemmas encompass three categories of causal scenario. In all three, helping refugees to repatriate causally contributes to coercive government policies. As such, return should generally not be facilitated, with some exceptions.

### 3.2.1 Simple Counterfactual Causation

In “Simple Counterfactual Causation,” an agent causes an event if, had the agent not acted as she had, the event would not have occurred. I also assume that, for an agent to cause an outcome, it must be the case that, in acting as she did, the outcome did occur.<sup>52</sup> In other words, A causes B if A’s actions were necessary for B to occur, and B did in fact occur.

If the government is detaining refugees to encourage return, and an

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<sup>52</sup>See David Lewis, “Causation,” *The Journal of Philosophy* 70(17)(1973):556-567.

organization makes return possible, this can motivate the government to detain more refugees than it otherwise would. IOM is an example of an organization that may have such an impact. Globally, the organization visits survival migrants in detention, taking down their details, and trying to secure their passports so they can repatriate, when they otherwise would not be able to.<sup>53</sup> If governments are only detaining refugees so that they repatriate, and refugees are only repatriating because of IOM, then IOM is causally contributing to detention, in the sense that its actions are necessary for the detention to occur.

UNHCR may contribute to coercive policies in a similar manner. In 1994 and 1995 UNHCR began facilitating the repatriation of Rohingya refugees from Bangladesh back to Burma. Soon after, the Bangladeshi government significantly increased its pressure on refugees to return, seeing that their return was now possible, as it was funded by UNHCR.<sup>54</sup> Similarly, in 2012, one Israeli Knesset report states that OBI had established that repatriation for South Sudanese was possible, and so the government should endorse a more aggressive return policy for those who had not yet returned.<sup>55</sup>

Facilitating return may also increase the government's capacity to use coercive measures. When OBI helped a refugee return from detention, the government quickly filled his cell with a new refugee, who had previously not been detained, keeping in line with the government's policy of filling

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<sup>53</sup>Ishan Ashutosha and Alison Mountz, "Migration management for the benefit of whom? Interrogating the work of the International Organization for Migration," *Citizenship Studies* 15(1)(2011):21-38.

<sup>54</sup>Barnett and Finnemore *ibid*: 106.

<sup>55</sup>Protocol 84 (Hebrew) "Distancing South Sudanese in Israel," Committee for the Problem of Foreign Workers, 30 April 2012; 18th Knesset.

the detention centre to its maximum capacity.<sup>56</sup> Thus, in this scenario, repatriation efforts directly determine the rate of detention at a given time.

The case of Israel raises an additional complication, overlooked in the examples above. OBI and HIAS were not the only agents facilitating return. The government also began its own repatriation programme in 2012, eventually returning thousands of asylum seekers.<sup>57</sup> In other countries, UN agencies, multiple private charities, and refugees themselves pay for transport home.

In such a scenario, any single NGO helping with return may seem to have no impact on the level of coercion, nor may it have an impact if any single means of repatriation fails. If existing bodies have the capacity to repatriate all refugees, a single NGO may very well not causally contribute to coercion. For, were it to discontinue its repatriation services, refugees would still be able to repatriate at the same rate, via a different facilitator. However, if the other facilitators are incapable of facilitating all refugees then each facilitator directly contributes to the rate of detention. The more agencies that are available for repatriation, the more refugees can repatriate, freeing up cells for further detention.

When NGOs' actions are necessary for coercive policies, coercion is not a mere background condition, but is dependent on repatriation. This leads to a simple argument for NGOs discontinuing repatriation services, related to the Good Samaritan Principle. Refraining from helping with return is costless. If this costless act of omission helps refugees avoid detention

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<sup>56</sup>Removing Barriers: Coalition for a just migration policy in Israel (co-funded by the European Union), "The Legal Corner," downloaded on 30 May 2015, <http://the-migrant.co.il/en/node/4>; Ilan Lior, "Asylum seekers thrown out of detention center after stroke," Haaretz 6/6/14.

<sup>57</sup>Galia Sabar and Elizabeth Tsurkov, "Israel's Policies towards Asylum-Seekers: 2002-2012," Instituto Affari Internazionali, Working Papers 15, 20/5/15.

and coercive conditions, then, as organizations created to help others, they should exploit this omission to efficiently achieve their goals.

We might argue that, in some cases, causally contributing to coercion does not harm refugees. In my sample, some refugees did not particularly mind that the government threatened to detain them or revoke their visas, because they would have returned regardless, for reasons unrelated to coercion. Some missed their families, or wished to contribute to the development of their country.

Even for these cases, it may be wrong for NGOs and the UN to help with return, because it is wrong to causally contribute to coercive policies, even if those subject to coercion do not feel subjectively worse off. For example, imagine again that Abbey puts a gun to Babu's head, telling him to buy Cathy's watch, but Babu wanted to buy the watch regardless. When Cathy sells her watch, she may be making Babu's life better in some ways, but she is also causally contributing to Abbey's act of raising a gun to another person's head. In such cases, Cathy should refuse to sell Babu her watch if she knows that this refusal will make Abbey put down her gun. She should wait until Abbey does this, and only then sell Babu her watch.

In a similar way, NGOs and the UN should avoid encouraging governments to detain refugees, as the act of detention is especially unjust, even if many refugees would have returned regardless. Repatriation facilitators should wait until the government ends detention, and only then agree to help with return.

### 3.2.2 Causation as Influence

There are instances where repatriation is not necessary for coercion, and so does not cause coercion in the counterfactual sense. Facilitating repatriation may still be wrong according to other criteria. Sometimes, a person wrongly causes an event by influencing it, even if their actions were not necessary for the general event to occur.<sup>58</sup>

For an example of such a phenomenon, imagine there is an assassin, and she pulls her trigger, leading the bullet to shoot out her barrel into the heart of a victim, unjustly killing him on the spot. She also has a hundred backup assassins, who are all working independently from her, and who would have killed the victim, had she not killed him first. As such, she was not necessary for his death, or even almost necessary for his death. She still causally contributed to his death if she influenced the particular way the death transpired.<sup>59</sup> This would be the case if, in a world without her, the bullet would have flown in a slightly different direction, piercing the victim's heart in a different place, while in a world without other assassins, her bullet would have still flown in the same direction it really did, piercing the victim's heart in the same way. She causally contributed to the event

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<sup>58</sup>David Lewis, "Causation as Influence," *The Journal of Philosophy* 97(4)(2000):182-197. Some may claim a person is merely "contributing" to an event in such cases; regardless, it seems clear that a wrong can take place when one contribute to an unjust event.

<sup>59</sup>This claim contrasts somewhat with those made by Lepora and Goodin. They argue, firstly, that for an agent to be complicit in a particular death, the agent must contribute to the death. To contribute to the death, an agent must be essential for the death or potentially essential for the death. To be potentially essential, an agent must have been necessary in a nearby possible world, and the closer the possible world, the more complicit they are. I do not believe that this closest-possible-world approach is entirely plausible. The assassin seems very complicit in the death of the victim, and very much causing his death, even if she would only be essential in a very distant possible world without the thousand back-up assassins. See Chiara Lepora and Robert E. Goodin, *On Complicity and Compromise*, Oxford: Oxford University Press 2013: 63-65.

by being necessary for the way the event transpired, even though she was not necessary for the general event to occur.

In such cases, even if the assassin causally contributed to the event by influencing it, we might still claim that she did not influence it in a way that harmed the victim; he would have been killed regardless. Nonetheless, as noted above, we have duties to avoid causally contributing to injustice, even if the victims are made no worse off from the causal contribution. If influence is a form of causation, then the assassin may be acting wrongly by influencing the injustice of killing another human being, regardless of whether the victim is worse off compared to a world where the assassin does not pull her trigger. In a similar sense, a single NGO may be wrongly causing an unjust event by influencing it, even if the general injustice would still have occurred had it not provided repatriation.

In cases where we causally contribute to injustice by influencing the event, such causal influence may still be justified if the influence is significantly helpful for the victim. The assassin, for example, may know she can more accurately shoot the victim directly at the centre mass of his body, leading to a quicker death compared to the backup assassins. If the assassin is in no way responsible for the presence of other assassins, and is shooting the victim only to reduce suffering, pulling the trigger may be morally justified. In a similar manner, an NGO can justifiably help with repatriation in cases where, though the help causally contributes to unjust coercion, it can also ensure a much safer return than would otherwise take place. However, unless the NGO is quite certain that its actions significantly help with return, it should avoid helping with repatriation, to avoid causally contributing to injustice.

### 3.2.3 Uncertainty

In some cases, a given NGO has essentially no influence. Their actions are neither necessary for coercion, nor do they influence coercion or the safety of return. This may be the case if there are multiple NGOs, each one providing equally safe repatriation, such that if one pulled out, the level of coercion and safety of return would be the same. Similarly, there may be only one NGO, but the government is detaining refugees both to encourage return, and also to placate protesters, or to deter new refugees from arriving in the country. We might suppose that an NGO assisting with return here does not causally contribute to coercive policies. For, had it not been for repatriation, there would still be other decisive reasons for the government to detain refugees. In such cases, an NGO may still have a strong reason to avoid helping with return.

An agent has a reason to avoid an act if she subjectively suspects that her act may increase the probability of a harmful event occurring, even if she is not ultimately necessary for the outcome and does not influence it. Imagine two assassins pull their triggers at the same time, both bullets flying out their barrels simultaneously, piercing the victim's heart in the same location at the same moment, such that neither assassin influenced his death.<sup>60</sup> One reason that each assassin acted wrongly is that, at the time she pulled her trigger, she could never be 100% certain the other would pull her trigger. In choosing to pull her own trigger, she increased the probability, in her mind, of the death occurring.

When there are multiple facilitators helping with return, then each can

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<sup>60</sup>Frank Jackson, "What Effects?" in (ed.) Jonathan Dancy, *Reading Parfit*, Blackwell Wiley 1997; Michael McDermott, "Influence versus Sufficiency," *The Journal of Philosophy* 99(2)(2002)84-101.

never be 100% certain that the others will make return possible. In choosing to help with repatriation, they risk possibly increasing the chances of repatriation occurring, and so the chances of coercion occurring. Similarly, when the government has multiple reasons for using coercive policies, the NGO can never know for certain that the government will still detain refugees in the event that repatriation is no longer a possibility. As such, repatriation should be discontinued, so that NGOs are certain they are not causally contributing to injustice.

Nonetheless, an exception may be made if the government has a large number of reasons for detaining refugees, such that detention would almost certainly continue even if repatriation ceased. Helping with such coerced returns are not ideal, but may be morally permissible, as the causal impact on coercion is unlikely, and the benefits significant, if the return is safer than alternatives.

We have, as such, reached a general conclusion: Coerced repatriation should only be facilitated if it does not significantly contribute to the coercive policies, and if all efforts have been made to first stop the coercive policies. Such repatriation is permissible on balance, assuming refugees are aware of the risks. When they are not aware of the risks, a distinct question arises, which I shall address in the next chapter.

### **3.3 Conclusion**

When a refugee is detained, her choices are far from voluntary. Given that this is the case, humanitarian agents have two options, neither ideal. They can help with an unsafe return, and free refugees from detention, or refuse to help, forcing refugees to stay. In reality, this case comes in two forms,



requiring two distinct policies.

In some cases, the government will arrest refugees, force them into detention, or deny them visas regardless of whether they return. NGOs and the UN should lobby for an end to such policies, and appeal to donors to provide food security and shelter. If they fail, it may be ethical to facilitate return, so long as refugees are aware of the risks.

In other cases, repatriation causes coercion. Facilitators are not mere third parties, as their actions impact government policies, intentionally or not. The more refugees are able to repatriate from detention, the more spaces become available in detention centres. This not only allows the government to detain more refugees, it gives them a reason to, seeing that past detainees were persuaded to return. In such cases, NGOs and the UN should not help with return, unless their assistance has only a small impact on coercion, and ensures a much safer return than would otherwise take place.

In light of these conclusions, NGOs and the UN ought to change their current policies and practice. Today, these bodies spend little of their budget on lobbying for the end of coercive conditions, and more on flights, stipends, and coordinating return. This is partly because NGOs and the UN often rely on government grants, at times competing with other NGOs to repatriate refugees at the lowest possible cost, at the fastest possible rate. But even NGOs who raise their own funds, such as OBI, continue allocating their entire budget to repatriation, feeling pressure from refugees who want to return as quickly as possible to avoid detention. Though refugees have good reason to return quickly, NGOs have good reasons to slow down return, freeing up resources for lobbying, and possibly dissuading governments from detaining quite so many refugees. Such a policy shift for

NGOs may mean fewer refugees can return, but fewer may want to, if conditions improve in the host country.

When George called OBI in 2012, it might have implemented a different policy, in light of these conclusions. It is unclear that George's detention was inevitable. The NGO might have done more to persuade the government to provide George residency right, or to provide greater residency rights for South Sudanese nationals in general. OBI should also have waited to facilitate this return, to see whether the government would eventually free George, seeing that he had no way of going back.

For George, and millions of others, immigration control involves not just force, but assistance. How organizations provide assistance can impact how governments respond, and how refugees react. If we are to have a fuller picture of what an ethical refugee policy would entail, we must shift our focus away from the policeman who followed George home, and onto NGOs who sit in small offices, answering calls from refugees who feel they need help returning, and quickly. While the urgency is clear, the best policy is not.

# Chapter 4

## Information\*

In 2009 the director of OBI landed in Juba, and met with ministers in the South Sudanese parliament. She then travelled to secondary towns, taking photographs of clinics, markets, schools, and solid buildings. After several weeks she flew back to Israel and showed these images on Powerpoint slides to South Sudanese refugees in community centres across the country, informing them that South Sudan had housing, security, free schools, universal healthcare, and income-generating opportunities.<sup>1</sup>

By 2011 several dozen families accepted OBI's assistance to repatriate. After return, most were without reliable shelter, medical care, regular meals, or school. Most notably, they lacked clean water, instead drinking from contaminated rural wells in villages, or streams that flow through mounds of waste in Juba. Some lived off the unreliable charity of distant relatives, or the occasional kind stranger in teashops which dot the corners of South Sudanese streets. While a small number started small businesses,

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*\* This chapter is based on a manuscript that has been accepted for publication, subject to minor revisions, in Res Publica.*

<sup>1</sup>Interview with Bol, Juba, 21 December 2013; Interview with Nathaniel, Juba, 14 December 2013; Interview with Vanessa, Juba, 25 December 2013.

they mostly failed. An unknown number were killed in ethnic-targeted killings<sup>2</sup> or illness,<sup>3</sup> and the majority were displaced within two years.<sup>4</sup>

In the larger philosophical discussions on informed consent, it is widely acknowledged that, if an agent is providing a high-risk offer, she must tell the recipient the known risks of accepting this offer. A surgeon must disclose known risks about surgery, a fireworks manufacturer must disclose known risks about fireworks, and the military must disclose known risks of joining the military. But though known risks must be disclosed, it is not clear what risks must be known. OBI did disclose what it knew, but perhaps it ought to have conducted more rigorous research than a short field visit in South Sudan.

To establish if this is true, we must establish when agents providing high-risk offers must work hard to learn about the risks of their offers. In some cases, it seems agents have no such duties. If I book a flight to Somalia, my airline needn't tell me the risks of my choice. While some agents do have responsibilities to learn about risks, it is not clear when such responsibilities arise.

This ambiguity has serious implications for repatriation, and has been largely overlooked in broader debates on immigration ethics. These debates overwhelmingly focus on when it is wrong to deport or detain an immigrant, rather than misinform an immigrant.<sup>5</sup> Throughout the past

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<sup>2</sup>Mollie Gerver, "The Role of Non-Governmental Organizations in the Repatriation of Refugees," *Philosophy and Public Policy Quarterly* 31(1)(2014): 1-13.

<sup>3</sup>Yuval Goren (Hebrew) "Aid organizations: More than 22 refugees expelled to South Sudan killed this year," *Maariv* 5/6/13.

<sup>4</sup>Based on the testimonies of returnees and NGO aid workers.

<sup>5</sup>David Miller, "Immigration: The Case for Its Limits," in (eds.) A. Cohen and C. Wellman, *Contemporary Debates in Applied Ethics*, Malden, MA: Blackwell Publishing 2005: 193-206; Gibney 2004 *ibid*; Alexander Betts, "Survival Migration: A New Protection Framework," *Global Governance* 16(2010):361-382; Javier Hidalgo, "Resistance to Unjust Immigration Restrictions," *Journal of Political Philosophy* 23(4)(2015):450-470.

three decades, misinformation has been a common reason for repatriation, as seen in the return of hundreds of thousands of refugees to Uganda, Iraq, and Afghanistan.<sup>6</sup> In these cases, individuals returned who otherwise would not have, had they known the risks. It remains unclear who has a responsibility to disclose the risks, if anyone.

In the following sections 1 and 2 I will describe “Misinformation Cases.” These cases arise when repatriation facilitators unintentionally provide false information on conditions in countries of origin. I will argue that, when certain conditions are met, facilitators are culpable for the resulting misinformed repatriation. In Section 3 I will then discuss related “Omission Cases,” where facilitators omit information they ought to know, rather than explicitly misinforming. I will argue that omitting unknown information is generally wrong in the same types of instances where misinforming is wrong. In Section 4 I will describe “Relevancy Cases,” where facilitators fail to warn about the risks of repatriating, but where refugees claim they would have accepted the offer to repatriate regardless. In some such cases facilitators still wrong those they fail to inform. Finally, there is an “Intent Question” which cuts across the above three cases. If facilitators are unaware they are misinforming refugees, it seems they are not intentionally misinforming refugees. If there is no intent, perhaps there is no wrong, or

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<sup>6</sup>Arne Strand, “Review of Two Societies: Review of the Information, Return and Reintegration of Iraqi Nationals to Iraq (IRRINI) Program,” Chr. Michelson Institute. <http://www.cmi.no/publications/publication/?4155=between-two-societies-review-of-the-information>. See also Helen Carr, “Returning ‘Home’: Experiences of Reintegration for Asylum Seekers and Refugees,” *British Journal of Social Work* (2014): 1–17 and Martha Walsh, Richard Black, and Khalid Koser, “Repatriation from the European Union to Bosnia Herzegovina: The Role of Information,” in (eds.) Richard Black and Khalid Koser, *The End of the Refugee Cycle? Refugee Repatriation and Reconstruction*, USA: Berghahn Books: 121; Anisseh Van England-Nouri, “Repatriation of Afghan and Iraqi Refugees from Iran,” *International Journal on Multicultural Societies* 10(2)(2008):144-169.

a lesser wrong. I shall argue that, most of the time, this is not the case.

Before I begin, a brief note on my approach.

I shall primarily focus on establishing whether NGOs and officials are culpable for misinformed repatriation. I shall assume that an individual is culpable if two conditions are met. Firstly, they have failed to fulfil various duties. Second, they have intent, in that they are aware of their actions,<sup>7</sup> have control over their actions, and use this control to bring about certain desired aims.<sup>8</sup> In Sections 1-3, my focus will be on establishing when the first condition has been met: when facilitators have failed to fulfil any duties to find information. I shall generally assume the intent condition is met, and only in Section 4 do I consider the objection that, even if facilitators failed to fulfil their duties, they did not intend such failures, and so were not culpable.

Though I focus on cases involving misinformation, coercion is highly relevant to my discussion. I wish to explore whether, when it is morally impermissible to coerce someone into accepting a service, then there is also an obligation to find information on the possible consequences of the service. Of course, there is great disagreement in immigration ethics as to when coercion is permissible, and so there may by extension be disagreement as to when information must be found and disclosed. Some believe states should only avoid deporting those fleeing persecution, others believe states should avoid deporting anyone whose life will be at risk, and still others believe that states should never deport anyone.<sup>9</sup> As in the last

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<sup>7</sup>K. Setiya, *Reasons Without Rationalism*, Princeton: Princeton University Press 2007: 24.

<sup>8</sup>Holly Smith, "Non-Tracing Cases of Culpable Ignorance," *Criminal Law and Philosophy* 5(2)(2011):115-146, especially p. 14.

<sup>9</sup>These are just some of the possible stances. See Matthew Gibney, *The Ethics and Politics of Asylum*, Oxford: Oxford University Press 2004; Javier Hidalgo, "Resistance to

chapter, I will assume that states should not deport anyone who is fleeing life-threatening circumstances, so long as states have the capacity to accept such individuals. As before, my general theory on misinformation is compatible with other theories, including the stance that only those fleeing persecution deserve protection, and the stance that nobody should be deported. My focus is not on when coercion is wrong but whether, if coercion is wrong because of the risks refugees will face, then information must be disclosed on these risks prior to repatriation.

## 4.1 Misinformation

Misinformation Cases arise when an NGO or official fails to gather a sufficient amount of data to determine the risks of repatriation. As a result, they provide inaccurate information to refugees, and refugees come to believe a falsehood they otherwise would not believe, leading them to accept repatriation they otherwise would not accept.

Such was the case in 1997 when the German government told Bosnian refugees that they would receive housing, employment, and other services upon return, none of which materialized.<sup>10</sup> In 2003 UNHCR told Afghan refugees living in Iran that it was safe to return, and refugees returned in light of this information, immediately facing violent attacks on the bor-

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Unjust Immigration Restrictions,” (Forthcoming) *Journal of Political Philosophy*; David Miller, “Immigration: The Case for Its Limits” in (eds.) A. Cohen and C. Wellman. *Contemporary Debates in Applied Ethics*, Malden, MA: Blackwell Publishing 2005: 193–206.

<sup>10</sup>Martha Walsh, Richard Black, and Khalid Koser, “Repatriation from the European Union to Bosnia Herzegovina: The Role of Information,” in (eds.) Richard Black and Khalid Koser, *The End of the Refugee Cycle? Refugee Repatriation and Reconstruction*, USA: Berghahn Books: 121.

der.<sup>11</sup> A year later the International Organization of Migration (IOM) in Norway told Iraqi refugees that there were income-generating activities in Iraq. They returned as a result, and found few job opportunities, many lacking food and shelter a year later.<sup>12</sup> In Israel, the Ministry of Interior set up a repatriation program in 2012, helping roughly 6,000 asylum seekers repatriate either to Sudan and Eritrea, or accept resettlement to Rwanda or Uganda. Here, too, refugees were provided inaccurate information, many displaced after departing the country.<sup>13</sup>

One reason refugees may have little information prior to repatriation is that they have never lived in their countries of origin as adults. Such was the case when OBI helped South Sudanese return from Israel. Of those I interviewed, seven subjects were from Unity State in South Sudan. They had last been in Unity State as small children decades prior, and failed to find information on the risks of returning. While it was public knowledge that approximately 140,000 had been displaced the year they returned in 2012,<sup>14</sup> an estimated death toll has never been publicized.<sup>15</sup> I also interviewed twenty-three subjects who returned to Upper Nile, three to Abyei, and one to Warap State. All were returning to areas where tens of

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<sup>11</sup>Anisseh Van England-Nouri, "Repatriation of Afghan and Iraqi Refugees from Iran," *International Journal on Multicultural Societies* 10(2)(2008):144-169.

<sup>12</sup>Arne Strand, "Review of Two Societies: Review of the Information, Return and Reintegration of Iraqi Nationals to Iraq (IRRINI) Program," Chr. Michelson Institute. <http://www.cmi.no/publications/publication/?4155=between-two-societies-review-of-the-information>.

<sup>13</sup>Galia Sabar and Elizabeth Tsurkov, "Israel's Policies Towards Asylum Seekers, 2002-2014," *Istituto Affari Internazionali Working Paper*, 15 May 2015.

<sup>14</sup>BBC, "Sudan's South Kordofan: 'Huge Suffering from Bombs.'" 14/6/11 <http://www.bbc.co.uk/news/world-africa-13767146>.

<sup>15</sup>Landmine and Cluster Munition Monitor, "South Sudan: Casualties and Victim Assistance" [http://www.the-monitor.org/custom/index.php/region\\_profiles/print\\_theme/2342#\\_ftn3](http://www.the-monitor.org/custom/index.php/region_profiles/print_theme/2342#_ftn3); BBC, "South Sudan profile" <http://www.bbc.co.uk/news/world-africa-14019202>.



thousands had been displaced a year prior, and at least hundreds had been killed, but the precise number of displaced and killed remained unknown.<sup>16</sup> Ten returning were from Jonglei, an area with slightly more complete data, but still sparse. One estimate states that 200,000 were displaced in Jonglei, and at least 2,700 civilians killed in 2011 to 2012, but the precise number of deaths was never confirmed.<sup>17</sup> Seven returnees were from the town of Akobo in Jonglei, where between 250 and 1,000 civilians were killed between 2011 and 2012, but the precise number never confirmed. Importantly, the total populations of Jonglei or Akobo have never been accurately counted in a reliable census, so an individual refugee could not have known the odds of being killed after returning.<sup>18</sup>

It was not just information on mortality rates that was missing. The World Bank and the International Labour Organization offer no unemployment statistics on South Sudan,<sup>19</sup> and Médecins Sans Frontières cannot provide precise statistics on the location of health clinics in South Sudan.

I asked subjects why they returned, given the unknown risks. Most responded that it was precisely because they did not know the risks that they returned. As Vanessa explains:

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<sup>16</sup>Norwegian Refugee Council/Internal Displacement Monitoring Centre, “Global Overview 2012: People Internally Displaced by Conflict and Violence – South Sudan,” <http://www.refworld.org/docid/517fb0526.html>; IOM South Sudan Annual Report 2012 [https://www.iom.int/files/live/sites/iom/files/Country/docs/IOM\\_South\\_Sudan\\_Annual\\_Report\\_2012.pdf](https://www.iom.int/files/live/sites/iom/files/Country/docs/IOM_South_Sudan_Annual_Report_2012.pdf); South Sudan: Cattle Raid in Warap State ‘kills 74’ <http://www.bbc.co.uk/news/world-16786869>.

<sup>17</sup>Humanitarian Practice Network, Judith McCallum and Alfred Okech, “Drivers of Conflict in Jonglei State” Humanitarian Exchange Magazine 57 (May 2013).

<sup>18</sup>According to the Sudanese 2008 consensus, the population was 1.2 million, but this has been disputed. See website of the South Sudanese National Disarmament, Demobilization, and Reintegration Commission: <http://www.ssddrc.org/states/jonglei.html>.

<sup>19</sup>World Bank, “Unemployment, total (% of total labour force) (modelled ILO estimate),” downloaded on 15 June 2015 from <http://data.worldbank.org/indicator/SL.UEM.TOTL.ZS>.

I was in prison for six months in Israel. I didn't like it. If I don't know what it's like in South Sudan, but I know I hated prison in Israel, I would prefer to go to South Sudan. . . it might have been worse, but it might have been better.<sup>20</sup>

Vanessa is from the Dinka tribe, but grew up among Nuer, and speaks the languages of both tribes fluently. Two years after her return, Dinka militias came to her home, believing she was Nuer. She fled, returning two days later to find her furniture and clothes stolen. "When we come home," she explains, "people on the street look at us. They don't ask questions. They don't know what tribe I'm from." Today, she does not regret returning, but others do, wishing they had stayed in Israel, even if this meant being detained, as they felt life in South Sudan was far more difficult than they expected.

When the OBI director began organizing returns, she was aware that some might be uninformed. She felt the same when helping Sudanese refugees fly to Juba, and then onwards to Khartoum and Darfur in Sudan. The government of Sudan has a policy of detaining and executing those who have been to Israel, and many may not have been aware of how likely this risk was. The OBI director also felt that she should not be the agent determining who knew about risks, as she had a conflict of interest: She wanted to impress donors by demonstrating that a large number of refugees were returning, and this may have impacted her ability to objectively determine informed consent. She hired HIAS instead. As noted in the last chapter, HIAS had a history of lobbying for refugee rights, and so OBI felt it could be trusted to critically evaluate if a refugee knew little about South Sudan or Sudan. HIAS interviewed each refugee, and if it felt that

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<sup>20</sup>interview with Vanessa, Juba, 25 December 2013.

a refugee knew little about their rights in Israel, and little about South Sudan or Sudan, it would tell this to OBI, who would then refuse to help them repatriate.<sup>21</sup>

This policy was ultimately ineffective, as HIAS staff appeared to know little about South Sudan or Sudan, and so largely failed to determine if individuals were uninformed about the risks of returning. The staff's training manual has only a very short page on the history of South Sudan and Sudan, and some information seems to lack any sources. For example, the manual states, "Although South Sudan...might not have the same services as we have in Israel, their family is a significant factor for positive mental health." It was not clear this was the case. Many I interviewed after return found their extended family unhelpful, and often emotionally harmful, largely ignoring them on the road and in their homes. The manual also states, "Many applicants might not be aware of the entire situation in Sudan. Instead, they might only know about the circumstances in their village. This is OK." In reality, information about urban centres was essential for refugees returning, as many villages lacked basic services and employment.

To learn about the extent and content of misinformation, I asked all subjects what information they recalled having prior to their return, how they had this knowledge, and whether they felt the information was true after returning. I then coded interviews for general categories of misinformation and the sources of this information.

The table on page 100 describes the findings from these interviews. The Y-rows describe different pieces of information provided to refugees, and the X-rows describe the sources of this information, including the police, NGOs,

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<sup>21</sup>HIAS Interview Form provided by HIAS in December 2012.

the media, and other sources. As noted, thirty-six of 126 respondents recall being told they would be detained indefinitely if they stayed, when this was unlikely for small children and mothers.<sup>22</sup> Sixty-eight subjects recall being told that South Sudan was a safe country. Almost a third were told this by government officials, but nine said they were told this by OBI or a UN official, who never mentioned continuous internal ethnic-based fighting.<sup>23</sup>

When interviewing subjects, I was aware that some respondents may be misrepresenting what they were told prior to returning, because they were disappointed with their return. While this was a possibility, it is likely that most were telling the truth, as those who were satisfied with their return recalled being told very similar misinformation to those who were disappointed with their return. Furthermore, to confirm the accuracy of responses, I also interviewed repatriation facilitators themselves, asking staff members what they recall telling refugees prior to returning. Though most recall saying nothing, in line with the policy of asking refugees to find information themselves, the OBI director recalled telling parents that their children would be able to access free healthcare, available in secondary towns.<sup>24</sup> This was possibly the most problematic of the misinformation,

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<sup>22</sup>Interview with Sigal Rosen, Tel Aviv, 9 December 2012.

<sup>23</sup>Jared Ferrie, "More Than 200 Die in South Sudan Tribal Feud, Official Says," CNN, 12/3/12, available at <http://edition.cnn.com/2012/03/12/world/africa/south-sudan-violence/>; Al Jazeera, "'Hundreds dead' in South Sudan cattle raids," 22 August 2011; <http://www.aljazeera.com/news/africa/2011/08/201182220946583842.html>; See, for example, "South Sudan: Violence against healthcare," 1 July 2014. <http://www.msf.fr/actualite/publications/south-sudan-conflict-violence-against-healthcare>; Small Arms Survey, "Fighting for Spoils: Armed Insurgencies in Greater Upper Nile," November 2011. <http://www.smallarmssurveysudan.org/fileadmin/docs/issue-briefs/HSBA-IB-18-Armed-insurgencies-Greater-Upper-Nile.pdf>; "Patients and Families Killed Outside of MSF Compound," 29 November 2007. <http://www.msf.org/article/patients-and-family-members-killed-inside-msf-compound>; Una McCauley. "Separated Children in South Sudan," *Forced Migration Review* 24 (2005).

<sup>24</sup>Interview with OBI Director, Jerusalem, 6 October 2010.

Table 4.1: Information, and source of information, amongst 126 South Sudanese refugees prior to returning

	Total	Police	Media	NGOs <sup>a</sup>	Return NGOs <sup>b</sup>	MOI <sup>c</sup>	Sudanese Gov't	Friends, Family	Israeli MKs	School or Job	memory
I would receive no work visa if I stayed:	37	3	0	0	0	18	0	2	0	9	0
I would be imprisoned if I stayed:	36	12	0	0	2	16	0	2	1	0	1
I would be deported if I stayed:	14	6	1	0	0	5	0	3	1	0	0
It's the law to go back:	43	3	2	5	1	3	0	3	31	3	0
Education is provided in South Sudan:	19	0	0	0	0	1	0	1	0	6	0
Conditions are secure in South Sudan:	68	3	19	1	9	4	3	19	9	2	0
Conditions are insecure in South Sudan:	33	0	6	0	2	0	0	13	0	0	3

<sup>a</sup> Refers to NGOs uninvolved in repatriation

<sup>b</sup> Refers repatriation facilitators, including OBI and HIAS

<sup>c</sup> Ministry of Interior

as post-return illnesses were the most likely cause of death in the first two years. Of the roughly 500 South Sudanese children who repatriated from Israel, aid organizations in Israel reported that at least seven died of malaria within the first three months, and at least twenty-two by the first year's end.<sup>25</sup> Of the forty-eight children whose conditions I could confirm, three died from illnesses, representing over 6% of my sample. The actual total percentage is most likely higher, given that I was unable to reach the most remote areas with even poorer healthcare.

In addition to misinformation about healthcare, OBI would also misinform refugees about security, food, housing, and jobs, informing them that all four were available. By 2014, I learned of one returnee killed in crossfire during the war, and four killed because of their ethnicity, including two children shot at gunpoint, aged three and five. There were most likely more I never heard about, due to survivorship bias in my sample. Displacement was also common, and of the 134 returnees whose conditions I could confirm,<sup>26</sup> thirty-two were of the Nuer ethnic group, and all from this group had fled militias from the Dinka ethnic group. We might suppose that the war was unpredictable ahead of time, but twenty-four of these individuals suffered less from the war than the general poverty in South Sudan, having no income or family support before fleeing to IDP camps. All lived off one meal per day, mostly consisting of corn meal, failing to obtain the basic nutrients necessary for survival according to World Health

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<sup>25</sup>Dimi Reider, "Israeli Children Deported to South Sudan Succumb to Malaria," 972 Mag, 8/10/12, available at: <http://972mag.com/israeli-children-deported-to-south-sudan-succumb-to-malaria/57287/>; Yuval Goren, (Hebrew) 'Aid organizations: Over 22 refugees expelled to South Sudan die within the first year,' 5/6/12. <http://www.nrg.co.il/online/1/ART2/477/197.html>.

<sup>26</sup>These included the 126 subjects who I interviewed.

Organization standards.<sup>27</sup> As of 2014, thirty-seven individuals were still living in South Sudan, and not displaced, but nineteen had no income, and also lacked food security. Twenty-five subjects had left South Sudan, and only two of these individuals had an income. The remaining were without basic medical care or food security.

For comparison, I also conducted interviews with individuals who returned, or were about to return, to Ethiopia, Guinea, Nigeria, Togo, Colombia, the Philippines, and Thailand. Their return had been partly facilitated by IOM, which provided me their contact details.<sup>28</sup> As with South Sudanese who returned, I asked respondents what they recall being told prior to returning, who told them this information, and whether this information seemed true after they returned. I then coded the interviews for the types of misinformation, the sources of information, and post-return conditions.

When comparing the data from all groups, including South Sudanese returnees, I found that those groups which faced the poorest information prior to returning also faced the most risks after returning. As noted in Table 4.2 on page 104, a large number of South Sudanese were misinformed prior to returning, and a large number died or were living in extreme poverty after returning. Those returning to Ethiopia, Nigeria, Guinea, Togo, and Colombia were slightly less likely to be misinformed, and less at risk of displacement and being killed. Those returning to Thailand were never misinformed, and never displaced or killed. Due to the small sample, there is a limit to how much we can conclude from this comparison, but even

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<sup>27</sup>See a list of recent guidelines from the World Health Organization, as well as datasets on food security by country: <http://www.who.int/nutrition/publications/en/>.

<sup>28</sup>IOM worked alongside a local NGO called the Centre for International Migration and Integration (CIMI). Interview with CIMI Director, Jerusalem, 22 September 2011; Interview with CIMI employee 1, Jerusalem, 23 September 2011; Interview with CIMI employee 2, Berlin, 3 March 2011.

within South Sudan there was a similar correlation between poor information and the risks faced after returning. Those returning with more information, especially from family members who had never left South Sudan, were the least likely to be displaced or without a job once they arrived in their home towns or villages.

It is not clear why South Sudanese were less informed, but one obvious reason is that they were returning to a more volatile country compared to those returning to other countries. Due to this volatility, it would have been difficult in 2011 to predict the future of South Sudan, and so difficult to gain accurate information. However, as noted above, most of the respondents were misinformed not about unexpected events, such as war, but about general poverty, food insecurity, and lack of healthcare, all ongoing in 2011.

A more likely explanation for why South Sudanese were less informed is that there was less available information on South Sudan, precisely because it was risky to conduct research in the country. Even in my own research, I was far less likely to visit unsafe and remote areas, such as Bor, where ethnic cleansing was especially widespread in 2011 and 2012, limiting my research to the capital and safer secondary towns.

Given that refugees often did return with inaccurate information, it remains unclear if repatriation facilitators ought to have found more information. We might suppose refugees should be the agents responsible for gathering information. But perhaps NGOs and officials have some responsibilities themselves. Whether they do depends on a number of considerations.



Table 4.2: Misinformation and post-return conditions

	South Su- danese 134	Nigeria, Guinea, Ethiopia, Togo, Colom- bia 15	Thailand and the Philip- pines 15
Misinformation about country-of origin	68	2	0
Internal displace- ment after return	32	0	0
Displacement to other countries	25	2	0
Death from illness	3	0	0
Death from vio- lence	5	0	0
Lack of food and medical care	62	4	0
Yet to return	0	7	0

## 4.2 The Duty to Know

Whether facilitators have a duty to know about risks is dependent, firstly, on costs. If finding information is costless, then NGOs and officials ought to find this information. This is somewhat obvious, and outside the scope of the difficult cases described, but important to state, as NGOs like OBI could have easily disclosed public data on health statistics and education in South Sudan.<sup>29</sup> When information is somewhat more difficult to obtain, NGOs and the UN may still have a duty of care, and so ought to find information. As argued in the previous chapter, NGOs and the UN were created precisely to help vulnerable populations, and so should do more than what is costless. Governments may similarly have a special duty to protect refugees, and this may entail finding more information on the risks of returning.

But governments and organizations may claim to have no such duty, and merely a responsibility to protect those who choose to stay. In such cases there may be three additional considerations. The first two are relatively weak, while the final is strong.

