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Decriminalizing People Smuggling

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Abstract: Since 2015 millions of migrants have paid smugglers to take them across borders. In response, states have increasingly arrested smugglers, hoping to morally condemn smuggling, and to decrease the rate of inward migration. This article argues that, even if a state is justified in morally condemning smuggling, and justified in decreasing inward migration, arresting smugglers is a disproportionate response for reaching these ends.

Keywords: refugees, proportionality, migration, smuggling

1 Introduction

Between 2014 and 2019 over five million migrants paid smugglers to cross international borders, traveling across the Sahara to reach Libya, the Mediterranean to reach Europe, and South America to reach the United States (Eurostat 2016; MHub 2015; UNODC 2018, p. 5). These and other journeys involved considerable risks. Of the roughly 1.1 million individuals attempting to leave Libya for Europe since 2014, at least 8,000 drowned at sea, suffocated in closed containers, or were murdered by their smugglers. Of the millions who left East Africa for Israel over the last decade, over 10,000 were killed crossing the Sinai dessert (MHub 2015; van Reisen et al. 2013). Of those crossing the Sahara, an unknown number died of thirst, poor navigation, and murder, their remains buried in shifting sands (Horwood and Malakoot 2014, p. 122). In response, states have instituted harsh criminal codes against smugglers. A special EU naval force, called ‘Operation Sophia,’ has arrested over fifty smugglers and destroyed over eighty ships (Tardy 2015). The UK now imprisons smugglers for up to fourteen years (Immigration Act 1971), and Australia up to twenty (Anti-people Smuggling and other Measures Act 2010). Similar measures are being instituted in Ethiopia, which has arrested over 200 smugglers operating along its 700 km border with Sudan (Igunza 2015).

States rarely claim that arresting smugglers increases the safety of migrants. Instead, they defend arrests with two other justifications. The first I call the *Condemnation Justification*: arresting smugglers morally condemns smuggling, a

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practice that is wrong because of the exploitation and risks involved (Igunza 2015; UK National Crime Agency 2016). The second I call the *Immigration Justification*: arresting smugglers decreases inward migration, and so is a justified form of immigration control.

This article considers the validity of these two justifications. After setting out some assumptions in Section 2, Section 3 rejects the Condemnation Justification. I argue that, though a range of smugglers are worthy of condemnation, imprisonment is a disproportionate response for this condemnation. Section 4 rejects the Immigration Justification, arguing that even if immigration control is just, arresting smugglers is often a disproportionate response for such control.

2 My assumptions

In addressing the criminalization of people smuggling, I will use the word ‘criminalization’ to refer to the sanctioning of smuggling using imprisonment. I focus on imprisonment because this involves a high degree of coercion, and my goal is to consider if such coercion is justified. However, many of my arguments – in particular my arguments against the Condemnation Justification – are relevant for other forms of sanctions as well. For example, if states fine smugglers in order to condemn their actions, rather than imprisoning them, this would fall under the Condemnation Justification. My response to this justification would be a response against fines as well.

I use the term ‘people smugglers’ to refer to those individuals who help migrants and refugees cross borders without engaging in direct fraud or physical coercion against these refugees and migrants. When smugglers do engage in fraud and coercion, they are clearly worthy of criminalization. My focus is on the more difficult cases, where no such obvious wrongs occur, but where states still insist that criminalization is warranted.

I refer to countries that individuals initially migrate from as ‘home countries,’ the countries they initially migrate to as ‘transit countries’ and countries that individuals aim to reach as ‘destination countries.’ My focus is primarily on people smugglers who transport individuals from home or transit countries to destination countries.

I focus on smugglers who transport both migrants leaving behind secure countries and refugees leaving behind insecure countries. I use the term ‘refugee’ to refer primarily to individuals who the UN claims should not be forcibly returned, but instead given asylum or the opportunity to apply for refugee status. These are individuals who may be at risk from persecution if they return

home, such as Nuer refugees fleeing South Sudan or Yazidi refugees fleeing Iraq (1951 Convention). Though I mostly focus on refugees fleeing persecution, I assume that individuals ought to receive similar protection if fleeing food insecurity, lack of medical care and general violence. Such ‘survival migrants’ (Betts 2010) have unique claims to protection in safe destination countries, and their claims are on a par with the claims of refugees fleeing persecution. This stance is supported not only by philosophers who believe in open borders, such as Joseph Carens (1987), but by those who defend states’ right to exclude immigrants, such as David Miller (2005), Matthew Gibney (2004) and even some states themselves (Arboleda 1991; Betts 2010; European Council on Refugees and Exiles 2009).

