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Ending the Routine Use of Immigration Detention: The Moral Argument for Alternatives in the United States and Beyond

Stephanie J. Silverman and Ben Lewis
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ENDING THE ROUTINE USE OF IMMIGRATION
DETENTION: THE MORAL ARGUMENT FOR
ALTERNATIVES IN THE UNITED STATES AND BEYOND

DR. STEPHANIE J. SILVERMAN
ADJUNCT PROFESSOR, CENTRE FOR ETHICS, TRINITY COLLEGE, TORONTO
SSHRC POSTDOCTORAL FELLOW, GRADUATE SCHOOL OF PUBLIC AND INTERNATIONAL
AFFAIRS, OTTAWA

BEN LEWIS
INTERNATIONAL HUMAN RIGHTS LAWYER AND THE ADVOCACY COORDINATOR OF THE
INTERNATIONAL DETENTION COALITION

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EXECUTIVE SUMMARY

This paper introduces the methodology of normative ethics as guidance for crafting better immigration detention policies and practices. The paper explains the theory of normative ethics and how the methodology taps into the core values of liberal states. It points the way out from the contemporary muddle of shifting public opinion, intense media scrutiny, and international pressures. Looking specifically at the Obama Administration's response to the summer 2014 "surge" of asylum-seeking women and children from Central America, the paper describes how this turn to detention as a tool of migration management falls short of minimum standards of fairness, justice, and common morality. The paper concludes that there is an ethical imperative to improve these gaps, including through implementing alternative to detention programs that are more consistent with ethical and sustainable approaches to immigration and asylum governance.

KEY FINDINGS

- Virtually every state in the world sees itself as ethical, fair, just, and democratic. Yet, these states often implement immigration detention policies that violate core liberal values.
- Normative ethics provides a novel methodology to sift through public opinion and evaluate the morality of immigration detention policies and practices.
- The Obama Administration's return to detention in response to the summer 2014 "surge" of Central American asylum seekers was not ethical.
- Governments can draw on normative ethics to construct better immigration and asylum policies that are more consistent with their population's core values.

KEY RECOMMENDATIONS

- Policymakers should draw on normative ethics to sift through public opinion and craft sustainable, ethical approaches to asylum and immigration management.
- Implementing alternatives is not only the more economically smart decision, it is the more ethical choice, too.

BRIEF AUTHOR BIOGRAPHIES

Stephanie J. Silverman is a SSHRC Postdoctoral Research Fellow at the Graduate School of Public and International Affairs, University of Ottawa, Adjunct Professor of Ethics, Society and Law at Trinity College, University of Toronto, and the co-editor of Immigration Detention: The Migration of a Policy and its Human Impact (Routledge, 2015).

Ben Lewis is an international human rights lawyer and the Advocacy Coordinator of the International Detention Coalition.

INTRODUCTION

In an age of unprecedented human migration, states are increasingly taking steps to control, reroute, and manage migrants' mobilities. Unfortunately, many of these policies and practices have the effect of punishing refugee, asylum seeker, and migrant populations for their trans-border movements; they may also violate conventions and agreements that guarantee fundamental rights and the obligation to treat others with dignity (Sampson and Mitchell 2013).

Chief among these troubling public policy decisions is the routine use of immigration detention. This trend is being driven by a number of complex and interrelated factors, including anti-immigrant attitudes, xenophobia, and outdated stereotypes of migrants and migration (Githu 2010; O'Nions 2010). The criminalisation of irregular migration and securitisation of borders leads to escalating and needless migrant arrests and detentions. In fact, irregular migrants pose no greater threat on average than members of the American public; conversely, due to violence or instability in the states of origin, the US may actually owe them protection, not detention. Research shows that routine immigration detention is financially costly, and harmful to detainees, their families, and the wider communities. It also demonstrates that detention is a relatively ineffective border control measure (Sampson, Mitchell and Bowring 2011). Importantly, the routine use of detention clashes with liberal states' deeply held moral beliefs.

Unlike other scholars who focus on legal and policy arguments on detention, this paper is interested in the *morality* of making routine the detention of asylum seekers and irregular migrants, especially children and individuals in family units. To do so, this article employs the novel methodology of normative ethics. This evaluative methodology studies a case, and generates a systematic determination of whether it comports with liberal ethics. This article focuses on the ethics of the US turn to detention as a response during the summer 2014 "surge" of asylum-seeking women and children coming from Central America. Normative theory presents an innovative, complementary argument for implementing non-custodial, community-based, alternatives to immigration detention ("alternatives" or "ATD"): namely, that in addition to the well-

established, pragmatic benefits of the programs, self-identifying ethical states have a moral imperative to consider alternatives in lieu of custodial detention, particularly for children and families.¹

WHAT ARE NORMATIVE ETHICS?