The first consideration concerns harm. Some argue that, if one is able to find information and does not, and this causes harm, then one is culpable for the resultant harm.<sup>30</sup> If I buy fish from a store that buys from a producer that uses slave labour, and my buying the fish reinforces slavery,

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<sup>29</sup>Andrew Green, "Healthcare in South Sudan at a Crossroads," *The Lancet* 379(9826)(2012); Giorgio Cometto, Gyuri Fritsche and Egbert Sondorp, "Health sector recovery in early post-conflict environments: experience from southern Sudan," *Disasters* 34(4)(2010):885-909; Tim Brown, 'South Sudan Education Emergency,' *Forced Migration Review* (supplement): 20-21. Available at <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/EducationSupplement/13.pdf>.

<sup>30</sup>Steven Lukes, *Power: A Radical View, Second edition*, London: Macmillan 2005: 53-54.

and I could have found this out, then I am partly blameworthy for my ignorance.<sup>31</sup> NGO or officials may similarly be causing harm through their ignorance, misinforming refugees and causing them to repatriate to unsafe countries.

But it is not clear that we are culpable whenever we fail to find information we are able to find, if it is very difficult to find the information. If I purchase fish, I may have a duty to read available research on labor conditions in foreign countries, but it is not clear I must fly to these countries in the absence of full data. It is not enough to establish that misinformation causes harm, but whether we have a duty to find information to prevent harm.

There is another consideration, which I also believe is of little help.

In the broader philosophical literature on consent, it is largely presumed that, if information is costly and there is no duty of care, then agents still have a duty to disclose relevant information they know.<sup>32</sup> If I am selling you my car, and I know it has faulty breaks, I should tell you this, because I have access to this information and you do not. In the cases of repatriation, though there is no asymmetry of information – all know little about countries of origin – there is an asymmetry in the ability to obtain new information. Governments, and often NGOs, have greater resources than refugees, and are more able to find information in areas that are difficult to reach.

This consideration may be relevant, but it would require demonstrating

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<sup>31</sup>Christina Stringer, D. Hugh Whittaker and Glenn Simmons, “New Zealand’s Turbulent Waters: the use of forced labour in the fishing industry,” *Global Networks* 16(1)(2016)3-24.

<sup>32</sup>Franklin Miller and Alan Wertheimer, “Preface to a Theory of Consent Transactions: Beyond Valid Consent” in (ed) Franklin Miller and Alan Wertheimer, *The Ethics of Consent: Theory and Practice*, Oxford: Oxford University Press 2009, p. 79-106: 96.

that agents really do have greater duties to find information when it is easier for them to find information. It is not clear that they do. If I am a car mechanic selling you a car, and could run a test that you are not able to run, it would seem unfair to claim I have a duty to run this test, while another car owner, who is not a mechanic, would have no such duty when selling you their car. Even if asymmetric knowledge is a reason to disclose information one knows, it does not follow that asymmetric ability to obtain knowledge creates a duty to know.

There is a more plausible and final consideration.

We often have duties to know which are unrelated to informed consent. Drivers, for example, have duties to avoid running others over, creating a duty to look in their rear-view mirror to know if anyone is behind them.<sup>33</sup> Similarly, drivers may have duties to inspect their car breaks annually, to ensure they do not run anyone over. Sometimes, when we have a duty to know information, this information happens to be information that, had we known it, we would need to disclose in a subsequent transaction. If I have my car inspected and learn the breaks are faulty, and I want to sell you my car, I should tell you about the faulty breaks. It is not that I must know about the breaks to tell you. Rather, I must know about the breaks because I have a duty to not run anyone over, and once I know this information, I have a duty to disclose it in a subsequent sale.<sup>34</sup> If am negligent, and fail to have my breaks inspected, and then sell you my car without telling you about the breaks, it seems I am partly blameworthy for

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<sup>33</sup>Holly Smith, "The Subjective Moral Duty to Inform Oneself before Acting," *Ethics* 125(1)(2014):11-38.

<sup>34</sup>It is not that I have duty to know about the breaks in order to tell you; I had a duty to know and, by chance, this information is the sort that I should disclose if I know about it.

your decision to buy my car without full information. It would seem a poor excuse to tell you, “I didn’t know about the breaks!” if I had a previous duty to know about the breaks.

We may apply similar reasoning to repatriation. States in general have duties to know about ethnic cleansing, famines, and genocides in foreign countries, derived from their “Responsibility to Protect” others from great harm, as outlined in the 2005 UN World Summit.<sup>35</sup> States also must know about suffering in other countries to help alleviate global inequalities, at least to an extent. If governments have duties to know this information, and have a duty to disclose what they know, then we may blame governments for failing to tell refugees about the risks. For, though they did not know about the risks, they ought to have known about the risks, due to their other duties.

A government ministry in charge of immigration may also have duties to know about countries of origin in order to establish who is a refugee amongst those who do not wish to return. Ignorance about South Sudan, for example, may have lead the Israeli Ministry of Interior to unjustly reject asylum claims. If the ministry fails to find information that is necessary to fulfil these duties to ensure a fair asylum process, their ignorance may be a poor excuse for their failure to disclose risks to refugees who want to return. For, they ought to have known, for reasons related to their other duties.

To clarify this point: I am not arguing that we have a duty to know information derived from our duties to ensure informed consent. For, it is

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<sup>35</sup>United Nations, “The Responsibility to Protect,” Outcome Document of the 2005 United Nations World Summit, A/RES/60/1, para. 138-140, <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml>.

unclear when we have a duty to ensure informed consent, when ensuring accurate information is costly. Rather, I am arguing that, when we have duties to know derived from other duties, unrelated to informed consent, then we ought to disclose this knowledge when it will help ensure informed consent. If we don't have this information, we are acting wrongly towards those we fail to inform.

Furthermore, I am not arguing that we should disclose all information we have a duty to know to anyone who wants this information. If my jealous neighbour asks about the breaks of my Lamborghini, but has no interest in buying it, I have not wronged her when I incorrectly but unknowingly tell her the breaks are perfect. For, were I to know about the faulty breaks, I would have no duty to tell my neighbour about them. Rather, my argument is that, when we have a duty to disclose information we know to a particular person, it is not an excuse to say we didn't know, if we ought to have known.

This reasoning implies that there are limits to information that must be sought. State officials may have no duty to know about ethnic cleansing abroad if such research would place their own lives at risk, and so do not wrong refugees if they fail to inform them. However, in such cases, if officials are to provide information at all, they should provide it with a clear disclaimer, informing refugees that there is insufficient information to know the full risks of return, because it is too dangerous to conduct research in refugees' home countries. And when finding information is merely difficult, but not life-threatening, there remains a duty to find information, and so misinforming is wrong.

### 4.3 Omission

This leaves open the question of whether it is permissible to not provide any information at all. This question became relevant in 2008, when the Norwegian government helped Iraqi nationals repatriate, never warning them of the risks, such as the challenges of securing food and shelter after returning.<sup>36</sup> A similar case arose in 2010 when the government of Denmark helped Iraqi refugees repatriate, also never disclosing risks.<sup>37</sup> More recently, the UK government helped refugees return to Sierra Leone without disclosing the risks of homelessness, common after return, and never warned refugees returning to Sri Lanka about security concerns, with many arrested, detained, and tortured after returning.<sup>38</sup>

In Israel, refugees were never informed that they could not re-enter Israel once they left, as OBI staff assumed they knew this.<sup>39</sup> OBI and HIAS also assumed refugees had information from family members about South Sudan, or from their own memories. For this reason, HIAS never disclosed information about violence in Unity State, Jonglei, and other

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<sup>36</sup>Arne Strand, "Review of Two Societies: Review of the Information, Return and Reintegration of Iraqi Nationals to Iraq (IRRINI) Program," Chr. Michelson Institute. <http://www.cmi.no/publications/publication/?4155=between-two-societies-review-of-the-information>.

<sup>37</sup>Maria Helene Bak Riiskjaer, "Circular repatriation: The unsuccessful return and reintegration with refugee status in Denmark," Research Paper 165, New Issues in Refugee Research, p. 7.

<sup>38</sup>Helen Carr, "Returning Home: Experiences of Reintegration for Asylum Seekers and Refugees," *British Journal of Social Work* 44(1)(2014): 1-17

<sup>39</sup>Interview with HIAS and OBI employee, Tel Aviv, 28 April 2012.

areas,<sup>40</sup> or information on healthcare and food insecurity.<sup>41</sup>

It was not completely unreasonable that HIAS assumed refugees could rely on their families for information. Amongst those I interviewed, family members were the best sources of information compared to other sources, such as the media, government officials, and NGOs. Of the nine I interviewed who found full employment after returning, eight had been told by family members that there were jobs. However, it was also the case that, of the nineteen who were told by family that there were jobs, eleven found no employment, and lacked reliable shelter. Though families were the best sources information, they were still not very good sources in absolute terms.

Before addressing whether it is obligatory to disclose risks, it is worth noting that it seems clearly preferable that agents disclose risks, if they already have a duty to find information on these risks. Information can be costly to obtain, but often free to disclose. When governments have duties to know about certain conditions in other countries, it seems preferable that they disclose this information to refugees, given that the act of disclosing is costless.

But even if it is preferable to disclose information, NGOs and govern-

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<sup>40</sup>Jared Ferrie, “More Than 200 Die in South Sudan Tribal Feud, Official Says,” CNN, 12/3/12, available at <http://edition.cnn.com/2012/03/12/world/africa/south-sudan-violence/>; Al Jazeera, “‘Hundreds dead’ in South Sudan cattle raids,” 22 August 2011; <http://www.aljazeera.com/news/africa/2011/08/201182220946583842.html>; See, for example, “South Sudan: Violence against healthcare,” 1/7/14, available at <http://www.msf.fr/actualite/publications/south-sudan-conflict-violence-against-healthcare>; Small Arms Survey, “Fighting for Spoils: Armed Insurgencies in Greater Upper Nile,” November 2011. <http://www.smallarmssurveysudan.org/fileadmin/docs/issue-briefs/HSBA-IB-18-Armed-insurgencies-Greater-Upper-Nile.pdf>; “Patients and Families Killed Outside of MSF Compound,” 29/11/07, available at <http://www.msf.org/article/patients-and-family-members-killed-inside-msf-compound>; Una McCauley. “Separated Children in South Sudan,” *Forced Migration Review* 24 (2005).

<sup>41</sup>Training manual provided by HIAS in December 2012.



ment may argue that omitting information is still permissible, or at least less wrong compared to misinforming.<sup>42</sup> To defend this claim, they might appeal to two arguments. Both, I argue, are relatively weak.

The first reason relates to causation. We might suppose that acts are wrong, or especially wrong, if they are both necessary and sufficient for a harmful outcome. If an agent misinforms a recipient of a service, rather than merely omits information, then the recipient is likely to believe a falsehood she did not believe before, and so the misinformation was necessary for the false belief, and also sufficient if this misinformation alone explains why the recipient held the false belief. Furthermore, if the recipient would not have accepted the risky service had she not been misinformed, and this misinformation was her only reason for accepting the risky service, then the misinformation was also necessary and sufficient for the decision to accept the risky service. In contrast, if a recipient already holds a false belief, and a service provider merely omits information that would have corrected this false belief, then this act of omission would not be sufficient for the recipient's false belief; other factors, such the recipient's other poor sources of information, were also necessary.

I do not believe this distinction is sound, because the act of misinforming is also not sufficient for the resultant false belief. If a recipient is misinformed, one reason they believe this misinformation is because they are not provided alternative information to correct this misinformation. As such, the resultant false belief is the result of both the false information provided by the service providers, in addition to information omissions from other sources. Misinformation, in this sense, can be similar to omitting informa-

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<sup>42</sup>James Edwin Mahone, "Kant and Maria von Herbert: Reticence vs. Deception," *Philosophy* 81(2006): 417-444.

tion. Just as information omissions only lead to false beliefs when there is misinformation from another source, misinformation only leads to a false belief when there are information omissions from another source. Omitting information, as such, can be causally responsible in a similar manner to misinforming.

There is a second reason omitting information may be less wrong. It may be that a “positive act” is worse than a “negative act,” and the former worse than the latter. Killing, it is often claimed, is a positive act, and worse than letting a person die, a negative act. Perhaps omitting information is a negative act and so a lesser wrong.

To consider if this is true, we must have plausible definitions of positive and negative acts. Some argue that positive acts are more causally related to upshots,<sup>43</sup> but, as noted above, acts of omission can have the same causal impact as positive acts.<sup>44</sup> A more plausible definition of the positive/negative distinction has been proposed by Jonathan Bennett, who argues that an agent’s act is positive if most of the other actions she could have taken would not have lead to the upshot, and an act is negative if most of the actions an agent could have taken would have still lead to the upshot. If a doctor injects arsenic into a healthy patient, most of the other things she could have done – stayed at home, gone for a stroll, read a book, danced a jig, and so forth – would not have lead to the patient dying. As such, she committed a positive act. In contrast, if the doctor failed to treat an ill patient, then most of the acts she could have done – also stayed at

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<sup>43</sup>Daniel Callahan, “Killing and Allowing to Die,” *The Hastings Center Report* Volume 19(1989).

<sup>44</sup>Frances Howard-Snyder, “Doing vs. Allowing Harm”, in (ed) Edward N. Zalta, *The Stanford Encyclopedia of Philosophy* (Winter 2011 Edition) <http://plato.stanford.edu/archives/win2011/entries/doing-allowing/>>.

home, gone for a stroll, and so forth – would still have lead to the patient dying.<sup>45</sup>

Some have critiqued this conceptualization, raising a counter-example: Martha is preparing to assassinate a man named Victor by shooting him. Martha knows that a second assassin is waiting across the street and will kill Victor if she doesn't. She could kill the second assassin, and let Victor live, but she doesn't, instead shooting Victor. Bennett's theory would seem to implausibly hold that Martha merely let Victor die in a negative act, because most of the other acts she could have done – read a book, danced a jig, and so forth – would had lead to the same upshot of Victor dying, this time from the second assassin.<sup>46</sup>

I do not believe this counter-example, and other similar cases of pre-emption, necessarily undermine Bennett's theory. Though there are many other actions Martha could commit that would lead to the upshot of Victor dying – read a book, danced a jig, and so forth – there are not many other actions she could commit that would lead to the increased probability, in her mind, of Victor dying. For, when she pulled the trigger, she could not have known, 100%, that the second assassin would necessarily have pulled

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<sup>45</sup>Jonathan Bennett, *The Act Itself*, Oxford: Oxford University Press 1998. Bennett ultimately concludes that his conceptual distinction does not provide a good normative distinction. Though it seems to match our intuitions about which acts are positive, and so more wrong, the distinction seems arbitrary. It is arbitrary whether most of the other things we could have done would still have led to a harmful upshot. But I believe that his distinction may have normative weight. Bennett seems to assume that, if we do not have what seems like a good reason for viewing a distinction as important, than it is unimportant, even if it seems intuitively to be important. As I noted in Chapter 2, where I set out my methodology, we often revise principles to ensure they are consistent with our intuitions. We should perhaps ensure positive and negative acts are distinguished because that is the only way our principles can be consistent with our intuitions.

<sup>46</sup>Frances Howard-Snyder, "Doing vs. Allowing Harm", in (ed.) Edward N. Zalta, *The Stanford Encyclopedia of Philosophy* (Winter 2011 Edition), <http://plato.stanford.edu/entries/doing-allowing/index.html#note-18>.

the trigger had she not. In this sense, had she not pulled the trigger, and instead gone for a stroll, read a book, or danced a jig, then the upshot would have been different in her mind. It would have been a world with a lower probability of Victor dying. Similarly, if misinforming the recipient of a service increases the subjective probability that the recipient will be misinformed, then misinformation is similarly a positive act, because most of the acts the misinformer could have done – walked, read, danced, and so forth – would not have led to the perceived increased probability of the recipient holding a false belief. In contrast, if an agent omits information, then most of the other acts she could have done would have still led to the same probability of a misinformed recipient.

While Bennett’s distinction helps explain why positive acts may be worse than negative acts, it does not establish that misinformation is necessarily worse than omitting information. In some cases, omitting information can be a positive act, and so as wrong as misinforming. HIAS kept records of the interviews it conducted, which the NGO provided to me. There are moments in the transcripts where a refugee says she is returning to South Sudan to access education, and moments where HIAS says nothing in response, failing to tell the refugee that they will unlikely have access to education. This moment of silence may be interpreted as a communicative act, signalling to the refugee that her beliefs are correct. Had the NGO not sat in silence and listened attentively, and instead never spoken to a refugee at all, then a given refugee may have sought out further information. If this true, then HIAS’s silence at that particular moment was a positive act: Most of the acts HIAS could have done instead, including gone for a walk or danced a jig, would not have led to the upshot of an increased probability of a false belief. Attentive and silent listening

can be a form of information omission that serves as a positive act, and as egregious as active misinforming.

There is a final reason that positive acts may be worse than negative acts. Many negative acts seem less wrong because negative acts tend to be much harder to avoid compared to positive acts.<sup>47</sup> It can be very difficult to avoid the negative act of failing to treat a patient – that would require treating the patient – but very easy to avoid the positive act of injecting arsenic into a patient – that would require merely keeping the arsenic at home. Because it is often demanding to ask that people refrain from all sorts of negative acts – such as sending money to people in need – then we often use negative acts as a proxy for what people are generally permitted to do, or for acts that are not as wrong. The same can be said regarding omitting information. It can be relatively easy to avoid misinforming someone. We can simply not open our mouths. In contrast, it can be difficult to avoid omitting accurate information, as this requires actively finding information and disclosing it. For this reason, we may view omitting information as less wrong.

Though the positive-negative distinction does often correlate with the hard/easy distinction, it does not always correlate.<sup>48</sup> Positive acts are sometimes as easy to perform, or almost as easy, as negative acts. When HIAS failed to tell refugees that there was widespread ethnic-based killings in Unity State and Jonglei, it could have easily changed its actions by searching the internet for “death toll in Unity State” and “death toll in Jonglei,” relaying this information without great effort. Importantly, even if negative acts are not as wrong as positive acts, they can still be wrong. We

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<sup>47</sup>Bennett 1998 *ibid*: 101-102

<sup>48</sup>Bennett 1998 *ibid*: 102.

can be blameworthy for the negative act that, though costly to save, would be a cost expected of us to bear, given our unique position, or our earlier commitment to help. If governments and NGOs ought to have information, and ought to disclose information they know, then we expect them to bare the costs of finding information and disclosing it. If they don't, they may be acting wrongly, even if slightly less wrongly than actively misinforming.

## 4.4 Relevancy

Until now, the examples I raised concerned NGOs or officials who misinformed, or failed to inform, and this lead refugees to return who would have otherwise stayed. There are instances where refugees would have accepted repatriation even if they had not been misinformed. In such cases, the misinformation turned out to be irrelevant, and so it is not clear if an NGO or official committed a wrong.

Consider the case of Stephen, a father of three who was approached by OBI in 2012. The organization told him it was safe in South Sudan, but he knew this was not the case, having lived in South Sudan relatively recently. He wanted to return despite the risks, and so accepted OBI's assistance, boarding a flight for Juba with his wife and children in 2012, hoping to start a business when he landed. Within a year he had established a small cleaning and maintenance company, which earned enough to support his family. On December 14th, 2013, Stephen went to work managing cleaners at the Sudanese People's Liberation Movement's (SPLM) annual congress. Towards the evening, members of the Presidential Guard opened fire on each other, and Stephen dropped to the ground, crawled to the entrance, and ran home. The next morning, peering out his window at sunrise, he

saw eleven small children, and two young men, taken out of their houses by soldiers, lined up, and shot dead. He told his wife and three children to exit with him through their back door, and they ran, arriving at the UN's Internally Displaced Persons (IDP) camp, where they remained as of 2014.<sup>49</sup>

Even after fleeing to the camp, Stephen said that OBI's poor knowledge of South Sudan did not bother him, because he himself knew the risks, and returned regardless. He does not regret his choice<sup>50</sup> and so, perhaps by chance, OBI did no wrong, or a lesser wrong.

Consider, also, the case of Yasmin. Unlike Stephen, she had no accurate information when she returned, and upon reaching her home village in Aweil she was surprised and disappointed to find no reliable clean water, no free education, and no safety for her children. She says that she would have returned even if she had been given more information. She runs a restaurant today, and is happy to be close to her family.<sup>51</sup>

In both of these cases, there is a question concerning relevancy. On the one hand, we might believe that OBI's failure to give both returnees accurate information meant it failed to ensure they gave their informed consent. Even if Stephen and Yasmin would have returned regardless, OBI did not know this, and so should have worked harder to find and disclose information about the risks. But though it seems OBI should have acted differently, we might believe in moral luck: Stephen happened to know about the risks, and Yasmin happened to not care. By chance OBI did no wrong, because neither Stephen or Yasmin returned due to misinformation.

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<sup>49</sup>Interview with Stephen, Juba, 6 January 2014; confirmed in interviews with other witnesses.

<sup>50</sup>*ibid.*

<sup>51</sup>Interview with Yasmin, Aweil, 30 March 2012.

They returned for other reasons – Stephen to start a business, and Yasmin to be close to her family. Though they were misinformed by OBI, they gave their informed consent.

Even if we believe in moral luck, there are reasons to believe that Yasmin, in particular, failed to give her informed consent. She says today she would have returned, but this may partially be because she cannot turn back time, and so feels she may as well be happy with her decision. Had Yasmin been told information while still in Israel, she may not have returned even if, today, she says she would have returned. For, in general, we often form preferences for our current conditions which we cannot escape.<sup>52</sup> As such, our current preferences for our past actions are not good indicators of whether we would have consented in the past, had we been better informed. This is less of a concern for Stephen, because we know that he would have returned even if OBI had given him more information, because he had this information before return, and still returned.

Let us say, though, that we trust Yasmin. She says she would have returned had she been better informed, and her words should be taken at face value. She really did miss her family, and this would have given her a decisive reason to return even if she had been given more information. If this is true, we might claim that she was not wronged. For, though she did not give her actual consent, she gave her “hypothetical consent.” In general, hypothetical consent is often sufficient for an intervention to be permissible. A coma patient is not wronged if they undergo treatment, so

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<sup>52</sup>In general, when our options are constrained, we may prefer the options we have because we have little other choice. See Joseph Fishkin, *Bottlenecks: A New Theory of Equal Opportunity* Oxford: Oxford University Press 2014: 16. We also often take steps to affirm our past choices, feeling this will make our lives go better than if we lived with regret. See R. Jay Wallace, *The View from Here: On Affirmation, Attachment, and the Limits of Regret* Oxford: Oxford University Press 2013: 66.



long as they likely would have consented to the treatment had they capacity and full information.<sup>53</sup> Similarly, citizens are not wronged, some claim, if governments use some levels of coercion, so long as citizens would have consented to such coercion, had they been fully informed and sufficiently rational.<sup>54</sup> Even if actual consent is preferable, hypothetical consent still indicates a lesser wrong, or no wrong, because at least the intervention promoted the aims and desires of those who would have consented. Yasmin did not consent, but repatriation promoted her desire to be close to her family, and so she experienced a lesser wrong, or no wrong at all.

There are two reasons why this reasoning fails. The first is that hypothetical consent does not lessen a wrong if actual consent is possible. This is because, without actual consent, the recipient lacks control over her choices. If an individual lacks information on the risks of various choices, then she is not truly aware of what these choices are, and so cannot deliberate on what is best for her, and so cannot truly control the way her life unfolds. It is wrong to deny another person control over their lives even if we know they would have chosen the same life regardless. Were we to deny them control, then we would disrespect them, treating them as

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<sup>53</sup>Jeremy Waldron, "Theoretical Foundations of Liberalism," *The Philosophical Quarterly* 37(1987): 139.

<sup>54</sup>Different theorists raise different counterfactuals. For Rawls, the relevant question is what citizens would consent to, if they were both rational, with capacity, and with information on general human economics and psychology, but under a veil of ignorance about their particular position in society. In *Just War Theory*, the use of hypothetical consent has also been evoked. For example, Jeff McMahan has argued that, when states decide whether to engage in humanitarian interventions in foreign countries, they must obtain the consent of the victims and, when this is not possible, they must consider what the victims would likely consent to, were we able to ask them. See John Rawls, *A Theory of Justice*, New York: Oxford University Press 1971 and Jeff McMahan, "Humanitarian Intervention, Consent, and Proportionality," in (eds.) N. Ann Davis, Richard Keshen, and Jeff McMahan, *Ethics and Humanity: Themes from the Philosophy of Jonathan Glover*, New York: Oxford University Press 2010.

humans not worthy of making a choice for themselves. In a useful example illustrating this point, Daniel Groll imagines a patient telling a doctor that she does not consent to life-saving surgery. The doctor then thinks for a few hours, returns to the patient, and tells him, “After thorough deliberation, I have taken into account what you told me, and concluded that I will not perform the surgery.” Such an attitude seems wrongly paternalistic, even if the doctor is helping the patient achieve her desires and aims.<sup>55</sup> A similar phenomenon is occurring when we rely on hypothetical consent to determine wrongdoing in cases of misinformation.

Some may reject this line of reasoning, believing that recipients of services do not truly lack control over their choices if these choices are consistent with their desires and aims. At the very least, they have some control, and so a lesser wrong has occurred. Even if we accept this as true, and hold that hypothetical consent indicates no wrong or a lesser wrong, there is reason to believe that Yasmin did not even give her hypothetical consent.

When considering if a person would hypothetically consent, it is necessary to establish an appropriate counterfactual. To do this, we must consider what it is we value. I assume we value information, which is why we ask what a person would have consented to, had they been informed. But if we value information, we don’t only value information on services offered to us. We also value information on the character of the service provider. When I consent to surgery, I want to know both about the risks of the surgery, and to know my surgeon is honest and informed about the risks herself. If my surgeon tells me an operation has no risks, and after the operation I learn that it actually entailed significant risks, I would feel wronged. I would think, “Had I known the surgeon was providing

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<sup>55</sup>Daniel Groll, “Paternalism, Respect, and the Will,” *Ethics* 122(4)(2012): 692-720.

me misinformation, I would have chosen a different surgeon who was more forthcoming about these risks, even if I still would have chosen to undergo the same operation.”

If so, then the relevant counterfactual in hypothetical consent is not a world where a person is informed by others; it is a world where a person is both informed and aware others are misinforming them. This counterfactual better captures the full range of information we value: the information on the risks of the service itself, and information on the type of agent the service provider is. We care about the type of agent the service provider is because we want to know if they are negligent about fulfilling the responsibilities of their position, as this can help us determine how much we trust them, and how competent they are. This can also help us determine how much we want to support them by endorsing their services. If I know a surgeon is not disclosing risks, I would want to signal to others the incompetence of the surgeon by not consenting to her providing surgery.

Even if refugees would have returned had they been fully informed, this does not mean they would have returned through a particular NGO or government official, had they known that this NGO or official was misinforming them. Indeed, some refugees refused to return via OBI precisely because they were upset about the misinformation provided by OBI, and the fact that OBI omitted risks. A man name Bok, frustrated by OBI’s powerpoint slides, paid for his own flight and managed his own logistics. He did not want to support an NGO that failed to warn about risks, and did not trust the NGO to have his best interests in mind.<sup>56</sup>

In Stephen’s case, we needn’t ask what he would have done had he known he was misinformed. In reality, he knew he was being misinformed,

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<sup>56</sup>Discussion with Bok, Juba, 1 January 2013.

and this did not bother him enough to refuse OBI's services. In Yasmin's case, we do not know if she would have returned, had she known that OBI was misinforming her. She may say today that she would have returned, but we cannot know what she would have truly done at the time. We must take her memories at face value for this consideration as well. And the more we rely on memories, the less we are certain that information really was irrelevant.

In general, we cannot travel back in time to a counterfactual world and see how refugees would act, had they been given accurate information. As such, it is difficult to establish what information was irrelevant. To be safe, NGOs and government officials should change their policies to ensure information is available to all refugees, and should be held accountable for failing to disclose information, even if the risks seem irrelevant. For, more generally, it is difficult to establish what an individual would do if they had both known the risks and knew their service provider did not know these risks. The more precise the counter-factual, the more difficult to imagine precisely what would have happened, and the less we can know if there was hypothetical consent.

## 4.5 Intent

When NGOs and officials speak with refugees, they rarely know they are misinforming or omitting information. If they are not aware of their actions, and awareness is a necessary condition for intent, they did not intend to misinform. If intent is necessary for blameworthiness, they are not blameworthy for misinforming.

This is not to claim that all agree that intent is important. According

to some theorists, one can be blamed for lacking morally important desires or motives if this leads to acts with harmful outcomes, even if one is not aware one is causing harmful outcomes.<sup>57</sup> If I lack compassion for the poor, and fail to think about their plight, and so fail to help them, I may be blameworthy for my failure to help them, even if I am not aware that I fail to help them. Similarly, if officials fail to inform refugees of the risks because they lack a desire to help refugees, they may be blameworthy for failing to have the desire to help refugees, and so blameworthy for failing to inform refugees. This would be true even if they are not aware they are misinforming and not aware that they lack important virtuous desires.

Others argue that the only condition for blameworthiness is foreseeability, or what a reasonable person could foresee. Foreseeability refers to the likelihood that one's actions will causally contribute to a harmful upshot, regardless of whether one intended this upshot.<sup>58</sup> NGOs and officials are blameworthy in this sense, if it is true that a reasonable person could foresee that failing to find information would increase the probability of an uninformed repatriation.

But there are a range of deontological theories that view intent as either necessary for blameworthiness, or a property that increases blameworthiness. To have intent, two conditions must be fulfilled. First, one must be in control of one's actions.<sup>59</sup> To be in control, one must be aware of what

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<sup>57</sup>Holly Smith, "Non-Tracing Cases of Culpable Ignorance," *Criminal Law and Philosophy* 5(2)(2011): 115-146; Michael Slote, *Morals from Motives*, Oxford: Oxford University Press 2001.

<sup>58</sup>For versions of this approach, see Jonathan Bennett, *The Act Itself*, Oxford: Oxford University Press 1998 and Frank Jackson, "What Effects?" in (ed.) Jonathan Dancy, *Reading Parfit*, Blackwell Wiley 1997.

<sup>59</sup>Neal Tognazzini and D. Justin Coates, "Blame", in (ed) Edward N. Zalta, *The Stanford Encyclopedia of Philosophy* (Spring 2016 Edition) <http://plato.stanford.edu/entries/blame/>.

one is doing. If one is not aware of what information is true, then one is not aware one is misinforming or omitting information. Second, to have intent one must have a particular aim in mind.<sup>60</sup> If one intends to omit information, then one chooses to keep one's mouth closed with the aim of never uttering this information. It is not clear NGOs or officials had any such thoughts when keeping their mouths closed, and so had no intent.

Such was seemingly the case when HIAS misinformed or failed to inform refugees. The NGO was not aware it was misinforming or omitting information, and so not in control of its actions, or having any particular aim in its actions. This was also the case when UNHCR helped Afghan refugees in Iran return home in the 2000s. After returning refugees faced regular attacks from warlords, drug dealers, and Taliban resurgent groups,<sup>61</sup> but the UN agency was not aware of this, because it never interviewed those who returned.<sup>62</sup> Subsequent refugees who wanted to return were told by UNHCR that it was safe, or never told any information at all, because the agency was not aware of the risks until the late 2000s. Similarly, when the German government gave misinformation to Bosnian refugees in the 1990s, the government did not know it was misinforming them because, as a matter of policy, it did not conduct post-return evaluations. Even if misinforming and omitting information is wrong without intent, it seems worse with it, a form of deception or recklessness, rather than a mere oversight.<sup>63</sup>

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<sup>60</sup>Holly Smith, "The Subjective Moral Duty to Inform Oneself before Acting," *Ethics* 125(1)(2014): 14.

<sup>61</sup>Anisseh Van Engeland-Nourai, "Repatriation of Afghan and Iraqi Refugees from Iran: When Home is No Longer Home," *International Journal on Multicultural Societies* 10(2008)(2): 158.

<sup>62</sup>Helen Morris and Michael Salomons, "Difficult Decisions: A review of UNHCR's engagement with Assisted Voluntary Return programs," UNHCR Policy Development and Evaluation Services July 2013.

<sup>63</sup>James Edwin Mahone, "The Definitions of Lying and Deception," in (ed.) Edward N. Zalta, *Stanford Encyclopedia of Philosophy* 2015,

In the above instances, it may be true that misinformation is unintentional, but there may still be wrongful intent. Sometimes an unintentional act can be blameworthy because it is the result of an earlier intentional act. A doctor may unintentionally fail to tell a patient about the risks of an operation, because he is not aware of these risks, but he may be unaware of the risks because, earlier, he intentionally failed to read the latest medical journals. In such cases, the doctor is blameworthy because, earlier, he had a duty to read the latest medical journals and intentionally failed to.<sup>64</sup>

There is some evidence that repatriation from Israel involved similar earlier intent. The director of HIAS, when asked why he never disclosed risks, responded that he was not aware there were risks to disclose, because he never conducted research on South Sudan, assuming refugees already had sufficient information.<sup>65</sup> His later action of unintentionally omitting risks can be traced back to his earlier intentional act of not finding out about these risks. The government also founded a repatriation program in 2012 and, as noted, by 2015 it had helped over 6,000 refugees depart Israel, facing displacement and poverty after departing.<sup>66</sup> The Israeli civil servant heading the scheme never warned refugees of the risks because he, too, was not aware that there were any risks to disclose. He was not aware of these risks because he never bothered to learn about them, and he intentionally never bothered to learn about them, feeling this would

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<http://plato.stanford.edu/entries/lying-definition/>; Holly Smith, "Negligence" in (ed.) Hugh LaFollette, *The International Encyclopaedia of Ethics*, Wiley-Blackwell 2013.

<sup>64</sup>Holly Smith, "Non-Tracing Cases of Culpable Ignorance," *Criminal Law and Philosophy* 5(2)(2011):115-146.

<sup>65</sup>Interview with Director of HIAS-Israel, Jerusalem, 11 December 2012.

<sup>66</sup>None of those resettled gained refugee status, from the best of our knowledge. See Galia Sabar and Elizabeth Tsurkov, "Israel's Policies Towards Asylum Seekers, 2002-2014," *Istituto Affari Internazionali Working Paper*, 15 May 2015.

be “patronizing”<sup>67</sup> to refugees, who were capable of finding information themselves. As with HIAS, he unintentionally omitted information because he had earlier intentionally never found information.

We might claim that it is not enough to consider if an act can be traced back to an intentional earlier act. It matters what, precisely, the earlier intent was. If the earlier act of failing to find information was done with good or neutral intentions, then the act was not quite so wrong, and so the subsequent omitting information not quite so blameworthy. We might suppose that HIAS and the civil servant both had only good intentions, as neither had the aim of encouraging unsafe returns. The HIAS director only failed to find information out of a belief that refugees were capable of finding information themselves. The civil servant only failed to find information to avoid being patronizing.

But there are reasons to believe that both these intentions can be traced back to even earlier wrongful intentions. The HIAS director may have believed refugees had their own information, but he still chose to never validate this belief. The director did not just intentionally neglect to find information on South Sudan; he intentionally failed to find out if his belief about refugees’ knowledge was correct. And we do not know why the HIAS director intentionally failed to find out if his belief about refugees’ knowledge was correct. It may be that his intentions were to encourage return. If so, then his ultimate intentions were wrongful.

Unlike the HIAS director, the civil servant’s intentions were not based on any failure to find out about refugees’ knowledge. Many refugees really may have felt patronized if they learned that the government was gathering information on their country, rather than relying on refugees’ own knowl-

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<sup>67</sup>Interview with AVR official, Tel Aviv, 7 August 2013.



edge. As such, we may think the civil servant's intentions were not based on a false belief, and so he cannot be blamed for intentionally failing to find out if any belief about refugees' knowledge was correct. But even if his reasons were to avoid being patronizing, reasons can be derived from other reasons. The civil servant perhaps chose to avoid being patronizing so that more would be misinformed, so that more would return. If so, then his ultimate intention was not to avoid being patronizing, but to encourage unsafe returns.

The above analysis is limited by the fact that we cannot know the intentions of other agents. It is impossible to read the minds of NGO employees and civil servants to learn about the reasons for their actions. Nonetheless, we can still find evidence of wrongful intent, if not decisive certainty. The policy of the Israeli government, as of 2014, was to promote civil servants based on how many refugees returned under their watch. As such, the civil servant had an interest in more refugees repatriating, to meet his annual targets. OBI similarly had such an interest, to impress donors who expected their donations to contribute to repatriation. HIAS may have seemed more neutral, but it received money from OBI for its work, and may have felt pressure from OBI to claim a refugee was informed to meet OBI's targets. Even if we cannot know the intentions of staff members and civil servants, we can at least conclude that there should be no annual targets that must be met, removing one reason to misinform, and so one reason to intentionally misinform.

## 4.6 Conclusion

When the director of OBI travelled throughout South Sudan and took photographs along the way, she could have read independent reports on the country, and interviewed more refugees who had already returned. Had she done this, she could have told refugees in Israel that there were few clinics, schools, or reliable policemen and soldiers in South Sudan. Instead, she assured her audience that the South Sudanese government was prepared to help them, and that all was stable. When service providers like OBI unknowingly provide false information, they may be acting impermissible, even if they do not know they are misinforming. For, as an organization created to help vulnerable populations, it ought to work hard to find information.

This much is obvious. What is less obvious is whether repatriation facilitators have duties to find information when they claim to have no special duties towards the refugees they help return.

I argued that, when agents have no duties to find information to ensure informed consent, they must still disclose relevant information they already know. And in some cases, they ought to already know information, because this information is relevant for their other duties, unrelated to informed consent. If I have a duty to not run anyone over, and this creates a duty to inspect my breaks, and I don't, and sell you my car without informing you of the breaks, I have wronged you. For, the information I omitted was the sort I would have needed to disclose had I known it, and I ought to have known it. If states have general duties to help prevent poverty and atrocities abroad, and have a duty to determine who is a refugee, then they have a duty to gather information on poverty, atrocities and persecution

abroad. If states have a duty to know about such conditions, then failing to know about them is a poor excuse for failing to warn refugees about to return.

In some cases, refugees are misinformed, return, but say they would have returned even if they had been better informed. In such cases, we might suppose facilitators have not wronged refugees, because the misinformation was irrelevant. To determine relevancy in informed consent, it is not enough to consider if recipients of a service would have consented had they been informed; we must consider if the recipients would have consented, had they known they were being misinformed at the time of the service. This is because, when we consent to a high-risk service, we have a right to know if the service providers are ignorant of key facts, to know if we trust them. Information is not only useful to provide facts about a service, but to provide facts about the provider of the service, including her knowledge and competency.