In making the above assumption regarding who a refugee is, it is worth noting that many states send aid to developing countries, and use this aid to justify preventing the entrance of those who are very poor. Some philosophers similarly argue that states can justifiably prevent the entrance of refugees if these refugees are provided aid where they are.¹

Though states may claim they have no duty to take in more refugees if such refugees are given aid abroad, in reality states rarely provide sufficient aid to justify such strong immigration control. States’ aid fails to ensure that refugees have enough nutrients according to minimal World Health Organisation standards, and states fail to provide sufficient aid and security for refugees to be free from persecution and violence in refugee camps (Gerver 2018 ch. 1; Parekh 2017 ch. 1). More importantly, even if states do provide sufficient aid to justify controlling inward migration, it does not follow that criminalizing people smuggling is always justified. This will be clear in Sections 3 and 4.

Some might suppose this entire question – of whether states are permitted to tackle smuggling – somewhat misses the mark. States are often responsible for the very conditions that create smugglers, supporting militias abroad who prevent migrants from boarding transport, and traversing the seas to circumvent refugees attempting to reach safety. These state actions create an expanded market for smugglers as refugees attempt to circumvent these state actions. States then respond with ever more militant actions, leading migrants to take

¹ More specifically, some argue that individuals are not refugees if, though they face life-threatening conditions, they can access aid from wealthy countries to ensure their lives are no longer at risk (see Cherem 2016, p. 190; Lister 2013, p. 660; Miller 2016, p. 83; Muller forthcoming, pp. 11 ff.; Price 2009, p. 73; Walzer 1983, ch. 2).

even more dangerous routes, making them even more dependent on smugglers, expanding the smuggling industry even more. It might seem odd to consider whether states are justified in arresting smugglers who exist precisely because of states' actions.

While this may seem odd, it is not so odd if we remind ourselves that states often take actions which lead to black markets, but sometimes refrain from arresting those who partake in these markets. This is because states recognise that the justification required for taking actions which lead to black markets is different than the justification required for arresting those partaking in these markets. For example, a state might ban drugs to reduce drug use, but refrain from imprisoning drugs dealers selling on the black market, feeling it is only justified in confiscating their drugs and profits. The debates surrounding the criminalization of drugs is important, because it addresses why criminalization might not be justified, even if bans are. My hope is that the same nuanced conversation can arise with human smuggling: states do often take actions which create a smuggling market, and perhaps banning smugglers is justified, but there is an important question of when imprisoning smugglers is justified. This article presents two common justifications for this imprisonment, and considers whether they can be upheld.

3 Moral condemnation

The first justification is that arresting smugglers expresses moral condemnation. Consider the case of Rekawt Kayani who fled his hometown in northern Iraq in 2002. He reached the United Kingdom and was granted asylum, obtaining citizenship in 2011. That year, according to the UK National Crime Agency, he began a smuggling operation, charging asylum seekers \$4,000 for assistance entering UK territory. He was arrested in 2016 as part of a policy to prosecute those who 'prey on vulnerable people to line their pockets' (UK National Crime Agency 2016).

The UK Crime Agency did not claim it was protecting migrants from harm when it arrested Mr Kayani. It claimed it arrested him because he was acting in a morally objectionable manner by lining his pockets. This general justification is consistent with a widely accepted view within philosophy of law: there are some actions that are sufficiently morally wrong to warrant condemnation, even when such condemnation does not increase safety for victims. When an action is worthy of condemnation, imprisonment is often a good method for expressing

such condemnation.² For example, states imprison those guilty of rape to express condemnation of rape. Were a state to learn that fining rapists was equally as effective at preventing rape, imprisonment would still seem more appropriate, because imprisonment expresses condemnation more than a fine.

In what follows, I present three reasons some smugglers seem worthy of condemnation. I reject the first reason, and accept the second and third, but argue that these reasons are not sufficiently strong to warrant imprisonment.

3.1 Consent

Perhaps smugglers should be condemned because they fail to obtain the voluntary consent of those they assist. Mr Kayani's clients were fleeing persecution and extreme poverty, and so coerced by their governments into paying him for safe passage. If consent is only valid if an individual is giving their consent voluntarily, and if consent is involuntarily when the result of coercion, then refugees coerced into fleeing are not giving their valid consent to use smugglers. Similarly, if consent is only voluntary if one has a range of acceptable options,³ and if a migrant is paying a smuggler because she lacks a range of acceptable options due to poverty, then she is involuntarily paying a smuggler. The smuggler has therefore committed a wrong and is worthy of condemnation.