Laws and policies generally reflect common ethical beliefs of the people living in a community. Conversely, such “normative ethics” condition how people approach and process the world around them. Norms influence opinions on, and reactions to, virtually every socio-political phenomenon. Norms are rooted so deeply that they appear self-evident. While public opinions ebb and flow, norms remain stable over time. For these reasons, normative ethics play important roles in the development of immigration and asylum policies and practices, particularly in liberal states.

While the precise content of a set of norms is a matter for debate, similarities exist across North American and European states. While it is difficult to identify all normative values, Carens (2013: 2) helpfully offers a number of “democratic principles” that collectively elucidate many of the “broad moral commitments that underlie and justify contemporary political institutions and policies”. Such common norms range from the equal moral worth of individuals to anti-discrimination, freedom, and consent to be governed. Quintessential liberal norms could perhaps be summarized as basic human dignity, equality of opportunity, non-discrimination, due process, and personal liberty; while other ideologies – democratic or not – may subscribe to some or all of the liberal democratic principles, Carens’ “democratic normative framework as moral compass” (2013: 3) provides grounds for a consensus that can then lead on to discussions of particular issues; in this case, it can lead on to conversations about the ethical propriety of immigration detention in the U.S.

¹ Following the Immigration Detention Coalition (2015), Alternatives to immigration detention can be defined as: “Any law, policy or practice by which persons are not detained for reasons relating to their migration status.” As explained by):

The phrase ‘alternatives to immigration detention’ (‘alternatives’) is not an established legal term nor a prescriptive concept, but a fundamentally different way of approaching the governance of migration. Alternatives shift the emphasis away from security and restrictions to a pragmatic and proactive approach focused on case resolution. An alternative approach respects asylum seekers, refugees and migrants as rights holders who can be empowered to comply with immigration processes without the need for restrictions or deprivations of liberty.

Norms are significant for morality but also for inferring value to more concrete structures of beliefs in human worth and flourishing, including human rights. Norms are central to the declarations, conventions, and agreements of every international and regional human rights body. For instance, the language of “equal and inalienable rights” applies irrespective of geographic, cultural, and religious differences. Norms are approximate eponyms for quasi-universal beliefs,² and align the “moral compasses” not only of philosophers but of modern liberal states as well.

Thus, while much detainee advocacy *a priori* assumes that the routine use of detention in the US is unethical, it is the methodology of normative theory that reveals, unpacks, and evaluates the applicability and rightness of these beliefs. Normative theory maps these assumptions onto detention to evaluate the morality of the practice and the consistency of the beliefs. In other words, normative theory provides a much-needed step back from the passions of the detention debate. It seeks a balance between or amongst competing interests. In order to get to the bottom of what is considered an ethical border and immigration policy and practice, normative theory takes stock of the debate, and measures its arguments for and against particular uses of detention in relation to a real-world understanding of the applicability of norms.

LIBERTY, ETHICS, AND NON-ARBITRARY DETENTION

Respect for an individual’s liberty is an essential component of normative ethics and, hence, normative theory. Liberty’s status as the first substantive, protected human right is reflected in Article 3 of the Universal Declaration of Human Rights, which proclaims that everyone has the right to life, liberty, and security of person (Human Rights Committee 2014). This right to personal liberty prohibits unlawful and “arbitrary” detentions. Now a foundational liberal norm, non-arbitrariness includes “elements of inappropriateness, injustice, lack of predictability, and due process of law, as well as elements of reasonableness, necessity, and proportionality” (*Ibid*).

The decision to deprive a person of her liberty must: be based upon relevant factors case-by-case, and not on a mandatory rule for a broad category; take into account less invasive means of achieving the

² Of course, any claim for worldwide application is tempered by the presence of groups like ISIS / ISIL and rogue states like North Korea, both of whom are involved in their own, alternative normative projects based on conscious rejections of liberal values. Nevertheless, these groups lack legitimacy and, in some cases, governments and territories, so they stand as exceptions that do not discount the rule of quasi-universal applicability.

same ends; be subject to periodic re-evaluation and judicial review; and take into account the effect of the detention on an individual's physical or mental health (*Ibid*). Detention is also arbitrary when “the manner in which the detainees are treated does not relate to the purpose for which they are ostensibly being detained” (*Ibid*).