Some refugees may claim they would have returned even if they knew they were misinformed prior to repatriating. But these refugee may be happy with their decision because they cannot change it. If they failed to give their valid consent prior to returning, their return should be viewed as possibly involuntary even if, by chance, they do not mind today.

In many such cases, NGOs and officials do not know they are misinforming when they misinform. They may still be intentionally failing to find information. Even when these intentions seem pure, such as an NGO that assumes refugees are already aware of the risks, this assumption – that refugees are aware of the risks – is also based on false information. If NGOs and officials intentionally fail to find out how knowledgeable refugees really are, because they wish to encourage repatriation, then their ultimate

intentions are wrongful.

To avoid misinformed consent, repatriation facilitators should institute a number of policy changes. First, they should ensure that resources are available for more accurate research on the potential consequences of repatriation. This would entail learning about the conditions of refugees who have already returned. Today, the UN explicitly states that it lacks the capacity to conduct such post-return research.<sup>68</sup> This may be because the current budget is earmarked for repatriation itself, paying for the transport of hundreds of thousands of refugees annually. Funds should be shifted from maximizing the number who return, towards maximizing the information available before return. The UN and NGOs should interview a substantial sample of past returnees, selected as randomly as possible, to determine how many were likely displaced, killed, or unable to access basic necessities after repatriating.

Such research should not only include a large number of subjects, but should account for survivorship bias. It is not enough to call refugees and interview those who answer their cell phones, because those who are killed will never answer, and those who have fled less likely to, having left to a different country with a different cell phone, or an IDP camp without electricity to charge their phones. To counteract such bias, facilitators should interview friends and family members of those who returned, to find out if they have been killed. Facilitators should also interview returnees without cell phone access in rural areas and refugee camps, ensuring that those who fled are included in the sample. The findings from such research

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<sup>68</sup>Helen Morris and Michael Salomons, "Difficult Decisions: A review of UNHCR's engagement with Assisted Voluntary Return programs," UNHCR Policy Development and Evaluation Services July 2013.

should then be clearly communicated to refugees considering returning.

In communicating such findings, repatriation facilitators should also clarify the limitations of their research, including survivorship bias that is difficult to completely mitigate. For example, if NGOs explain that 2% of returnees in a sample were killed, they should explain that the mortality rate amongst this sample is likely lower than amongst the total population of returnees. In addition to communicating bias in sampling, facilitators should also avoid bias in communication. Today, when NGOs provide information on their websites, they publish success stories, accompanied with photographs of smiling returnees.<sup>69</sup> NGOs rarely describe in detail the conditions of those less successful, instead using vague phrases such as, “People in Afghanistan have reported concerns about security.”<sup>70</sup> To encourage refugees to consider all information, NGOs should resist including only photographs of successful refugees, and should include personal stories and statistics on those who were displaced or killed. More generally, facilitators should spend more time warning refugees of potential problems, rather than opportunities. Given that repatriation is irreversible and potentially unsafe, precaution should be the primary goal, ensuring refugees are aware of what may happen to them if they go back.

One of the reasons that facilitators fail to find information may be that they have an interest in more returning. In general, agents finding information on risky services should not be the same agents who have an interest in encouraging the promotion of these services. This approach is already, at least in theory, applied in medicine, with most countries demanding that

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<sup>69</sup>Refugee Action, “Stories of Return,” [www.choices-avr.org.uk](http://www.choices-avr.org.uk); IOM, “Assisted Voluntary Return and Reintegration: At a glance,” 2015.

<sup>70</sup>Refugee Action, “Afghanistan,” [www.choices-avr.org.uk](http://www.choices-avr.org.uk).

independent researchers determine if medication is safe, ensuring these researchers have no interest in maximizing the sale the medication under trial. The same approach should be adopted for repatriation. Civil servants tasked with finding information on the risks of returning should not be promoted based on how many refugees they return, nor should NGOs receive grants based on how many return. If there is to be any method of promotion or support, it should be based on how satisfied and informed refugees feel after returning.

Despite hundreds of thousands of refugees repatriating annually, none of the above policies have been implemented. As a result, many return and soon regret doing so, finding themselves again displaced, without asylum, or without basic food and clean water. Just as preventing coerced returns is essential, so is ensuring informed returns.

# Chapter 5

## Regret

As Mol boarded his flight in 2012, he was fully informed about the risks, but by 2013, he regretted taking them. That year, nine days before Christmas, six armed men followed him home. As he reached his front gate to his Juba home, they approached him from the side.

“What tribe are you?” they asked him.

“Why are you asking me?” he responded.

One of them grabbed him, but he managed to pull away, and ran to a UN Internally Displaced Persons (IDP) camp.<sup>1</sup>

Twenty-nine years earlier, Mol was a young boy studying in an elementary school in Maiwut, a small town in southern Sudan. One morning, militias arrived at his school, he fled out the back door, took a bus to Khartoum, a train to Wadi Halfa, and a boat to Egypt, eventually crossing over into Israel as an adult, where he was given temporary protection from deportation, but no work visa. Though he managed to survive by finding a job on the black market in Tel Aviv, in 2012 immigration authorities

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<sup>1</sup>Interview with Mol, Juba, 30 December 2013.

warned him that he would be detained if he did not repatriate to South Sudan. He asked OBI for help returning. Staff members warned him that there was widespread food insecurity and ethnic violence in South Sudan, and that most past returnees regretted their choice to return, and he likely would as well.<sup>2</sup> He insisted that he still wished to return, and the NGO provided him with a free flight and \$1,500.

He landed in Juba soon after, opened a small tea shop, made a decent income, and was happy with his decision to return until, nine days before Christmas, he was again displaced. His IDP camp lies near a military base, where soldiers occasionally fire at camp residents. He has no access to food, as the camp provides no food aid for adults, and he fears venturing outside because his ethnicity is clear from the tribal Nuer scars on his forehead. When I visited him, latrines in the camp were overflowing, dysentery spreading, and Medicines Sans Frontiers evacuating.<sup>3</sup> Today, if Mol could, he would go back in time, reject the help of the NGO, and instead live in Israel, even if this meant living in detention.

Should OBI have helped Mol repatriate, given that his regret was likely?

More generally: Do we have reason to deny someone a service, if they will likely regret accepting this service?

When I write “reason” I refer to a fact that gives Agent A a normative pro-tanto reason to deny a service to Agent B. When I write “service” I refer to an irreversible offer provided by Agent A to Agent B involving

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<sup>2</sup>Thousands of civilians had been killed between 2011 and 2012 because they were Dinka, Nuer, Barri, or Shilluk, depending on the region one was in. See Human Rights Watch, “Southern Sudan: Abuses on Both Sides of Upper Nile Clashes,” 19/4/2011, available at <https://www.hrw.org/news/2011/04/19/southern-sudan-abuses-both-sides-upper-nile-clashes>; Mollie Gerver, “The Role of Non-Governmental Organizations in the Repatriation of Refugees,” *Philosophy and Public Policy Quarterly* 31(1)(2014): 1-13.

<sup>3</sup>After I left in January 2014, they returned.



resources, actions, or opportunities, where A uses no force on B, and where A's intentions in providing the service are to enhance B's autonomy or, at least, not undermine such autonomy. I am not interested in whether forced intervention is justified to prevent regret, but whether voluntary offers should be denied to prevent regret.

This issue, pertinent for repatriation, is relevant for a range of scenarios. A hospital may find that most patients regret accepting a given treatment. An abortion clinic may learn that most women regret receiving an abortion. A philosophy department may learn that most students regret enrolling in a PhD program. In these cases and many more, it is often possible to predict that future recipients of a service will feel similar regret. It remains unclear what the moral status if this future regret is.

We might suppose that regret is never itself a relevant reason to deny a service; when we predict an individual will feel regret, we are predicting they will experience painful or welfare-reducing outcomes, and it is these outcomes alone that give us reason to deny a service. Surely Mol's future displacement and poverty was reason enough to deny him repatriation assistance. In the following Section 1 I refute this claim: Regret can be an independent reason to deny a service, separate from reasons related to painful or welfare-reducing outcomes, even when one feels regret because of these outcomes. I raise the case of Mol precisely to demonstrate this point.

Though I shall claim that regret is sometimes a reason to deny a service, it is not always a reason. Many women regret having abortions, but this does not seem like a reason to deny an abortion.<sup>4</sup> Indeed, no country in the

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<sup>4</sup>Kate Greasley, "Abortion and Regret," *Journal of Medical Ethics* 38(2012): 705-711.

world – with the exception of the United States<sup>5</sup> – denies abortions solely based on predicting a woman’s future regret. In Section 2 I will argue that regret is only a reason to deny a service if four conditions are met, and these conditions are not met in most life choices. In section 3 I will address cases where individuals will likely regret accepting an offer but, if they reject the offer, they will likely regret this choice as well. In such cases, it is not clear how service providers, including repatriation facilitators, ought to act. In Section 4 I will address cases where there is insufficient information to know whether recipients will likely regret accepting a service, and so it is not clear whether the service should be offered.

Before I begin, a brief description of what I mean by “regret.”

Regret, as I define it, is a state of mind in which one no longer endorses one’s earlier choices, preferring the outcome of an alternative choice rather than the one chosen. We can predict such regret as likely when the vast majority of past recipients of a service regret their choice, and there is reason to believe that this regret will likely arise in the future. If, for example, 80% of past recipients of a choice wish they had chosen otherwise, because they prefer the life they would have likely lived, and future recipients hold similar characteristics to past recipients, then we can often predict that there is an 80% chance that any given recipient will later feel similar regret. My focus is on the moral status of this likely future regret.

I limit my discussion to future regret that is a response to an outcome of a choice. I do not address cases where one will likely regret their choice but not the outcome, such as a soldier regretting killing an innocent civilian to save two innocent lives, feeling this was morally impermissible, but not

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<sup>5</sup>Maya Manian, ‘The Irrational Woman: Informed Consent and Abortion Decision-Making,’ *Duke Journal of Gender Law and Policy* 16(2009): 223-292.

regretting the outcome due to the lives saved. I also put aside cases where one regrets a state of affairs but not a choice, as when I say it is regrettable I never became friends with Alanis Morissette, despite never having a choice in the matter.

In addressing regrettable choices, my focus is on invariant regret: It never subsides, lasting the remainder of one's life. However, I do include cases where an individual, though forever feeling regret, feels no distress about their regret, at least after some time has passed. It is simply that, if they could, they would travel back in time and change their earlier choice, feeling the counterfactual life they would live would be preferable to the life they live now.

Finally, I limit my analysis to choices that are with valid and informed consent. I put aside cases of forced interventions to prevent future regret, or regret arising from incapacity and lack of information.<sup>6</sup> Recipients, in all of my examples, are fully aware of the risks, and even the risks of regretting their choices.

Why would an individual make a choice they know they will likely regret? One reason is that the potential pay-offs are substantial, as with the lottery. Another reason is that recipients cannot quite imagine what it would actually feel like experiencing this regret, and so take the plunge, later wishing they had not. Individuals also accept offers that take extended amounts of time such that, for every day that lapses, accepting the service is rational and regret unlikely. I might accept a box of fine chocolates everyday, because one box on one day will have minimal harm, and

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<sup>6</sup>Alan Wertheimer and Franklin Miller, "Payments for Research Participation: A Coercive Offer?" *Journal of Medical Ethics* 34(2008): 389-392; Holly Smith, "Non-tracing Cases of Culpable Ignorance," *Criminal Law and Philosophy* 5(2011): 115-146.

give me joy as I bite into each praline, until I later suffer from the health complications, regretting my accumulative decisions.<sup>7</sup>

Finally, a person may accept a service they know they will regret if, at the time they make a decision, they have certain preferences which give them reason to accept the service, even though they know their future preferences will change. I might accept tequila at 8:00pm, knowing I will regret it tomorrow, because at 8:00pm I prefer drinking tequila and regretting it tomorrow to not drinking tequila and feeling no regret tomorrow. Tomorrow, of course, my preferences will change. It is perhaps unclear if my accepting the tequila is rational, or whether feeling regret tomorrow is rational.<sup>8</sup> Regardless, we often make such decisions and feel such regret. It remains unclear when others should deny us services to prevent this regret from transpiring.

Because I address cases with valid consent, I limit my discussion to cases where a service provider uses no coercion. I include, however, cases where a third party uses coercion, so long as the service provider does not. As in Chapter 3, I assume Mol's consent to repatriate was valid for OBI even though he was coerced by the Israeli government into repatriating, assuming that OBI did everything possible to prevent his coercion, and its assistance did not causally contribute to government coercion. His consent was valid in the sense that, amongst the choices put before him, returning was preferable to staying, and OBI could do little else other than offer him

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<sup>7</sup>Warren Quinn's example of the self-torturer is a similar case of rational regret. See Warren Quinn, "The Puzzle of the Self-Torturer," in *Morality and Action*, Cambridge: Cambridge University Press 1993: 198.

<sup>8</sup>For a related discussion on the rationality of similar decisions, see Michael Bratman, "Toxin, Temptation, and Stability of Intention," in (ed.) Jules L. Coleman, *Rational Commitment and Social Justice: Essays for Gregory Kavka*, Cambridge: Cambridge University Press 1998: 59-83.

repatriation. As in cases without coercion, it was nonetheless also the case that his regret would be likely, and it is not clear what the moral status of this regret was.

Some might suppose that, because Mol was choosing between two very objectionable options, then he did not truly feel regret about his choice. He only regretted the state of affairs in Israel where he was forced to choose between detention and unsafe repatriation.

While it is true he regretted the state of affairs in Israel where he had only two choices, he also regretted the one choice he did make. More generally, one can regret a state of affairs and the choice made within this state of affairs. A patient diagnosed with cancer can later regret having had to choose between death and life-extending treatment, while still regretting accepting the life-extending treatment because of its painful side effects. This regret for a single choice is important: In many tragic or unjust scenarios, third parties must decide whether to offer an additional objectionable choice, likely to be regretted, or do nothing at all, constraining choices now.

## 5.1 Regret as a reason

I propose the following claim: *If we can predict that a person will regret accepting our service, but would feel no regret had they rejected our service, preventing regret is sometimes a reason to deny the service.*

I shall not argue that regret is always a reason to deny a service; in the next section it will be clear that strict conditions are required, and these conditions are rarely met. For now, I wish to simply defend the claim that regret is sometimes a reason to deny a service.

My claim can be derived from two broad values. First, there seems to be a general value, all else being equal, in helping individuals live lives they prefer living. If an individual will later regret their decision to accept a service, and this regret will extend into the remainder of their lives, then we can help them live the life they prefer by denying the service. It is true that future preferences are difficult to establish. But when predictions of future regret are strong and invariant, this future regret ought, at times, to take priority over current short-term preferences.

There is a second value that underpins my general claim. Preventing regret can enhance autonomy, often described as the being the “author of one’s life.”<sup>9</sup> A person can never be entirely the author of one’s life, given that we cannot travel back in time and change earlier decisions we made. Given this limitation, we sometimes have reason to prevent others from being in a state of affairs where they want to travel back in time, and cannot. We therefore sometimes have a reason to deny a service that leads to likely regret. This is not to claim that, when we help a person make a decision they will regret, we are morally responsible for this regret. The recipient may very well have no complaint towards us, and we may have no reason to feel remorse about our offer. Nonetheless, we still have reason to deny the offer when regret is likely. This is because we often have reason to deny offers because of outcomes, even if we will not be responsible for the outcomes. If my friend asks me to burn her money, so she can be less materialistic, I am not responsible if she later wishes she had the money for a meditation retreat, but I still have a good reason to avoid burning the money if I can predict this outcome is likely. Future regret is a reason to deny an option even if we are not responsible for the future regret.

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<sup>9</sup>Joseph Raz, *The Morality of Freedom*, Oxford: Oxford University Press 1988: 370.

I take the above claim to be a relatively modest one. I am not claiming that regret is a particularly weighty consideration, or that it cannot be outweighed by other considerations, or even that regret is always a reason. Rather, I merely claim it is sometimes a pro-tanto reason, and only when strict conditions are met, to be described in the next section. Though this claim is relatively modest, it may seem to be susceptible to two objections.

The first is what I call the *Future Preferences Objection*. It comes in two forms. The first is related to reasons. Some argue that we have little reason to determine what we provide others based on their future preferences. This is because we have little reason in our own lives to make choices based on our future preferences. This is because our future preferences are not our current preferences, and so what we have reason to want later is not what we have reason to want now. This argument is often made by appealing to an example from Derek Parfit, involving a fourteen-year-old girl who decides to conceive, even though she is extremely ill-prepared to do so. She knows that, once her child is born, she will love her child, and feel it is preferable the child was born. The child, of course, will feel this as well.<sup>10</sup> Neither will regret the decision. This prediction of future non-regret, it is argued, seems like a poor reason for the girl to conceive at such a young age. Though she will later have reasons to be happy with her past decisions, these reasons arise from an attachment she does not have prior to conceiving. Future preferences for past actions are often poor reasons for these actions at the current time.<sup>11</sup> And, as such, we should not deny

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<sup>10</sup>Derek Parfit, *Reasons and Persons*, Oxford: Oxford University Press 1984: 357-61.

<sup>11</sup>R. Jay Wallace, "Justification, regret, and moral complaint: looking forward and looking backward on (and in) human life" in (eds.) U Heuer and G Lang, *Luck, Value and Commitment: Themes from the ethics of Bernard Williams*, Oxford: Oxford University Press 2012; Kate Greasley, "Abortion and Regret," *Journal of Medical Ethics* 38(2012): 705-711.

services to others based on predicting their future preferences.<sup>12</sup>

I am not certain that the fourteen year old's future affirmation about giving birth gives her no reason to conceive. She may simply have other reasons to not conceive which supersede this reason: It is better to create a world with children raised by mature parents, able to offer sufficient resources and care.<sup>13</sup> But even if one believes that the fourteen year old has no reason at all to conceive, it may still be the case that future regret gives her a reason to not conceive. More generally, even if future affirmation for past actions is irrelevant for how we act at the current time, future regret may remain relevant for how we ought not act at the current time. Imagine a second girl who, unlike the original, knows she will not love her child in the future, and knows she will regret having the child, later wishing she could go back in time and never give birth. This second girl has a very strong additional reason not to conceive, precisely because of her future regret. Even if we would not help a fourteen year old girl conceive regardless of her future regret, future regret seems like an additional reason to not help, on top of the other reasons.

There is a second version of the *Future Preferences Objection*, related to autonomy. Autonomy is protected, according to a range of theorists, if one is the author of one's life, and one is the author of one's life even if one's preferences change, and even if this change leads to subsequent regret. For autonomy to be protected, it must merely be the case that one has "the mental abilities to form intentions of a sufficiently complex kind,

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<sup>12</sup>Elizabeth Harman, "'I'll be Glad I did it' Reasoning and the Significance of Future Desires," *Philosophical Perspectives* 23, *Ethics*, (2009): 177-199.

<sup>13</sup>R. Jay Wallace, *The View from Here: On Affirmation, Attachment, and the Limits of Regret*, Oxford: Oxford University Press 2013: 96-108.



and plan their execution.”<sup>14</sup> Some of these plans will be regrettable, but they are autonomous nonetheless. If an eighteen year old makes a choice that impacts her life at thirty, such as getting a tattoo, she can still lead an autonomous life, so long as her preferences and choices at eighteen are made with full capacity and information.<sup>15</sup>

This claim, however, merely demonstrates that autonomy can be upheld even if regret is likely; regret is compatible with autonomy in some cases. It may still be true that in other cases autonomy can be undermined because of regret. Had the eighteen year old consented to a full-body tattoo that constrained her ability to access employment in the future, then denying the tattoo seems to uphold autonomy more than providing the tattoo. And even if one is not convinced that autonomy is better upheld by denying the tattoo, there is still value in fulfilling future preferences to not have quite so many tattoos, and so reason to consider future regret in what we provide others.

There is a second broad objection to my claim, which I call the *Other Reasons Objection*. In cases where a person feels regret, we might suppose they are feeling regret about some change in their life, whether it be a reduction in welfare, freedom, happiness, or preferences to not have full-body tattoos. It is these facts that give reasons to deny the service. Regret creates no additional reason to deny the service.

There are three versions of this objection. The first draws upon the principle of autonomy. In general, one condition for autonomy is that

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<sup>14</sup>Raz 1988 *ibid*: 372.

<sup>15</sup>Raz 1988 *ibid*: 371; Richard Arneson, “Autonomy and Preference Formation,” in (eds.) Jules L. Coleman and Allen Buchanan, *In Harms Way: Essays in Honour of Joel Feinberg*, New York: Cambridge University Press 1994: 42-75.

one has sufficient welfare and an adequate range of options.<sup>16</sup> It is wrong, therefore, to provide services that reduce welfare or the number of options.<sup>17</sup> In cases where we intuitively feel that regret is a reason to deny a service, our intuitions are responding to the reduction in welfare or options. Mol should not have been provided repatriation because doing so would result in him fleeing to an IDP camp, or risk his life outside the camp. His autonomy, some might argue, was undermined for this reason alone, rather than because of the regret he felt.

In some cases, this reasoning holds. But in cases where a person's autonomy will be constrained regardless of whether they accept a service, regret may remain a deciding factor. Mol was choosing between detention in Israel, unable to travel more than a mile, or returning to South Sudan, able to travel but risking his life. In such a case, we cannot claim that Mol's autonomy was undermined from returning relative to leaving, because his autonomy was undermined either way. In such a case, his future regret tips the balance against helping with his return, creating a reason that would otherwise not exist. A similar claim regarding regret arises in instances where, though a service undermines autonomy, an individual is willing to forgo her autonomy to reach an important goal, such as a refugee who is returning to help reconstruct her country, even if displacement is likely. In such an instance, future regret may be an autonomy-based reason to deny the repatriation, when assisting with repatriation would otherwise be permissible.

Some may insist that, in the case of Mol, life in an enclosed camp in Israel was objectively better for him than life in an IDP camp in South

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<sup>16</sup>Raz 1988 *ibid*: 373.

<sup>17</sup>Raz 1988 *ibid*: 408.

Sudan, protecting his welfare and autonomy more than if he returned. This was reason enough to deny his return, regardless of regret. Even if one accepts this conclusion for Mol, there are tens of thousands of other refugees who live in insecurity and poverty in a country of asylum, and choose to return to a country of origin with roughly the same levels of insecurity and poverty. Between 1982 and 1984 the government of Djibouti both denied refugees work visas and also reduced their rations, leading many to return to Ethiopia, where they faced similar levels of poverty and security.<sup>18</sup> More recently, Burundian refugees faced a choice between living in camps in Tanzania, where they often lacked basic necessities and security, or returning to Burundi where they faced similar poverty and insecurity.<sup>19</sup> For these and other refugees, given the similar conditions in both host and home country, we cannot claim that reductions in welfare and autonomy explain why return is wrong. If we feel that it is wrong to assist with return when regret is likely, it seems the regret itself explains this intuition.

There are other cases where the same intuition seems to arise. Imagine helping monks join a monastery they cannot easily leave, because they lack any profession or social support outside of the monastery. If they wanted to join and never regret their choice, it seems no one has wronged them despite the undermining of freedom and the reduction in welfare. In contrast, if monks in an order consistently regretted their choice, this would seem one reason to discontinue recruiting new monks. Forgoing future freedom seems

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<sup>18</sup>Jeff Crisp, "The Politics of Repatriation: Ethiopian refugees in Djibouti, 1977-1983," *Review of African Political Economy* 30(1984).

<sup>19</sup>US Department of State IDIQ Task Force Order No. SAWMMA13F2592, "Field Evaluation of Local Integration of Former Refugees of Tanzania." See p. iii for summary of findings; See, also a report from Refugee International, cited by the IRIN news agency, on strict confinement to camps.<http://www.irinnews.org/report/49519/east-africa-special-report-on-repatriation-of-burundian-refugees>.

more problematic if future regret is strong. A similar claim can be made regarding physical harm. Though future physical harm is often reason enough to deny a service – it is probably wrong to buy someone heroin regardless of regret – sometimes physical harm is an insufficient reason to deny a service unless we can also predict regret. A coach who assists athletes to compete in high-intensity and high-risk sports may have a good reason to discontinue the service if most regret competing, but perhaps not if most are happy they competed despite broken bones and concussions. A hospital that provides life-extending treatment to patients may have an additional reason to discontinue the treatment if most patients feel regret due to the painful side effects, but not if most feel no regret.

Some may argue that these examples do not demonstrate that regret is an independent reason to deny a service. They demonstrate the following: We have paternalistic reasons to deny various services, such as unsafe sports or painful treatment, and these paternalistic reasons are overturned in cases where the recipients will later affirm their decision to accept a given service. It is future affirmation that creates a reason to give a service, rather than future regret creating a reason to deny a service.

In some cases, this is true. It may be that for some athletes, refugees, or monks, we have reason enough to deny a service due to the harm it will cause unless recipients will later affirm their decision despite this harm. But in cases where we have competing considerations to both give and deny the service, regret may be the deciding factor against its implementation. When refugees are facing extremely constrained options in a refugee camp, but are at least safe, but will face extreme insecurity upon arriving, but at least will be free, we may be uncertain as to whether to assist them in returning. The likely regret can tilt the balance against providing

repatriation.

There is a second variety of the *Other Reasons Objection*. Some might claim that, though we have reason to deny a service when regret is likely, the regret is not an independent reason to deny a service. When individuals feel regret, they regret something that has happened, such as losing their freedom, or security, or subjective happiness. Regret is just the additional psychological response to such outcomes, rather than an independent consideration. To establish if regret is a reason, some might claim, we must consider cases where there is regret without any of the painful outcomes that tend to be associated with regret. In other words, a truly interesting thesis on regret would pull apart regret from other considerations, and this is only possible when considering cases where a person feels regret despite their life going better. The case of the athletes and refugees are not cases of such regret, as it seems the future injury or insecurity they will face – a major welfare harm – explain the reason for their regret, and this underlying reason is what is relevant.

I do not believe, however, that we can only establish if regret creates an additional reason to deny a service by isolating it from other properties, such as welfare harms. This is because, more generally, I do not believe we can only establish if a property creates a reason for action by isolating it from other properties. A property can constitute a reason in itself even if it only arises when interacting with other properties, as noted in Chapter 2. If I promise to lend Katie my pen I have a reason to lend her my pen, even if this reason is contingent on other properties, such as her caring about borrowing my pen, or being effected by borrowing my pen.<sup>20</sup>

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<sup>20</sup>F.M. Kamm demonstrates this point in her discussion on whether distance matters for determining if we have a duty to save a person's life. To consider if distance matters,

While regret is usually a feeling that arises in response to certain welfare harms, or constrained freedom, it is still sometimes a reason separate from these outcomes. To prove that regret is a reason separate from these outcomes, I needn't isolate regret from these outcomes, but these outcomes from regret. This is possible by comparing pairs of cases where freedom, welfare, and happiness are identical for two individuals, where regret is present for one individual and not the other. If we compare two athletes, two refugees, and two patients, and the first of each pair will experience both regret and a reduction in welfare after a service, and the second will experience no regret but the same welfare reduction after the service, it seems we have reason to deny the offer to the first and not the second. Regret is a reason to deny an offer, even if it is contingent on the existence of certain other properties.

There is a final version of the *Other Reasons Objection*, derived from an argument by Krister Bykvist. We are often faced with choices, Bykvist notes, that we know we will regret, but which we also know will make us

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she argues, it is not enough to consider cases where distance is the only relevant property, such as a case where we can press a button and save the life at no cost to ourselves. In such cases, it seems clear distance does not matter. Rather, we must consider if distance ever matters. We might consider, for example, two cases where we must work hard to save a life, but one life is right by us, and the other is across the globe. We might conclude that, when saving a life is very hard, then distance does matter. See F.M. Kamm, "Does Distance Matter Morally to the Duty to Rescue?" *Law and Philosophy* 19(6)(2000):655-681. Shelly Kagen demonstrates this point with another example. Imagine we wish to establish whether we have a distinct reason to avoid causing someone harm, as opposed to letting someone experience harm. We compare two cases: In one I push a guilty aggressor into a pit, causing him harm, and in another I let her fall into the pit, letting her experience harm. Many people hold the intuition that both are comparable, and equally permissible. This does not demonstrate, however, that there is no distinction between causing harm and allowing harm. It merely demonstrates that, in instances of self-defence, causing harm is no worse than allowing harm. It may still be the case that, when the person we are harming is innocent, then causing harm is worse than doing harm. The property of "innocence" may be a necessary condition for us to have a distinct reason to avoid causing harm. As such, we sometimes have reason to avoid causing harm. See Shelly Kagen, "The Additive Fallacy," *Ethics* 99(1)(1988): 18.

happier. Imagine I have a choice to either stay single or get married. If I stay single, I will be happy, but will regret my choice, feeling marriage was preferable. If I marry, I will be miserable, but not regret my choice, still feeling marriage was preferable. It seems that the future regret I will feel as a single person is not a good reason to get married, because I will be more miserable as a married person. Instead, Bykvist argues, we ought to consider how strongly we will later want our future state of affairs, and not whether we will prefer this state affairs to the life we could have lived. If I will be happier as a single person I have reasons to stay single, even if I will prefer being married and so regret not having married.<sup>21</sup> If Bykvist is correct, then we can similarly claim that, when offering services to others, their future attitudes about their circumstances are what matter, rather than future attitudes about the life they could have lived, had they chosen differently.

Bykvist's example is helpful for demonstrating that future regret is often a very poor consideration for how we ought to act now. Nonetheless, it does not demonstrate that future regret is no reason at all. It merely demonstrates that, when we will be miserable with a choice, this future misery creates a countervailing reason to avoid this choice. It remains the case that, when we are faced with two choices with equal predicted misery, or equal predicted happiness, then future regret may be a reason in how we ought to proceed. Similarly, when we can predict that another will feel regret when accepting a service, but equally miserable or happy either way, this likely regret is sometimes a reason to deny a service.

If future regret is sometimes a reason to deny service, this has an important implication. It implies that, if a person will likely develop adaptive

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<sup>21</sup>Kristen Bykvist, "Prudence for Changing Selves," *Utilitas* 18(3)(2006): 264- 283.

preferences to avoid feeling regret, then we have one less reason to deny a service. Similarly, if there was a magical pill that a recipient could swallow to rid herself of the regret, then we would have one less reason to deny a service. This is an implication I am willing to accept. If Mol wanted to return to South Sudan to rebuild his country, and we could predict that he would adapt his preferences, or swallow a magical pill, then there would be one less reason to deny repatriation assistance.

Importantly, one may accept this implication without holding that adaptive preferences make a harmful service right. If an individual is living a safe life, we should often deny a service that will endanger their life even if the person will learn to prefer this life. I am merely claiming that, if regret is likely, this future regret is an additional reason to deny a service compared to an individual who will feel no regret because of adaptive preferences. And this future regret can create decisive reasons against a service in cases where an individual will face harm regardless of what we do.

Until now, I have merely claimed that regret is sometimes a reason to deny a service. It clearly is not always a reason. If we found that some women were likely to feel regret about having had an abortion, but other women would likely feel no regret, it would seem wrong to deny an abortion to the former but not the latter. As such, we must consider the conditions that make it the case that future regret is a reason to deny a service, and conditions where regret is no such reason at all.

## 5.2 Four Jointly Sufficient Conditions

There are four conditions that would make regret a reason to deny a service. When all four conditions are met, we know that we have a pro-tanto reason



to deny a service, to be weighed against other competing reasons to provide the service. When there are no competing reasons, then the regret is a decisive reason to deny the service.

The first condition is that the future regret will be what Kate Greasely calls “all-things-considered regret.” In the context of abortion, for a woman to feel such regret, she would need to consider all life events that resulted from the decision to have an abortion, such as the job she has and the relationships she built, and compare these to every event that would have happened, had she decided differently, such as the job she would not have, and the relationships she would not build. Greasely argues that, whenever we make a choice in life, we usually cannot know if the life we are living now would be very similar or very different than the life we would live, had we decided differently. Without knowing how life would be different, we would struggle to know if we regret our past choices. She concludes that, if we rarely know if we regret our past choices, then it is usually wrong for others to deny us a choice, based on future regret.<sup>22</sup>

Though Greasely is correct to argue that it is difficult to know if one feels all-things-considered regret, it is still possible. In rare cases, a person feels that all possible lives they could have lived, had they chosen differently, would have been better than the best possible life they can now live, as a result of the choice they made.<sup>23</sup> If we can predict such regret is likely, and will continue over the course of one’s life, perhaps we have reason to deny a service.

In the case of Mol repatriating, such regret was likely. Nearly all who

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<sup>22</sup>Kate Greasely, “Abortion and Regret,” *Journal of Medical Ethics* 38(2012): 705-711.

<sup>23</sup>When I write “better” I mean preferable. When I write “best possible life” I mean “most preferable possible life.” I shall use the words “better” and “best” in these senses for the remainder of the chapter.

had returned imagined the very worst life they could have in Israel, including in detention, and felt this would have been better than the best life they could now imagine living in South Sudan. Those who returned accurately thought, “I would now have food, shelter and medical care if I had not repatriated, and these necessities are now more valuable for me than the freedom I gained from return.” If most refugees who return feel this way, despite being aware of the risks at the time of departure, this regret seems to be one reason to discontinue repatriation services, and Mol should have possibly been denied assistance.

This first condition, however, is not sufficient for regret to be such a reason. Imagine a woman who feels all-things-considered regret at having an abortion, feeling that the best life she can now live really is worse than the worst life she could have lived. While she may feel regret, she does not necessarily feel regret about having had the option to have an abortion. We often want services to control our lives, and retrospectively are happy we had this control, even if we regret the way we use this control. If so, then for regret to be a reason, a second condition must be met: An individual must regret both their past choice to accept a service, and wish this service had never been available at all. If they could, they would go back in time and somehow destroy access to the service.

I believe this condition is not met when women regret having an abortion, as it is doubtful individuals wish they had been blocked from having access to the abortion completely, even if they regret their own decision. Mol, in contrast, does wish today that OBI had never given him the option of returning, and had never set up the repatriation program at all.

These first two conditions are also not sufficient. For, they could in theory be met when a woman regrets having an abortion, and many may

find it counter-intuitive to claim that, if we could predict this ahead of time, this would create a reason to deny the abortion. Less controversially, nearly everyone would feel a woman has a right to contraceptives, even if we could somehow predict her future all-things-considered regret about never having had children, wishing she never had the opportunity to use contraceptives.

For regret to be a reason to deny a service, a third condition must be met. The regret must be the result of the choice to accept the offer, and not from any other earlier or subsequent choices. If a woman were to have an abortion, reach menopause, and then feel all-things-considered regret at not having had children, the woman would be regretting both the abortion and also earlier and subsequently not having had children. As such, when others help fulfil a woman's choices, they are not contributing a great deal to any subsequent feeling of regret the woman may have. She would be doing a large part of the work, making a series of choices throughout her life that would lead to an outcome which, in retrospect, will make her wish she had chosen otherwise on multiple occasions.

In some cases, all three conditions are met. Imagine a segment of the population, despite leading the healthiest of lives, is diagnosed with cancer, and they undergo treatment to extend their lives by two years, leading to painful side effects and all-things-considered regret. Most feel the worst possible outcome without the treatment would have been better than the best outcome with it. In such cases, the doctor providing the treatment would be contributing a great deal to the regret felt. Consider, also, the case Mol. Before he returned to South Sudan, while he was still living in Israel, he could not apply for refugee status, and so was forced to work on the black market, during which he would be eventually arrested. He had

only two choices: live a life in detention, or repatriate. When he returned, his only source of income was the money he returned with, his only option of employment was to start a business, and the only place he could live was Juba, as he would have struggled to find sufficient customers in secondary towns. He was then forced to flee to an IDP camp. In a life of few services, repatriation was the only choice that resulted in the outcome of regret. And it is this choice alone that was made possible by OBI. As such, he received help to make a choice that was largely responsible for the regret he felt.

This is not always the case with repatriation. Unlike Mol, some refugees can apply for refugee status, but choose not to. Had they applied, and gained refugee status, they would have gained residency and possibly citizenship. Had they gained citizenship, they could have left and re-entered the host country fairly easily. Had they repatriated after this, their repatriation would be reversible, and less regrettable. If in reality they chose to not apply for refugee status and also chose to repatriate, their regret would be from a series of choices, and not just repatriation. Helping with repatriation in such cases is not as ethically problematic. Repatriation is contributing to only one of many choices that, in combination, leads to the regret felt.<sup>24</sup>

We have, as such, three sufficient conditions that would seem to create

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<sup>24</sup>Of course, if someone has few choices in life, like Mol, we might feel that others should expand their range of choices, and not simply deny a service because of the regret felt from the service. For example, a UN official should not think, “Refugees have few options, so I will not help with return, because they will regret their decision from repatriation alone.” Instead, the UN official should try to expand refugees’ options by assisting them in obtaining refugee status. But if this fails, and the official starts facilitating return, she should stop if the vast majority feel all-things-considered regret from the choice to return alone. More generally: Even if we should help others have more options, it is still preferable to deny an option, if this option alone will lead to regret.

a reason to deny a service based on future regret: The regret must be all-things-considered; there must be a wish that the service had never been available at all; and the regret must not be from other choices made prior to and after receiving the service. But claiming these conditions are sufficient may still conflict with many people's intuitions about some cases we might imagine. Consider a woman who regrets the choice to abort the foetus from a particular man on one particular night. She feels no other life choice would have been enough to change the feeling that her life would have been preferable had she never been given an abortion. This regret fulfils the three conditions: It is all-things-considered; it exists alongside a wish that the service had never been available; and it is not from earlier and subsequent choices. It would seem wrong to deny abortions or contraceptives if this regret was pervasive, so long as women were aware of the risks of later regret.

Consider, similarly, some simple lotteries. At age ten I spent fifty cents on a raffle ticket to win a stuffed animal. I lost. I am fairly certain my life would have turned out the same had I not entered this raffle, but it would have been slightly better, as I would have fifty extra cents. So the best possible life I could live from the raffle – my actual life without fifty cents – turned out worse than the best possible life I would have lived had I not played the raffle – my actual life but fifty cents richer. This all-things-considered regret is from the one choice to enter the raffle, and no others, and a part of me wishes I had never entered the raffle, in addition to regretting my own choice. If such regret is pervasive, this seems like a poor reason to discontinue raffles.