Smugglers like Mr Kayani have a response to this claim: Involuntary consent can be valid, so long as the agent obtaining consent is using no coercion herself. If I am held up at gunpoint, and the criminal demands that I withdraw money from the bank, the bank teller ought to accept my consent to withdraw my money. It is true that my consent is involuntary, but it is better that she accepts my involuntary consent as valid, to protect me from getting shot.⁴ Indeed, it is precisely because I am coerced by the thief that the teller ought to listen to my request, assuming this is the only way she can prevent me from facing harm. Smugglers can similarly accept refugees' consent as valid, even if refugees are

² For discussions on the view that the immorality of an act is a justification for its criminalization, see Braithwaite and Pettit (1990, p. 99), Duff (2013), Feinberg (1988, p. 324), Gardner (2007, ch. 11), Moore (1997, p. 662).

³ For example, if a woman is living in extreme destitution and agrees to sell herself into slavery, her initial choice is said to be involuntary, as she lacks a range of acceptable options. For a broader discussion on reasonable options and voluntary consent, see Long (2013, pp. 162f.) and Wolff and DeShalit (2007, p. 78).

⁴ Some, such as Millum (2014), may claim that my consent is not valid, but the teller should still accept my invalid consent, given that I will otherwise die. This is consistent with my general claim.

coerced by governments into fleeing. If this is true, smugglers are not worthy of condemnation for reasons relating to consent, and so not worthy of arrest for reasons relating to consent.

3.2 Risks

There is a second reason at least some smugglers may be worthy of condemnation. Some smugglers are acting recklessly when they intentionally impose severe risks on refugees, and some smugglers act negligently when they fail to find out what these risks are.⁵ Smugglers working along the Sahara often lack navigational skills, refusing to accept the assistance of nomadic locals who do have these skills (Kingsley 2015). Smugglers working along the Sinai often work with criminals they know are involved in trafficking, placing their passengers at risk (Lijnders and Robinson 2013; van Reisen and Rijken 2015). Smugglers assisting migrants cross the Mediterranean often overcrowd boats to the detriment of those onboard, or utilize inflatable rubber dinghies unlikely to survive the journey (Del Valle et al. 2016). It is true that smugglers may ultimately succeed in transporting refugees and migrants to safety; and it is true they may be saving migrants and refugees from even greater risks in their home and transit countries. They are still culpable for creating greater risks than necessary.

This is because, more generally, we can be culpable for creating greater risks than necessary even while reducing risks overall. If I put poison into your tea, with a 50 % chance of you dying as a result, I am culpable of risking your life, even if someone else would have put poison with a 100 % chance of death had I not put in mine first.⁶ It is true I reduce the risks of you dying compared to no act at all, and it is true you may be lucky and survive, but my actions are wrong, assuming my poison is not necessary to stop the stronger poison from

⁵ If an agent acts negligently, I assume this means that she is ignorant of risks and intentionally fails to find out what these risks were. This falls under the category of what philosophers call ‘tracing case of culpable ignorance,’ in that the agent’s culpability can be traced back to an earlier point in time where she intentionally failed to find out about risks. For example, a doctor which prescribes an unsafe drug is negligent if, though she is not aware of the risks, intentionally cancelled her subscription to the latest medical journals, where she would have learned about these risks. For more on tracing cases of culpable ignorance, see Smith (2016).

⁶ This type of example is often raised as a counter-example to the theory that, for A to cause B, A must increase the probability of B occurring. I take this also as an example demonstrating that we can be culpable for risking the life of another even when we decrease their risks of harm. For a discussion on preemptive causal scenarios, see Hitchcock (2012).

entering your tea. I ought to instead refrain from putting in the weaker poison and inform you of the other poisoner. Similarly, smugglers may be providing a journey less risky for refugees than remaining in home and transit countries; they can still be culpable for creating unnecessary risks during a journey. Smugglers ought, instead, to transport refugees using safer means, assuming the costs are not significantly high.

Some smugglers might have a defense against this claim. Unlike intentionally putting poison into someone's tea, some smugglers only unintentionally place refugees and migrants at risk. Some may be acting neither recklessly nor negligently, because they both do not know the risks they place others in, and could not have known these risks.⁷ Moreover, some may be placing refugees and migrants at no risk at all.⁸

More importantly, even if smugglers are aware of risks – and it does seem many are (Achilli 2018; Sanchez 2017) – they have another defense: smugglers telling refugees the known risks can obtain these refugees' consent, unlike agents who secretly put poison in tea. If refugees give their consent, smugglers are permitted to provide at least a Pareto-improving journey, rather than providing optimal safety. It would be comparable to you drinking tea with poison that has a 100% chance of you dying, and you consenting to drinking my poison which serves as an antidote to the first, decreasing your risks from 100% to 50%. If I had no duty to help you at all, and you agree to accept my poison, perhaps I am not worthy of condemnation.⁹