HOW NORMATIVE ETHICS DIFFER FROM PUBLIC OPINION

Racist and xenophobic discourse can masquerade as ethics. It must be extracted and understood distinctly from normativity. When making policy decisions, the dangers of not separating popular opinion or hard-line political positions from normative ethics are heightened. A key historical example is the Second World War internment of over 120,000 Japanese-Americans in the U.S. following a moral panic in the aftermath of the attack on Pearl Harbor. It is now regarded as a breach of U.S. values (Silverman 2010: 7). It is in these sorts of instances that moral language can obfuscate substantive claims within descriptions of moral beliefs of some smaller group existing within the larger society (Clarke and Simpson 1989; Price 2008). It is also in these instances when the methodology of normative ethics can be most useful.

THE POWER OF AN APPEAL TO ETHICS

Researchers, policymakers, politicians and many others appeal to ethics as a strategy to rally support for their arguments. After outlining the methodologies, interpretations, and results of their data, Slack, Martinez, Whiteford, and Peiffer (2015: 124), for example, turn to ethics to conclude that: ‘We are currently at a juncture where we can change course and adopt a humane immigration system and inclusive approach to security that addresses our needs as one society connected by family, economics and the desire to make a better life for ourselves and our loved ones.’ Their language connects directly to liberal norms. The standbys of a ‘better life’ and ‘one [unified, equal] society’ balanced against a ‘humane’ approach to ‘security’ are tenets of normative ethics, particularly as regards the human right to migrate across borders (Cf. Carens 1992: 28 – 31; 1999: 1083). This tactic also speaks to the currency of ethics in arguing the rightfulness of immigration and asylum control.

THE SUMMER 2014 “SURGE” OF WOMEN AND CHILDREN ASYLUM SEEKERS

It will surely necessitate years of hindsight to pinpoint the causes of the 2014 summer “surge” and its diminishment. A longer temporal view, for example, would demonstrate that the “surge” of women and children actually began in 2011 when the U.S. Government recorded a rise in arrivals of unaccompanied and separated children from El Salvador, Guatemala, and Honduras. Indeed, C.B.P. apprehensions of such children increased from 4,059 in FY 2011 to 10,443 in FY 2012 and then more than doubled again, to 21,537, in FY 2013 (United Nations High Commissioner for Refugees Regional Office for the United States and the Caribbean 2014: 4). A more robust linguistic approach would also reveal problems with our labeling this particular time of migration as a “surge”. Our work aligns with other scholarly efforts to unpack how the Other-ing of migrants normalizes detention (see section below on *Does the policy treat people equally and non-discriminatorily?*) and so we are reluctant to use “flooding” language. Likewise, even the most generous estimates of the new child and family arrivals are small when compared with the overall U.S. population. The framing of the issue as a “surge” reifies the perception of a crisis in irregular immigration, and serves to justify harsh deterrence policies, including mandatory detention (Mainwaring and Silverman, *forthcoming*). Therefore, to signal our discomfort around employing this terminology but also our lack of imagination at finding a better vocabulary, we will use “surge” but enclose it with quotation marks.

What we can say is that the “surge” seems to have begun around the spring of 2014 and tapered off by August 2014. Between October 2013 and June 2014, 47,000 children were arrested crossing the US southern border, representing a more than 90 percent increase from the previous year (Hennessy-Fiske and Carcamo 2015). Three quarters of this population originated from the three Central American states of Honduras, El Salvador, and Guatemala (Villiers Negroponte 2014). Over FY 2014, 51,705 unaccompanied minors from these states were detained. As a comparison, the FY 2013 figure was less than half FY 2014 at 20,805 while FY 2011 was lower still, at 3,933 detentions. Apprehensions of families (composed almost exclusively of mothers with young children) more than quadrupled in one year from 14,855 persons in FY 2013 to 68,445 persons in FY 2014 (Lind 2015; Medrano 2015).

El Salvador, Guatemala, and Honduras are impoverished and violent when compared to the U.S., with little police control over the gangs and narco-traffickers. Domestic abuse is prevalent. These states have

some of the highest murder rates in the world, and are notorious for their unsolved *femicide* cases (Tobia 2013). The *Economist* (2014) characterizes the situation as a “crime disease” infecting the region. Vulnerable persons such as women and children are particularly harmed by the violence in the region.

At least four more factors help to explain the remarkable “surge”: first, many people were attempting to reunite with the approximately 2.5 million Central Americans living in the U.S.; second, false but widespread rumors held that a new law allowed women with children to secure a *permiso*, or pass, to stay in the U.S. indefinitely; third and relatedly, Central American networks broadcast that vulnerable people – particularly unaccompanied minors — would be eligible for protection under U.S. law, due to the high levels of violence in Central America; and finally, smuggling operations pivoted from moving drugs to people, across the U.S. southern border.