To address such counter-examples, we must add a fourth necessary condition. The regret must be for a service that is “epistemically transforma-

tive.”<sup>25</sup>

According to L.A. Paul, an epistemically transformative experience arises if one gains knowledge that would be impossible to gain without the experience. All experiences are epistemically transformative to an extent. The apple I ate this morning tasted slightly different than other apples I have eaten, and so I could not have known ahead of time what the apple would taste like. Some choices are slightly more transformative, such as eating a durian fruit for the first time. Some choices entail such an extreme transformation that nearly all of life changes, or all of life seems to change as a result of a new piece of knowledge.<sup>26</sup> A woman who has seen only black and white, and suddenly experiences the color red, would experience such a transformation,<sup>27</sup> as would a soldier enlisting, a deaf individual gaining hearing, and a parent having a child for the first time. Before making such a choice there is an insurmountable information-constraint, as there is no way to know how one will react to their choice until after they have made it.<sup>28</sup> In such cases, we cannot make an entirely informed choice, but we can consider how much we value new experiences and discoveries for their own sake, as distinct from the subjective goodness or badness of the outcomes. Because we each value new experiences to a different degree, only we can decide what we ought to do.<sup>29</sup>

Based on the above analysis, third parties should generally not deny services based on their epistemically transformative character. Nonetheless, special reasons to deny such services arise if regret is likely.

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<sup>25</sup>L.A. Paul, “Transformative Choice” in *Transformative Experience*, Oxford: Oxford University Press 2014: 1-51.

<sup>26</sup>Paul 2014 *ibid*: 1-51

<sup>27</sup>Frank Jackson, “Epiphenomenal qualia,” *Philosophical Quarterly* 32(1982): 127–36.

<sup>28</sup>Paul 2014 *ibid*: 115.

<sup>29</sup>Paul 2014 *ibid*: 115-123.

If individuals will likely regret a choice, then they will later fail to live the life they want to live, and be unable to change their earlier decisions. Given this likely outcome, we have reasons to ensure recipients are especially well-informed about the choices they are about to make. Just as we have a higher standard of informed consent for high-risk services, such as surgery or military enlistment, we should have a higher standard of informed consent for high-regret services, such as some forms of medical and repatriation services. A higher standard of informed consent requires an especially clear understanding of what can be expected from the service. Such a clear understanding is impossible for services that are epistemically transformative, as they are impossible to comprehend ahead of time. This impossibility creates one reason to deny the service, a reason that would not exist with regrettable offers that are not epistemically transformative.<sup>30</sup>

Not every regrettable service is epistemically transformative in the strong sense that, prior to the service, nearly all of life seems different. I do not believe abortions are the types of choices that are epistemically transformative in this strong sense, where individuals are stepping into an entirely new way of seeing life, as with having children, repatriating, or seeing red for the first time. Even if one regrets the choice to have an abortion, this does not lead to a major increase in experiences that are new, nor is this likely to lead women to view life as entirely different, in every way. A woman, before having an abortion, knows that after the abortion she can continue to live in the same neighbourhood, go to the same shop, read

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<sup>30</sup>No such reason to deny the service would arise with epistemically transformative offers that are not regrettable or harmful, such as introducing someone to the color red for the first time. This is because, if there is little regret, and no harm, there is less of a need for a high level of informed consent, and so the epistemically transformative nature of the service is less problematic.

the same books, call her mother, and allocate roughly the same amount of time to whatever activities she has been pursuing prior to the abortion. As such, while women may struggle to predict their future regret, they will be more capable of making such a prediction compared to women making a choice that will transform far more in life.

In contrast, some regrettable choices are epistemically transformative. Mol's choice to repatriate lead to far more new experiences that he could not have experienced ahead of time. While in Israel, he could call his friends, eat three meals a day, read on his phone, or go to a doctor if he was feeling ill. Even in detention in Israel these services would be open to him. Today, he can decide who to request food from, where in the IDP camp to walk down, when to leave the camp grounds, and what newspapers to look at from those strewn around the streets of Juba. These experiences are not necessarily worse, but they are different and, as such, he would have struggled before return to accurately imagine how he would emotionally react after return. When individuals take a plunge into an entirely unknown life, their choices are less than fully informed, creating a reason to deny the service when regret is likely.

There are other choices in life that are epistemically transformative. Some women agree to serve as surrogates. Surrogates are aware that many women feel a strong connection to the infant they give birth to, and pain at giving this child to her biological parents. These facts concerning childbirth are difficult to comprehend until one has actually given birth. Because childbirth may be epistemically transformative, involving a feeling that is only understood until one has felt childbirth, then we would have one reason to deny surrogacy if most women regretted being surrogates, and this regret extended into the remainder of their lives. More specifically, we



have a pro-tanto reason to ensure that surrogates are never forced to give up the infant they give birth to, to prevent regret from transpiring, given that a high level of informed consent is impossible.

Now, we might imagine a case where a woman has an abortion and all four conditions are met. A woman may be emotionally distraught about her choice, and each experience she has feels entirely different as a result, in a very transformative way. Sometimes, we are surprised how much a single change effects us, even when everything else stays the same. It may be comparable to suddenly seeing red for the first time: Each experience is different, even if all other properties stay the same. Indeed, sometimes it is precisely the fact that everything is the same that makes a choice so painful, as everything seems to bring back memories of what life was like before the choice. We might similarly imagine a woman who, as a result of having an abortion, is looked at differently by her community, or forced to leave, such that nearly every experience in her world is different, and she feels all-things-considered regret as a result.

If we did, in fact, learn that the vast majority of women felt such all-things considered regret, and lived a life where all seemed entirely different, then I believe this very well may be a reason to deny an abortion service.

However, if we still feel it is important to provide such family planning, then our knowledge of likely regret could simply create a reason to ensure that abortion and contraceptive services did not change most experiences about people's lives. We ought, for example, to ensure that women receive sufficient counselling prior to having an abortion, and therapy after an abortion, to ensure that they can continue to live fulfilling lives after their abortions. We ought to also ensure that family planning services are completely discrete, such that a woman's entire external world needn't change

as a result of her choice. If we cannot ensure such therapy and privacy, and regret really is widespread, then this is a reason to deny the service.

Even if future regret is a reason to deny a service, there may still be countervailing reasons to accept the service. In the case of abortion, we may feel more disturbed about a woman forced to have a child compared to a woman who regrets not having had one. We may also wish to prioritize the minority who will not regret their choice, even at the expense of the majority who will. This might be the case if those who will not regret their choice are the worst off, and more in need of the change provided by the service. This might also be the case if those who will not regret their choice are the best off but will help the worst off as a result of their choice. Some refugees who repatriated from Israel started their own businesses, felt no regret, and employed other South Sudanese nationals who would otherwise have no employment. Such benefits may justify continuing repatriation services. And in all cases, we may feel that regret is not a decisive reason to deny a service if, in the distant future, the recipients will ultimately feel no regret. This future satisfaction may create a countervailing reason to support the service, even if regret in the interim period is likely.

But when there are no countervailing considerations, then all-things-considered regret may be a decisive reason to discontinue a service if the regret is from the service alone, the recipient will wish it were never offered, and it leads to a life entirely unimaginable compared to the life left behind. Similarly, regret may be a “trump reason,” a decisive reason to deny a service if there are two sets of competing reasons, neither decisive on their own. Such is the case in repatriation when refugees want to return to avoid detention, but will face risks in doing so. When these two competing considerations arise, future regret can be a decisive reason against

assistance if the four conditions are met.

Until now, I have limited my discussion to instances where an individual will feel regret in addition to lower levels of welfare and freedom. I believe that regret might even be a reason to deny a service if all four conditions are met and welfare or freedom will be improved. Imagine a refugee who repatriates to Gambella in Ethiopia, never having tasted Ethiopian food or Ethiopian espresso, never having lived in a hot tropical climate, never having slept under a mosquito net, and never having worked as an interpreter, his new profession upon arrival. His life is not unpleasant, and he is subjectively happier than before, but he regrets his choice, a choice he could not have imagined prior to repatriating. I believe we would have a reason to deny repatriation if most felt such all-things-considered regret at having had this option to repatriate. This is because, if regret is likely, we ought to demand a higher level of informed consent, impossible to obtain with epistemically transformative decisions.

We might even imagine refugees who are not repatriating, but instead accepting resettlement to Canada, later feeling all-things-considered regret in Canada, fulfilling all four conditions. If such future regret was felt by the vast majority of those who were resettled, and we could predict that this regret would continue, there would be one reason to discontinue the resettlement program. If we feel there is value in helping individuals live the lives they prefer living, we ought to account for the likelihood that, in the future, individuals will not prefer living in Canada, and will want to reverse their earlier decision. We might still conclude that safety in Canada is more important than preventing regret; but regret ought to be one pro-tanto consideration.

A similar conclusion ought to be reached regarding a service that helps

individuals join a life-transforming religious order that changes a range of life experiences, where all-things-considered regret is likely. Regret is a reason to deny such a service, even if life is better in terms of objective welfare and freedom. Similarly, we might learn that types of gambling change nearly all of life in a way that is impossible to comprehend ahead of time. Even if most do not find their welfare or options significantly reduced, there may still be a reason to discontinue certain types of epistemically transformative gambling if all-things-considered regret is likely.

Some may reject these last claims, and argue that regret is only a reason to deny a service if life is not improved. If so, then a fifth condition might be added: Regret is only a reason to deny a service if life will not be improved by the service. We might even conclude that regret is only a reason to deny a service if life will become worse, in terms of welfare, as a result of the service. But even with this fifth condition, regret is still a reason to deny a service, separate from the reductions in welfare. If we were to compare two individuals who would likely feel regret, and one would experience regret and a reduction in welfare, and the second would experience no regret and the same reduction in welfare, there would be a reason to deny the service to the first and not the second.

### **5.3 Regret Either Way**

Even if we accept that regret is a legitimate reason to deny a service in some cases, this does not provide a solution for what I call Regret Either Way Cases. These cases occur when a population accepts a service, and most regret their choice, but those who decline the service also regret declining it. Therefore, both continuing and discontinuing the service will

lead individuals to feel their preferences have not been met at a later point in time.

For example, when the Israeli government completed a mass detention centre for asylum seekers in 2013,<sup>31</sup> thousands were detained or denied work visas, leading thousands to return, some with the help of NGOs. Though many regretted their choice to return, those who stayed in Israel regretted staying, feeling they were wasting their youth in a cold detention cell in the middle of a desert in Israel,<sup>32</sup> or homeless in Tel Aviv. In such cases, it is not clear if NGOs should have continued helping with return.

Some might claim that it is irrational to feel regret either way. It is either true that the best outcome in Israel would be worse for a given refugee than the worst outcome in South Sudan, or true that the best outcome in South Sudan would be worse than the worst outcome in Israel. How could both possibly be true? I believe they can. As humans, our preferences and opinions change depending on what we are experiencing. As such, we may later wish we had chosen the opposite of what we chose, precisely because we chose it. For example, some people get married because they cannot imagine life without their partner being better than life with them. After several years of experiencing life with their married spouse, they start to feel that the worst life without their partner would be better than the best life with them. If they get divorced, they may again change their mind, pining for their ex-spouse precisely because they are gone, again feeling that the worst life with their ex-spouse would be better than the best life

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<sup>31</sup>Ruvi Ziegler, “No Asylum ‘For Infiltrators’: The Legal Predicament of Eritrean and Sudanese Nationals in Israel,” *Immigration, Asylum, and Nationality Law* 29(2)(2015): 172-191.

<sup>32</sup>Ilan Lior, “Prison service confiscates heaters from asylum seekers detained in Holot,” *Haaretz* 10/1/15; Gideon Levy and Alex Levac, “Seekers find asylum with crammed rooms and no heat,” *Haaretz* 1/2/14.

without them. While marriage is reversible – allowing a person to marry and divorce multiple times – many choice pairs are not. When a person must decide which of two irreversible choices to choose, they may face genuine angst and indecision, knowing that future all-things-considered regret is inevitable. When we are tasked with helping others reach one of two likely regrettable ends, it is similarly unclear what we ought to do.

In such cases, we might appeal to other considerations. If refugees will face detention if they stay, in addition to regretting their choice, then return should be facilitated, because at least they will be free. Or, alternatively, if refugees will face persecution if they return, in addition to regretting their choice, then return should be not facilitated, because at least they will be safe. But this is unhelpful if refugees will face detention if they stay and lack safety if they return, regretting both outcomes.

To consider what ought to be done in such cases, the fourteen-year old girl may again be of help.

In many ways, her case is similar to a Regret Either Way Case. It is, more specifically, a No Regret Either Way Case. She will have no regrets if she conceives, but also no regrets if she does not conceive. For, if she does not conceive, she can still later conceive, and be happy she had this later child. To determine if she has a decisive reason to conceive, she should compare the extent that she later will be satisfied with one choice over another. I assume she will be more satisfied if she does not conceive. For, at a later time, she can still conceive, love this child just as much, give her child more, and have a more fulfilling life for herself. Similarly, if a person will regret either choice, they should consider which choice will lead to less regret, and choose this choice for themselves. They will still regret their choice later, wishing they had chosen otherwise, but at least this wish will

be less forceful than if they had chosen the alternative.

Similarly, service providers have a reason to discontinue a service if they can predict that those who accept the service will regret accepting it more than rejecting it. Or, alternatively, providers should discontinue a service if more who accept the service regret their choice compared to those who reject the service.

When making such a comparison, it is not enough to simply compare those who accepted the service and those who rejected it. It may be that those who rejected the service were less likely to regret rejecting it compared to those who accepted it because they wanted it less. If everyone were to be denied the service in light of this data, many who were denied the service may be less satisfied than if they were provided the service. For example, if most refugees who stay are satisfied with their choice compared to those who left, this may be because they wanted to stay more than those who left. Were an NGO to deny repatriation in light of this data, many who are forced to stay may feel their preferences are less satisfied than if given the choice to return.

A better way to make predictions about future regret would be to randomly divide all who want to accept the service into two groups: those will immediately be given the service, and those who will not be given it, at least not in the near future. If those who randomly received the service regret it more than those who randomly could not receive the service, this is strong evidence that the service leads to greater regret than not giving the service. If, on the other hand, a very large number of those who did not receive the service wish they had received it, even years later, while fewer who received the service now regret receiving it, then there are reasons to continue the service.

In the context of repatriation, an NGO could provide repatriation to only some refugees who say they wish to return, and not others. After two years, the NGO could then ask those who returned if they regret their choice, and ask those who did not return if they still wish they had returned. If more feel all-things-considered regret from returning compared to those who stayed – and the four necessary conditions are fulfilled – this is a strong reason to discontinue repatriation. This reasoning could be applied to other spheres. In medicine, Random Control Trials (RCTs) already compare outcomes. The goals of RCTs are to see if those who receive a pill with the active ingredient tend to experience better outcomes and fewer side effects than those who receive a sugar pill. Regret seems to be a pertinent side-effect to know about, and could be added to the standard questions subjects are asked when taking part in RCTs.

Some may feel that it would be unfair to randomly select who is provided assistance, and who is not. But it is important to emphasize that nobody will be forced to accept assistance. I would never suggest that some refugees be forcibly repatriated, just to see if they will later regret repatriating. What I suggest is merely that, of those who want a service, some wait a specified time period before receiving it, to see the outcome of others who have accepted the service. If those refugees who returned overwhelmingly regret their choice, but those who stayed regret staying less, this is a good reason to discontinue repatriation.

Some might still feel it is wrong to force some refugees to stay in detention, rather than help all repatriate who wish to. Others may feel it is wrong to provide repatriation to some, who will then likely live in poverty and insecurity in South Sudan, rather than relative security in Israel.

A similar problem exists with RCTs, where a random percentage of a



sample will receive a pill with just sugar, rather than an active ingredient. Such random selections may be frustrating for patients, who may prefer a pill with an active ingredient. But if preference satisfaction matters, and trials can establish what pill better fulfils future preferences, then trials may be justified. In repatriation, and other life-altering choices, it is not clear which service is helpful from the perspective of future preferences, because the experiences before the service are so radically different than those after the service. Randomly being denied the service may be fair, and so such policies permissible.

Some may argue that autonomous individuals ought to be the agents who choose what services they receive, even if regret is likely. But randomly providing the service to some, and not others, may enhance autonomy in the long run. A truly autonomous choice requires a minimal threshold of information, and there is often a lack of information on services that drastically alter life, including a lack of information about likely regret. Randomly selecting some to receive the service can increase information on both the outcomes of the service, and the likelihood of future regret, further justifying such selections.

## 5.4 Uncertainty

There are Uncertainty Cases which cut through cases involving regret and regret either way. Often, agents who provide a service cannot contact past recipients of the service to determine if they regret their choices. It is not clear if a service should be continued in such instances. For example, the UN may be unable to contact those who have migrated to other countries after repatriating. More worryingly, those who most regret repatriating

may be the most difficult to contact, because they have been killed, or fled to another country, or do not have access to a cell phone in an IDP camp. It is not clear if repatriation should be provided for future refugees, if the UN cannot predict the extent that past refugees regret their decisions to return.

In such cases, we might turn to other considerations. One consideration is related to the irreversibility of a choice. Sometimes, providing a service is irreversible, while denying the service is not.<sup>33</sup> The fourteen year old girl is one such case. If she conceives now, she cannot later un-conceive. If she does not conceive now, she can later conceive. This asymmetry may be one extra reason for her to not conceive at age fourteen, and one reason to not help her conceive. Importantly, this would hold true even if we knew nothing about the girl's personal future preferences, and the extent that she would later regret her choice to conceive. Similarly, refugees repatriating to South Sudan could not live in Israel later, but if they had stayed in Israel they could still repatriate later, providing one reason to deny repatriation when regret is impossible to predict.

Such a policy, unfortunately, would create another irreversible state of affairs, forcing refugees to stay, possibly in detention or destitution. Rather than refusing to provide them with repatriation, facilitators could merely nudge refugees to reject their services, and encourage refugees to stay, rather than return. This can be instituted by forcing refugees to wait a specified amount of time, or by emphasizing the extreme dangers of return and the advantages of staying.

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<sup>33</sup>In Parfit's example of such a choice, you must decide whether to prevent a person from committing suicide. One reason to prevent them is that, if they are forced to live now, they can still commit suicide later, but if they commit suicide now, they cannot live later. See Derek Parfit, *On What Matters*, Oxford: Oxford University Press 2011: 197.

The idea of nudging individuals to accept a reversible decision over an irreversible one seems intuitively appealing for spheres outside of repatriation. It has been argued by Wang et al that, when a person posts on Facebook or Twitter, they are posting a largely irreversible post, as others can share the post and re-tweet, such that the original author can no longer delete the post. Some posts are life-altering, involving an offensive joke or an incriminating photo, undermining a person's career, friendship network, and self-perception. Because of this risk, Wang et al suggest that users be first asked if they are certain they wish to post a comment.<sup>34</sup> While the authors emphasise that this policy is justified to mitigate regret, I believe the reason it mitigates regret is that, if users post now they cannot reverse the act, but if they do not post now they can always post later.

While only nudging is justified in most cases, completely denying the service may be justified if service providers can predict that, in the future, their services will become reversible. In such cases, service providers should wait until this day arrives before helping. Consider the case of Theodore, a South Sudanese refugee who arrived in Israel in 2007. Had he returned during his first few years in Israel, he would be unable to re-enter Israel, as he lacked residency status. NGOs knew that, in the future, he would likely gain residency status, as he was in a relationship with an Israel national, with whom he had a child.<sup>35</sup> Once he gained this status, he would be able to enter and exit Israel at will, and repatriating would no longer be an irreversible choice. NGOs should refuse to help refugees like Theodore repatriate until they gain residency status, and returning is no

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<sup>34</sup>See Wang et al, "From Facebook Regrets to Facebook Privacy Nudges," *Ohio State Law Journal* 74(2013): 1308-1334.

<sup>35</sup>Interview with Theodore, Jerusalem, 17 July 2014.

longer irreversible. Under such a policy, recipients of a service would be able to avoid the all-things-considered regret that comes from irreversible decisions, while still accessing the service at a later time.

In many cases, irreversible choices will likely remain irreversible. There will never be a day, I hope, where someone can conceive and have a child, and later go back in time and un-conceive her. Nor will it ever be possible to post on Facebook or Twitter and wipe the post clean from all websites, computer screen, and the minds of social media users. In such cases, we cannot wait until the choices become reversible, because they never will. The irreversible nature of the choice is not a reason to deny it, even if regret is possible.

## 5.5 Conclusion

When an individual consents to a service, we might provide it, believing it is her choice to make. But a choice at one time can conflict with a preference at another. Mol later felt that the worst possible outcome in Israel would have been better than the best outcome in South Sudan. We might suppose he was simply unlucky, and that circumstances might have transpired differently for him. But the UN reports at the time warned of likely violence and poverty, and past returnees had expressed similar regret to what Mol felt. When such regret for a life-altering choice is extremely prevalent, and the result of the particular service alone, then regret is one reason to discontinue the service.

In cases where someone will likely feel all-things-considered regret from both receiving a service and not receiving it, the service should only be denied if those who regret receiving it are more numerous than those who

regret not receiving it. When there is insufficient information to know this, we should not deny the service, instead merely discouraging potential recipients from accepting an irreversible service which they can always accept later. When the service is irreversible now but will become reversible in the future, we should not merely discourage recipients from accepting the service, but deny it completely, until a later point in time when it becomes reversible.

Perhaps the conditions I set are rarely met, or rarely met outside of refugee repatriation, and so of little significance in the vast majority of services provided. But there is value in realizing why, in most cases, we do not consider regret a legitimate consideration. Rarely does any given choice we make lead directly to the regret we feel. It is more likely part of a web of complex decision making, with the particular choice to accept a service only one factor in the ultimate feeling that we wish we had chosen otherwise. And rarely do we really know, after a choice, that our lives would be better had we chosen differently. Exploring rare cases of all-things-considered regret is helpful precisely because they are exceptional, emphasizing why regret, as a general rule, is not a particularly good consideration for the choices we make, nor a good consideration for the choices we provide others.

Though regret is not usually a legitimate consideration, there remain a range of cases where regret is relevant, requiring us to re-evaluate the types of services provided, and when they are provided. Soldiers may feel all-things-considered regret from the single choice to enlist, and their lives may be different than those they left behind. Athletes engaging in extreme sports may feel similarly, as may patients undergoing certain treatments, even if the treatments help patients in other ways. Refugees may later wish they could turn back the clock and reject help returning, even if

this meant living a life in detention, or without legal status. If regret is a relevant consideration for how we treat others, then soldier, athletes, patients, and refugees should be asked if they wish they had never been offered a service in the first place. Most forms of regret will not be all-things-considered, and most will be from a series of choices. But some forms of regret may be similar to what Mol felt. We should know about such psychological experiences, accounting for the preferences people have later, when assisting them now.

# Chapter 6

## Payments\*

In 2007 Sweden offered \$7,150 to families who agreed to return to Afghanistan.<sup>1</sup> A year later, the Ghanaian government, working with the UN, gave refugees \$100 to return to Liberia.<sup>2</sup> Soon after, Denmark began offering \$18,700 to anyone returning to Iraq, Iran, and Somalia.<sup>3</sup> In 2010 the British National Party, in an election campaign, promised to give \$78,000 to migrants or refugee who agreed to leave the country. The BNP was never elected, but in 2011 the UK government handed over \$3,500 in cash to families who agreed to return to Zimbabwe.<sup>4</sup> More recently, Australian Prime Minister Tony Abbott proposed paying asylum seekers \$10,000 to go back to their

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\* *This chapter is based on a manuscript that has been accepted subject to major revisions in Political Studies.*

<sup>1</sup>UNHCR, “Sweden, Afghanistan, UNHCR sign deal on voluntary return of Afghans,” 23/6/07, <http://www.unhcr.org/468bb4542.html>.

<sup>2</sup>Naohiko Omata, “‘Repatriation is Not for Everyone’: The life and livelihoods of former refugees in Liberia,” *New Issues in Refugee Research*, UNHCR Working Papers 213, 2011.

<sup>3</sup>The Telegraph, “Denmark offers immigrants £12,000 to return home,” 10/11/09.

<sup>4</sup>Frances Webber, “How Voluntary are Voluntary Returns?” *Race and Class* 52(4)(2011): 98-107.

countries of origin,<sup>5</sup> and in 2013 the Israeli government began giving \$3,500 to thousands of asylum seekers who agreed to repatriate. Those who refused to repatriate from Israel were given a slightly different offer: \$3,500 to accept a one-way ticket to Uganda, Rwanda, or Ethiopia, where they would be unable to obtain any legal status. In all six of these cases, and many more,<sup>6</sup> a large proportion of those returning were refugees, or owed protection on humanitarian grounds.<sup>7</sup>

It is not clear if such payments are morally permissible. One might think that even if forcing refugees to leave is wrong, paying someone to leave is not, because it is a voluntary transaction. But payments often encourage extremely unsafe returns, and are often accepted involuntarily when refugees agree to return to avoid detention or deportation.

Such payments are not new,<sup>8</sup> but there are few studies describing them, and no analysis as to whether they are morally permissible. This chapter provides such analysis, describing three types of cases concerning payments,

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<sup>5</sup>Sarah Whyte, “Abbott offers asylum seekers \$10K to go home,” *The Sydney Morning Herald* 21/6/14.

<sup>6</sup>Maria Helene Bak Riiskjaer and Tilde Nielsson, “Circular Migration: The unsuccessful return and reintegration of Iraqis with refugee status in Denmark,” Research Paper No. 165 2008; Richard Black, Michael Collyer, and Will Somerville, “Pay-to-go Schemes and other Non-coercive Return Programs: Is Scale Possible?” *Improving US and EU Immigration Systems*, [www.migrationpolicy.org/pubs/pay-to-goprograms.pdf](http://www.migrationpolicy.org/pubs/pay-to-goprograms.pdf).

<sup>7</sup>For a description of this “minimal standard,” of those who have a claim to residency, see Javier Hidalgo, “Resistance to Unjust Immigration Restrictions,” *The Journal of Political Philosophy* 23(4)(2015): 450-470 As noted in the previous chapters, both those supportive of more open borders, and those supportive of closed borders, tend to agree that forced return is unjust if those returning would lack basic necessities. See David Miller, “Immigration: The Case for Its Limits” in (eds.) A. Cohen and C. Wellman *Contemporary Debates in Applied Ethics*, Malden, MA: Blackwell Publishing 2005: 193–206; Joseph Carens, “Aliens and Citizens: The case for open borders.” *Review of Politics* 49 (1987): 251-73; Matthew Gibney, *The Ethics and Politics of Asylum*, Cambridge: Cambridge University Press 2004.

<sup>8</sup>George Stoessinger, *The Refugee and the World Community*, Minneapolis: Minneapolis University Press 1963: 68-71 and 202; Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics*, Cornell: Cornell University Press 2004: 106.



and what ought to be done in each case. In the following section I will address what ought to be done in “Motivation Cases.” When governments provide payments, we might think the payments are wrong, because they motivate refugees to partake in risky repatriation. But though refugees are motivated to take risks, perhaps this is not wrong, if their choice is voluntary and they prefer to take these risks, given the money they can gain. I argue that such payments are only morally permissible if refugees can again access the host country after returning, such that their return does not substantially undermine their future safety. In Section 2 I address “Coercion Cases.” Refugees are often returning involuntarily, because they are unjustly forced into detention. Non-governmental organizations (NGOs), eager to help, provide money to refugees who return. If refugees are accepting money to return under coercive background conditions, it is not clear if NGOs should be providing such money. Consistent with Chapter 3, I argue that they should provide such funds if refugees will likely face indefinite detention regardless, and if providing payments does not causally contribute to government coercion. In Section 3 I address an objection that cuts across the first two cases. It may be that, regardless of whether refugees are in detention or returning freely, they have a right to funds to repatriate, to ensure they have the choice to return with some resources. I argue that payments may, indeed, be justified for this reason, but only in cases where the funds are substantial enough to ensure long-term safety.

Before addressing the above claims, a number of clarifications. As before, I assume that survival migrants – those fleeing hunger or lack of healthcare – are refugees who deserve protection, if states have the capacity to accept them. As before, one can accept my general conclusions about payments, but reject my specific conclusions about who states should not

deport. I aim to merely consider whether, if you believe it is wrong to deport someone because of conditions in their countries of origin, it is also wrong to pay them to return to their countries of origin.

The case of Israel is especially useful for exploring payments, but not because officials acted very differently from an ethical perspective. Rather, it is useful because the Israeli government openly publicized a wealth of data on this topic, detailing the number who returned each month, the extent of detention, and the amount of money provided to individuals between 2012 and 2013. This data – which includes return to Sudan and Eritrea – provides limited evidence that money motivated return, raising the question of whether such money should be provided. Furthermore, I have original data I gathered in interviews with refugees who, after given money to leave, agreed to return to Ethiopia, Eritrea, Sudan, and South Sudan, or accept resettlement to another East African country. These interviews provided valuable information on the conditions under which payments were provided, raising unique scenarios that pose especially difficult questions.

Though I present original data from Israel, I shall demonstrate that the case of Israel is not entirely different from other repatriation programs. As such, my descriptions raise questions likely found in other countries that pay refugees to repatriate.

## 6.1 Motivation

Motivation Cases occur when states offer refugees full protection, and motivate them to decline this protection, providing money on the condition that they repatriate. It is unclear if states are ethically permitted to provide such payments.

Consider, for example, the case of Gatluak, who fled southern Sudan as a young boy during the Second Sudanese Civil War in the 1980s. As an adult he eventually took a boat to Egypt and crossed into Israel with the help of smugglers. In Israel the government never assessed his claim that he was a refugee, but provided him a temporary visa as part of general protection granted to all southern Sudanese refugees. He was happy with his life in Israel, as he was free to work in a hotel, could access medical care, and experienced no coercive pressure to leave. When South Sudan became an independent country in 2011 Gatluak feared returning due to his ethnic identity, and because he lacked family networks to ensure basic food security after returning. He changed his mind in 2012, returning when the Ministry of Interior told him he could receive \$1,500 upon reaching Juba. Six months after his return, he was living on a concrete patio outside a police station in Juba, without shelter, savings, job skills, family, or daily meals. When I visited him that year, strangers were providing him limited food, medicine, and water. He did not know how long their charity would last, and had no access to state services.<sup>9</sup> I was unable to reach him when the South Sudanese Civil War broke out in 2013. Based on my interviews with other former refugees who returned, he was likely displaced, and possibly killed.

We might suppose that, in Gatluak's case, the Israeli government did not truly provide him protection, because they refused to assess his claims and the claims of other asylum seekers. We might also suppose that, in this case, we cannot be certain that those returning were genuine refugees, precisely because their claims were never assessed. But Motivation Cases also arise in cases where states do assess all claims, are certain that individuals

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<sup>9</sup>Interview with Gatluak, Juba, 15 March 2012.

are refugees, and provide full residency rights, also providing money to encourage repatriation. In the 1990s Australia recognized tens of thousands of Afghan asylum seekers as refugees, providing them access to social services, work visas, and healthcare, later offering each family \$10,000 to repatriate in 2002, leading 3,400 refugees to return, their fate never monitored by the government, but likely leading to the deaths of at least some.<sup>10</sup> Similarly, in the 1990s the German government assessed the claims of all Bosnian asylum seekers, and recognized them as refugees, later using monetary incentives to motivate them to repatriate to a country where they ultimately struggled from extreme poverty and discrimination.<sup>11</sup> Sweden, when providing payments to Afghan refugees, similarly assessed their claims and provided them refugee status before paying them to repatriate.<sup>12</sup> In all of these cases, states were offering protection, but also paying refugees to decline such protection. It is not clear if such policies are ethically permitted.

The UN's official position is that such policies can be legitimate if conditions have substantially improved in refugees' countries of origin.<sup>13</sup> The UN also endorses cash payments when, though conditions remain unsafe, there is evidence that conditions are improving, and refugees' status will soon be revoked, as when the UN provided \$100 to refugees returning from

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<sup>10</sup>Fethi Mansouri and Sally Percival Wood, "Exploring the Australia-Middle East Connection," in (ed.) Fethi Mansouri, *Australia and the Middle East: A Front-Line Relationship*, London: Tauris Academic Studies 2011: 9.

<sup>11</sup>Ulrike von Lersner, Thomas Elbert and Frank Neuner, "Mental health of refugees following state-sponsored repatriation from Germany," *BMC Psychiatry* 8(88)(2008).

<sup>12</sup>UNHCR, "Sweden, Afghanistan, UNHCR sign deal on voluntary return of Afghans," 23 June 2007, <http://www.unhcr.org/468bb4542.html>.

<sup>13</sup>Helen Morris and Machiel Salomons, "Difficult decisions: A review of UNHCR's engagement with Assisted Voluntary Return programmes," United Nations High Commissioner for Refugees Policy Development and Evaluation Service 2013; Katherine Haver, Felicien Hatungimana, and Vicky Tennant, "Money matters: An evaluation of the use of cash grants in UNHCR's voluntary repatriation and reintegration programme in Burundi," Policy Development and Evaluation Service 2009.

Ghana to Liberia in 2008. However, the UN remains silent on cases where return is clearly unsafe and will remain unsafe, and governments still wish to encourage return, using no coercion, and monetary incentives alone. Furthermore, even in cases where conditions have improved, it remains unclear whether motivating return is ethical, if conditions are still sufficiently dangerous as to warrant continued protection.

Before considering when such monetary incentives are ethical, it is worth establishing if there is any empirical evidence that money motivates return. In the cases noted, refugees may be responding only to fear of future detention, or a belief that conditions have improved in their countries of origin. If money itself does not motivate return, there are no Motivation Cases.

Data from Israel provides limited evidence that money was, at the very least, strongly correlated with decisions to return in this case, even when detention rates were relatively low, and conditions in countries of origin remained the same. By analysing Israeli labour statistics and interviews with civil servants, I found that, in months where refugees were paid more money to leave, more refugees agreed to return, even when the detention rates were the same as in other months, and conditions in countries of origin remained the same.<sup>14</sup> For example, in October 2013, the government paid all asylum seekers \$1,500 if they left the country, and also began detaining asylum seekers. 180 left. While the number dropped in November, when the High Court of Justice ordered that asylum seekers be released, from the beginning of December the government passed new legislation to detain refugees, and also increased the grant money to \$3,500, such that detention policies were similar to October, but the payments greater. That December

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<sup>14</sup>See Appendix C.

295 returned compared to October's 180, a significant increase.

There was also evidence that the government used money to encourage return precisely when detaining refugees became legally difficult. In March 2013, the UN and Israeli High Court of Justice pressured the government to stop detaining refugees and, that same month, the government increased the payments from \$100 to \$1,500. Between March and August 2013 the government found other ways to detain refugees, using a series of by-laws to circumvent the court's instructions, also never raising the payments. The High Court ordered the end of these by-laws in September, requiring the government to once again release refugees, and the government soon began talks to increase the payments again. When the government stalled and never actually released any refugees, the High Court forced the government to release refugees in October, and the Prime Minister rapidly approved an increase in payments from \$1,500 to \$5,000.<sup>15</sup> Throughout this two year period, the government also seemed to increase payments in response to refugees' unwillingness to return, issuing a type of market-sensitive payment scheme, providing only \$100 in 2012, raising it to \$1,500 when few returned, and finally providing \$3,500 when it saw a dip in repatriation rates.

The above does not prove that money motivated return, as other unknown variables – such as the rate of policing, or refugees' subjective preferences – may also explain the variation in return rates. Nonetheless, this provides supporting evidence that money motivated return, and similar evidence was found in studies on repatriation from Pakistan to Afghanistan, where refugees were provided \$100 to repatriate;<sup>16</sup> from Tanzania to Bu-

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<sup>15</sup>Ilan Lior, "Israel to Offer African Migrants \$5,000 to Leave," Haaretz 30/10/13 <http://www.haaretz.com/news/national/.premium-1.555218>.

<sup>16</sup>Eric Davin, Viani Gonzalez, and Nassim Majidi, "UNHCR's Voluntary Repatriation

rundi, where refugees were provided \$41 to repatriate;<sup>17</sup> and from the UK to Zimbabwe, where refugees were paid \$3,500 to repatriate.<sup>18</sup> In all of these cases, there were positive correlations between payments and return rates, and governments stated that payments were designed to motivate return.

If money does motivate return, and is intended to, is it morally permissible? To answer this question, we might first determine whether, when refugees accept money to return, their choice is truly voluntary. To consider this, we must establish what we mean when we claim a choice is voluntary.

In general, there is a broad consensus that three criteria must be met for a choice to be voluntary. Individuals must be fully informed and with full capacity when making a decision;<sup>19</sup> they mustn't be coerced into their decisions; and they must have at least one alternative that ensures an acceptable level of welfare.<sup>20</sup> For an example where the last condition is not met, imagine a starving person accepting a job at slave wages. Their choice is involuntary, as both working and not working involve unacceptably low levels of welfare. Refugees are similarly involuntarily repatriating when choosing between malnutrition in a refugee camp and an unsafe return.<sup>21</sup>

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Program: Evaluation of the Impact of the Cash Grant," Office of the United Nations High Commissioner for Refugees (UNHCR) in Kabul 2009.

<sup>17</sup>Katherine Haver, Felicien Hatungimana, and Vicky Tennant, "Money matters: An evaluation of the use of cash grants in UNHCR's voluntary repatriation and reintegration programme in Burundi," Policy Development and Evaluation Service 2009: 6.

<sup>18</sup>Frances Webber, "How Voluntary are Voluntary Returns?" *Race and Class* 52(4)(2011): 98-107.

<sup>19</sup>Allen Wertheimer and Franklin Miller, "Payments for Research Participation: A Coercive Offer?" *Journal of Medical Ethics* 34(2008): 389-392.

<sup>20</sup>Katy Long, *The Point of No Return: Refugees, Rights, and Repatriation*, Oxford: Oxford University Press 2013: 159-161; Mikhail Valdman, "A Theory of Wrongful Exploitation," *Philosophers' Imprint*, 9(6)(2009): 1-14; Jonathan Wolff and Avner De-Shalit, *Disadvantage* Oxford: Oxford University Press 2007: 78.

<sup>21</sup>Long 2013 *ibid*: 161-163.

Though choices are not voluntary when both the choice and alternatives are unacceptable, I assume that a single choice can be voluntary if this choice is acceptable and all alternatives are not. Katy Long has persuasively demonstrated this point, using the example of a person who has no choice but to accept a low-paying job they feel is fulfilling, and which meets their basic welfare needs.<sup>22</sup> The person's choice, she contends, seems voluntary because they have one acceptable option. Following Long's reasoning, a choice is also voluntary if one is leaving behind a life with an acceptably high level of welfare, and choosing a life without these basic necessities, such as a businesswoman voluntarily choosing to quit her pleasant and well-paying job and move to a desert island. Her choice seems voluntary because she has at least one acceptable alternative.