To determine the validity of this claim, it would help to consider if it is true that smugglers have no duty to help refugees. If they do have a duty to help refugees beyond mere Pareto improvements, then Pareto improvements are not sufficient to justify risks. This is because, more generally, if agents have a duty to help others beyond mere Pareto improvements, they cannot offer a mere Pareto-improving offer alone, and claim the recipient's consent justifies this offer. One reason an agent may have a duty to help others beyond mere Pareto improvements is because they have *Good Samaritan* duties to do so. The Good Samaritan duty requires us to help others in need if doing so involves

⁷ Many scholars claim that a necessary condition for smugglers to act ethically is that they disclose known risks to refugees, rather than disclose all risks. See Muller (forthcoming, p. 10) and Aloyo and Cusomano (forthcoming, p. 8).

⁸ For an overview of the variation of smuggling operations, see Achilli (2018) and Sanchez (2017).

⁹ Of course, if you consented to drink a poison that had a 100% chance of death, and you would have otherwise lived, that may be wrong even though you consented. It might be wrong for the same reason some claim assisted suicide is wrong. But assuming the poison is better for you than no poison, and you consent, then it seems your consent is a defence for my actions.

no more than moderate costs.¹⁰ If I can easily give you an antidote that decreases your risk of dying from 100 % to 10 %, I ought to give you this antidote, rather than only offering you the antidote that decreases your chance of death to 50 %. Were I to only offer you the latter, I would be acting in a morally condemnable manner even if you gave your consent. Just as I ought to give you the antidote that decreases your risk of death to 10 %, given that this is easy, smugglers ought to take precautions during their journeys, assuming this would be easy. If a smuggler can easily ask for navigation assistance crossing the Sahara, and doesn't, she acts in a morally condemnable manner.

There are two potential objections against this argument. One is that many smugglers can only provide unsafe smuggling, and so shouldn't be condemned for doing the best they can (Muller forthcoming, pp. 9f.). Even when smugglers can easily provide safe smuggling and don't, there is another compelling objection to their arrests: if smugglers' failure to provide low-cost risk-reduction makes them worthy of condemnation, then all agents who fail to provide low-cost assistance to refugees are worthy of similar condemnation. These include non-smuggler agents sitting at home, such as myself, who may fail to send money to distant refugees who could use this money to feed themselves or their families, reducing the risks they face in home and transit countries. If we are unprepared to arrest all those who fail to help refugees when they easily can, we ought not arrest smugglers in particular.

There is a final risk-related argument in support of condemning at least some smugglers, and I believe this argument is more promising. Smugglers may have special obligations to help beyond the Good Samaritan duties held by all. We often have special obligations arising from roles we inhabit. Particular roles can create duties when a person voluntarily opts into a role, voluntarily opting into the duties constitutive of this role.¹¹ For example, if one opts into becoming an anesthetist, then one has opted into the duties constitutive of anesthetists, such as working hard to ensure safe and effective anesthesiology. Failing to fulfill this duty is especially egregious not only because it causes material harm against patients, but because it undermines their autonomy. If I enter a hospital, and have an appointment with an anesthetist, I expect her to give me a specific level of care while receiving

¹⁰ This has also been referred to as the 'duty to rescue.' There may be distinctions between the duty to rescue and the Good Samaritan Duty, but nothing in my argumentation hinges on these distinctions (Barry and Øverland 2012; Fabre 2006, chs. 1 and 2; Singer 1972; Waldron 2000; Wellman 2005, p. 31).

¹¹ This claim is consistent with the 'voluntarist approach' to special obligations (see Nelkin 2015).

anesthetics, given that she has opted into the role of being an anesthetist. I consented to anesthetics with this expectation in mind, and it seems my autonomy is undermined if she acts contrary to these expectations. This would be true even if she gave me unsafe but Pareto-improving anesthetics.

Just as anesthetists have special obligations to ensure safe care, derived from their voluntary choice to become anesthetists, transport providers have special obligations to ensure safe passage, derived from their voluntary choices to provide transport. Just as a negligent anesthetist cannot defend her actions by claiming sub-par care was better than no care at all, a pilot or captain cannot defend her actions by claiming an unsafe boat or flight was better than no boat or flight at all. Smugglers, as transport providers, have similar duties to ensure safe passage when providing a boat, jeep or lorry crossing an ocean, desert, or border. Failing to fulfill these duties means they are worthy of special condemnation for putting migrants in harms' way, beyond the condemnation toward all those who fail in their Good Samaritan duties. If at least some smugglers are worthy of special condemnation, and prosecuting them expresses such condemnation, then prosecuting smugglers is justified at least some of the time.