The Obama Administration was concerned with more asylum seekers continuing to come to the U.S. from Central America. The “surge” presented a unique amalgam of urgent humanitarianism, long-term consequences, and passionate, intuitive reactions. Against this background, the Administration positioned its turn to mandatory detention to deter future arrivals as a second-best option; the Administration also stressed that release into the community would not be feasible although so-called Alternatives to Detention Programs based on community monitoring, case management, and deposit of documents would be considered.³ U.S. Home Secretary Johnson (2014) asked the Senate Appropriations Committee to allocate funds for a strategy to deal with the asylum-seeking women and children, of which the centerpiece would be “an aggressive deterrence strategy focused on the removal and repatriation of recent border crossers”.

³ In January 2016, an alternative was implemented for some of the detained families. The so-called Family Case Management Program (FCMP) relocates ‘non-dangerous, low-flight-risk families’ to the metropolitan areas of Baltimore/Washington DC, Chicago, Los Angeles, Miami, New York City/Newark, and Miami. There they will be managed under a caseworker system until their ‘immigration lifecycle’ is complete (U.S. Immigration and Customs Enforcement 2016).

RESPONSE

The U.S. policy to detain asylum-seeking women and children had been earlier curtailed after the T. Don Hutto residential family detention facility closed in 2009. The history, and ethics, of the 512-bed Hutto detention facility, and family detention policy more generally, are complicated but worth reviewing. Before 2001, apprehended non-citizen families with children were typically released and given a notice to appear before an Immigration Judge at a later date. Following the attacks of September 11, 2001, however, the default presumption of liberty was removed and families were no longer regularly released. The resultant increase in the family detainee population outstripped existing detention facilities' capacities. The U.S. Department of Homeland Security (D.H.S.) resorted to separating children from their parents and placing them with unaccompanied minors in specialized facilities. In 2005, when Congress learned of this practice of separating children from parents, it was deemed appalling and Congress quashed it immediately. In May 2006, the Hutto detention facility was re-opened to hold family units only (Love 2009: 11).

Unfortunately, Hutto's living conditions were revealed to be substandard (e.g. Taylor 2008). Families were kept in small cells for 11 to 12 hours each day; these cells had open toilets and no food or toys. Amongst other indignities, children were clothed in prison garb and were threatened by Hutto guards that if they did not behave, they would be separated from their parents (Women's Commission for Refugee Women and Children, and Lutheran Immigration and Refugee Service 2007). Legal and civil society efforts mobilized, once again, to shut down Hutto. These efforts facilitated the second conversion of Hutto, this time into a women-only detention center in 2009. While stopping short of banning the practice, Congress allocated specific funds and directed D.H.S. to detain families in 'non-penal, home-like' facilities (López 2012: 1643).

Following the closure of Hutto and continuing until the summer 2014 "surge" began in spring/summer 2014, D.H.S. family detention efforts were confined mostly to a 96-bed, short-term, publicly operated facility in Pennsylvania. This facility was used mainly as a last resort. In response to the "surge", the Obama Administration instructed the D.H.S. and its subcontracted private firms to operationalize two new family detention facilities. These facilities had a combined detention capacity of more than 1,000 beds. After shutting one, the Administration unveiled in December 2015 the 'South Texas Family Residential Center' in Dilley, Texas ('the Dilley Center'): a 50-acre secure facility estimated to cost 260 million USD per annum, the Dilley Center's 2,400 beds are spread across barracks-like structures without toilets or showers within the

housing units. A high fence and security cameras border the treeless site, and security guards wake the children at 5:30 a.m. each morning by shouting and turning on the lights (Takei 2015). As of June 12, the Dilley Center housed 1,735 individuals, about 1,000 of them children (Hennessy-Fiske 2015).

The Dilley Centre's living conditions bear striking similarities to those documented at Hutto (Lutheran Immigration and Refugee Service, and Women's Refugee Commission 2014: 7, *passim*). For example, children are once again subject to indignities like being issued identity cards and being asked for them when they want to play with a toy. It is also the same private security company running the Dilley Center that managed Hutto. An interfaith coalition of civil rights groups, immigrant advocates, and other grassroots organizers has coalesced around the denunciation of the Dilley Center as un-American; they are once again calling for an end to family detention (Contreras 2015; Gonzales, Speed, and Rosas 2015; Ordonez 2015b).