Based in the above criteria, refugees who accept money and return are doing so voluntarily if they are returning to a country where their lives will be safe and their conditions reasonably acceptable or if, though returning is unsafe, they have the option of staying in the host country with reasonably acceptable conditions, including full social services and rights. In the case of Israel, these conditions were arguably met for Gatluak, though not for all refugees in the country, as I will describe in the next section. These conditions were also met for refugees returning from Germany to Bosnia in the 1990, and from Australia and Sweden to Afghanistan in 2002 and 2007.

Therefore, the minimal conditions for voluntariness can be met with payment schemes. But even if returns are voluntary, there is another reason to believe the payments are unethical. In general, voluntary offers can be morally impermissible if they demean the recipients of the offers, or create

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<sup>22</sup>Long 2013 *ibid*: 162-163



negative externalities for others.<sup>23</sup> When governments directly pay refugees to repatriate, this may reinforce the stereotype that refugees are unwanted members of society, whose exit is worth whatever money the government is willing to pay them to leave. Payments also send a demeaning message to refugees: “We do not want you so much,” the payments imply, “that we are willing to sacrifice money so that you repatriate.” The greater the money offered, the stronger this message. For this reason, the British Nationalist Party – a fringe party and openly xenophobic – was willing to spend \$78,000 for each asylum seeker or refugee who returned, far more than any other party or country in the world. Refugees have no alternative but to be exposed to this demeaning treatment, whether they accept the money or not.

I believe this is a strong reason to deny payments some of the time. When the government pays only African refugees to leave, as part of a racist immigration policy, the payments are impermissible because of their demeaning nature alone. I shall elaborate on this reasoning in Chapter 8. However, when all refugees are paid to leave, and there is no racist intention, I do not believe the demeaning nature of the payments creates a decisive reason against their provision. Refugees can turn down the offer, and send a strong counter-message back: “We want to stay so much that we are willing to reject your money in order to stay.” The greater the money offered, the stronger this counter-message. Rejecting payments can strengthen the expressed commitment of refugees to stay, publicizing how dangerous it is to leave.

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<sup>23</sup>Deborah Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* Oxford: Oxford University Press 2010; Anne Phillips, *Our Bodies, Whose Property?* Princeton: Princeton University Press 2013.

There is a second, stronger reason to believe payments are impermissible. In general, offers are impermissible if they involve great physical harm. For example, if I agree to lend you money, and you agree to give up your right hand if you do not pay me back, no judge should uphold the agreement, and force you to give your right hand if you cannot pay me back. In contract law, judges do not uphold such “unconscionable contracts” partly because it is wrong for the state to encourage self-harm,<sup>24</sup> given that states were created partly to protect citizens and residents within their territories. Were the government to encourage self-harming activity, then the state would also be forcing citizens to pay taxes into a system that makes such encouragement possible, and there is a limit to what the state should force citizens to do.<sup>25</sup> Self-harming contracts are also involuntary in one sense: When an individual accepts money on the condition that they accept possible harm in the future, then their future selves will be forced to accept this harm. There is a limit to the harm our future selves should be forced to accept, even in light of previous consent.

Payments to repatriate are types of “unconscionable contracts.” In Israel, refugees arrive at the office of a civil servant, sign on a dotted line, receive \$1,500 in an envelope, their legal status is revoked, and they board a flight. If they attempt to re-enter the country, they will likely be deported, because they had earlier received money to forgo any future protection.<sup>26</sup> Throughout this process, refugees are encouraged to risk their lives, rather than continue to accept protection, and the public is forced to pay taxes into a system that enforces this contract with detrimental consequences.

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<sup>24</sup>Seana Valentine Shiffrin, “Paternalism, Unconscionability Doctrine, and Accommodation,” *Philosophy and Public Affairs* 29(3)(2000): 205-250.

<sup>25</sup>Shiffrin *ibid.*

<sup>26</sup>Interview with Assisted Voluntary Return official, Tel Aviv, 7 August 2013.

We might claim that, in the case of Israel, it was not payments that were wrong, but the enforcement of the agreement. If refugees who tried to re-enter Israeli territory were deported, then this was a form of *refoulement*, the illegal forced removal of a refugee according to international law. The problem is not the payments, we might contend, but the wrongful rejection of genuine refugee claims. However, even in cases where refugees are merely paid to repatriate, but not blocked from re-entering, they may still face immediate danger after return, and be unable to apply for a visa, fly back to the safe country, and again apply for refugee status. When civil war broke out in South Sudan, almost half of my respondents fled to an IDP camp, and could not leave the camp safely, because of their Nuer ethnic identity. They also lacked money to pay for a private vehicle to pick them up, take them swiftly to the airport, and flee the country by air. If the risks of return are significant, then the government is still encouraging self-harming activity, even if it is merely paying for repatriation, rather than paying for the revoking of all future refugee rights.

The above reasoning suggests that payments are morally permissible if an individual will not be at risk if they return. This may be the case for refugees returning to countries with considerably improved conditions, or for asylum seekers who have private means of ensuring their protection. Even if an individual is returning to an unsafe country, payments could possibly be ethical if returnees had practical and legal mechanisms to later re-enter the host country to safety if they found themselves again in danger.

This last condition may be realized if the state paid refugees to leave while also providing re-entry visas, money to return to the host country, and evacuation services in the event of a crisis after returning, similar to the evacuation services provided to citizens abroad. The risks to return would

be limited, and so such payments permissible. A close version of this policy was implemented in the 1990s, when the governments of Sweden, France and the United Kingdom provided funds to Bosnian refugees to travel to Bosnia, where they could easily re-enter these states' territories if they were unhappy with their return.<sup>27</sup> On a more limited scale, UNHCR organized "go-and-see" visits for Burundian refugees in Tanzania, providing them payments to repatriate, along with transport to again re-enter Tanzania if they wished to.<sup>28</sup> Many of these programs did not allow refugees to change their mind more than once: They could repatriate, re-enter the host country once, and if they repatriated a second time they were not offered a visa to again re-enter the host country.<sup>29</sup> Nonetheless, we might envision such a payment scheme involving both the ability to exit and enter the host country at will, and access to emergency evacuations if necessary. Such payments would merely incentivize return, without significantly sacrificing refugees' safety.

## 6.2 Coercion

While the first case addresses whether governments should pay refugees to return, Coercion Cases address extremely non-ideal scenarios where refugees and asylum seekers will likely face serious risks if they return,

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<sup>27</sup>Richard Black, "Return and Reconstruction in Bosnia-Herzegovina: Missing link or mistaken priority?" SAIS Review, 21(2): 177-199.

<sup>28</sup>UNHCR, "Burundi: repatriation from Tanzania – numbers remaining under 300,000," Briefing Notes, 18 May 2004, Downloaded on 19 September 2015 at <http://www.unhcr.org/40a9e0a21.html>.

<sup>29</sup>Helen Carr, "Returning Home: Experiences of Reintegration for Asylum Seekers and Refugees," British Journal of Social Work 44(1)(2014): 140-156; Khalid Koser "The Return and Reintegration of Rejected Asylum Seekers and Irregular Migrants," IOM Migration Research Series 2001.

but if they stay in their host country they will be detained, destitute, and likely deported in the future. In such cases, NGOs often have the resources to provide their own funds to refugees hoping to return, and it is not clear if they should provide such funds. There is no question that individuals' choices to return are involuntary, as they are choosing between two unacceptable alternatives. Nonetheless, perhaps NGOs should provide payments if refugees and asylum seekers are unlikely to be offered full rights and protection. It may be better to encourage individuals to return via a repatriation program than to remain in detention and possibly face a completely forced deportation, which can be traumatic and violent.

This dilemma was common in Israel, where detention was widespread, and the government vowed to detain the majority of Eritrean and Sudanese asylum seekers, including the refugees amongst them. At first, the government was the only body to provide funds to refugees in detention, and most NGOs refused to cooperate, feeling refugees were accepting funds partly because they feared detention or deportation. There is evidence to this effect found in Labour Statistics. Rates of return would often increase when detention increased, and decrease when detention decreased, even when government payments to leave stayed the same.<sup>30</sup> For example, in August 2013 the government passed a new "Anti-Infiltration Law" allowing the Ministry of Interior to arrest refugees and detain them, and 170 returned. When the High Court of Justice nullified the law in September, only 89 returned, even though payments remained the same. When no one was actually released in the beginning of October 2013, the number of returns increased again, from 89 to 180, even while payments remained the same as in September.

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<sup>30</sup>See Appendix C.

Some refugees, though in detention or destitute, were afraid to return, and remained in detention or homeless. As the Israeli government seemed unwilling to change its policy, some NGOs eventually offered their own payments of €800, feeling this was preferable for especially vulnerable refugees. One of the first refugees to receive such funds was Tigisti, her husband Massawa, and their two children.<sup>31</sup> All were included in the 38,000 individuals whom UNHCR considered likely refugees,<sup>32</sup> despite the Israeli government denying them this status. Though UN officials were working to resettle some refugees to North America and Europe, Tigisti did not know if she would be included in this resettlement. When her husband was detained in 2013, NGOs tried to help him obtain a visa, but failed. Instead, they offered to pay the family €3,200 to repatriate. After returning they were forced to flee to Ethiopia where they gained asylum-seekers status but no work visas to support themselves.<sup>33</sup>

Similar cases of coerced returns occurred in Tanzania when, in the mid-2000s, anti-refugee sentiment increased, prompting the government to confine Burundian refugees to camps, denying them the option of working in urban areas, forcing many into detention-like conditions. The UN, hoping to help alleviate these conditions, offered refugees funds to repatriate, even as evidence grew that they would unlikely find food security in Burundi with the money offered.<sup>34</sup> In these and similar cases, it remains unclear if the UN should provide such funds.

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<sup>31</sup>Interview with Tigisti, Dessie, 8 June 2014; Interview with Massawa, Addis Ababa, 8 June 2014.

<sup>32</sup>UNHCR, "Israel: Subregional operations profile - Middle East," 2015, <http://www.unhcr.org/pages/49e4864b6.html>.

<sup>33</sup>Interview with Tigisti, Dessie, 9 June 2014.

<sup>34</sup>Katherine Haver, Felicien Hatungimana, and Vicky Tennant, "Money matters: An evaluation of the use of cash grants in UNHCR's voluntary repatriation and reintegration programme in Burundi," Policy Development and Evaluation Service 2009.

The dilemma becomes more complex when we consider cases of individuals who are asylum seekers, and yet to prove to the UN or government that they are refugees. Consider, for example, the case of Daniel. In the 1980s the government of Ethiopia confiscated his ancestral land, forcing him to migrate to Sudan, where he joined a church, found work, and married, but faced harassment from authorities. He eventually moved with his wife to Egypt, where they found work and gave birth to their daughter, but faced similar harassment from authorities, deciding eventually to pay smugglers to take them into Israel in 2006. Once there, they found jobs in hotels, and a school for their daughter. Six years later, in 2012, Daniel's wife left him, and he raised his daughter on his own for several months. When anti-immigration protests spread throughout the country, he was soon detained, and his daughter placed in foster care. Government officials pressured him to return, telling him they could pay for his flight to Ethiopia, using no handcuffs, but that he would be forcibly deported if he declined the offer. He refused for over a year, demanding that he have access to a Refugee Status Determination process. The government refused, and he finally changed his mind when an NGO offered him €800 to return, sponsored by the European Refugee Fund. He returned with his daughter in 2013, and by 2014 both lacked medical care, food security, reliable shelter, or access to Daniel's ancestral land. At the end of 2014 Daniel was planning to pay smugglers to cross illegally with his daughter into Sudan.<sup>35</sup>

We might at first suppose that, in the case of both Tigisti and Daniel, NGOs should not have provided money for return. Tigisti and her family were faced with only two unreasonable options, and so their choice was

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<sup>35</sup>Interview with Daniel, Addis Ababa, 10 June 2014.

involuntary, and so victims of *refoulement*, the illegal forcing of refugees back to their countries of origin. Daniel was not necessarily a refugee, but he was denied the right to apply for refugee status, and so was wrongfully forced to return before given the right to a Refugee Status Determination process. If his return was unsafe, he too was faced with only unreasonable alternatives, and so his choice was also involuntary in this regard.

In response to the above reasoning, NGOs might defend their payments with the following three arguments. First, as argued in Chapter 3, it is not wrong to help a person with an involuntary choice, if there is no other possible choice to provide them. For example, if I am shot by a sniper, and then run to the hospital, I can give valid consent to a doctor for risky but life-saving treatment, even though my options have all become unacceptable due to the sniper. Refugees may be capable of giving valid consent to NGOs, even though they are coerced into their choice by the government, so long as NGOs themselves use no coercion, and can do little else to help. This is not to claim that NGOs should simply look the other way as governments detain refugees; as argued in Chapter 3, NGOs have certain duties to help vulnerable populations, including the duty to try and stop government detention of refugees, or at least not causally contribute to this detention. But if NGOs do everything in their power to try and stop this government's detention policy, and fail, refugees' consent to return may still be valid from the perspective of NGOs. Similarly, in cases where refugees and asylum seekers are denied access to food and shelter, NGOs act rightly when they provide funds to repatriate, if there is nothing else the NGOs can do to help. Though recipients of money are involuntarily accepting the offer, because they have no reasonable alternatives,<sup>36</sup> it would be even more

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<sup>36</sup>Mikhail Valdman, "A Theory of Wrongful Exploitation," *Philosophers' Imprint*,



involuntary for refugees to lack the resources to return. This reasoning has been expressed by the UN, which states that, though NGOs should try and assist refugees to obtain their legal rights, if this fails, assisting with return may be ethical if the “life or physical integrity of refugees in the country of asylum is threatened.”<sup>37</sup>

The above argument, however, is not quite enough to justify the payments. NGO could make return possible without actively encouraging return by offering thousands of euros to do so. And though refugees may be deported, this is not certain, and so encouraging return risks undermining protection that refugee might have otherwise obtained later.

NGOs may present a second argument in favour of their payments. Encouraging refugees to return is justified, because returning is better than waiting for a possibly violent and traumatic deportation. If Daniel had stayed in detention, immigration officials would likely one day open his cell door, force him and his daughter into a van, drive them to the airport, and handcuff both to their seats as the plane lifted off. Deportations throughout Europe involve psychiatrists forcibly sedating refugees on flights and officials physically sitting on refugees until they cannot breath, move, or fight back.<sup>38</sup> If deportation is traumatic, it would be better to return without resistance, and money encourages such non-resistance.

Though payments may encourage a safer return compared to forced deportations, there is a reason NGOs should still avoid payments. As noted

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9(6)(2009): 1–14; Jonathan Wolff and Avner DeShalit, *Disadvantage*, Oxford: Oxford University Press 2007: 78.

<sup>37</sup>Megan Bradley, *Refugee Repatriation: Justice, Responsibility and Redress*, Cambridge: Cambridge University Press 2014: 52; Mollie Gerver, “Is Preventing Coerced Repatriation Ethical and Possible? The case of NGO repatriation of South Sudanese in Israel,” *International Migration* 53(5)(2015): 148-161.

<sup>38</sup>Liz Fekete, “The Deportation Machine: Europe, Asylum, and Human Rights,” *Race and Class* 47(1)(2005): 64-78.

in Chapter 3, NGOs should avoid causally contributing to coercive policies. When humanitarian organizations and agencies encourage refugees to return from detention, they may encourage the government to detain even more refugees.

Such a causal phenomenon may have been at play in some of the cases raised in Chapter 3. In 1994 and 1995, when UNHCR began facilitating repatriation of Rohingya refugees from Bangladesh to Burma, they provided limited aid to the most vulnerable, and various forms of aid upon return. The Bangladeshi government may have significantly increased its pressure on refugees to return precisely because it knew that aid would be provided.<sup>39</sup> And, in general, if facilitating return frees up places in detention, as I argued in Chapter 3, then encouraging return would free up cells even more, causally contributing to the further detaining of refugees.

Such payments may also make petitions against government policies very difficult, by making it difficult to prove that return is coerced. If refugees quietly accept cash in an envelope, the public may believe the choice to return is voluntary and safe, when it is not, and a judge would never see evidence of forced returns. This may undermine advocacy efforts, further fuelling detention policies. In contrast, if refugees stay in detention they send a message to the public that they are afraid to return and, if they are eventually deported, the public and judicial system will be aware that they were forced to return.

Payments to repatriate may similarly discourage refugees themselves from protesting for a change in policy. Activist refugees in Israel, who strongly opposed payments schemes, would organize hunger strikes in de-

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<sup>39</sup>Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics*, Cornell: Cornell University Press 2004: 106.

tention, long marches through the desert, and incessant media campaigns documenting precisely why they left Ethiopia, Sudan, Eritrea, and South Sudan.<sup>40</sup> They focused on encouraging others to lobby the Israeli government, so that their claims could be heard. These politically active refugees felt that repatriation funds undermined legitimate resistance. This phenomenon was especially clear in 2012. That year, a month before the planned deportation of all South Sudanese nationals in Israel, hundreds of refugees protested regularly against the deportation. Soon after, representatives from OBI began offering money to return, explaining to refugees that deportation was likely.<sup>41</sup> The campaign to prevent deportation slowly died down, as more returned, and fewer remained in detention. As the campaign died down, the detention rates steadily increased, leaving fewer behind to protest and encouraging even more to return. As more returned, more detention cells became available, allowing the government to detain even more refugees.

More evidence is needed to fully establish whether funds causally contribute to coercive policies in the way described. If they do, then NGOs should discontinue such payments. Not only will denying payments help mitigate coercion, but it needn't force refugees to stay in detention or face a traumatic deportation. Refugees can still avoid such deportation by acquiescing to deportation without money. Immigration authorities informed Daniel that his flight would be paid for by immigration authorities, and he could board the flight without handcuffs, even if without money. NGOs, in paying refugees to return, are not substantially increasing refugees' options;

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<sup>40</sup>Illan Lior, "Israel to Offer African Migrants \$5,000 to Leave," Haaretz 30/10/13 <http://www.haaretz.com/news/national/.premium-1.555218>.

<sup>41</sup>Interview with Bol, Juba, 21 December 2013; Interview with Nathaniel, Juba, 14 December 2013; Interview with Vanessa, Juba, 25 December 2013.

they are merely encouraging acquiescence to a silent return, reinforcing the involuntary nature of returns.

The above reasoning suggests it would be ethical for NGOs to provide payments in either one of two scenarios. The first scenario is where individuals will not be at risk if they return, because they returning to countries that are now safe, or because they are receiving enough money pay for basic security and necessities after return. Such a return would be voluntary because the choice would entail an acceptably high level of welfare upon return, even if unacceptable detention in the host country.

The second scenario where payments would be permissible is when, though return is unsafe, refugees will continue to lack rights regardless of whether they are paid money to repatriate and, in being paid money, this does not causally contribute to the coercion of others. Money needn't encourage coercion if the government has unlimited means of coercion. If the government has enough cells in detention centres to detain all refugees in the country, encouraging one refugee to return would not free up a cell to detain a new refugee. The government might also, rather than detain all, simply deny work visas to all, forcing all into destitution, such that if one person left, this would have no effect on the overall level of destitution.

I do not believe that either of these scenarios arose in the case of Daniel or Tigisti. For Daniel, return was not particularly safe and, though indefinite detention was a possibility for him, encouraging return would free up his detention cell, likely leading to the detention of a new refugee or asylum seeker. The case of Daniel would only have been justified if there was enough space in detention to detain all asylum seekers and refugees, or if he merely faced no work visa, and his return did not encourage the government to deny visas to more refugees and asylum seekers. Helping

him return, in this hypothetical case, would not contribute to the further coercion of others, and would help him and his daughter avoid a traumatic deportation or life of destitution in Israel.

In the case of Tigisti, Hewan and their children, return was safe and there was a strong chance they would eventually secure refugee status, either in Israel or another safe country. The UN in Israel already recognized them as likely refugees and the High Court of Justice had called for ending indefinite detention of Eritreans. The growing international pressure on Israel to change its policies also lead some Western governments to accept a growing number of refugees for resettlement from Israel. Though there was a possibility that Tigisti and her family would eventually be violently deported, NGOs should not have encouraged them to acquiesce to returning, given that there was a significant chance they would obtain protection if they stayed. Even if they ultimately would be deported, at least the deportation would be public, unlike quietly returning with money. A public deportation can serve as evidence in a court petition against the government's actions, and help contribute to greater protection for others in the future.

Some may find the implications of my last point disturbing. By denying payments to refugees, NGOs would be creating a scenario where some refugees will not agree to return and may ultimately face deportation, possibly experiencing police brutality in the process. To deny refugees payments would seem to be using them as a means, discouraging them from returning quietly for the purposes of creating a traumatic return, all to help bring about a change of policy. Encouraging refugees to repatriate, in contrast, addresses the welfare of refugees as individuals with their own needs, rather than objects for a larger scheme.

Though it is true that refusing to give money is for a larger scheme, it is not true that refusing such money is wrongly using refugees. For, we generally do not wrongly use others when denying them an option, unless we have a duty to provide the option. If I refuse to buy another person cigarettes, out of concern for others who would be harmed from second hand smoking, I am not using the person as a means, because I have no duty to buy these cigarettes. Similarly, if NGOs have no duty to pay refugees to return, then they are not using refugees when refusing to provide them money to leave.

### **6.3 Choice**

We have, at this point, reached two conclusions: Governments should avoid payments that encourage return, unless they also provide re-entrance visas; and NGOs should avoid payments to return to unsafe countries if these payments contribute to government coercion. These two conclusions imply that, though payments are often wrong, governments are permitted to allow refugees to repatriate on their own, even if this means they will be unable to reach safety. Similarly, though NGOs should often avoid payments, they should not actively stop refugees from repatriating on their own.

If this is true, some may raise the following reason to provide payments: If some refugees will return regardless, perhaps it is best to provide money, as money can expand post-return choices, serving as investments for businesses, education, and onward transport. Even if refugees would not really have returned on their own, and are indeed motivated to return because of money, choices may be enhanced from the money itself, and there is value in such choice, especially if it also increases post-return welfare compared

to returning with no money at all.

Consider the case of Bessie. In 2009 she fled an East African country, went to Egypt, and paid smugglers who promised to take her to Israel. As she began her journey across the Sinai, she was kidnapped and tortured, but managed to flee to Israel, where she was given a year of residency, and a room at a centre for victims of human trafficking. She wished to return to her country of origin with some investment money, a choice that was made possible when she was offered €800, enough money to help her survive during the first year after repatriation in her home village. She used the money for rent, school for her children, and to start a chicken farm. Within several months the chickens she bought died, she lost her life savings, and now works in a small eatery, with just enough to live on. She faces regular food insecurity, and regrets she returned. Nonetheless, she is happy she had the opportunity to leave Israel with money. Though the money ultimately did not help her reintegrate and access sufficient welfare, she feels it increased the chances she would, giving her one choice she otherwise would not have.<sup>42</sup>

The idea that money enhances choices is widely accepted by a number of repatriation programs, such as the former UK program, called “Choices,”<sup>43</sup> which emphasizes that funds assist refugees to start businesses or receive job training after return, an option they otherwise would not have. In Pakistan, the UN similarly emphasized that refugees should have the choice of returning to Afghanistan with funds, rather than no assistance at all, even if they faced insecurity after returning.<sup>44</sup> The UN made similar claims

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<sup>42</sup>Interview with Bessie, Dessie, 9 June 2014.

<sup>43</sup><http://www.choices-avr.org.uk>.

<sup>44</sup>E. Davin, V. Gonzalez, and N. Majidi, “UNHCR’s Voluntary Repatriation Program: Evaluation of the Impact of the Cash Grant,” Altai Consult-

when helping Burundian refugees returning from Tanzania.<sup>45</sup>

Though money may provide an extra choice, it can also diminish choices in the long run. If a refugee is unlikely to access sufficient welfare after returning, they will lack various choices associated with welfare, including the choice to leave a given village, send one's children to school, and access sufficient nutrition. A year after Bessie returned, she lacked the full range of employment choices open to her in Israel, and the resources to leave her home village. As a result, she also lacked the resources to ensure she could access an adequate range of food, shelter, and education for her children. Similarly, two years after South Sudanese refugees repatriated, most of my respondents were confined to IDP camps, without the resources to leave. Their choices were severely constrained compared to their co-nationals in Israel. If NGOs and governments will be unable or unwilling to send money to those who have already returned, and those who return will later need money to access mobility and basic necessities, then funds may encourage a choice that causally contributes to a state of affairs with fewer choices.

Some may feel that, even if money does encourage a return that diminishes choices, there is still value in providing return assistance. The value of choices is that it provides individuals the opportunity to control their lives, and controlling one's life often means taking risks that may diminish one's long-term choices. But while it is true that there is value in allowing a person to control their life, it is not clear that enhancing such control now, by offering money, is better than enhancing control in the long-run,

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ing and the United Nations High Commissioner for Refugees 2009, available at <http://www.unhcr.org/4fcf23349.html>.

<sup>45</sup>Katherine Haver, Felicien Hatungimana, and Vicky Tennant, "Money matters: An evaluation of the use of cash grants in UNHCR's voluntary repatriation and reintegration programme in Burundi," Policy Development and Evaluation Service 2009.



by offering no money and encouraging refugees to stay.

This suggests that providing the money may be ethical if it does not substantially diminish security and welfare and the choices associated with security and welfare. We might imagine a refugee returning with her husband and four children, and each family member receiving \$78,000 each, as promised by the BNP. Perhaps such funds, totalling almost half a million dollars, could provide refugees various choices relating to where they live, what they eat, and where they move. It is nonetheless not enough to claim any amount of money increases choices. Money can enhance choices at one point in time, but constrain them at another.

## 6.4 Conclusion

Immigration control involves not just force, but incentives. One major incentive for refugees is the money they receive when agreeing to return home. If it is wrong for governments to endorse physically unsafe contracts, it is wrong for governments to provide payments to encourage unsafe repatriation. In cases where the government is detaining refugees or threatening them with deportation, NGOs should avoid providing payments that contribute to these policies. NGOs should limit their activities to helping those who will unlikely ever gain asylum, or whose lives will not be at risk if they return, and whose return does not causally contribute to the detention of more refugees. While it is true that some payments may enhance choices, repatriation itself can undermine choices when a country of origin lacks sufficient resources and infrastructure.

Given these conclusions, governments and NGOs should consider changing their current practices, adopting three major policies.

First, in cases where return entails significant risks, states should only provide funds to repatriate if they also provide refugees the option of again living in the host country. This may be instituted by providing refugees residency visas prior to return, or by providing them with special re-admission agreements, where refugees can return to the host country with the same legal status they had prior to repatriating. Such a policy was implemented in France, Germany, and the UK in the 1990s and 2000s, when they provided funds to Bosnian refugees repatriating, allowing them to re-enter these countries if they felt their return was unsafe.<sup>46</sup> An even stronger policy would also include evacuation services for refugees who find themselves again displaced after returning, and unable to reach safety. Were refugees denied such re-admission visas and evacuation services, they may fail to gain a visa to board a flight to safety, forcing them to pay smugglers, endangering their lives again. Such was the case when South Sudanese refugees returned from Israel, again faced persecution, and were forced to pay smugglers to try reaching Egypt, Sudan, and Israel. Such fleeing itself entails significant risks. In contrast, promising re-admission and evacuation services would ensure that refugees could access protection, even if paid to return.

To ensure that repatriation does not lead to long-term destitution and persecution, states should also conduct post-return research. After a significant number of refugees and asylum seekers have returned, states should interview a random sample of such returnees, and conduct an in-depth study on the mortality rate, rate of displacement, and other risk factors related to their return. If the vast majority of returnees are living in safety

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<sup>46</sup>Richard Black, "Return and Reconstruction in Bosnia-Herzegovina: Missing link or mistaken priority?" SAIS Review, 21(2): 177-199.

and security, it may be justified to provide funds to encourage return without the corresponding promise of allowing later re-entrance. Repatriation would be far more permanent, but at least safe. However, this policy must ensure absolute safety for returnees, including access to food security, healthcare, and reliable protection from the police and military.

In cases where refugees are in detention, and their return is coerced, NGOs should avoid immediately providing payments for return. They should first do everything possible to try and secure a fair Refugee Status Determination process for those in detention, and help them obtain access to freedom, work visas, and social services. NGOs should only provide repatriation funds to those whose lives will certainly not be at risk, or for those likely to face deportation if they stay, and only if this does not contribute to further deportation, detention or destitution. They should not provide payments to populations likely to later gain refugee status if they refuse to repatriate, as was arguably the case with Tigisti, or for those whose departure will contribute to detaining new refugees, as was arguably the case with Daniel.

Though NGOs should not provide money for return in these cases, they may still provide money to those who have already returned. So long as NGOs do not widely publicize that they are helping refugees and asylum seekers after return, such assistance needn't encourage repatriation, while still helping protect returnees in their countries of origin. For example, a small NGO in Israel, who opposed any repatriation assistance, began paying for the school fees of children whose families had returned to South Sudan on their own. Such assistance, because it was relatively limited, and only provided to those most in need after return, did not have a major impact on encouraging future repatriation. Indeed, the NGO actively dis-

couraged South Sudanese from returning, even while assisting those who insisted on returning on their own. Policies should be focused on post-return aid as the need arises, rather than pre-return funds to encourage return.

Though I believe the above would make payments morally permissible, there remain serious ethical dilemmas. It is not clear if payments are always morally permissible when provided to migrants returning to safe countries. At first glance, we might suppose they are; even a proponent of open borders might support such payments, and a proponent of closed borders may believe them preferable. But such payments still raise questions. If only some ethnic groups are offered money to leave, such offers may be wrongfully discriminatory, as I will argue in Chapter 8. We may also feel uncomfortable with officials approaching our friends, classmates, and colleagues, telling them they can have cash if they leave, after having established themselves in our neighbourhoods, schools, and businesses. Payments do not become ethically unproblematic simply because return is safe. It is just that they are especially problematic when return is unsafe. NGOs and governments should both avoid encouraging such unsafe returns, and reconsider their current payment practices.

# Chapter 7

## Children

A child is very sick, and her parent refuses to bring her to a hospital. The child dies. We may blame the parent for being reckless if he placed the child at greater risk than we deem acceptable. This is not because we believe the parent has neglected some duty to save the child's life by acquiring the medical skills and equipment to do so. Rather, the parent has a duty to be in a particular place, at a particular time, so others can save the child's life.

A hospital is a very narrow space. We might imagine a broader geographical location where children have a higher likelihood of being saved if they are in danger. It may be reckless for a parent to be in a particular neighbourhood, region, or country, if they are exposing their children to greater risks than parents are permitted to take. Should parents be able to live wherever they please? More specifically, should parents be able to migrate to any country they wish to?

There are many reasons that parents may choose to live in an unsafe country, but perhaps the most common is that they are refugees wishing

to return to the countries they fled from. In some such cases, refugees are repatriating to countries unsafe for children due to ongoing violence, insufficient food security, and a lack of public services. Such unsafe repatriation was common when parents returned from Australia to Afghanistan in 2002,<sup>1</sup> from Norway to Iraq in 2008,<sup>2</sup> from Sweden to Afghanistan in 2007,<sup>3</sup> and from Denmark to Iraq in 2010.<sup>4</sup> In all of these cases, parents left countries with security, free education, and reliable healthcare, traveling to countries without these basic necessities. Though some parents had savings, many did not. And of those who did, it was not clear how long their money lasted, nor if it helped.

As noted in previous chapters, when South Sudanese repatriated from Israel, the country lacked basic food security,<sup>5</sup> safety, and healthcare.<sup>6</sup> De-

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<sup>1</sup>Fethi Mansouri and Sally Percival Wood, "Exploring the Australia-Middle East Connection," in (ed.) Fethi Mansouri, *Australia and the Middle East: A Front-Line Relationship*, London: Tauris Academic Studies 2011: 9.

<sup>2</sup>Arne Strand, "Review of Two Societies: Review of the Information, Return and Reintegration of Iraqi Nationals to Iraq," (IRRINI) Program. Chr. Michelson Institute. <http://www.cmi.no/publications/publication/?4155=between-two-societies-review-of-the-information>.

<sup>3</sup>UNHCR, "Sweden, Afghanistan, UNHCR sign deal on voluntary return to Afghanistan," 23/6/07.

<sup>4</sup>Helen Carr, "Returning 'Home': Experiences of Reintegration for Asylum Seekers and Refugees," *British Journal of Social Work* (2014): 1-17.

<sup>5</sup>UNICEF in South Sudan, "Summary finding of Sudan Health Household Survey (SHHS) 2010 and Multiple Indicator Cluster Survey," 2010, available at <http://www.southsudanembassydc.org/PDFs/others/SHHS%20II%20Report%20Final.pdf>; D. Maxwell, K. Gelsdorf and M. Santschi, "Livelihoods, Basic Services, and Social Protection in South Sudan," Working Paper 1, Secure Livelihoods Research Consortium, Feinstein International Centre, 2012; R. K. Rai, A. A. Ramadhan, and T. H. Tulchinsky, "Prioritizing Maternal and Child Health in Independent South Sudan," *Maternal and Child Health Journal* 16(6)(2012): 1139-1142.

<sup>6</sup>Jared Ferrie, "More Than 200 Die in South Sudan Tribal Feud, Official Says," CNN, 12/3/12, available at <http://edition.cnn.com/2012/03/12/world/africa/south-sudan-violence/>; Al Jazeera "'Hundreds dead' in South Sudan cattle raids," 22/8/11, available at <http://www.aljazeera.com/news/africa/2011/08/201182220946583842.html>; MSF, "South Sudan: Violence against healthcare," 1 July 2014. <http://www.msf.fr/actualite/publications/south-sudan-conflict-violence-against-healthcare>; Small Arms Survey, "Fighting for Spoils:

spite the risks, parents returned with their children, wishing to raise them on their ancestral land, or feeling there were more opportunities in South Sudan compared to staying in Israel.

One returning family was Mary, Dak, and their two newborn twins and six year old son. They landed in Juba in the summer of 2012 and took a taxi to the neighbourhood of Tong Peng, just south-west of the airport, where friends awaited to host them until they found work. As weeks passed, Mary and Dak both failed to find employment, and were unable to pay for their children's schooling. In November, when their youngest son contracted malaria, they sent him to a hospital, using most of their \$3,000 in emergency savings. As the treatment continued, their money ran out, and their son steadily lost the ability to walk or speak, dying two months later in February 2013. He was one of twenty-two children known to have died within the first year of return, representing at least 4.4% of the 500 children who returned by 2012.<sup>7</sup> At least two more were killed when civil war broke out in December 2013.<sup>8</sup> Of the forty-eight children whose conditions I could confirm as of July 2014, five had died of malaria or were killed, representing over 10% of my sample. I learned of these five children from their parents or guardians. If we were to look at all of the children who returned, including those in especially unsafe areas, and whose parents and guardians had also died, the percentage would likely be higher than

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Armed Insurgencies in Greater Upper Nile," November 2011. <http://www.smallarmssurveysudan.org/fileadmin/docs/issue-briefs/HSBA-IB-18-Armed-insurgencies-Greater-Upper-Nile.pdf>; "Patients and Families Killed Outside of MSF Compound," 29 November 2007, available at <http://www.msf.org/article/patients-and-family-members-killed-inside-msf-compound>; Una McCauley, "Separated Children in South Sudan," *Forced Migration Review* 24 (2005).

<sup>7</sup>Yuval Goren, (Hebrew) "Aid organizations: More than 22 refugees expelled to South Sudan killed this year," *Maariv* 5/6/13.

<sup>8</sup>Personal Interview with Matthew, Juba IDP Camp, 4 January 2014.

10%.

It was not clear if these parents had a right to repatriate to South Sudan, or whether NGOs should have assisted in their endeavour. For, more generally, it is not clear if parents have a right to live in any country they wish to.

The question of parental rights to migrate – including to repatriate – has been largely overlooked in today’s debates on immigration and children’s rights. Many political theorists focus on whom states should not deport,<sup>9</sup> not whom states should allow to leave. The few discussions on the right to emigrate largely focus on adults, with most arguing that adults always have a right to leave a state.<sup>10</sup> Even if they do, it remains unclear if they have a right to bring their children with them.

To consider the extent of parents’ migration rights, I first present a very general theory of parental rights, which I outline in the next section. Parents, I argue, must protect their children’s welfare above a given threshold. When parents fail to protect their children’s welfare, states have a right to intervene. In Section 2 I will then consider what I call a “Migration Question.” If parents migrate to a country where they will not have access to welfare services, such as education and hospitals, it is not clear if states are permitted to intervene and forcibly stop such migration. Though the migration will harm children, the harms will take place in another jurisdiction. I argue that states do have a right to stop such migration or, at

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<sup>9</sup>Matthew Lister, “Who Are Refugees?” *Law and Philosophy* 32(5)(2013): 645-671; Matthew Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, Cambridge: University Press, Cambridge 2004; David Miller, “Immigration: The Case for Its Limits” in (eds.) A. Cohen and C. Wellman. *Contemporary Debates in Applied Ethics*, Malden, MA: Blackwell Publishing 2005: 193-206.

<sup>10</sup>Anna Stilz, “Is There an Unqualified Right to Leave?” in Sarah Fine and Lea Ypi (eds.) *Migration in Political Theory: The Ethics of Movement and Membership*, Oxford: Oxford University Press 2016.



the very least, ought to discourage such migration. In Section 3 I address the “Coercion Question.” When parents and their children are detained because they lack the legal right to stay, they may turn to NGOs and UN agencies for help repatriating or migrating to an unsafe country. It is not clear if NGOs or the UN should help with such choices. I argue that they should only help if detention is more dangerous for children compared to leaving the country.

Before addressing the above arguments, a brief note on my focus and assumptions.

Throughout this chapter, I will focus on both general migration, where a parent is moving to a new country where she does not have citizenship, and repatriation, where a parent is moving back to their country of citizenship. I do not differentiate between these two parental choices, as the general questions I raise cut across both types of cases. As such, I shall primarily use the term “migration” to refer to both.

I shall largely focus on migration that is irreversible, describing families who leave a safe country and cannot easily return to the safe country. This may be the case when families are banned from re-entering a safe country after leaving, or when refugees repatriate and are again displaced or impoverished, unable to find the means to re-enter a safe country.

Though I focus primarily on parents leaving a safe country with their children, my conclusions may have implications beyond families exiting a state. If children should never be forced to migrate unsafely, a state could justifiably deny entrance on the grounds that it is too dangerous for children within its territory. We might imagine, for example, that a state suffering from internal strife, poverty, or a natural disaster could refuse to grant visas to minors. Though I do not address these cases, it is possible

that states ought to take such measures, based on the arguments I put forth.