Approximately a year after it began, a District County judge declared unlawful the state's strategy of detaining these mothers and children to deter future, unnamed asylum seekers from coming to the U.S. from Central America (American Civil Liberties Union 2015). It remains to be seen whether the practical realization of this legal ruling is feasible (American Immigration Lawyers Association 2015). There is no statistical evidence that immigration detention policies deter irregular migration (Sampson 2015; c.f. Lofgren, Roybal-Allard, Gutiérrez, and Various 2015). These developments should be further contextualized by the House of Representatives' eventual allocation of 362 million USD for detention operations in FY 2015, and the normalization of bond rates of \$7,000 or more that has put bail out of reach for many family detainees.

In light of this fluctuating legal-political situation, more than 100 House of Representative Members signed an open letter to Secretary Johnson. They are calling for the closure of the Dilley Centre on the grounds that it breaches American ethics. The Members articulate their concerns with detaining mothers and children, including violations of liberty and national values and universal care for children. They urge the Administration to do 'the right thing' and extend respect to the asylum seekers.⁴ The growing unease with

⁴ The Members write: "We believe the only solution to this problem is to end the use of family detention... We believe that it is undeniable that detention in a secure facility is detrimental to mothers and children and is not reflective of our values as a Nation... We must prioritize the health and well-being of mothers and children while also prioritizing our enforcement objectives. Detaining mothers and children in jail-like settings is not the answer. We have an opportunity to do the right thing and are confident that DHS has the

family detention is summed up by the headline of a *New York Times* feature that went viral: "The Shame of America's Family Detention Camps" (Hylton 2015). The next section of this article explains why it matters that family detention is being attacked as unethical.

A NORMATIVE EVALUATION OF FAMILY DETENTION

If we re-visit our list of quintessential liberal norms—basic human dignity, equality, non-discrimination, due process, and liberty—it becomes clear that there is a fundamental tension between normative ethics and the routine use of immigration detention for families. While each liberal state endeavors to eliminate borders dividing social classes or ethnic minorities within its domestic population, detention policies promote the adoption of laws and approaches that stigmatize and marginalize non-citizens (Silverman 2014).

As mentioned, normative ethics as a methodology is concerned with balancing competing interests. States have legitimate interests in managing their borders but these interests must not override fundamental rights obligations owed to *all* human beings. A state's use of immigration detention and other migration controls frequently rubs up against its ethics precisely because the rights, care, and protection of non-citizens are opposed to "tough on migration" policies which seek to limit the rights and access to protection of these same populations, often based on vague or populist notions that migrants are threats to the domestic population. Further, these same policies of protectionism may not only spring from xenophobia, racism, and, more recently, Islamophobia; additionally, policymakers may use immigration detention to restrict admissions and rights to reside due to domestic, democratic concerns around distributing scarce resources, conserving the welfare state, or concerns over long-term refugee and migrant integration. How might states like the US work to resolve this ethical dilemma? The following series of questions may help. These methodological questions tease out how detention relates to the quintessential liberal norms.

capacity to honor our Nation's longstanding commitment both to the protection and well-being of refugee families and to law enforcement and public safety." (Lofgren, Roybal-Allard, Gutiérrez, and Various 2015)

DOES THE POLICY RESPECT BASIC HUMAN DIGNITY?

The normative commitment to treating all people with dignity means that the state must avoid subjecting anyone—regardless of legal status—to conditions known to produce harm.⁵ A familiar instantiation is the prohibition on cruel, inhuman, or degrading treatment or torture. The normative commitment to human dignity also includes a heightened duty of care to protect the most vulnerable members of society, including children, asylum seekers, pregnant women, torture survivors, the elderly, the mentally ill, the abused, and the neglected.

The scientific literature shows that immigration detention violates human dignity because it damages people. Detainees often experience severe decline in their mental and physical health across a spectrum of symptoms, such as post-traumatic stress disorder, bed-wetting, anxiety, depression, and psychosis (e.g. Cleveland and Rousseau 2013; Dudley 2003; Mares and Jureidini 2004). Each day in detention exacerbates this trauma. People subject to indefinite detention - such as detainees in the U.S. where there is no firm time limit on detention - are at particular risk of depression, suicide, enduring personality changes, and estrangement from family and community (Physicians for Human Rights 2011). With regards to family detention, overwhelming evidence indicates that there are severe, negative, lifelong impacts on the mental, physical and developmental health of children, whether they are held alone or in family units (Brabeck and Xu 2010; Physicians for Human Rights 2011; Kronick, Rousseau, Cleveland 2015; Lorek, Ehntholt, Nesbitt, et al. 2009; Rothe, Lewis, Castillo-Matos, et al. 2002).