I also do not address whether parents have a duty to flee dangerous countries for the sake of their children. Perhaps parents who can flee at absolutely no cost or risk have a duty to do so. A state could also require that parents evacuate their children from the state's territory, and find protection abroad. However, fleeing will almost never be costless in the real world, and there will rarely be a scenario where a safe State A agrees to accept the parents and children of another dangerous State B, with permission from State B. There have, historically, been mass population transfers, but these have caused extreme suffering to those being transferred, and include many considerations that are beyond the scope of my discussion.<sup>11</sup> As such, I limit my analysis to cases where a parent wishes to leave a safe state with their child, and consider whether preventing their migration is just.

## 7.1 Parental Rights

To establish a general theory of parental rights, let us start with a consensus: Across the literature and across cultures, most hold that parents have some rights to decide where their children live, what they eat, where they go to school, and what languages they speak. This is partly because, if parents have such authority, they can more easily care for their children, ensuring they have basic food and shelter, and various moral and inferential reasoning skills. This is also because parents' rights matter, and parental

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<sup>11</sup>For an empirical overview of such population transfers, see Chaim D. Kaufmann, "When All Else Fails: Ethnic Population Transfers and Partitions in the Twentieth Century," *International Security* 23(2): 120-156.

rights to share their culture and way of life ought to be respected.<sup>12</sup>

There is also a general consensus that parents have a right to raise their own biological children.<sup>13</sup> Were the state to pry away children from competent parents, or ban them from having any relationship with their children, the psychological distress a parent felt would be significant, and so such state interference should be avoided, unless a parent's care falls below a minimal acceptable threshold.<sup>14</sup>

A minimal threshold of care, I assume, ensures children lead healthy lives and gain the skills to reason, form reciprocal relationships,<sup>15</sup> and function in the society they are residing in. While there are debates as to why children should gain these capacities – some claim these capacities protect welfare, others claim they protect children's ability to make autonomous decisions<sup>16</sup> – there is a consensus that children have a right to

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<sup>12</sup>David Archard, *Children: Rights and Childhood*, 2nd ed., London and New York: Routledge 2004; Ferdinand Schoeman, "Rights of Children, Rights of Parents, and the Moral Basis of the Family," *Ethics* 91(1980): 6-19, 14.

<sup>13</sup>Such a principle may also better protect children. Historically, when states have denied parents authority over their children, prying them from their arms and giving them to supposedly better parents, the results have at times been detrimental, with children experiencing greater incarceration, drug addiction, and anti-social behaviour. See Australian Human Rights Commission, "Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families," Human Rights and Equal Opportunity Commission Report, April 1997.

<sup>14</sup>Joseph Millum, "How Do We Acquire Parental Rights?" *Social Theory and Practice* 36(1) (2010): 112-132, Norvin Richards, *The Ethics of Parenthood*, Oxford: Oxford University Press 2010; Edgar Page, "Parental Rights," *Journal of Applied Philosophy* 1(2)1984: 187-203; Matthew Clayton, *Justice and Legitimacy in Upbringing*, Oxford University Press 2006.

<sup>15</sup>Martha Nussbaum, *Liberty and Conscience: In Defence of America's Tradition of Religious Equality*, New York, New York: Basic Books 2008; Amy Guttmann, *Democratic Education*, Princeton: Princeton University Press.

<sup>16</sup>Samantha Brennan, "Children's Choices or Children's Interests: Which do their Rights Protect?" in (eds.) David Archard and Colin M. MacLeod, *The Moral and Political Status of Children*, Oxford: Oxford University Press 2002; Eamonn Callan, "Autonomy, Child Rearing, and Good Lives" in *ibid*: 118-140; Shelley Burt, "What Children Really Need: Toward a Critical Theory of Family Structure," in *ibid*: 231-252; Matthew Clayton, "Anti-Perfectionist Childrearing," in (ed) Alexander Begattini and

obtain these capacities and that parents should avoid preventing children from obtaining them.

Perhaps one of the most central of these capacities is the skill to function within an economy, allowing children to later access resources to survive, and the self-respect that comes with employment. However, it is not clear whether children must merely have the capacities to function within the economy which they will live, or to function within any economy anywhere. Swift and Brighouse seem to suggest the former, raising the example of nomadic tribespeople in sub-Saharan Africa, who can function within their economy without a high level of literacy,<sup>17</sup> and so can respect children's rights even if the children never learn to read. Others have argued, similarly, that parents have the right to raise their children to function within their own culture's economy, on the grounds that a liberal state ought to tolerate the practices of minorities who value traditional ways of life.<sup>18</sup> On this conception of children's rights, parents must merely raise their children to function within their own economy.

However, children may be forced to live within a particular economy precisely because they only gained skills to function within this economy. If a young girl does not gain a high level of literacy because she is living in a rural nomadic tribe, then the reason she lives in her economy may be because she has not gained a level of literacy to function elsewhere. Indeed, if all children everywhere were denied literacy and numeracy, and grew up into adults who formed verbal-based economies, then they too may be able

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Colin Macleod, *The Nature of Children's Wellbeing*, Netherlands: Springer 2015.

<sup>17</sup>Harry Brighouse and Adam Swift, *Family Values: The Ethics of Parent-Child Relationships*, Princeton: Princeton University Press 2014: 60.

<sup>18</sup>Chandran Kukathas, "Are There Any Cultural Rights?" *Political Theory* 20(1992): 117; William A. Galston, "Two Concepts of Liberalism," *Ethics* 105(3)(1995): 529.

to function in their own economy without having gained a high level of literacy. This tells us nothing about what sort of economy children ought to be able to function in as adults.

It seems that children ought to be able to function in an economy that can, at the very least, provide them a safe life, likely to live until the average global life expectancy of seventy years, and likely to have a life they feel is worth living. I take this as the minimal threshold not because this is sufficient, but because there is a universal acceptance that this is necessary. Education can often help children obtain these goals. It provides fluency in reading and writing that is often essential for communicating with colleagues and customers across distances, and it provides numeracy that is often essential for keeping track of transactions, revenue, and profits. While none of this ensures employment or a pleasant life, it increases the chances of both compared to no education at all. This reasoning is accepted by nearly all states today, which aim to ensure that all children attend school. Even children who live a nomadic or subsistence lifestyle are normally required to gain a sufficient level of literacy so that, once they become adults, they can access other job markets in the event that their traditional economies fail.<sup>19</sup>

## 7.2 The Migration Question

Though all states strive to provide education, healthcare, and security, many states fail. When parents wish to migrate to such states with their

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<sup>19</sup>John Aluko Orodho, Peter Ndirangu Waweru, Kennedy Nyambeche Getange, and Justus Mbae Miriti, “Progress towards attainment of Education for All (EFA) among Nomadic Pastoralist: Do Home-based Variables make a Difference in Kenya?” *Research on Humanities and Social Sciences* 5(18)(2013): 54-68.

children, there is a Migration Question. We might at first suppose that parents have no right to migrate if this entails harms we do not allow parents to inflict on their children domestically. If failing to bring a child to school or a hospital would deem a parent reckless, then moving to a country without reliable schools or hospitals would deem a parent reckless. But we might also suppose that, if a parent is leaving the state with their children, they are not harming their children within the state. Just as states do not send policemen to foreign countries to force parents to act a certain ways towards their children, states should not prevent parents from emigrating to countries where children will lack certain necessities. To prevent a parent from emigrating, especially a parent who has citizenship in a foreign country, would interfere in the jurisdiction of another state.

I shall accept the premise that states should not interfere in the safety and welfare concerns of a foreign country, except in extreme cases. If a country has poor hospitals and education, that is not sufficient grounds for foreign interventions and so, we might suppose, is not sufficient grounds for preventing a parent from moving to this country. But there are a number of reasons that preventing emigration would not involve such foreign interference. Emigration is, in many ways, a domestic act. The act of planning to emigrate includes paying for flights and arranging travel documentation, all of which take place locally. Just as parents have no right to plan an act that will place their children at risk, such as planning to marry off their child before she is sixteen, and planning to abuse her, parents have no right to plan to move to a country where their children will likely be harmed.

We might claim that planning an act is not as wrong as the actual act, and the actual act of migration takes place outside of the state's jurisdiction. But in many ways the act of migration does takes place domestically.

Migrating involves not just arriving in a foreign country, but boarding a bus, or arriving at the airport, sitting down in the departure lounge, boarding the flight, and sitting down in a seat, all of which take place without leaving the state. Just as the act of theft involves not just placing money in a bag, but breaking, entering, and picking up the money, the act of migrating involves not just arriving in a foreign country, but everything prior that is necessary to arrive in the foreign country. Even the moment an individual's body passes over a border may be considered within the jurisdiction of the state, in the sense that borders are shared by states, and so within their jurisdiction. If parents have no right to act recklessly within the state, and migration takes place within a state, then parents have no right to recklessly migrate.

Some may argue that geography is not as relevant as the legal status of a parent. If she is a foreign national, then her own country of origin ought to have jurisdiction over her, and not the country she wishes to leave. However, it is generally accepted that states can prevent illegal acts that take place within their own jurisdiction, regardless of the citizenship of those who commit these illegal acts. A parent who intentionally refuses to bring his child to the hospital may be tried for recklessness, regardless of his nationality. If migration really is a domestic act that places one's child at risk, and creating such risks is illegal, then the state can legitimately prevent a parent from partaking in such migration, and so prevent him from exiting the state. And just as a parent who fails to bring his child to a hospital can be prevented from leaving a state precisely because he has broken the law, a parent who places their child at risk by beginning an emigration process may be similarly prevented from leaving because he has broken the law.

Though the state is permitted to prevent parental migration, perhaps the state has no duty to, if the risks are not quite so extreme. One might hold this belief if one also holds that states are permitted to deport foreign nationals. If deportation is permissible, then so is allowing emigration. Of course, many hold that deportation is not permissible for foreign nationals whose lives would be at certain risk from extreme famine, violence, or persecution,<sup>20</sup> and so we might suppose that states should intervene to prevent children migrating to countries with these extreme and immediate risks. But if children will merely fail to receive reliable healthcare or education, then states have no duty to protect them from deportation, and so no duty to prevent their parents from migrating.

I believe, however, that children do deserve protection from deportation to countries without reliable healthcare and education. This is because we ought to lower the threshold of risks children should be forced to face, compared to adults. Children have fewer mental capacities, and are less able to survive in an unsafe environment compared to adults. If the country a child is returning to lacks reliable healthcare, children will be more susceptible to various contagious diseases, partly because they have less immunity, but also because they may struggle to take precautions. If a child also lacks education, she may be unable to develop the capacities in the future to care for herself as much as she could with this education. Because of this, children should be protected from deportation even if the risks in their countries of origin are not substantial enough to protect adults from de-

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<sup>20</sup>David Miller, "Immigration: The Case for Its Limits" in (eds.) A. Cohen and C. Wellman. *Contemporary Debates in Applied Ethics*, Malden, MA: Blackwell Publishing 2005: 193-206; Matthew Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, Cambridge: University Press, Cambridge 2004.



portation.<sup>21</sup> If children should be protected from deportation to countries without reliable healthcare or education, then the state may similarly be required to stop parents from bringing their children to this country.

Some may argue that, though the state has a duty to avoid deporting children to countries without education or healthcare, the state has no duty to forcibly prevent such migration. Parents, we might suppose, have the right to deny their children some levels of education and general healthcare to progress their own culture and conception of the good life. Different groups, and different parents, have different conceptions of what is necessary in life, and so parents ought to have some discretion over what necessities children must be provided.<sup>22</sup> For this reason, parents are occasionally given the right, within a state, to pull their children from school at an earlier age, or refuse to vaccinate their children as infants. If such policies are morally permissible, then states have no duty to prevent migration to countries with similar risks, such as preventing migration to a country without reliable schooling or vaccinations. So long as there is no extreme

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<sup>21</sup>Indeed, this general approach is occasionally taken, in an ad-hoc bases, in some states, which will protect a family from deportation because of the harms towards children, even though adults could generally survive. A recent case in the United Kingdom involved a woman and her son, both from Nigeria. The woman struggled to care for him. When she was given a deportation notice, she fell into deep depression, further neglecting her son. Her lawyers appealed her deportation, arguing that she was “a lone woman returning to Nigeria without family or support” and this would result in destitution. Her lawyers also demonstrated that her son struggled to develop various social and cognitive skills as a result of her neglect, and that she was at risk of being trafficked in Nigeria if she returned. Eventually, after a number of appeals, she was eventually granted leave to remain. But this case is exceptional. It holds that, in every extreme cases, families should not be deported. But less extreme cases should be viewed as comparable to cases of domestic negligence and recklessness. Parents should not be forced to bring their children to any country that lacks services which parents must accept domestically. See *RA vs. The Secretary of State for the Home Department, Office of the Children’s Commissioner*, JR/2277/2015. Available at: <https://www.judiciary.gov.uk/wp-content/uploads/2015/04/ra-and-bf-v-sshd-21.pdf>.

<sup>22</sup>Chandran Kukathas, “Are There Any Cultural Rights?” *Political Theory* 20(1992): 117; William A. Galston, “Two Concepts of Liberalism,” *Ethics* 105(3)(1995): 529.

and immediate risks to migrating – such as a child with diabetes migrating to a country without insulin – then states should allow exit. There will be risks, but there are clear subjective benefits for the parents and, in these parents' minds, these benefits extend to their children.

These considerations ought to be taken seriously. But if migration is a domestic act, as I argued above, then states should still only permit the same risks through migration that are permitted for parents who stay. If parents are required to bring their children to the hospital, even if this conflicts with a parents' religious beliefs, the state should not allow parents to migrate with their children to countries without reliable emergency medical care. If the state requires that parents provide schooling for their children until age eighteen, even if the parent believes this is not necessary for their children, then the state should not allow parents to migrate with their children to a country without any secondary schooling. This also suggests that, if the state permits certain acts within the state, then states ought to allow migration to a country that would require such an act. For example, if a state allows parents to remove their children from school at age sixteen, then the state ought to allow parents to migrate to a country where, due to a lack of schools, they will be forced to remove their children from school at sixteen.

We can summarize this as a general rule of thumb:

*States should prevent parents from migrating when this entails harm or risks to harm we do not allow parents to take while remaining within the state, but allow parents to migrate if this entails harm or risks to harm we do allow parents to take within the state.*

When following this rule of thumb, we will come across difficult cases.

Parents may have strong personal reasons for migrating. They may face widespread and painful discrimination in a country, and wish to move to a country without such racism. Though parents may have legitimate reasons for migrating, we ought to still only allow risks that would be acceptable for parents who stay. Within a country, we require parents to protect their child even when this means facing racism. For example, a country may have hospital wards with widespread discrimination, where patients of African descent, though they receive adequate care, are given poorer care and looked at with distrust. Parents from African countries may be loath to seek medical attention, but they are still obligated to go to the hospital if the child's life is at risk. For, the basic welfare of the child should trump the parent's will to avoid racism. While we should certainly try and end racist practices, and sympathize with parents who migrate with their children because of racism, we should not grant them the right to do so.

We might suppose that, if the state should treat migration like other parental acts, then a state which allows extensive freedom for cultural minorities ought to allow extensive freedom to migrate. For example, in the United States Amish parents can remove their children from school at the age of fourteen and teach them a vocation instead.<sup>23</sup> Perhaps parents have a right to move to a country without schooling at fourteen if the circumstances in the country are similar to that the Amish.

Most of the time, however, circumstances will not be very similar. Migrating entails an irreversible choice. When a child leaves school at fourteen

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<sup>23</sup>Shelly Burt, "In Defense of Yoder: Parental Authority and the Public Schools" in (eds.) Ian Shapiro and Russell Hardin, *Political Order*, New York and London: New York University Press 1998: 412-437 and David Archard and Colin MacLeod, "Religious Parents, Secular Schools: A Liberal Defense of an Illiberal Education," *Review of Politics* 56(1)(1994): 51-70.

within a state, but remains in the state, she can often return to school later as an adult, and leave her community behind. In contrast, a fourteen year old migrating to a country without schooling cannot later return to school and leave her community behind. In a similar vein, because leaving a country is irreversible, the risks compound. Though a fourteen year who leaves school but stays in the country will face some risks – she will struggle to learn math and reading skills later in life and so struggle to find employment – these risks can be somewhat mitigated through adult education classes. In contrast, if a fourteen year old permanently moves to a country without free secondary schooling, then the risks of poor education will extend beyond childhood, into adulthood, where she will lack both skills and the ability to try and obtain them. Similar conclusions may be reached regarding some vaccinations and healthcare: A parent who refuses to vaccinate their children or bring them to a doctor within a state is not limiting their children’s ability to access vaccinations and doctors in the future.<sup>24</sup> In contrast, migrating to a country without such services entails preventing the child from accessing vaccinations and reliable doctors in the future. As a general rule, we must account for the irreversible nature of migration when calculating its risks; irreversible migration requires greater safety than comparable acts within a state.

In current policies around the globe, the opposite is the case. The acceptable safety required when migrating is often lower than the safety required while remaining within a state. In the UK, for example, parents are only banned from migrating with their children if they are planning on

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<sup>24</sup>For vaccinations that cannot be obtained in the future, it is at least the case that children, once adults, can access treatment for diseases that arise from their lack of vaccinations. When children will face risks that cannot easily be treated, we might argue states really do have a duty to require vaccination.

marrying their child off or travelling to Islamic State-controlled territory.<sup>25</sup> In contrast, a family is permitted to travel to Central African Republic or South Sudan, both of which lack universal schooling and reliable health-care.<sup>26</sup> In other words, while parents do not have authority to remove children from school or a hospital domestically, they do have authority to permanently move to a country without schools and hospitals. But it is precisely leaving a state that may be irreversible, and the consequences far more permanent, requiring greater vigilance, rather than less.

Now that I have established that parents have no right to migrate when risking their children's safety and capacities, and states have a duty to prevent such migration, let us consider how, exactly, the state should intervene. The state could consider the particular risks a child will face, because of the parents' personal characteristics or motives. For example, the UK has a policy of preventing a parent from travelling to Pakistan with their child if there is evidence that the parent intends to marry their child off upon reaching Pakistan.<sup>27</sup> Such a policy, however, may fail to protect most chil-

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<sup>25</sup>2015 EWHC 869 (Fam) Case No: FD15P00125, FD15P00126, FD15P00127, FD15P00128, FD15P00129; Court 46, The Royal Courts of Justice, Strand, London, WC2A 2LL, 27 March 2015. Before: Mr. Justice Hayden, Between The London Borough of Tower Hamlets, Claimant, and M and Ors, Defendants.

<sup>26</sup>John P. Renschler, Kelsey Walters, Paul N. Newton and Ramanan Laxminarayan, "Estimated Under-Five Deaths Associated with Poor-Quality Antimalarials in Sub-Saharan Africa," *The American Journal of Tropical Medicine and Hygiene* 2015; UNICEF in South Sudan, "Summary finding of Sudan Health Household Survey (SHHS) 2010 and Multiple Indicator Cluster Survey," 2010; D. Maxwell, K. Gelsdorf and M. Santschi, "Livelihoods, Basic Services, and Social Protection in South Sudan," Working Paper 1, Secure Livelihoods Research Consortium, Feinstein International Centre 2012; R. K. Rai, A. A. Ramadhan, and T. H. Tulchinsky, "Prioritizing Maternal and Child Health in Independent South Sudan," *Maternal and Child Health Journal* 16(6)(2012): 1139-1142; MSF, "Patients and Families Killed Outside of MSF Compound," 29/11/07, available at <http://www.msf.org/article/patients-and-family-members-killed-inside-msf-compound>; Una McCauley, "Separated Children in South Sudan," *Forced Migration Review* 24(2005).

<sup>27</sup>Forced Marriage, (Civil Protection) Act 2007, <http://www.legislation.gov.uk/ukpga/2007/20/contents>.

dren, as the risks often arise from the country the child is moving to, rather than the intentions or actions of the parents. The state could instead ban parents from travelling to certain countries that are especially unsafe, to prevent permanent migration to such countries. This might involve, for example, banning travel to South Sudan, which has an 18% school enrolment rate, an illiteracy rate above 50%, and a child mortality rate of 74 deaths per 1,000 live births.<sup>28</sup> Under such a policy, the state would use physical force if a parent attempted to travel to South Sudan, either revoking their passports or imprisoning them as a last resort. Migration would only be permitted if a parent proved that, due to their exceptional circumstances, they were able to provide security and education for their children. The burden of proof would be on parents to demonstrate that their predictions on risks were accurate.

Some may feel that this policy would be overly harsh. It would prevent even short trips to unsafe countries, as the state would be unable to differentiate between parents permanently migrating and those merely visiting. This would also conflict with the liberal assumption that individuals have the right to leave the country they are residing in. Travel bans prevent merely possible risks to children, while certainly undermining freedom of movement for parents.

A less controversial policy would entail discouraging parents from travelling to certain countries with their children, without physically preventing them from doing so. Such a policy could have significant impacts on the choices parents make, as many parents move to countries that are not safe for children because they are unaware of the risks that such migration en-

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<sup>28</sup>World Health Organization, South Sudan, Global Health Observatory 2014, available at <http://apps.who.int/gho/data/node.cco>.

tails. Such was the case when many repatriated from Israel to South Sudan. After having lived their whole lives outside of South Sudan, the majority did not know about malaria rates, ethnic-based violence, and the lack of universal healthcare and education. A significant percentage struggled to find this information because they lacked literacy, and most had no relatives to call in South Sudan, and so simply assumed conditions would be similar to those in Khartoum, Cairo, Tel Aviv, or other cities they had lived in. In such cases, governments should disseminate information about risks via public or private forums.

Importantly, the goal of this information should be to persuade parents to stay, rather than to simply inform parents of the various risks.<sup>29</sup> And for parents who are already aware of the risks, the goals of the campaigns should be to constantly remind them that migrating is illegal and unsafe, and that staying is preferable to protect the security and welfare of their children.

### 7.3 Coercion

The policy recommendations above are highly unlikely to be supported in countries where governments actively encourage migrants to repatriate, threatening to detain them or denying them work visas. In some such cases, parents lack the funds to repatriate, and the government refuses to provide such funds. NGOs and the UN step in, providing free flights to parents and their children, raising a Coercion Question. It is not clear if NGOs

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<sup>29</sup>The UK does provide limited information to refugees considering return, but the goal is always to ensure choices are informed. It is not to persuade parents to avoid repatriating. See the website of Refugee Action, the NGO which facilitated the UK's Assisted Voluntary Return and Reintegration program until 2014: [http://www.choices-avr.org.uk/countries\\_of\\_return](http://www.choices-avr.org.uk/countries_of_return).

and the UN should help with such repatriation. While the assistance may help parents be free from detention, it also places their children at risk.

In earlier chapters, I argued that NGOs should help with return if there is little else they can do to help, if the return does not encourage further coercion, and if parents are informed and unlikely to regret their choice. But even if these conditions are met, it may be morally impermissible to help parents return with children, given the risks children will face.

The question of whether to help families return became increasingly relevant in the summer of 2012, when two immigration officials in Israel sat in their offices and printed out white excel sheets, listing the names and addresses of several hundred South Sudanese children and their parents, and then hiring dozens of policemen to travel throughout the country, visiting the homes of each family, and using metal batons to bang on their doors. One door belonged to the family of Nyandeng, the fifteen year old girl described in the introduction, who had arrived in Israel six years earlier with her mother, eventually settling in the northern town of Naharia. As police arrived at their home, Nyandeng and her younger brother were both wearing their backpacks, about to walk to school:

My little brother left the house and saw big men come and enter. They said to us, “Sit. You are not going to school.” They were very scary looking and huge. My mother wanted to call friends for help, and the three men said, “No you cannot call anyone.” The immigration police told my mother to just sign some papers and that’s all. She signed that paper that says she wants to go back. Everyone signs it. She needed to sign, otherwise we would go to prison.<sup>30</sup>

Though Nyandeng’s mother agreed to return, they lacked the means

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<sup>30</sup>Interview with Nyandeng, Entebbe, 9 May 2013.



to do so, and received a free flight from OBI and \$1,500 to each family member. Nyandeng's mother describes how she felt before boarding the flight:

I was crying and crying. I did not want to go to prison, but I have nothing to do in South Sudan. I was not born in South Sudan and I have nothing here. Even my mother and father had spent most of their lives outside of South Sudan, and died in Port Sudan.<sup>31</sup>

We might suppose there were good reasons for the NGO to help Nyandeng, her mother, and her younger brother return. Children have a right to freedom, which they cannot obtain in detention. Returning helps them obtain this freedom, even if this means risking their health and safety. This reason, I believe, is relatively weak. While it is true that basic freedom, such as the freedom to leave a home, may be as important as health and safety for children, it does not seem that more general freedom, such as the freedom to leave a detention center, is more important than health and safety for children. If children can still run, play, and attend school in detention, then their freedom is not so overwhelmingly undermined as to justify helping them repatriate to a country without education and medical care, where violence is widespread. Of course, if there were serious human rights abuses in detention then NGOs would be justified in helping with return, but such justifications only arise if detention places a child at greater risk than repatriating.

There is another reason we might believe NGOs should pay for repatriation.

Some parental burdens are so great that no parents should be forced to

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<sup>31</sup>Interview with Nicole, Entebbe, 9 May 2013.

accept them, even when doing so is necessary for their children. No parent, for example, should be forced to work in a dangerous and demeaning job to feed their children, such as forcing a mother to work in prostitution to support her child. Similarly, parents should not be forced to stay in detention to protect their children. Parents have certain rights as distinct from those of their children, and the right to be free from detention is one such right. If so, perhaps NGOs should help parents repatriate to avoid detention, even if this places their children at risk.

Though there is a limit to the burdens parents should be expected to accept for their children's welfare, there is also a limit to the burdens children should be forced to accept for their parents' freedom. If so, then it is not clear that helping with return is the preferable option. Nor is it the case that NGOs are themselves forcing parents to sacrifice freedom for their children. Rather, NGOs are simply responding to the government's detention policy, which they have no control over. In responding to this policy, NGOs have two choices: either help secure parents' freedom at the expense of children, or protect children's welfare at the expense of their parents' freedom. The child's welfare should take priority, given that children are generally more vulnerable than adults, and so deserving of special protection.

There are, however, cases where an NGO is not the only agent helping with return. As noted in Chapter 3, there are often multiple ways of migrating or repatriating, such as the government paying for their flights, or parents paying for their own flights. When families are likely to leave the country regardless, and move to an unsafe country regardless, should an NGO help them? I believe they should not, for similar reasons raised in Chapter 3. A given NGO can never be certain that a given parent will

leave if the NGO refuses to help, because it is never certain the parent will have the means to leave on their own, nor certain the government will ultimately pay for their flight if the NGO does not. An NGO should avoid helping with unsafe migration, to avoid possibly being necessary for reckless migration. An exception should only be made when NGOs can ensure a much safer return than would otherwise likely take place. This might be the case if a parent will almost certainly return regardless and, if she does not receive help to return, will use clandestine means to migrate, placing herself and her child at risk. If an NGO can provide a very safe passage over borders, then helping with such returns may be legitimate.

The above cases focus on parents who return to avoid detention. In reality, many refugees return because they are misinformed about what to expect, as noted in Chapter 4. Of the 126 individuals I interviewed after return, fourteen falsely believed that, had they stayed in Israel, their children would have remained on the streets without food, shelter, care, or education. These parents told me that, in South Sudan, they could at least ask relatives and friends for help. Importantly, of the fourteen who believed their children would have no food in Israel, four left only for this reason; when I coded the interviews, I saw that these four individuals had no other information, from any source, that provided them additional reasons to return.

Had parents stayed, their children would unlikely have been homeless in Israel, and instead placed either in foster care, or detained with their parents, still able to access food, shelter, healthcare and education. In such cases, NGOs should tell parents that their children will access such necessities, and that such necessities will be unavailable after returning. Informing parents of this can help them make better decisions, even in

the midst of coercive conditions. Such information will also be helpful for explaining to refugees why return assistance is denied, and will help persuade parents to not pay for their own repatriation.

## 7.4 Conclusion

Children often lack capacity and, as such, lack the right to decide where to live. Adults decide on their behalf, considering what might be in their interests. To protect these interests, parents have no right to migrate to a country that fails to provide sufficient security or welfare for children. States should discourage parents from engaging in such migration if, in migrating, this entails a reduction in security and welfare that would be unacceptable for children staying within the state. This policy should be applied for both parents migrating to a new country they have never lived in, and repatriating to their country of origin. When states insist on encouraging such repatriation, and detaining migrants and refugees who stay, NGOs should refuse to assist, unless returning is safer for children than staying in detention, or much safer than returning via other means.

The analysis I raise may have implications beyond emigration and repatriation. As noted in the introduction to this chapter, countries suffering from internal strife should possibly deny visas to minors attempting to enter their territory. Similarly, perhaps some states have a duty to help evacuate children from their territories, or from especially unsafe regions within their territories. We might imagine the US government, or private NGOs, helping relocate families in a high-crime area of Detroit, or the Thai government helping families relocate from unsafe areas of southern Thailand to the north of the country. While these are not the only policy

solutions – it may be better to invest resources in making areas safe – such policies may be the best option when children’s lives and education are at immediate risk, and change will not come in the near future.

The policies I have proposed are more limited, touching upon migration and repatriation alone. However, they still have broad implications for parental rights, some slightly disturbing, such as states denouncing the choices of refugees returning to their countries of origin, and NGOs refusing to help with return, even as minors and their parents are forced to live inside the barbed-wire borders of a detention facility. These policies, though disturbing, are still preferable to the alternatives. We may no longer see a child once she crosses a border, but this does not mean she has suffered no harm. We must account for such harm in formulating a theory of children’s rights. Just as parents should protect children within a state, they should protect them when travelling between states, better ensuring they have access to the safety, education, and healthcare they need.

## Chapter 8

### Discrimination

In 1972, under the rein of Emperor Haile Selassie, a severe famine broke out in Ethiopia, leading to the deaths of roughly 60,000 individuals. Amidst unrest, the Marxist Dergue staged a coup d'etat that ended in Selaisse's assassination, and the start of civil war in 1974.<sup>1</sup> Three years later the war reached the town of Axume in northern Ethiopia, where a toddler named Milka lived with her mother. Together, Milka and her mother walked into Sudanese territory, where they received food and shelter in a UN refugee camp, but faced constant harassment from Sudanese authorities. In 2003, Milka paid smugglers to take her by bus to Wadi Halfa, and then by boat to Egypt, and then by jeep across the Sinai Desert, eventually reaching the border fence with Israel. She climbed the fence, dropped onto a bound of sand on the other side, and hailed a lift to Tel Aviv, where she worked on the black market for over a decade, cleaning rooms in hotels, and then selling fresh Ethiopian *injera* bread to locals in the surrounding neighbourhoods.

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<sup>1</sup>Cormac Grada, *Famine: A Short History*, Princeton: Princeton University Press 2009; Benjamin A. Valentino, *Final Solutions: Mass Killing and Genocide in the Twentieth Century*, Ithaca: Cornell University Press 2004.

She married, had two children, and divorced in 2011, the same year her *injera* business began to flounder. It went under a year later, and she struggled to pay rent or purchase food for herself or her children. As a result, in the spring of 2012 she considered returning to Ethiopia. She felt it would be safe, and had extensive knowledge about her home town, as her sister had moved there several years earlier.<sup>2</sup>

As Milka considered whether to repatriate, an Israeli Member of Knesset stepped onto a podium in South Tel Aviv, and gave a speech before thousands of anti-immigration protesters. Africans, she declared, were “a cancer to the body” and the government should do everything possible to encourage them to leave the country. The majority of Israelis agreed with her.<sup>3</sup> Shortly after her speech, citizens began smashing the windows of African-owned shops, with one protester throwing a grenade at a nursery with African children,<sup>4</sup> and three others stabbing to death three Eritrean pedestrians walking home from work.<sup>5</sup> As protests against African migrants continued, the Prime Minister stated that Africans were infiltrators threatening the country. Soon after, the Ministry of Interior began offering free flights and money to almost all African migrants who agreed to repatriate or resettle to a third country in Africa.<sup>6</sup> Non-African migrants of comparable legal status, such as those from Myanmar or Ukraine, were

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<sup>2</sup>Interview with Milka, Tel Aviv, 29 July 2014.

<sup>3</sup>A study conducted in 2012 asked a random sample of respondents, “To what extent do you agree with the statement that ‘Africans are a cancer to the body?’” 52% percent stated that they agreed with this statement. See Ephraim Yaar and Tamar Hermann, “Peace Index - May 2012,” Downloaded on 3 October 2014 from [http://en.idi.org.il/media/602071/Peace%20Index-May%202012\(1\).pdf](http://en.idi.org.il/media/602071/Peace%20Index-May%202012(1).pdf).

<sup>4</sup>Haggai Matar, “Community Shaken after Night of Arson Attacks on African Refugees,” 972 Magazine, 27/04/12.

<sup>5</sup>Haggai Matar, “Three Eritreans Stabbed in South Tel Aviv Internet Café,” 972 Magazine, 31/07/12.

<sup>6</sup>Ilan Lior, “Israel to Offer African Migrants \$5,000 to Leave,” Haaretz, 30/10/13.

never offered such assistance to repatriate. As a result, Milka was told she could receive \$14,000 if she left. She accepted the offer, hoping to start a restaurant in Addis Ababa, and build a better life for herself and her two children.

Was Milka a victim of wrongful discrimination when she was paid to leave?

Milka, and many other migrants, were clearly wronged from the violence and inflammatory speeches. But imagine that were no speeches or violent attacks. Instead, the Prime Minister quietly set up a special budget to help Africans leave, using no coercion or incitement, and only funds to make return possible for them, but not others. Would such a plan be wrongful discrimination? More generally: Is it wrong to pay unwanted minorities to leave?

In this chapter, I move beyond discussing refugees alone, and address migrants who are not at serious risk from returning, but who are assisted to return because of their ethnicity. While such returns are less problematic, they still pose the concern that repatriation is wrongfully discriminatory.

If it is wrongfully discriminatory, it is not clear why. When we think of discrimination, we often imagine victims treated differently in a way that either harms them or, at the very least, does not benefit them. Victims are denied visas, jobs, apartments, places in universities, and equal rights before the law.<sup>7</sup> Rarely do we imagine victims treated differently in a way that is more beneficial for them precisely because they are not wanted.

Such forms of discrimination are not limited to immigration control in

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<sup>7</sup>Kasper Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination*, Oxford: Oxford University Press 2014; Deborah Hellman, *When Is Discrimination Wrong?*, Cambridge, MA: Harvard University Press 2008; Shlomi Segal, "What's so Bad about Discrimination?" *Utilitas* 24(1)(2012): 82-100.



Israel. Over fifty years ago, in New Orleans, white segregationists provided funds to African-American families who agreed to move to New York City.<sup>8</sup> In a recent case in New York, a landlord paid black tenants \$12,000 to leave their apartments, increasing the value of the property as only white tenants remained.<sup>9</sup> As noted in Chapter 6, in 2010 the British National Party (BNP) promised to pay \$78,000 to asylum seekers agreeing to voluntarily leave the country. The BNP made clear that only those who were not “White British” would qualify, and no force would be used.<sup>10</sup> More recently, British Prime Minister David Cameron discussed the refugee influx in 2015, and his only mention of African refugees was in the context of a “return path,” implying that African refugees would receive assistance to repatriate, never mentioning similar return assistance for Syrian refugees.<sup>11</sup> When Milka was paid to leave, her case was not exceptional. Like similar cases, it has simply been overlooked.

In the next section I will consider cases outside the sphere of immigration, describing private individuals who pay minorities to leave towns and apartment buildings. I address such cases outside of immigration to determine whether, more generally, it is permissible to pay minorities to leave. I demonstrate that current theories of discrimination cannot quite answer this question. Theories either implausibly assume that discrimination is in no ways wrong when the benefits outweigh the harms, or theories accept that such beneficial discrimination is wrong, but fail to specify if

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<sup>8</sup>Clive Webb, “‘A Cheap Trafficking in Human Misery’: The Reverse Freedom Rides of 1962,” *Journal of American Studies* 38(2)(2004): 249-271.

<sup>9</sup>DW Gibson, “‘I Put in White Tenants’: The Grim, Racist (and Likely Illegal) Methods of One Brooklyn Landlord,” *New York Magazine* 12/5/15.

<sup>10</sup>Jon Smith, “BNP would offer £50,000 to leave the country,” *The Independent*, 29/4/10.

<sup>11</sup>Emma Dabiri, Leah Green, and Bruno Rinvulcri, “Africans Being Left Behind by a Two-Tiered Refugee System,” *The Guardian* 30/09/15.

it is permissible. In Section 2 I argue that paying minorities to leave is impermissible when certain conditions are met. In Section 3 I apply my arguments to the case of migrant repatriation.

Before proceeding, a brief note on my focus and assumptions.

I shall focus on cases where an individual, in paying minorities to leave, is engaging in an act she has no duty to pursue, giving assistance that is above and beyond what the minorities would otherwise obtain. I shall generally assume that such acts can be wrong in some ways but still all-things-considered permissible. When I write “wrong in some ways” I mean there are moral reasons to avoid the act, even if there are countervailing reasons to partake in the act. When I write “permissible” I mean that, because these countervailing reasons are especially weighty, individuals are morally permitted to engage in the act, and others have reasons to permit and legalize the act. I assume that one reason to permit a wrongful act is that the consequences are sufficiently beneficial for a victim, who also consents to the act because of these benefits. For an example of such an act, consider a sexist individual who believes women are mentally inferior to men and so, as a result, helps women in need by providing generous donations to women’s shelters. While this man’s actions have some wrong-making features, including his sexist intentions and the demeaning nature of his assistance, his actions may still be permissible, due to the benefits obtained for the women he assists. At the very least, it is worth considering when such actions may be permissible despite their wrong-making features. This is not to claim that actions are permissible based solely on consequences or that, if an individual acts permissibly, they are not worthy of moral criticism. Nor do I assume that, if an individual benefits from a permissible act, they must be grateful. Rather, my assumption is merely

that benefits can create countervailing reasons for establishing permissibility.<sup>12</sup>

When presenting my arguments, I shall generally assume that paying minorities to leave has wrong-making features. Intuitively, this seems clear, and I shall present theories that explain this intuition. But though the payments have wrong-making features, the benefits may still constitute a countervailing reason to permit the act. My goal is to establish when this countervailing reason is sufficient to permit the act, and when it is not.