Asylum-seeking families in indefinite detention in the Dilley Center also encounter: the difficulties associated with living under the ever-present threat of deportation (Kotsioni, Ponthieu, and Egidi 2013); overcrowding; physical isolation; substandard mental and physical health care (Shahshahani 2012); and overly criminal-like conditions (United Nations 2012). These failures to meet basic standards of care, and,

⁵ As befits a norm of this significance, the obligation not to subject someone knowingly to harm is codified in many treaties and conventions, including the *International Covenant on Civil and Political Rights* (1966), articles 7, 10(1); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment* (1984), art. 16(1); *Convention on the Rights of the Child*, articles 3, 22(1), 37(1990); *International Convention on the Protection of Human Rights of All Migrants and Their Families* (1990), art. 17; *UNHCR Revised Guidelines on Applicable Standards Relating to the Detention of Asylum Seekers*, (1999) and *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988), Principles 1, 3, 6, 28.

indeed, to cause harm knowingly, are virtually impossible to justify, particularly for asylum seekers and for people without criminality.

Additionally, in terms of their ability to screen and assess individual vulnerabilities, modern immigration detention regimes are relatively blunt instruments. A clear-cut example is the continuing detention of children in the Dilley Centre. The *best interests of the child* principle lays out a prohibition against child detention (Committee on The Right of the Child 2012). Clear guidance from the international community elaborates the practical meanings of this principle in the immigration and asylum contexts (Inter American Court of Human Rights 2014; Council of Europe 2014). Since states have a heightened duty of care towards children regardless of immigration status, the continued detention of children appears particularly ethically egregious. From a normative point of view, the fault lies at the system level because the possibility for child detention is presumed by the legal and policy architecture of the practice: the detention centre is not understood as a space of protection and care, but rather of control and enforcement.

DOES THE POLICY TREAT PEOPLE EQUALLY AND NON-DISCRIMINATORILY?

Equality and non-discrimination are also significant normative commitments. The state punishes negative discrimination on the basis of race, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, nationality, migration status, age, disability, statelessness, marital and family status, sexual orientation or gender identity, health status, and economic and social situation (see, e.g., OHCHR 2014). Yet, the reality of the 2014 U.S. turn to detention clashes with this normative commitment.

Discriminatory profiling motivated the expansion of immigration detention. Before the “surge”, a 25 January 2009 snapshot of the US detention system showed that the majority of detainees hailed from Mexico (28%) and Central America (28%) (Chacón 2014: 622). Cabot (2014: 366 – 367) pointed out worrying trends in the subjective and discriminatory wielding of discretionary detention powers by U.S. border guards:

some asylum seekers have been threatened with incarceration and separation from their family at the time they make a protection claim, while others have been turned away .. [and guards] told them that ‘the United States is full.’ These responses highlight a disturbing fact: border agents have

complete authority over asylum seekers at the point of entry, and violations are extremely difficult to remedy.

Yet, this discriminatory targeting is encouraged through designing detention systems to “catch” certain nationalities pursuant to removal of the group. While the racialized population may result from, say, men being more mobile than women and therefore winding up detained at higher rates, or that certain ethnic or minority groups are more likely to fall into states of irregularity, such speculation does not justify discriminatory treatment, not least because it would be arbitrary, disproportionate, and unfair (Silverman, forthcoming). The U.S. Administration’s concentration on Central American women and children is a case in point.

Importantly, discriminatory detention practices mirror larger ethnic, gender, racial, and class prejudices endemic to most states’ immigration control apparatuses. As Silverman (2014: 611 – 612) suggests, “men and certain minorities are routinely singled out for discriminatory treatment, and this prejudice is revealed when detention is brought into the equation.” Global surveys indicate that detainee populations overly represent individuals hailing from the Global South and from lower socio-economic statuses (United Nations 2013). Over time, the discriminatory deployment of detention policies may contribute to normalizing the marginalization and criminalization of entire swaths of people, a phenomenon that is extensively documented in the ‘criminalization of immigration’ literature, especially in the US and post-9/11 (e.g. Bowling 2013; Chacón 2012; Dow 2004; Hernández 2012; Weber 2002). As Golash-Bazo and Hondagneu-Sotelo (2013) argue about deportation, it is a gendered and racial removal project, the consequences of which are also skewed across gendered and raced lines in the U.S.