I will largely remain neutral as to the full range of reasons for why discrimination is wrong. Some argue that discrimination is only wrong when it excludes individuals, others when it denies opportunities, others when it harms the worst off, others when it demeans minorities, and so forth. Some believe, as I do, that discrimination can be wrong for two or more of these reasons, depending on the context.<sup>13</sup> My goal is not to prove that any one or more of these reasons explains the wrongness of discrimination, but to establish whether, in cases where there are multiple reasons to believe discrimination is wrong, it is still permissible when the victims benefit.

When I speak of benefits, I shall focus primarily on cases where individuals are paid to leave, as in Chapter 6, or where individuals are provided

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<sup>12</sup>We might call such acts “wrongful permissible acts,” or “suberogatory” acts but, for simplicity, I shall use the word “permissible” on its own. Some deny the existence of wrongful permissible acts, arguing that there are only right and permissible acts, or wrongful impermissible acts, or neutral acts that are neither right or wrong. If one holds this, then when I write “permissible” I merely mean that others should not interfere and attempt to stop the act. See Julia Driver, “The Suberogatory,” *Australasian Journal of Philosophy* 70(1992): 286–295 and Hallie Rose Liberto, “Denying the Suberogatory,” *Philosophia* 40(2)(2012): 395–402.

<sup>13</sup>Sophia Moreau, “What is Discrimination?” *Philosophy and Public Affairs* 38(2)(2010): 157–160; David Benatar, *The Second Sexism: Discrimination Against Men and Boys*, Malden, USA and Oxford, UK: Wiley-Blackwell 2012: 5.

free transport they otherwise could not obtain, as in Chapters 3, 4, 5, and 7. I shall not distinguish between assistance which makes it possible to leave and assistance which merely incentivizes a person to leave, referring to both as “paying minorities to leave.” I make no distinction primarily for simplicity, to focus on puzzles of discrimination that cut across both types of cases.

There are other forms of assistance, besides money and transport, which similarly encourage minorities to leave. Minorities may be offered free housing far away, or food aid in a distant refugee camp. There are also forms of discrimination that, like payments to leave, involve significant benefits. An employer might believe women have poorer math skills and promote them to higher-paying managerial positions where math skills are not necessary. I shall not directly address such cases, because when minorities historically have been paid hard cash to leave, the racist and sexist goals of the payers have been especially salient, as have the benefits for the recipients. But though I focus on money to leave, the conclusions I reach may be similar for other cases involving benefits for the discriminated.

Throughout the chapter I shall primarily focus on cases involving ethnic minorities or women. I will not significantly address other groups, primarily for simplicity. If you believe that discrimination against other groups is also wrong, this is consistent with the argumentation I put forth. Finally, I put aside cases of structural injustice, where no agent has an explicit intent to exclude.<sup>14</sup> In all of the cases I present, the discriminator pays minorities with the intent of encouraging them to leave precisely because the

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<sup>14</sup>Fred Pincus, “From Individual to Structural Discrimination,” in (eds.) Fred L. Pincus and Howard J. Ehrlich, *Race and Ethnic Conflict*, Boulder, CO: Westview 1994: 82-87, 84.

discriminator thinks they are less valuable. The politician who paid Milka to leave had openly racist preferences, but was giving Milka an opportunity she otherwise would not have, privileging her above non-African migrants, many of whom wanted to return home, but lacked support to do so. Given the advantage that Milka gained, it is not clear if she was treated in an impermissible manner.

## 8.1 Theories of Wrongful Discrimination

Current theories on discrimination cannot establish whether paying minorities to leave is impermissible. To demonstrate this point, let us begin with a domestic case, and consider what different theories might say about an organization called the White Citizens Council, established in the American South in 1954.

The Council, as a white supremacist group, had the primary aim of keeping segregation legal. It spent a decade lobbying congressmen, boycotting black-owned businesses, and even producing a children's book that taught heaven was segregated.<sup>15</sup> By 1962 it had failed to keep segregation legal, so it changed its tactics, offering thousands of African-Americans transport and money to leave southern states, and move north. The first family to accept this offer included Louis and Dorothy Boyde and their eight children, all living in New Orleans. Louis had recently lost his job after falling ill, and Dorothy was expecting another child. They accepted the Council's \$50, food, and bus tickets out of town,<sup>16</sup> packed their belong-

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<sup>15</sup>Timothy B Tyson, *Blood Done Sign My Name: A True Story*, USA: Random House 2005: 182.

<sup>16</sup>Clive Webb, "'A Cheap Trafficking in Human Misery': The Reverse Freedom Rides of 1962," *Journal of American Studies* 38(2)(2004): 249.

ings, and boarded a bus for New York City, arriving two days later, elated to start a new life with less overt racism, more stability, and greater employment opportunities.<sup>17</sup> The Council had many goals in sponsoring their migration, but one was simple: to reduce the number of African-Americans in New Orleans.<sup>18</sup>

If there is something wrong with the Council's payments – and there certainly seems to be – then a good theory of discrimination will explain why, and also establish whether such payments are morally permissible. Current theories of discrimination either fail to establish why such acts are wrong or, though they can establish wrongness, cannot establish if they are permissible.

## **Other Features Account**

The first theory is not quite a theory, but a claim: The payments were not themselves wrong or impermissible. It was the other features of the case that indicate wrongful or impermissible actions.

The Council engaged in other racist activities, and there was general racism in New Orleans. Any institution that pays minorities to leave probably exists in a society where minorities cannot attend certain schools, buy certain houses, or walk down the street without fear of being lynched. At the very least, it is a society with widespread implicit biases and structural inequalities, and it is these inequalities alone that are wrong and impermissible to support.

Another possible wrong-making feature is related to the potential involuntariness of the Boydes' decision. As victims of severe poverty and general

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<sup>17</sup>Webb 2004 *ibid*: 249.

<sup>18</sup>Webb 2004 *ibid*: 253.

racism, they were potentially compelled to accept the free transport and cash.<sup>19</sup> If ethnic minorities are compelled to leave town, they are victims of forced discrimination. Perhaps it is the forced nature of their departure that disturbs us, rather than the offer of money itself.

Finally, some might argue that the Boydes were wronged because they were exploited, rather than because they were paid. In general, wrongful exploitation occurs when we enter a transaction with an individual whose rights have been violated, and we benefit off of their rights violations. If a factory owner hires a worker, paying her a piece of bread a day, and the reason she accepts such a low wage is because her land has been stolen, then she is being exploited.<sup>20</sup> Similarly, if the Boydes' reason for accepting the \$50 was because of general discrimination and poverty in New Orleans, they were wrongly exploited. The White Citizens' Council gained from the Boydes' unjust circumstances in the sense that, for a mere \$50, it could encourage African-Americans to leave, satisfying its racist preferences.

I do not believe that these other features of the case – racism in New Orleans, the involuntariness of the consent, or exploitation – can fully ex-

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<sup>19</sup>Webb 2004 *ibid.* 249.

<sup>20</sup>This theory of exploitation is slightly different than that raised by others, such as Valdman and Steiner. Both claim that, to wrongfully exploit another person, it must be the case that the exploited gain less from the exploiter than some counter-factual state of affairs where the exploited were not vulnerable or had their rights violated. This formulation is problematic. Consider the following example: a starving person agrees to accept a piece of bread to work, but had she not been vulnerable or had her rights violated, she would have accepted nothing at all, and volunteered for the factory. It still seems like exploitation if the woman really is vulnerable or had her rights violated even though, in a counter-factual world where she was not vulnerable, she would have accepted the same or less payment. She is exploited, I believe, because her reasons now for accepting only a piece of bread is that she is vulnerable or had her rights violated. See Mikhail Valdman, "A Theory of Wrongful Exploitation," *Philosophers' Imprint* 9(6)(2009): 1-14; Hillel Steiner, "A Liberal Theory of Exploitation," *Ethics* 94(2)(1984): 225-241 and Hillel Steiner, "Liberalism, Neutrality, and Exploitation," *Politics, Philosophy, and Economics* 12(4)(2013): 335-344.

plain the intuition that there is something wrong with paying minorities to leave. Imagine the Council consisted of exactly one white supremacist living in a very tolerant city. She spent her days knocking on the doors of ethnic minorities, offering money on the condition that they leave town, and recipients accepted the money without facing any coercion or other forms of discrimination. Many may feel uneasy about such payments even though they entail no other forms of coercion or racism. Something seems wrong with the payments themselves, and a good theory of discrimination will explain why.

## Harm and Beliefs-based Accounts

There are two theories of discrimination that struggle to explain the wrongness of payments to leave, let alone if they are impermissible. The first theory claims that discrimination is wrong if it harms its victims. Different theorists claim that different harms are morally relevant. Some claim that it is wrong to exclude minority members, even if they are not made worse off.<sup>21</sup> Others claim discrimination is wrong when it disadvantages the worst off in society.<sup>22</sup> Some claim discrimination is wrong when it denies equal opportunities to minorities.<sup>23</sup> Finally, some claim discrimination is wrong when it widens the gap between advantaged and disadvantaged groups.<sup>24</sup>

These harm-based theories seem to imply, counter-intuitively, that there

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<sup>21</sup>Hugh Collins, "Discrimination, Equality, and Social Inclusion," *Modern Law Review* 66(1)(2003): 16–43.

<sup>22</sup>Kasper Lippert-Rasmussen, "The Badness of Discrimination," *Ethical Theory and Moral Practice* 9(2005): 167-85, 167.

<sup>23</sup>Kasper Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination*, Oxford: Oxford University Press 2014: 175 and Shlomi Segal, "What's so Bad about Discrimination?" *Utilitas* 24(1)(2012): 82-100.

<sup>24</sup>Tarunabh Khaitan, *A Theory of Discrimination Law*, Oxford: Oxford University Press 2015.



was nothing wrong with the Council paying the Boydes, because they were not harmed. Though the Boydes left, they were not excluded in the traditional sense. They were never forced to leave, and the money helped them escape a society full of exclusion, and join one with less segregation and far more job opportunities. While it is true that leaving New Orleans was likely a difficult experience, prying them away from friends, families and the home they knew, it also helped them obtain opportunities they preferred to have. Nor did the family just happen to benefit from the Council's discriminatory payment scheme, as when a person is denied a job opportunity, moves to another city, and happens to find greater opportunities and advantages in this new city.<sup>25</sup> The White Citizens' Council specifically intended for African-Americans to benefit from migrating, to persuade them to leave and never come back.

The Boydes, as members of a disadvantaged group, were also never made worse off by the payments, or denied equal opportunities to white residents. Nor did the payments widen the gap between their position and the position of white residents of New Orleans. Precisely the opposite: As they boarded the bus, cash in hand, they were given one extra opportunity that white residents did not have, including very poor residents who preferred funds to leave, but could not access these funds. It seems oddly to fall under the category of affirmative action, which Lippert-Rasmussen argues is a form of justified discrimination. The bus tickets and money, to use his words, closed "the gap between how well-off those who benefit unjustly from discrimination are and how well-off they would be if no discrimination took place henceforth."<sup>26</sup>

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<sup>25</sup>Lippert-Rasmussen 2014 *ibid*: 157.

<sup>26</sup>Lippert-Rasmussen 2014 *ibid*: 160.

Harm-based theories similarly struggle to establish the wrongness of other cases involving payments. Today, some attorneys claim that women can receive higher severance pay if they prove they were discriminated against, including in the termination of their contracts.<sup>27</sup> If this is true, some companies may essentially pay women to leave, offering generous severance to women in return for their quiet acquiescence to the termination of their contract. These women may be better off than if they received no extra severance pay, and slightly closer, economically, to their male counterparts. We might even imagine a woman paid to leave a company and made economically better off than if no discrimination had taken place at all, receiving more money than the men received in their salary and severance pay. If we intuitively feel there is something wrong about such severance pay, a good theory of discrimination should explain why.

A second set of theories, called belief-based theories, can better account for the intuition that something is wrong. These theories view discrimination as wrong when the result of racist or sexist beliefs, regardless of whether victims are excluded or disadvantaged.<sup>28</sup> The Council had racist beliefs which lead them to pay blacks to leave, and companies may have sexist beliefs which lead them to pay women to leave.

Though belief-based theories explain the wrongness in these types of cases, they cannot explain the wrongness of paying minorities to leave without any racist or sexist beliefs. Consider a case, from 2015, involving

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<sup>27</sup>Andrew S. Bosin, LLC. "Discrimination and Harassment Claims Could Increase Amount of Severance Offered," downloaded on 20 July 2015 from: <http://www.njbusiness-attorney.com/articles/discrimination-harassment-claims-increase-severance.html>.

<sup>28</sup>Richard Arneson, "What is Wrongful Discrimination?" *San Diego Law Review* 43(4)(2005): 775-807; Larry Alexander, "What Makes Wrongful Discrimination Wrong?" *University of Pennsylvania Law Review* 14(1)(1992): 149-219.

a Brooklyn landlord paying \$12,000 to black residents agreeing to vacate their apartments, never paying white residents this money. His interests were financial: An all-white building increased the market value of his property, allowing him to charge more rent.<sup>29</sup> He may have had prejudicial beliefs – a recent interview suggests he did<sup>30</sup> – but if he did not, his actions still seem disturbing, even if motivated by financial gain alone.

Some may argue that the Brooklyn landlord is a case of racist beliefs. The landlord was responding to the demands of white renters willing to pay more to live in an all-white apartment. These white renters had racist beliefs, or at least objectionable preferences and biases. It is wrong, some argue, to discriminate in response to the racist preferences or biases of others, even if the discriminator himself has independent non-objectionable beliefs.<sup>31</sup>

But even if racist beliefs can explain the wrongness of paying minorities to leave, such beliefs do not establish whether such payments are impermissible. It is precisely these racist beliefs that contribute to victims' benefiting. If victims' prefer the money to leave than no money at all, perhaps we ought not prevent these payments from transpiring.<sup>32</sup> To be clear: this

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<sup>29</sup>Importantly, there is no evidence he discriminated in his choice of tenants; he merely encouraged black tenants to leave, while white tenants remained. He could then raise the rent of the vacated apartments, as white residents were willing to pay more money to live in an all-white apartment building.

<sup>30</sup>DW Gibson, "I Put in White Tenants': The Grim, Racist (and Likely Illegal) Methods of One Brooklyn Landlord," *New York Magazine* 12/5/15.

<sup>31</sup>For example, it is wrong to only hire white salespeople to successfully sell to white racist costumers. This is close to the argument raised by David Benatar. See Benatar *ibid*: 7.

<sup>32</sup>Adam Slavny and Tom Parr note, in a footnote, a similar point. They argue that discrimination can be wrong based on objectionable beliefs but suggest the possibility that, even if discrimination is wrong because of the beliefs of the discriminator, discrimination may still be permissible (or not "all-things-considered wrong") if the victim benefits significantly. They raise the example of a racist admissions officer in a low-ranking university who hopes to reduce the number of dark-skinned students. Rather

is not a criticism of belief-based accounts, which are intended to establish wrongness, rather than permissibility. Rather, it is to emphasize that, if we wish to establish when payments to leave are impermissible, we need a theory distinct from belief-based accounts.

## Expressive Meaning Account

The “expressivist” theory is especially effective at explaining the wrongness of the payments but, like belief-based accounts, does not establish permissibility.

According to Scanlon and Hellman, both proponents of this general theory, discrimination is wrong because it expresses an offensive<sup>33</sup> or demeaning message that minority groups are “not fully human or . . . of equal moral worth.”<sup>34</sup> One can express demeaning messages even if one has no racist or sexist beliefs, and even if one is not aware one is offending and demeaning others. If a principal requests that black students and white students sit on opposite sides of a classroom for purely aesthetic reasons – and completely unaware of the history of segregation – his classification would be demeaning regardless of his beliefs.<sup>35</sup>

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than rejecting these applicants, she persuades the admissions team at Oxford to accept them instead. The students are happy with this result. Slavny and Parr conclude that “Sufficiently large benefits may be capable of defeating the wrongness of the discrimination.” (p. 12). It is not clear, however, precisely when such large benefits defeat the wrongness, or at least make the discriminatory act morally permissible, and free from state interference. See Adam Slavny and Tom Parr, “Harmless Discrimination,” *Legal Theory* (forthcoming): 12.

<sup>33</sup>Thomas Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame*, Cambridge, MA: Harvard University Press 2008.

<sup>34</sup>Deborah Hellman, *When Is Discrimination Wrong?*, Cambridge, MA: Harvard University Press 2008: 35.

<sup>35</sup>Hellman 2008 *ibid*: 26. This example was original raised by Paul Brest. See Paul Brest, *Processes of Constitutional Decisionmaking: Cases and Materials*, Boston: Little Brown and Company 1975.

One can even demean someone who is not aware they are being demeaned.<sup>36</sup> A girl with cognitive disabilities may be demeaned if taunted on the playground, even if her impairment means she is not aware she is being taunted. Importantly, one can offend or demean another even if they benefit in some ways. Hellman argues this point using an example of Nelson Mandela in prison on Robben Island. He and black inmates were forced to wear shorts, clothes normally reserved for children. Mandela may have benefited from cooler clothing on such a hot island, but was wronged because he was treated in an infantilizing manner.<sup>37</sup> We might imagine other offers with a benefit that entails a demeaning message. A woman may be given the opportunity to work in a pornographic film that is violent and degrading towards women. Let us put aside whether such practices are wrong.<sup>38</sup> It seems clearly wrong to go up to a woman on the street and ask if she would be willing to take part in violent sexual acts in return for money. Offers for extra options can be demeaning even if, in accepting such offers, some women profit.

There are a number of reasons why offers can be demeaning, even if recipients benefit. One reason is that offers objectify recipients, as in the case of the woman above, or because they express a lack of sensitivity to historical injustices, as in the case of the principal segregating children. Beneficial offers can also demean if combined with an endorsement of racism or sexism, such as offering women extra severance pay to leave. Finally, discriminatory offers can demean others when treating them as members of

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<sup>36</sup>Hellman 2008 *ibid*: 27.

<sup>37</sup>Hellman 2008 *ibid*: 27.

<sup>38</sup>Cynthia A. Stark, "Is Pornography an Action?: The Causal vs. the Conceptual View of Pornography's Harm," *Social Theory and Practice* 23(2)(1997): 277-306; Hellman 2008 *ibid*: 42.

a group, rather than as individuals with their own autonomous decisions, preferences, and talents. Imagine an orchestra director who selects an East-Asian violinist, despite her poor performance, because he is influenced by the stereotype that women of East-Asian descent are better at playing the violin. The director disrespects her because he treats her as a member of a group, rather than an individual with her own unique character and skills. He demeans her even if she benefits.<sup>39</sup>

The expressivist account seems consistent with the intuition that the White Citizens' Council's actions were in some ways wrong. The Council was treating the Boydes, and all African-Americans in New Orleans, as members of a group, rather than individuals to be judged according to their skills, character, and unique attributes. Because the payments were combined with an endorsement of segregation, the payments also implied a demeaning message: "We do not want you so much, that we are willing to give you money to leave." Indeed, the greater the financial benefit for the victims, the more strongly the discriminator is expressing how much they are willing to sacrifice personal resources to meet their racist preferences.<sup>40</sup> In this sense, payments are distinct from merely requesting that another

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<sup>39</sup>Benjamin Eidelson, "Treating People as Individuals" in (eds.) Deborah Hellman and Sophia Moreau, *Philosophical Foundations of Discrimination Law*, Oxford: Oxford University Press 2013. Sometimes, such treatment is not demeaning, or seems less demeaning. If a white man is elected because of his gender and ethnicity, despite poor performance, it does not seem he is demeaned, despite being treated as a member of a group, rather than an individual. It may only be demeaning if the minority group is in some ways disadvantaged, or has been historically disadvantaged. See Tarunabh Khaitan, "Prelude to a Theory of Discrimination Law," in (eds.) Deborah Hellman and Sophia Moreau, *Philosophical Foundations of Discrimination Law*, Oxford: Oxford University Press 2013: 145.

<sup>40</sup>Indeed, some argue that, whenever we undermine the dignity of others, we are essentially expressing a certain offensive message. See Tarunabh Khaitan, "Dignity as an Expressive Norm: Neither Vacuous Nor Panacea," *Oxford Journal of Legal Studies* 32(1)(2012):1-19.

person leave, without offering any money at all. The money is constitutive of the message, and so constitutive of the wrong.<sup>41</sup>

The idea that payments can be demeaning may be consistent with some harm-based accounts. If payments are demeaning, they also socially exclude,<sup>42</sup> in the sense that individuals are told how little they are valued in society. If payments are demeaning, they also undermine equality of opportunity, in the sense that individuals no longer have the opportunity to be free from the demeaning message implied by the payments. Similarly, if demeaning others harms them, and harming the worst off is what makes discrimination wrong,<sup>43</sup> then we can view demeaning payments as wrong in this sense. In other words, some harm-based accounts, like the expressivist account, can view demeaning others as wrong even when they benefit.

Despite the expressivist account's helpfulness in establishing wrongness, it does not establish permissibility. As Hellman herself notes, her theory of discrimination does not "say when the wrongfulness of [discrimination] may be overridden by other considerations."<sup>44</sup> Other considerations may include the benefits minorities gain, and their acquiescence in light of these benefits. Were payments to cease, this would deny minorities access to

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<sup>41</sup>This is not to claim that, whenever an agent pays minorities to leave, they are necessarily demeaning these minorities. We might imagine an anti-racist NGO that provides funds to rescue minority members from a racist society. Their actions may not be demeaning if the NGO makes clear they support equality, and provide money in a way that mitigates any offensive meanings that may arise. They might, for example, provide money alongside lobbying for the end of racism, while making clear that the payments are to help individuals achieve equal opportunity, rather than to reinforce racial separatism. But when payments are provided as an endorsement for racism or sexism, or in a way that evokes an offensive meaning due to historical injustice (as with the principal), then the payments do imply a demeaning message.

<sup>42</sup>Hugh Collins, "Discrimination, Equality, and Social Inclusion," *Modern Law Review* 66(1)(2003): 16–43.

<sup>43</sup>Lippert-Rasmussen 2014 *ibid*: 167.

<sup>44</sup>Hellman 2008 *ibid*: 31.

money they could otherwise obtain, and which some wish to obtain. While the demeaning character of discrimination constitutes its wrong, it remains unclear if the beneficial character of some discrimination establishes its permissibility.

Some might argue that benefits for victims – even significant ones – are not competing moral considerations, and so ought not make wrongful discrimination permissible. Hellman and Yuracko both discuss a case that evokes this intuition, involving a casino that forced female workers to wear makeup, forbidding male employees from doing so. For different reasons, Hellman and Yuracko both conclude that the casino wrongfully discriminated against the women.<sup>45</sup> This case is interesting, I believe, partly because the employees gained a salary, were not forced to work at the casino, and possibly benefited compared to alternative forms of employment. Despite these benefits, I still feel the women were treated in an impermissible manner for the reasons raised by Hellman and Yuracko. The weight of the benefit seems insignificant.

Even if this is true, the women were not benefiting from the discrimination itself; they would still gain a salary in a world where employers stopped requiring women to wear makeup, assuming the casino retained its customers when the women stopped wearing makeup. If the government banned sexist dress codes in casinos, it is unlikely women would be worse off. This is not the case with payments to leave: Minorities would lose money if this type of discrimination were banned, because the discrimination is what entails paying individuals money.

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<sup>45</sup>Hellman 2008 *ibid*: 46 and Kimberly Yuracko, “Sameness, Subordination, and Perfectionism: Towards a More Complete Theory of Employment Discrimination Law,” *San Diego Law Review* 43(2006): 857-897.



Some might argue that, even if minorities prefer the payments, such preferences are not strong reasons to permit otherwise wrongful discrimination. This is because, more generally, preferences hold little weight in establishing the permissibility of wrongful discrimination. If most women in a country prefer banning the vote for women, their preferences seem less important than our hope that all women be given the freedom to vote. But there is an important distinction between preferences for forced exclusion and preferences for voluntary incentives. When minority members support forced discrimination, they are denying opportunities to others. Women who support banning female voting are denying other women the opportunity to vote. The same cannot necessarily be said about the Boydes. When they boarded the bus, nobody else was forced onto the bus. In consenting to leave, it was their private choice alone.

Of course, it was not quite their private choice alone. The Council's actions, and the Boydes' consent to leave, may have harmed others in society. This is a possibility I shall now address.

## **8.2 Impermissible Beneficial Discrimination**

If payments are only permissible when all parties benefit and consent, then payments are impermissible if there are parties harmed without benefiting, or paid without consenting. In other words, payments may be impermissible when one of two conditions is met: third parties are harmed, creating negative externalities for society; or the recipients of the payments have failed to consent to the payments.

## Third-Party Harm

There are a number of ways payments can create harm for third parties. One way is by increasing implicit bias, harming all members of a given group, including members never paid to leave. If the public is unaware there is an exchange of payments, they may assume that minorities are less willing to stay, reinforcing the stereotype that members of this group are less committed to staying.<sup>46</sup> Imagine, for example, if a sexist CEO offered women generous severance payments to leave their place of employment, leading more women to retire early. In such cases, others may assume that women are more likely to retire early because they are less committed to their jobs when, in fact, they are choosing to retire because they are paid to do so. If this stereotype about women sets back the interests of other women, including those never paid to leave, then others are harmed without the corresponding benefit.

Even if payments do not have these concrete impacts, they may still demean all members of a minority group, including those never paid. The discriminator is sending a general message: “I am willing to pay money to encourage members of this group to leave.” Other members of the group understand that they, too, are not wanted, even if never offered payments. Indeed, discrimination can demean individuals who are not of the minority group paid to leave, but are members of other disadvantaged groups, including other ethnicities, religions, genders or sexualities. These groups, residing in the same town, building, or place of employment, may under-

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<sup>46</sup>A related argument has been raised by Deborah Satz with regards to some market transactions. In her example, a reason to ban surrogacy services is it reinforces stereotypes of women as baby-making machines, and this may harm other women. See Deborah Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* Oxford: Oxford University Press 2010: 130.

stand that, in a close possible world in which their group was targeted, they too would be unwanted. Being exposed to this possibility may be unsettling, and possibly offensive, without the corresponding financial benefit obtained by the parties directly paid to leave. Payments may even offend members of the majority group who oppose the racist and sexist ideals being promoted by the payment schemes. If I learn that my employer has paid off all minority workers, so that only non-minorities remained, I would feel the policy was offensive towards the ideals I hold, specifically the ideal of creating a society where all are valued regardless of their ethnicity, sexuality, or gender. A small part of my interests have been set back as a result of the payments, without any corresponding benefits.<sup>47</sup>

Payments do not necessarily materially harm, demean, or offend others in the manner described. They needn't enhance biases if they only occur sparingly, nor do they express an offensive message if they only occur privately. If the landlord in Brooklyn only offered these payments once, and if he never advertised his actions, we might conclude that only those directly given money were demeaned and, because they benefited and consented, were not treated in an impermissible manner.<sup>48</sup> But given the public nature

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<sup>47</sup>The above argument focuses on the public nature of the payments, as a public expression of disrespect towards all members of a minority group. I believe that even private payments could demean third parties. This is because discrimination can be demeaning towards individuals who are not aware of the discrimination, and so never personally offended. Return, again, to the case of the girl with cognitive disabilities who is taunted on the playground, demeaned despite being unaware of the meaning of the taunting message, and so never personally offended. If one can be demeaned from a message one never comprehends, perhaps third parties can be demeaned from a message they never hear. Whether one accepts this claim depends on whether one accepts it is possible to wrong someone who is not aware they are wronged, and experiences no reduction in welfare. Putting this debate aside, we can at least conclude that public payments constitute a clear expressive harm towards third parties. They have been wronged without any benefits and, as such, have been impermissibly wronged.

<sup>48</sup>Such payments, though permissible, could still be open to critique due to the beliefs of the landlord or the expressive nature of his actions. As noted in the introduction

of the landlord's offer, and the possibility that such offers are pervasive, these payments should be viewed as impermissible due to the way they demean others who do not benefit. A similar claim can be made regarding the White Citizens' Council. It offered thousands of African-Americans payments, possibly reinforcing the outside status of blacks in New Orleans, and demeaning other African-Americans, who understood just how much they were not wanted, even if never given money to leave. When offers reinforce biases in this manner, and also demean other members of a minority group, we should generally prioritize society's interests over the preferences of the individuals receiving the money.

Though we should generally prioritize society's interests, there remains a concern. Some recipients of payments may feel their interests should be prioritized because they are from an especially disadvantaged group. This argument has been raised in other cases involving beneficial discrimination. In 1991 Manuel Wackenheim, a man with dwarfism, would take part in a sport called "dwarf throwing." Large men would throw Mr. Wackenheim large distances for entertainment, paying him a steady income to participate. France eventually banned dwarf-throwing due to its demeaning nature, and Mr. Wackenheim felt this unfairly denied him employment for the sake of societal aims.<sup>49</sup>

While the tension between individual benefits and societal harm can never be fully resolved, a step in the right direction would be to adopt a principle of proportionality. If preventing discrimination would cause dis-

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to this chapter, if a man donates to women's shelters because he believes women are less capable than men, he can be criticized for his sexist beliefs, even if his actions are permissible.

<sup>49</sup>Manuel Wackenheim V France, Communication No 854/1999, U.N. Doc CCPR/C/75/854/1999(2002).

proportionate harm to minorities, denying them basic goods – including food, shelter, and an adequate range of options – then the discrimination is permissible. Perhaps Mr. Wackenheim had the right to engage in dwarf-throwing if he had no other employment opportunities. Similarly, minorities have a right to payments to leave if they have no other means of accessing employment, food, and other necessities. If they have such a right, then the payments are permissible. This may have occurred with the Boydes. If they had no other means of accessing employment other than accepting the Council’s assistance to move to New York, then the Council acted permissibly, even if their actions demeaned other African-Americans. If the Council acted permissibly, then the US government acted rightly in not preventing the Council’s payments.<sup>50</sup>

As such, we can arrive at the following conclusion: Paying minorities to leave is impermissible if two jointly sufficient conditions are met. First, third parties are harmed and, second, recipients are not dependent on payments for basic goods.

## Consent

Even when third parties are unharmed, or recipients are dependent on payments for basic goods, payments are impermissible when recipients have not consented to their provision. There are two groups who may fail to consent.

One is comprised of those who reject the offer of payments, and have been forcibly exposed to such offers against their will. If women are offered

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<sup>50</sup>This assumes the US government was unable or unwilling to provide equivalent payments for the Boydes. If it could, the government perhaps should have done so, rather than permitting the payments.

greater severance pay to leave, or black families funds to relocate, they are treated impermissibly if they reject the offer, given that they are demeaned without any corresponding benefit. This is not to claim we should determine permissibility based on benefits or consent alone. I merely claim that, if the vast majority reject the offer, there is no conflict between their preferences and the wrongness of demeaning treatment. Their preferences have not been met, and they have been demeaned. Of course, some might claim that, even if individuals do not consent to the payments, they still benefit in an objective sense. They are offered a great deal of money, and this money offsets the wrong-making features of discrimination. This seems unlikely. If recipients do not perceive this money as sufficiently beneficial to offset the wrong-making features of discrimination, it seems safe to proclaim the benefit is insufficient to establish permissibility.

The second non-consenting group is comprised of individuals who accept an offer, but only because it was offered. Given the choice, they would never have wanted the offer to begin with.<sup>51</sup> This may occur when individuals feel that, once a demeaning offer is on the table, the expressive meaning has already been conveyed, and so they may as well accept the money and leave. Individuals may also accept an offer to be polite, or to avoid creating tension, while still wishing the offer were never posed.<sup>52</sup> As with

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<sup>51</sup>As David Velleman puts it: "Preferring to accept an invitation is consistent with wishing you had never received it." See J. David Velleman, "Against the Right to Die," *Journal of Medicine and Philosophy* 17(6)(1992): 672. More generally, it can be rational to consent to an offer, but also rational to prefer the offer never be available at all. See Thomas Schelling, *The Strategy of Conflict*, Cambridge: Harvard University Press 1960.

<sup>52</sup>Velleman raises similar arguments in the context of euthanasia. One reason that states ought not to grant the right to euthanasia is that, once a patient has the option, they may feel pressure to accept it. More generally, we often would be better off without an offer even if we would consent to an offer once it was given. For example, in a country where dueling is legal, individuals may consent to duel to save their honor; but many would prefer to never have the option to duel, to avoid being in a position where they

the first group, their preferences have not been met and they have been demeaned. This may have occurred with the Brooklyn tenants. They may have accepted money because it would be preferable to leave than to continue living in the building of a racist landlord. These tenants may have felt that, given the choice, they would have been happier had they never been offered the money at all.

Some may claim that, even if the vast majority of minority members do not want the offer to leave, the offers should still be permitted if no third parties are harmed or demeaned. If minorities are never told about the offers, all will never be able to accept them. Importantly, we cannot know if an individual would have consented to being given the offer unless they are asked, “Do you want me to offer you money to leave?” and this question would be tantamount to an offer. To address this concern, we may wish to distinguish between the ways in which offers are posed. Very public advertisements may be more intrusive compared to private offers, and so may undermine consent more than private offers. If payments should ever be permitted, offers should be limited to discretely advertised offers alone.

### 8.3 Discrimination in Repatriation

Let us return to Milka, and consider whether states are permitted to pay ethnic minorities to repatriate. To address this, we must first address a related question: When can states use discrimination to deny visas, subjecting minorities to deportation? If it is permissible to deport someone because of their ethnicity, then it seems permissible to pay them to leave because of their ethnicity, using no coercion at all. In the private cases

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need to reject a duel, and lose their honor. Velleman 1993 *ibid*: 676.

of the last section, we needn't have delved into this issue; it seems obviously impermissible for a landlord to only accept white tenants, and for an organization to force individuals to leave a city, so the question was only whether payments were also impermissible. But if denying visas based on ethnicity is permissible, it seems paying minorities to leave is as well.

There are reasons to believe racist visa denials are impermissible. Consider two major justifications for immigration control. One is that citizens have freedom of association.<sup>53</sup> Citizens are similar to members of a large club, and if clubs can exclude, then states are permitted to exclude as well. Another justification is that, if states have no control over who enters and stays, this can overwhelm welfare institutions, harming residents within the state. If either of these justifications is valid, then it seems they do not permit racist exclusion. This is because, in general, freedom of association and welfare do not permit racist exclusion. Private golf clubs, even if they have a right to exclude, do not generally have a right to ban members of a given ethnic group.<sup>54</sup> Similarly, local municipalities, though they can sometimes force some to sell their houses for overall welfare, cannot force only some ethnicities to sell their houses for overall welfare.<sup>55</sup> If excluding

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<sup>53</sup>Christopher Heath Wellman, "Immigration and Freedom of Association," *Ethics* 119(2008): 109-141.

<sup>54</sup>Of course, there is some private freedom of association where discrimination is permissible. If a person is less attracted to members of other ethnic groups, they are not acting impermissibly when marrying a member of their own ethnicity. For, it is generally accepted that we cannot quite control who we love, or who we are attracted to, and even who we become friends with. But such ethnic and gender-based exclusion is unacceptable in more public establishments, where members have no intimate attachments to each other, such as golf clubs, schools, and apartment buildings. See Sarah Fine, "Freedom of Association is Not the Answer," *Ethics* 120(2010): 351.

<sup>55</sup>Many object to the claim that immigration control is justified on the grounds I described, arguing that states are nothing like clubs, and welfare gains do not justify the use of force. My argument is that, even if we accept these justifications for immigration control, ethnic-based immigration control is still wrong. For an argument against the right to exclude based on freedom of association, see Sarah Fine, "Freedom of Association



ethnic groups is wrong regardless of association and welfare gains on the domestic level, then such forced discrimination is also wrong in immigration control.

Why make this leap? One reason is that consistency is important in debates on immigration control. The justifications for immigration control, if there are any, is that they uphold values we apply in other spheres. If we do not intuitively feel that people should be able to exclude ethnic groups from their private clubs, then this weakens the state's right to exclude ethnic groups from their territory. Similarly, if we do not intuitively feel it is just to use force against only certain ethnicities, even when this protects welfare, then deporting only some ethnic groups is also impermissible, even if this improves the welfare of citizens. These conclusions are consistent with a range of theories in immigration ethics. Even David Miller, a strong proponent of states' right to exclude, agrees that racist and sexist immigration control is wrong, even if immigration control is generally justified.<sup>56</sup>

Some argue that states – and, indeed, private clubs – do have a right to deny membership based on ethnicity, or any criteria they wish. If one holds this view, then there is another reason states should not deny visas based on ethnicity. Denying visas would offend or demean the state's own citizens. Were a state to only provide visas to white applicants, this would communicate to non-white citizens that they are less valued by the government.<sup>57</sup>

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is Not the Answer," *Ethics* 120(2010): 338-356.

<sup>56</sup>David Miller, "Immigration: The Case for Its Limits" in (eds.) A. Cohen and C. Wellman, *Contemporary Debates in Applied Ethics*, Malden, MA: Blackwell Publishing 2005: 204.

<sup>57</sup>Christopher Heath Wellman, "Immigration and Freedom of Association," *Ethics* 119(2008): 139.

This claim, originally raised by Christopher Wellman, seems to have a disturbing implication. If the only reason discriminatory immigration is wrong is that it offends one's own citizens, this implies that a state with only white citizens is permitted to deny visas to non-white visa applicants, because there would be no non-white citizens to offend. If we find this implausible, it seems we must reject Wellman's premise that denying visas is only impermissible if it demeans citizens. But I do not believe his premise – that denying visas is wrong when it demeans citizens – leads to his conclusion – that denying visas is only wrong when there are minority citizens. As I argued in the previous section, discrimination can demean individuals from other disadvantaged groups, including religious and sexual minorities, who understand that, in a close possible world where they were targeted, they too would be unwanted. And it demeans members of the majority who would feel offended by their government's racist visa policy.

From here we can conclude that paying minorities to leave, like racist visa denials, is impermissible because it demeans or offends citizens. When Milka was paid money, she was essentially told, "You are not wanted." "You" referred to individuals of African descent. Even if the message implied only that non-citizens from Africa were unwanted, from this we can infer another message to citizens of African descent: "If you were not a citizen," the payments imply, "you would be unwanted because of your ethnicity." The greater ethnicity is used as an indicator of who receives money to leave, the more citizens of the same ethnicity understand that, in a close possible world, they too would be unwanted. This message may offend not only citizens of the same ethnicity, but all citizens who find the meaning offensive in general, undermining the ideals they value.

As with domestic cases, the payments may also reinforce stereotypes

and biases. If non-citizens of a certain ethnicity are paid to leave, the public may increasingly associate a person's ethnicity with their outside status, viewing citizens of the same ethnicity as outsiders. In some instances, this may place minority citizens' lives at risk. Between 2012 and 2015 assailants in Israel attacked at least two Jewish Ethiopian citizens. The assailants mistakenly believed the men were non-Jewish non-citizen migrants from Eritrea or Ethiopia.<sup>58</sup> This not only harmed the men who were attacked, but the public at large, which was opposed to any discrimination against Ethiopian Jewish citizens, regardless of what they thought of non-citizen migrants from Eritrea and Ethiopia. The more ethnicity is a metric for who should be encouraged to leave, the more citizens may view ethnicity as an indicator of who should be attacked or, at the very least, viewed as different, suspected as not belonging.

Though this generally creates a decisive reason to view payments as impermissible, this reason may conflict with the interests of non-citizen minorities who prefer to have the payments and leave. As argued in the previous section, a principle of proportionality would permit paying minorities to leave if, though the payments are demeaning towards others, they provide food, shelter, and mobility to recipients. For this reason, the US government ought to have permitted the White Citizens Council to pay the Boydes to leave if the Boydes were dependent on such payments for basic mobility and employment.

There is an important difference, however, between domestic cases like

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<sup>58</sup>Vered Lee, Tomer Zarchin and Yaniv Kubovich, "Protesters Attack Israeli of Ethiopian Origin in Rally against African Migrants," *Haaretz*, 30/5/12 and Arin Hillel Mizrahi, (Hebrew) "Police Officer Hits Border Patrol Soldier: Thought he was foreign national," *Ynet* 1/1/15, available at <http://www.mynet.co.il/articles/0,7340,L-4631012,00.html>.

the Boydes and immigration cases like Milka. Migrants are often dependent on payments to leave because of the government's own actions. The Israeli government denied Milka a visa to access welfare benefits in Israel, causing her to become destitute, and causing her to become dependent on the government's payments to leave and open a business in Ethiopia. If the government acts wrongly in denying visas, then we cannot claim the government acts permissibly because migrants need the money; they only need the money because of the government's other impermissible actions.

Many would claim that the government is often acting permissibly in denying visas. In the case of Israel, there is little evidence that the government was racist in allocating visas to migrants, and so denying a visa to Milka may have been permissible, assuming she was not at risk in her country of origin. If denying her a visa was permissible, and if denying her a visa meant she needed money for basic goods, then it was better to provide her basic goods by paying her to leave than to provide no payments at all. It is true that the payments were racist, and so demeaning towards other citizens, but basic goods for migrants – including the ability to go home – arguably take priority over avoiding demeaning citizens. An alternative conclusion we might reach is that basic goods for migrants is equally as important as avoiding demeaning citizens. If this is true, the government ought to find mechanisms to provide basic goods to migrants in a way that does not demean citizens. The government could, for example, offer all migrants funds to repatriate, or offer all migrants visas to stay, ensuring payments are not racist.

I shall not attempt to determine which conclusion is more plausible, nor whether the government was permitted to deny Milka a visa. I shall instead reach the following more modest conclusions. In cases where mi-

grants are not dependent on payments for basic goods, the government should cease providing payments to leave if this harms or demeans citizens. In cases where migrants are dependent on payments for basic goods, then it is preferable (though perhaps not obligatory) for the government to provide payments to all migrants regardless of ethnicity, or to provide aid to migrants that is not dependent on leaving. This will prevent demeaning messages towards citizens, while still securing basic goods for migrants.

These conclusions rest on the assumption that migrants prefer to have the payments than not. As argued in the previous section, payments in the private sphere are impermissible when recipients have not consented to them, either because they reject the payments, or would rather they were never offered at all. This is true even if payments do not harm or demean others, and even if they provide basic goods to recipients. To consider if this conclusion regarding consent is relevant in immigration control, we must consider whether the consent of migrants matters in immigration control.

Some argue that consent does not matter. States, many claim, are permitted to deny visas or deport a range of migrants, even without the consent of these migrants. If states are permitted deport migrants without their consent, we might suppose states are permitted to offer payments to leave, even if migrants have not consented to being exposed to these racist payments. Even proponents of open borders may conclude that, though coercion in immigration control is wrong, exposing migrants to racist payments without their consent is permissible so long as no physical coercion is used.

Of course, we might suppose that paying minorities to leave is sufficiently racist as to be wrong even if no direct coercion is used. Migrants have a right to a certain level of respect, and this respect is impossible if

they are forced to endure racist offers to repatriate. If so, states are only acting permissibly if (but not only if) recipients of the payments consent to their being exposed to such offers. The consent of migrants does matter.<sup>59</sup>

I shall not attempt to determine which of the two claims is more plausible, and instead reach a more modest conclusion: The benefits for migrants in being paid to leave, and the consent they provide in leaving, is not a relevant consideration if these migrants feel their lives would be better had they never been offered money at all. In such cases, states cannot justify their actions by appealing to consent. This leaves open the possibility of other justifications for permitting payments, or the possibility that the payments are impermissible for other reasons.

## 8.4 Conclusion

Many minorities would prefer to accept assistance to leave than face continued incitement by politicians, violent attacks on the street, and an inability to find a job, rent an apartment, and interact with others as equals. Others wish to leave not because they face discrimination, but because they hope to find better opportunities elsewhere, only possible when handed a large amount of cash to move far away. While paying minorities to leave may seem intolerable, it helps minorities escape intolerance, or start their lives anew, making it easier to resettle, find a job, and integrate into a new neighbourhood, city, or country. And while such payments are demeaning, they give resources to the demeaned, helping ensure their exit is

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<sup>59</sup>To clarify: The consent is a necessary condition, but is not sufficient. It must also be the case that no third parties are demeaned or harmed. The above reasoning refers to instances where no third parties are demeaned or harmed, but where we still might suppose the payments are impermissible because recipients have failed to consent to their provision.

smoother than it otherwise would be, at times enriching them more than if no discrimination took place at all.

To consider when such offers are permissible, it is not enough to consider if individuals are demeaned or harmed, given the tremendous benefits they can accrue. We must appeal to other considerations, the first relating to third parties. Payments are only permissible if they do not harm the interests of minority members never offered assistance to leave. Such harm can arise when payments demean other members of the same minority, signalling to them that their ethnicity is less valued. Payments can similarly harm the interests of non-minority members offended by the message of inequality and implicit biases that arise.

The second consideration is related to basic goods. If minorities are dependent on payments to access food, shelter, or mobility, then payments may be permissible even if they demean other members of society. In the context of immigration control, if the state is permitted to deny visas to migrants, they may be permitted to pay them to leave if this provides basic goods that migrants would otherwise not access. It is preferable, however, that the state find other non-racist means of providing basic goods to migrants.

The final consideration relates to consent. Within the domestic sphere, payments are impermissible if recipients would rather never be exposed to the payments at all, regardless of whether they demean or harm others, and regardless of whether they provide basic goods to recipients. Within immigration control, such payments may still be permissible, albeit there is one less reason for their provision.

Accounting for these considerations is essential for establishing a more complete theory of discrimination. It is true that Milka preferred to return,

feeling \$14,000 provided more opportunities than staying in Israel. But we ought to shift our gaze away from the money she received, and onto the status of other migrants and citizens. In doing so, we can consider a broader array of people, preferences, and outcomes, better determining when discrimination is impermissible and repatriation is wrong.



# Chapter 9

## Conclusion

At 1:35pm on January 15th, 2013, Nhial boarded Ethiopian Airlines flight 491, flying from Juba to Addis Ababa. He wore a hat, to cover his Nuer tribal scars, and settled into his seat, landing two hours later in Ethiopia, where he took off his hat, strode into the sunlight, and asked a Nuer stranger for help. Together, they drove into town.

When Nhial was a small boy, Northern Sudanese militias entered his village, grabbed his leg, pulled him into a truck, and took him to their home in the north of the country, where he worked as a slave into adulthood. He eventually escaped to Khartoum, and then Egypt, arriving in Israel in 2007, where he worked, saved money, and read extensively about the risks of living in modern-day South Sudan. In June 2011, he bought a ticket for Juba, arriving on July 2nd, 2011, a week before South Sudan became an independence country. He rested for a day, and then sought employment in the oil industry, but his applications were ignored, even as his Dinka friends were hired. Instead, he opened a small stall in a market, selling

sweets, making enough to live on.<sup>1</sup>

In 2013, a day after the outbreak of the civil war, Dinka soldiers arrived at his stall, grabbed his sweets and money, and demanded that he leave. He did, jogging to the IDP camp, where we ran into each other a week later, recognizing each other from Jerusalem. He told me he did not regret his choice to return, despite being forced to flee to the camp. We met again on January 16th, by chance on the same flight to Addis, him fleeing the country, me returning home. He still did not regret his choice and, half a year later, joined the opposition military in South Sudan. In 2014 I visited him in Gambella in Ethiopia, where he was still satisfied with his choice to repatriate.

OBI never assisted Nhial in returning, but if they had, they would have done no wrong. He was never coerced into leaving or paid to leave, saving up money himself, finding enough information to be aware of the risks, and returning without children, his choice endangering him alone. Nor was he likely to regret his choice. The year he returned, past returnees in Juba were happy with their decisions, and it was likely he, too, would be happy with his.

Unlike Nhial, most refugees leaving Israel were coerced into their decisions, either threatened with deportation or living in destitution. In such cases, NGOs and the UN should refuse to help with return unless they also lobby for the end of coercive government policies, and their assistance does not causally contribute to more coercive policies. Even when NGOs and the UN are not necessary for repatriation, because other agencies are helping with repatriation, they may still be increasing the probability of repatriation occurring, and so increasing the probability of coercion occur-

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<sup>1</sup>Interview with Nhial, Juba, 4 January 2014.

ring. In such cases, NGOs and the UN should only help with return if they can ensure a much safer return than would otherwise take place, and if they are providing information about the risks of returning.

In providing information on risks, NGOs and the UN should disclose what they already know, but also strive to know more, reading existing reports, and conducting their own post-return evaluations. When governments facilitate return, including completely non-coerced return, they also have an obligation to conduct research, if this is necessary to fulfil their other duties, unrelated to repatriation. If, for example, governments have obligations to help prevent atrocities and poverty abroad, then they have a duty to research data on atrocities and poverty. If they do not conduct such research, but ought to, they are culpable for failing to inform refugees of the risks of returning to countries with widespread atrocities and poverty.

Even when refugees are told accurate information, it may still be impermissible to facilitate return if most refugees will likely regret having had the opportunity to return. More specifically, repatriation should be discontinued if the vast majority of past returnees feel that the worst life they could have lived had they stayed would have been better than the best life they can now live in their country of origin. Assuming this feeling is a result of repatriation alone, and repatriation is impossible to imagine ahead of time, then NGOs and the government have a strong reason to stop providing repatriation assistance.

Even when such regret is not widespread, NGOs and the government should still refrain from providing money to refugees who agree to return, if such money motivates refugees to repatriate to a country where their lives will be at risk. Even if refugees are likely to be detained or deported if they refuse to return, NGOs should still refrain from providing payments

if encouraging return causally contributes to these coercive policies. Such payments are only permissible if they either fail to motivate return and contribute to coercion or if, though motivating return and causing coercion, also provide refugees with the means of protecting and supporting themselves in their countries of origin.

The above conclusions suggest that some repatriation assistance is permissible even if return is unsafe. If refugees are not encouraged to return, nor misinformed or likely to feel regret, and if NGOs do everything possible to end coercion, then they are acting permissibly when assisting with return. Though this return may involve a great deal of risks, adults have a right to take such risks.

Though adults have this right, children do not. By 2014, at least twenty-two children died after returning from Israel and, in my own sample, five out of forty-eight children died within the first two years. Regardless of how informed and voluntary the return is, parents and their children should not be assisted in repatriating unless repatriation is safer for children than staying.

Even when return is completely safe, or when only adults are returning, there are still ethical concerns if states and NGOs only assist some ethnic groups to return. When the goal of this assistance is to decrease the number of ethnic minorities in a country, the assistance is demeaning towards citizens of the same ethnicity who understand that, in a close possible world, they too would be unwanted. Governments should discontinue such repatriation, and NGOs should generally refuse to assist, unless no third parties are harmed or demeaned.

In light of these conclusions, repatriation facilitators should change their current policies. When refugees are coerced by governments into repatri-

ating, NGOs and UN agencies should invest far more resources in lobbying for the end of such coercion, meeting with policy makers to explain the risks that refugees will face if they return, and raising court petitions to free refugees from detention. Such efforts will often mean NGOs and the UN have fewer resources for repatriation itself, but the repatriation that does take place is more likely to be voluntary, rather than forced. Resources should also be invested in evaluating the outcome of repatriation, finding information on the mortality rate, rate of displacement, and access to healthcare amongst those who have returned. This requires that repatriation facilitators travel to IDP camps in countries of origin to ask returnees in these camps about their conditions. Facilitators should also interview returnees who have migrated or fled to surrounding countries, and they should interview relatives of returnees, to find out if returnees have died after returning. The findings from such interviews must be clearly communicated to refugees who have yet to return. If the findings include evidence that past returnees have severely regretted their decisions to return, there are strong reasons to discontinue repatriation until conditions in countries of origin have improved.

In addition to gathering and disclosing more information, facilitators should discontinue providing payments that encourage repatriation that is unsafe. To determine if payments encourage unsafe returns, NGOs and governments should determine if there are strong correlations between return rates and the provisions of these payments, even while detention rates and conditions in countries of origin remain unsafe. If payments do encourage unsafe return, they should be discontinued. It may still be justified to provide aid to those who have already returned, if there is no evidence that such post-return aid encourages future unsafe repatriation.

When parents wish to return with their children, or unaccompanied minors wish to return on their own, then facilitators should refuse to assist if the children are unlikely to gain security, healthcare or sufficient education in their countries of origin. To determine the likelihood of these risks, facilitators should consider the mortality, literacy, and numeracy rates in the country of origin. If the country is insufficiently safe, assistance should be denied, and states should possibly block families from attempting to pay for their own flights, stopping them at the airport and revoking their passports. At the very least, governments and NGOs should implement campaigns to discourage such returns. When possible, NGOs and social workers should meet with parents, trying to persuade them to not repatriate, providing them detailed information on the lack of clinics, schools, and safe locations in the country of origin. NGOs should also clearly communicate to parents their rights in the host country, explaining to them that if they are detained, their children can access welfare services and foster care. In cases where children will not have access to such services in the host country, and will likely go without sufficient food, shelter, and security, then NGOs should ultimately help with repatriation, but only if this is safer for children than staying.

Finally, when return is safe, then repatriation facilitators should generally avoid supporting programs whose aims are to reduce the number of unwanted minorities in the country. If payments are ever to be instituted, officials should first ask citizens, including citizens of the same minority group, if they feel the payments are demeaning towards them, and casually contributing to greater implicit biases in society. Officials should also ask recipients of the payments if they are dependent on them for basic goods, such as employment or mobility, and if they prefer to have been offered the

payments than not. It is only permissible to provide payments if there is no evidence that third parties are demeaned or harmed, no evidence that recipients depend on payments for basic goods, and significant evidence that recipients prefer to have the payments than not. Even when these three conditions are met, it remains preferable that governments avoid such payment schemes. They may be morally permissible, but government should strive to provide equal payments to all who wish to repatriate, rather than targeting unwanted minorities alone.

In addition to the policy conclusions above, there are three broad theoretical conclusions I have reached, relevant beyond the scope of repatriation. The first regards consent.

We should not assume that coerced consent is invalid. We must consider whether the agents obtaining consent have a duty to stop the coercion. To establish this duty, we must consider whether the agents obtaining consent have the ability to stop the coercion, and whether they have greater resources to do so, or earlier promised to do so. We should similarly not assume that, whenever a consenter is misinformed, they have failed to give their valid consent. We must consider whether the agent obtaining consent has a duty to inform the consenter. I argued that such duties arise when it is easy to find information, when there is a duty of care, and when agents have other obligations which create duties to know. When such conditions arise, and an agent fails to inform, she is culpable for the resulting uninformed consent. Importantly, such culpability can arise even if the recipient of a service would have consented had they been more informed. If they would not have consented had they known they were being misinformed at the time of the misinformation, then they have failed to give their valid consent.

Even if a consenter is fully informed and un-coerced, a service should

still be denied if regret is likely, and four conditions are met: The regret is likely to be so severe that recipients feel the worst life they could have lived without the service would have been better than the best life with the service; the regret is likely to arise from the service itself, rather than other life choices; the individuals who regret accepting the service also wish the service had never been offered at all; and the service is epistemically transformative, involving an experience that would be impossible to imagine ahead of time. This principle concerning regret has implications beyond refugee repatriation, and ought to be incorporated into a number of areas involving similarly life-altering services, most notably medical interventions. But though regret is sometimes a reason to deny a service, it usually is not, as life is rarely entirely worse and entirely transformative from a single choice alone.

In addition to my theoretical contributions on consent, I have attempted to contribute to the broader discussion on children's rights. It is widely accepted that children have a right to an education that provides them the capacity to function within an economy. I argue, more specifically, that children have the right to an education necessary to function within an economy that can secure food, shelter, and basic welfare. This would entail a right to fluent literacy and numeracy, in addition to the more basic rights of immediate security, shelter, and healthcare. Parents, as such, have a correlative duty to avoid moving to a country without these necessities, and should be dissuaded from doing so.

Finally, I have addressed the broader question of whether discrimination is morally permissible when the victims of discrimination benefit. When minorities are paid to leave, they benefit, and so we cannot establish impermissibility by appealing to harm alone. To determine what is permissible



in such cases, we must focus on the consent of the discriminated, and the harm caused towards third parties.

In reaching the above theoretical conclusions, I have attempted to draw upon a diverse array of examples, reaching a central methodology conclusion: Fieldwork is essential for making us realize what we overlook, rather than just applying what we already know. If we wish to make robust and specific rules for political philosophy, we must consider a broader range of cases. This is only possible if we expose ourselves to cases we might otherwise not consider, which is easier if we speak to individuals we might otherwise not meet.

Qualitative fieldwork, in particular, is helpful for considering the subtle details of cases. Through in-depth interviews, refugees described not only the coercion they experienced, but the reasons for their actions, their knowledge and preferences at the time of their actions, and their current judgements about their past actions. Indeed, such details are often what make fictional cases so effective in ethics. We know the future preferences of the fourteen year old girl about to conceive, and the intent of the doctor about to misinform a patient. In-depth case comparisons, like fiction, include rich details often missing in aggregate data on immigration, details that can be essential in formulating action-guiding principles.

If what matters are rich details, then making philosophy relevant entails not only replacing fictional cases with real ones, but general descriptions with specific ones. This requires speaking with subjects over an extended time period, to learn about why they make decisions, and what they later fear, know, and regret. In taking this approach, we can better establish if individuals have been wronged, and whether others have wronged them, better formulating policies for governments and organizations, and

the refugees and migrants they assist.

# Appendix A

Throughout the research process I followed ethics guidelines set forth by the London School of Economics. To ensure informed consent, I communicated the following facts to subjects prior to the interview:

1. The interview is for a research project, as part of a PhD at the London School of Economics, a university in London.
2. The aim of the project is to better understand why refugees returned from Israel, what has happened to them after returning, and whether NGOs should have helped with repatriation.
3. Participation as subjects is voluntary, and subjects can refuse to take part at any point during the interview, without giving any reason for doing so.
4. The likely duration of the interview is between an hour to two hours long.
5. There will be no monetary remuneration for participating in the project.

6. Personal information will be treated as strictly confidential and will not be made publicly available or given to any other person.
7. Findings from the interviews may be published and the PhD will be made publicly available.
8. No identifying information will be included in the PhD or published works.

I took the following measures to ensure data was protected:

1. All original data with identifying information remains securely protected within my own laptop and Dropbox account.
2. All names have been changed for publication, all identifying information has been removed, and some data has been disaggregated.
3. When transporting data within and from South Sudan and Ethiopia, I kept data on me at all times, never leaving data outside of my range of vision.

I also took the following additional measures:

1. I did not provide a written consent form, as this would increase the risk of personal information leaking to authorities. Because some participants were critical of the South Sudanese government, I wanted to mitigate any risks that participants' names would reach authorities.

2. There were possible risks involved in being interviewed, particularly in IDP camps in South Sudan during the first months of the war. Participants were aware of these risks, and wished to participate regardless. There were various reasons they wished to participate. Some felt it was important to tell citizens and officials in Israel what had occurred to them since they were forced to return. Others possibly felt they would more likely receive aid from me, though I made clear that I could not provide compensation for interviews.
3. For some participants, I did provide various forms of aid when doing so was urgent, or when I was the only agent available to provide this aid. When possible, I only offered aid after individuals consented or declined to be interviewed, to ensure they did not feel pressure to be interviewed in return for aid.
4. In urgent cases where aid was delivered prior to an interview, I made clear that continuation of aid was not dependent on whether they wished to be interviewed or continue being interviewed.
5. I provided information to participants on findings as they became available. For example, I provided information to IDP residents on the conditions outside of the IDP camp, and information to those outside the camp on conditions within the camp.

When interviewing children, I took the following measures:

1. I obtained informed consent from parents or guardians before interviewing all subjects younger than 19.

2. In obtaining consent from children under sixteen, I explained that the interview was to learn about their life in Israel, South Sudan, Uganda, and Ethiopia, for a book I was writing that many would read.
3. Parents and adult siblings would speak with the children before any interviews would begin, to ensure that the children felt comfortable being interviewed.
4. If children expressed distress during the interview, I would stop the interview.

# Appendix B

## List of interviews

Interviews with refugees in Israel prior to the introduction of repatriation (n=12)

1. Subject from South Sudan, Jerusalem, fall 2009
2. Subject from Darfur, Jerusalem, 6 July, 2009
3. Subject from Congo, Tel Aviv, 20th August, 2010
4. Subject South Sudan, Jerusalem, 18th August 2010
5. Subject from South Sudan March 24th, 2009.docx
6. Subject from Darfur, 2st February, 2009.docx
7. Subject from Eritrea 12 August 2010.docx
8. Subject from Darfur March 5th 2008.docx
9. Subject from Eritrea May 12th, 2009 in Tel Aviv.docx
10. Subject from Congo August 25th, 2010 in Tel Aviv.docx

11. Subject from Darfur 11 March 2009.docx
12. Subject from South Sudan January 2008 tel aviv, wife of Mahiri.docx

Location and dates of interviews in South Sudan, 2012. Cited interviews include names, all of which have been changed to protect the subject. (n=27)

1. Aweil, 26 March 2012
2. Aweil, 19 March 2012
3. Aweil, 2 April 2012
4. Aweil, 31 March 2012
5. Aweil, 25 March 2012
6. Aweil, 16 March 2012
7. Aweil, 30 March 2012
8. Juba, 29 March 2012
9. Aweil, 28 March 2012
10. Aweil, 25 March 2012
11. Aweil, 20 March 2012
12. Aweil, 27 March 2012
13. Wau, 4 April 2012



14. Wau, 16 March 2012
15. Juba, 12 April 2012
16. Juba, 15 March 2012
17. Aweil, 25 March 2012
18. Aweil, 21 March 2012
19. Aweil, 1 April 2012
20. Aweil, 24 March 2012
21. Juba, 12 April 2012
22. Aweil, March 16 2012
23. Awil, 25 March 2012
24. Aweil, 2 April 2012
25. Interview with Joseph, Juba, 10 April 2012
26. Interview with Gatluak, Juba, 15 March 2012
27. Interview with Yasmin, Aweil, 30 March 2012

Locations and dates of interviews in Uganda, 2013: (n=30)

1. Entebbe, 14 May 2013
2. Entebbe, 14 May 2013

3. Entebbe, 14 May 2013
4. Entebbe, May 13 2013
5. Entebbe, 14 May 2013
6. Kampala, 7 May 2013
7. Entebbe, 14 May 2013
8. Entebbe 3 May 2013
9. Entebbe, 14 May 2013
10. Entebbe, 11 May 2013
11. Entebbe, 10 May 2013
12. Kampala, 7 May 2013
13. Kampala, 5 May and 7 May 2013
14. Kampala, 9 May 2013
15. Kampala, 7 May 2013
16. Entebbe, 14 May 2013
17. Kampala, 11 May 2013
18. Kampala, 10 May 2013
19. Kampala, 6 May 2013
20. Entebbe, 13 May 2013
21. Entebbe, 13 May 2013

22. Entebbe, 13 May 2013
23. Kampala, 6 May 2013
24. Entebbe, 8 May 2013
25. Entebbe, 10 May 2013
26. Entebbe, 9 May 2013
27. Entebbe, 9 May 2013
28. Interview with Natalina, Entebbe, 11 May 2013
29. Interview with Nicole, Entebbe, 10 May 2013
30. Interview with Nyandeng, Entebbe, 9 May 2013

Dates of interviews in Juba, South Sudan, 2013-2014: (n=61)

1. 26 December 2013
2. 9 January 2014
3. 27 December 2013
4. 27 December 2013
5. 20 December 2013
6. 21 December 2013
7. 11 January 2014

8. 29 December 2013
9. 9 January 2014
10. 22 December 2013
11. 23 Dec 2013
12. 9 January 2014
13. 18 December 2013
14. 27 December 2013
15. 27 Dec 2013
16. 8 January 2014
17. 2 January 2014
18. 20 December 2013
19. 1 January 2014
20. 20 December 2013
21. 20 December 2013
22. 1 January 2014
23. 1 January 2014
24. 15 December 2013
25. 9 January 2014
26. 30 December 2013

27. 15 December 2013
28. January 2 2014
29. Dec 29 2013
30. 1 January 2014
31. 22 December 2013
32. 23 December 2013
33. 23 December 2013
34. 1 January 2014
35. 20 December 2013
36. 12 January 2014
37. 14 December 2013
38. 27 December 2013
39. 15 December 2013
40. 6 January 2014
41. 9 January 2014
42. 1 January 2014
43. 21 December 2013
44. 23 December 2013
45. 1 January 2014

46. 21 December 2014
47. 22 December 2013
48. 10 January 2014
49. 4 January 2014
50. 4 January 2014
51. 4 January 2014
52. 25 December 2013
53. 22 December 2013
54. 11 January 2014
55. 27 December 2014
56. Interview with Matthew, 4 January 2014
57. Interview with Mol, Juba, 30 December 2013
58. Interview with Nathaniel 14 December 2013
59. Interview with Nhial, 1 January 2014
60. Interview with Stephen, 6 January 2014
61. Interview with Vanessa, 25 December 2013

Eritrean who moved to South Sudan after returning to Eritrea: (n=1)

1. Juba, Jan 12 2014

Interviews with South Sudanese in Ethiopia, 2014 (total: 9; total new subjects: 8)

1. Addis Ababa, 12 June 2014
2. Addis Ababa, 21 June 2014
3. Gambella, 15 June 2014
4. Gambella, 16 June 2014
5. Addis Ababa, 12 June 2014
6. Gambela, 16 June 2014
7. Addis Ababa 12 June 2014
8. Gambella, 16 June 2014

Interviews with North Sudanese who returned from Israel and fled to Ethiopia: (n=2)

1. Addis Ababa, 12 June 2014
2. Addis Ababa, 20 June 2014

Interviews with returnees in Ethiopia: (n=2)

1. Interview with Daniel, Addis Ababa, 10 June 2014
2. Interview with Bessie, Addis Ababa call to Dessie, 9 June 2014

Interview with Eritrean refugees who were resettled from Israel: (n=2)

1. Interview with Massawa, Addis Ababa, 8 June 2014
2. Interview with Tigisti, Dessie, 8 June 2014

Interviews, via Skype, with returnees to Guinea (n=2)

1. Guinea, 10 September 2014
2. Guinea, 20 September 2014

Interviews, via Skype, with returnees to Nigeria (n=3)

1. Lagos, 9 September 2014
2. Lagos, Blessing, 9 September 2014
3. Lagos, Rose, 10 September 2014



Interview, via Skype, with returnee to the Philippines (n=1)

1. Manila, 13 August, 2014

Interviews with returnees to Thailand: (n=14)

1. Nakon Ratchasima, 16 August 2014
2. Udon Thani, 16 August 2014
3. Unknown (Skype Call), 13 August 2014
4. Chaiyaphum, 13 August 2014
5. Nongbualumphu, 14 August 2014
6. South Korea (Skype Call) 19 August 2014
7. Bangkok, 13 August 2014
8. Bangkok, 14 August 2014
9. Udon Thani, 13 August 2014
10. Ubon Ratchathani, Sakda Khomsan 14 August 2014
11. Sakon Nakhon, 16 August 2014
12. Nakhon Phanom, 14 August 2014
13. Nakhon Phanom, 14 August 2014
14. Udon Thani, 16 August 2014

Interviews with migrants before repatriation: (Total:=8 Total new subjects: 7)

1. Returning to Togo, Tel Aviv, 29 July 2014
2. Returning to Togo, Tel Aviv, 29 July 2014
3. Returning to Colombia, Herzilyah, 30 July 2014
4. Returning to Colombia, Herzilyah, 30 July, 2014
5. Returning to Colombia, Herzilyah, 30 July, 2014
6. Returning to the Philippines, Tel Aviv, 28 July 2014
7. Interview with Milka 29 July 2014, Tel Aviv, returning to Ethiopia (confirmed her return in January 2015)
8. Interview with Saeda, Tel Aviv, Israel 29 July 2014

Interviews with Northern Sudanese who stayed in Israel: (n=3)

1. From Darfur, Tel Aviv, 20 Dec 2012
2. From Darfur, Tel Aviv, 22 Dec 2012
3. From Darfur, Tel Aviv, 23 Dec 2012

Interviews with repatriation facilitators, and those involved in repatriation: (n=10)

1. Interview with CIMI Director, Jerusalem, 22 September 2011
2. Interview with CIMI employee 1, Jerusalem, 23 September 2011
3. Interview with CIMI employee 2, Berlin, 3 March 2011
4. Interview with Galia Sabar, Tel Aviv, 17 Dec 2012
5. Interview with Jean Marc, Jerusalem, 14 Dec 2012
6. Interview with HIAS-Israel Director, Jerusalem, 11 Dec 2012
7. Interview with HIAS and OBI employee, Tel Aviv, 28 April 2012
8. Interview with OBI Director, Jerusalem, 6 October 2010
9. Interview with HIAS coordinator of AVR, Jerusalem, 19 Dec 2012
10. Interview with Assisted Voluntary Return (AVR) official, Tel Aviv, 7 August 2013

Interviews with NGO employees uninvolved in repatriation: (n=2)

1. Interview with Sigal Rosen, Tel Aviv, 9 December 2012
2. Interview with Sharon, ASSAF volunteer, Tel Aviv, 2013

Interviews with UNHCR officials: (n=3)

1. Interview with Sharon Harel, Assistant Protection Officer, UNHCR Israel, Tel Aviv, Dec 20 2012
2. Interview with Larry Bottinick, Senior Protection Officer, UNHCR Israel, 16 December 2015
3. Interview with Ewen Macleod, Head of Policy Development and Evaluation Service, UNHCR, Skype Interview to Geneva, 10th February 2016

# Appendix C

## Total returning, payments, and detention rates

Month	Total returning to South Sudan, Sudan, Eritrea, and Ivory Coast	Money paid to Sudanese and Eritreans	Significant Events
May-June 2012	1,200-3,000	\$1,500 <sup>1</sup>	South Sudanese told they will be detained indefinitely or deported if they do not return. The Government also amends the Anti-Infiltration bill, allowing more widespread detention of asylum seekers. <sup>2</sup>
July 2012	unknown	0-100	
August 2012		0-100	
September 2012		0-100	On 16 September 2012, the High Court of Justice invalidates provisions of Anti-Infiltration Law which allows for prolonged detention. <sup>3</sup> Government then issues new procedure allowing the state to arrest anyone suspecting of criminal acts, without trial. <sup>4</sup>
October 2012		0-100	Human rights organizations submit petition against procedure above. <sup>5</sup>
November 2012		0-100	
December 2012	570-656 <sup>6</sup>	0-100	Ivorian refugees threatened with deportation if they do not leave by January.
January 2013	unknown	0-100	
February 2013	124	0-100	
March 2013	53	\$1,500 <sup>7</sup>	UNHCR, in an unprecedented move for the organization in Israel, submitted a request to file a friend of the court brief with the High Court of Justice on 7 March 2013. <sup>8</sup> In an initial hearing at the High Court of Justice on 12 March, order nisi issued for the government to explain why the amendment to the anti-Infiltration Law should remain intact. <sup>9</sup>
April 2013	59	\$1,500	
May 2013	70	\$1,500	
June 2013	75	\$1,500	State prosecutor announces, in a court hearing, that the state is unlikely to accept any claims of Eritrean nationals for refugee status. <sup>10</sup>
July 2013	164	\$1,500	
August 2013	170	\$1,500	Hotline for Migrant Workers reports slight improvements in living conditions in detention facilities. <sup>11</sup>
September 2013	89	\$1,500	Nullification of anti-Infiltration amendment which allows detention of asylum seekers. <sup>12</sup>
October 2013	180	\$1,500	Interior Minister Gideon Saar proposes plan to Prime Minister Netanyahu to raise grant from \$1,500 to \$5,000. No final decision reached. <sup>13</sup> No asylum seekers released, despite High Court order.
November 2013	116	From mid to late November: \$3,500	Following human rights petition to high court, some detainees released, consistent with High Court Order. Following this, the Cabinet approves increasing payment from \$1,500 to \$3,500 in mid-November. <sup>14</sup>
December 2013	295	\$3,500	Knesset Passes new amendment, detaining new asylum seekers for one year. <sup>15</sup>
January – August 2014	Aprx 3312 <sup>16</sup> Per month: 414	\$3,500	Asylum seekers continue to be detained.

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<sup>1</sup>Based on the 126 interviews conducted with returnees to South Sudan.

<sup>2</sup>“Israel: Amend Anti-Infiltration Law,” 10 June 2012.

<sup>3</sup>Amnesty International, “Blind to Violations, Deaf to Obligations: Israel’s Human Rights Record,” available at <http://www.amnesty.org/en/library/asset/MDE15/015/2013/en/c88f325d-74ba-434e-9db0-44b544eb732b/mde150152013en.pdf>

<sup>4</sup>Amnesty International, Assaf, and the Hotline for Migrant Workers, *Israel's Policy towards Refugees and Asylum Seekers: Prolonged Administrative Detention*, March 2013. <http://assaf.org.il/en/sites/default/files/Israeli%20Policy%20of%20Prolonged%20Administrative%20Detention%20March%202013.pdf>

<sup>5</sup>ibid

<sup>6</sup>The Labour Statistics do not differentiate between African countries that are not Sudan and Eritrea. However, nearly all Ivorian refugees repatriated after January 2013, so I only include Sudanese and Eritrean migrants as the total numbers of returnees in the relevant sample.

<sup>7</sup>Interview with Assisted Voluntary Return (AVR) official, Tel Aviv, 7 August 2013.

<sup>8</sup>Talila Neshet, “UN refugee agency petitions High Court to overturn ‘infiltration’ law,” Haaretz, 12 March 2013, available at <http://www.haaretz.com/news/national/un-refugee-agency-petitions-high-court-to-overturn-8216-infiltration-law.premium-1.508765>

<sup>9</sup>The Association of Civil Rights in Israel, “High Court of Justice Prepares to Hear Petition against Anti-Infiltration Law,” available at <http://www.acri.org.il/en/2013/05/29/anti-infiltration-law-2/>

<sup>10</sup>Amnesty International, 7 June 2013, <http://www.amnesty.org/fr/library/asset/MDE15/005/2013/en/07259891-b209-4058-b370-e76c3cdccfe8/mdel50052013en.pdf>

<sup>11</sup>Maya Kovaliyov-Livi and Sigal Rozen, “‘From one prison to another’: Holot Detention Facility,” Hotline for Migrant Workers in Israel, June 2014.

<sup>12</sup>Barak Ravid and Ilan Lior, “Court Invalidates Legislation Allowing Israel to Detain Migrants without Trial,” Haaretz 16/9/ 2013, available at <http://www.haaretz.com/news/diplomacy-defense/.premium-1.547311>

<sup>13</sup>Ilan Lior, “Israel to Offer African Migrants \$5,000 to Leave,” Haaretz, 30/10/13, available at <http://www.haaretz.com/news/national/.premium-1.555218>

<sup>14</sup>It was unclear if this was approved in November or December. A civil servant in the Ministry of Interior recalled that the increase was “around November 2013,” but some media sources report that the approval took place in the cabinet in December. Regardless, it was almost certainly after some detainees were released from detention following the High Court decision. William Booth and Ruth Eglash, “Israel Says it won’t Forcibly Deport Illegal Migrants, But it Wants them to Leave.” Washington Post, 20/12/2013; Interview with Assisted Voluntary Return (AVR) official, Tel Aviv, 7 August 2013.

<sup>15</sup>Maya Kovaliyov-Livi and Sigal Rozen, “‘From one prison to another’: Holot Detention Facility” Hotline for Migrant Workers in Israel, June 2014.

<sup>16</sup>Based on total reported to have left for Sudan and Eritrea (or a third country in Africa for resettlement) by Human Rights Watch as of August 2014 (6,400 to Sudan and 367 to Eritrea), minus the total who returned in 2013 to Sudan and Eritrea based on Labour Statistic (1,687 to Sudan and 268 to Eritrea), minus 1,500 like from Sudan who returned in 2014. Unfortunately, for 2012 official Labour Statistics only provide the total number who returned to all countries (20,500) and

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the total who returned via the Office for the Encouragement of Return (2,600). The 2,600 total for 2012 includes a reported 1,100 South Sudanese who returned. The remaining 1,500 are likely from Sudan as it is unlikely that any Sudanese voluntarily returned without the use of Assisted Voluntary Return unit, as this office paid for their flights and arranged their travel documentation. As such, the total estimated to have returned between January to August 2014 was:  $6,400 + 367 - 1687 - 268 - 1,500 = 3312$ . The Labor Statistics for 2012 (Hebrew) are available at <http://www.piba.gov.il/PublicationAndTender/summery/Documents/summary2012.pdf> and Labor statistics 2013 (Hebrew) are available at <http://piba.gov.il/PublicationAndTender/ForeignWorkersStat/Documents/563343n80.pdf>; Human Rights Watch, "Southern Sudan: Abuses on Both Sides of Upper Nile Clashes," 19/4/2011, available at <https://www.hrw.org/news/2011/04/19/southern-sudan-abuses-both-sides-upper-nile-clashes>