Language and xenophobic beliefs about the “Other” contribute to the discriminatory application of immigration detention. Whether biological, physical, or social, common U.S. metaphors or analogies for Central Americans and other Hispanics liken them to threats to society (Cisneros 2008; Martínez 2008; Santa Anna 2008). The media routinely refers to immigrants to pollution or waste, natural disasters (Heyes 2014; Staff Writer 2015), animals (El País 2014), and invading armies (Román 2013). In a survey of major newspaper coverage of the summer 2014 “surge”, Reynolds (2015: 125) finds that ‘water-related metaphors were by far the most frequently used metaphor... [with] the next most common primary metaphors [being]

“other,” war/ combat and body’. Discrimination is unfair and illiberal, and using detention to enhance or justify harmful treatment is normatively unjustifiable.

A final nuance relates to the US, the crime-immigration nexus, and private firms. In a context where the U.S. is the largest jailor in the world, the prejudicial arrests and detentions of immigrants are argued by some observers to mirror the disproportionate incarceration of Black and Latino men for criminal punishments in that state (e.g. Golash-Bazo and Hondagneu-Sotelo 2013). There is also the related issue of the rise and influence of private prison firms in what Golash-Bazo (2009) refers to as the ‘immigration industrial complex’. Privately operated prisons account for 62 percent of immigration detention beds, and there are 11 Bureau of Prisons facilities holding 23,000 non-citizens who have committed ‘immigration crimes’ such as ‘illegal re-entry’ or crossing back over the border after being deported, all of which are subcontracted to private firms for their daily operations (Freed Wessler 2016). Importantly, however, mass incarceration in the US predated and perhaps provoked the rise of private firms (Lopez 2016), and further research needs to be conducted on how a fuller understanding of the history of these intertwined trends impacts our understandings of the ethics of immigration detention.

DOES THE POLICY PROVIDE ROBUST DUE PROCESS PROTECTIONS?

Normative theory also focuses on the realization of due process rights. States must ensure fundamental fairness when wishing to deprive a person of life, liberty, or property (Detention Watch Network 2012; Kessler 2008 - 2009). In the context of detention, this translates to ensuring that the detainee enjoys a series of minimum rights, including the right to know the reasons for being detained, the right to an attorney, and the right to challenge the legality of the detention in court (United Nations Human Rights Committee 2014).

Yet, the majority of immigration detention systems bypass these rights. Typical failures of due process in immigration detention include: absent judicial control over the detention decision; lack of legal representation; in some security-based cases, no right to see the evidence; and little or no opportunity to challenge individual detention (International Detention Coalition 2013). Normatively, detention’s production of a parallel, less fair judicial process with fewer due process guarantees is difficult to justify. This difficulty is amplified when we consider that immigration detainees have committed no crime per se.

DOES THE POLICY COMPORT WITH FUNDAMENTAL NOTIONS OF FAIRNESS, JUSTICE AND PROPORTIONALITY?

The normative commitment to protect the liberty and security of persons has already been explored. Like all human rights, the right to personal liberty is not based on a certain immigration status. This right shields the individual from arbitrary detention. Non-arbitrariness means not only that state actions must be lawful, but also that they comport with broader principles of fairness, justice, and proportionality. In order to be non-arbitrary, deprivation of liberty is reserved for the most extreme or severe threats to the state; the general rule holds that any deprivation of liberty must be an exceptional measure of last resort.

A key normative critique of the routine use of immigration detention is that it is not at all exceptional. Indeed, an ethical violation occurred in summer 2014 when the U.S. Administration used *en masse* detention that transformed the practice into a quotidian, regularized border control measure. Individual detention determinations were overwhelmingly arbitrary—that is, that the decision to detain was not proportional to the threat or risk posed by the asylum seeker or migrant in question. The Administration called upon a justificatory link between irregular, mass arrival and absconding risk, but this bias is not supported in the research (Sampson 2015).

The hefty normative weight assigned to individual liberty compounds the seriousness of the charge of arbitrariness. The Administration's use of grave force implies that migrants pose a similar risk to society as convicted criminals, or a similar risk to themselves as those who have been medically institutionalized. It is normatively difficult to envision how such detention practices would be proportionate to the harm posed by women, children, and families fleeing the the well-documented violence in countries such as El Salvador, Guatemala, and Honduras.

As mentioned earlier, there is no credible evidence that immigration detention deters unwanted or irregular immigration. The push-pull dynamics of immigration and control are too complex to pinpoint why someone migrated somewhere, especially when in obviously problematic situations where successfully deterred, would-be migrants to the U.S. must be found and interviewed. What detention does do, however, is publicize and give heft to an insidious tautology that there is a looming migration crisis. Both the highly visible manifestations of detention in the Dilley camps as well as the subtler incarnations in private

immigration prisons and backlogged courts “imply the existence of a crisis of unregulated, undesirable migrants amassing; detention thus corroborates a populist impression that an out-of-control, unwanted, and potentially dangerous inflow of non-citizens is amassing at the gates while signaling that the state is working to identify and punish this population.” (Mainwaring and Silverman, *forthcoming*).

DRAWING ON NORMATIVE ETHICS TO CONSTRUCT BETTER IMMIGRATION POLICIES

Fortunately, some states are already taking positive steps to reform their laws and practices to bring them into alignment with their normative commitments. Advocates of alternatives to immigration detention have been campaigning around the world on platforms of human dignity for all, with a concerted focus on the non-detention of children, families, and the most vulnerable to abuse or harm in the context of international migration. As mentioned, the U.S. began rolling out a new ATD for family units that gives them an exit from detention; since the program commenced in January 2016, it is too early to assess the net normative gain, although the conformation with the legal rulings is promising.

The following examples briefly describe some of the efforts being made to incorporate normative ethics into better policy-making on detention through the implementation of alternatives in Belgium and Japan:

BELGIUM

Given the known harms of detention to children and families, in 2008 Belgium launched an ATD pilot for asylum seeking families whose claims for asylum had been refused (UNHCR 2011). Rather than being detained in the process of return, families were housed in one of 15 open, residential facilities. From October 2008 to August 2011, 217 families were housed in these open accommodation shelters, with an average stay of 24 days. ‘Coaches’, not privately hired security guards, staffed the facilities. The coaches built trust with the families, and helped them to find a permanent solution through securing either a right of residency within Belgium or a dignified and safe return to their sending states (*Ibid*).

JAPAN

Although it detained 15,000 people in 2013, Japan has since taken steps to reduce the asylum seeker and irregular immigrant detention population. Following a number of high-profile instances of suicide, self-harm, and rioting, the Japanese authorities decided to release all children from detention and introduce a policy to prevent future child detention (Sampson and Mitchell 2013). The Government amended Japanese law to establish monitoring committees who would ensure transparency in the treatment of detainees and contribute to the proper management of existing facilities (Hashimoto 2013). As a result, Japan reduced its overall detention numbers, developed working partnerships with local non-governmental organizations and supported an ATD pilot project for vulnerable groups (Sampson and Mitchell 2013).

CONCLUSION: DOING ‘THE RIGHT THING’

Deprivations of liberty require the strongest possible justification. In examining the U.S. turn to mandatory detention following the summer 2014 “surge” of Central American families across its southern border, this Working Paper argues that the decision to detain was not ethically consistent with that country’s liberal norms. More generally, the Working Paper has interrogated the ethics of the most common justifications for administrative immigration detention. Namely, that detention based on irregular or non-citizenship status is justifiable: (1) because it is convenient and efficient for the state; (2) because it deters the irregular arrival of migrants and asylum seekers; and (3) because it is popular amongst the electorate. Using a 4-question methodological “text” for whether the use of detention squares with quintessential liberal norms, we find that none of these reasons are ethically defensible. Instead, we argue that the norms, conventions, and laws instantiating the “moral compasses” of the U.S. and other liberal states require there be more robust, convincing justification for the use of immigration detention. This requirement becomes all the more pressing in the context of mass arrivals, such as the summer 2014 “surge”, when liberal norms are easily jettisoned in the face of public fears about migration.

We recommend that policymakers draw on normative ethics in order to strike a new balance between their commitments to quintessential norms, on the one hand, and their selective use of detention practices, on the other. Normative ethics promotes better responses to the natural and ongoing phenomenon of human migration and better situates countries to respond to large or unforeseen increases in irregular

migration and asylum seeking, such as the Central American “surge” in 2014. A key facet of a more ethical approach involves implementing cost-effective and normatively consistent alternatives, such as those implemented in Japan and Belgium. Such reform would insert sorely missing care and support into migration governance. It would also devalue xenophobic or ‘popular’ opinion that supports the expansion of detention and its trappings of criminalization and securitization. It would save the Administration money and satisfy fiscally conservative critics who decry migration as a money-losing enterprise. However, as mentioned, the one large-scale program ever embarked on by the U.S. Administration is still in its infancy, and there are no official or journalistic reports on its progress. It remains to be seen whether the so-called Family Case Management Program ultimately proves to be a true alternative to detention, or rather a disappointing alternative *form of* detention or other arbitrary restrictions or controls. There is also a significant, and related query, about the absence of a normative and political discussion on reinstating the option of *release* on recognizance without monitoring. While the House of Representatives’ letter that policymakers should do “the right thing” is clearly the best ethical way forward, the best way to ascertain how to put these values into practice is not quite certain, especially in the context of large-scale influxes and the passions they provoke.

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