While this argument is promising, it still faces a challenge: arresting smugglers who fail to fulfil their duties is a disproportionate response. I shall consider this possibility in Section 3.4. Beforehand, let me consider another way that smugglers might be worthy of moral condemnation.

3.3 Exploitation

This argument concerns not risks, but profits. According to a widely accepted view, it is wrong to profit off the vulnerabilities of others. Doing so is a form of exploitation. Two versions of this theory are prominent. According to Hillel Steiner's libertarian version of exploitation, *A exploits B when A profits more than she would have, had B's property rights or liberty not been violated* (Steiner 1984; 2013). Imagine I learn that your water source has been wrongly destroyed, and I have a bottle of water I bought for 50 cents which I sell to you for \$10, knowing you have little other choice. I exploit you if the only reason I can sell you this water is that your own water source has been unjustly blocked. Roemer's Marxist view can be formulated as *A exploits B when A profits more than she would have, had assets been fairly and equally distributed, and B cannot reasonably refuse A's offer* (Roemer 1982; Valdman 2009). If I learn that you lack enough water to survive, and I have water in excess, I exploit you if I sell you my excess water and profit in the process. Both theories measure exploitation as the extent that A and B walk away with an unjust or unfair distribution of holdings:

A has more than she would have, or B less than he would have, had things been more just or fair.

There are two ways that A can extract a profit above what she would have, had things been more just or fair. One way, widely discussed in the literature, is for A to charge B more money than A would be able to charge had B not been wronged. If I sell you a small bottle of water for \$10, and in a world where your rights were not violated you would have spent no more than 50 cents, then I exploit you, because I profit \$9.50 more than I ought to.¹² A second way A can extract an exploitative profit is by giving B a poorer service, but charging the same amount, such that B would not have accepted such a poor service had he not been wronged. If I sell you contaminated water for 50 cents, and you only agree to this water because your own clean source has been blocked, then I exploit you.

Smugglers are often guilty of both forms of exploitation. When smugglers charge a fee for their services, and refugees only accept this fee because they are fleeing persecution or hunger, and smugglers profit, then smugglers exploit those they help. When smugglers fail to ensure safe passage, and refugees agree to unsafe passage because they are fleeing persecution or hunger, and smugglers profit as a result, then smugglers exploit those they help. If such profit is wrong, then smugglers are worthy of condemnation. This condemnation is not the usual condemnation towards all those who fail to provide safe help, such as those sitting at home doing nothing at all. It is the additional condemnation towards all those who profit from unsafe help. It is true that smugglers may be obtaining the consent of those they help, and perhaps have no duties to provide high-cost safety in general; but they ought not profit excessively in doing so, given that the profit arises from the rights violations refugees experience.¹³

We might suppose that some smugglers have an excuse. If a smuggler is charging for their services to pay for basic necessities for themselves, then perhaps they are not worthy of condemnation. More generally, we ought not blame individuals for exploitation if they are profiting to access basic necessities. If I charge you \$10 for a bottle of water because I need this money to access food and shelter, it seems I ought not to be condemned, even if I

¹² This is the type of exploitation raised by Steiner (see Steiner 1984, 2013).

¹³ For some examples of non-exploitative fair smuggling, see Hidalgo (2016, pp. 18f.). Aloyo and Cusumano (forthcoming, p. 9) similarly argue that smugglers ought not exploit those they assist, arguing that smugglers exploit those they assist when ‘charging extremely high and above-market fees.’ My theory builds on this, in that it explains when fees are ‘extremely high’ according to both Libertarian and Marxist theories of exploitation.

am exploitative. Even if this is true, we can at least conclude that some smugglers are worthy of condemnation, assuming some smugglers are not profiting to obtain basic necessities. If they are worthy of condemnation, then there seems reason to arrest them to express this condemnation.

3.4 Proportionality

We have come to the following conclusion: smugglers who fail in their role-based duties to ensure safety are worthy of condemnation, as are smugglers who exploit those they help when doing so is for non-necessitous benefits. States therefore sometimes have reason to arrest smugglers.

Though they sometimes have reasons to arrest smugglers to express condemnation, the weight of these reasons is limited. This is because, in determining when condemnation is grounds for criminalization, it is necessary to determine if the condemnation is proportionate to the crime. There are two ways condemnation via punishment can lack proportionality. It can lack *narrow* proportionality: a punishment against the prosecuted may be excessively severe for the crime she committed (Fish 2008; Hirsch 2005). If the state imprisoned a woman for years for stealing a single candy bar, this would be narrowly disproportionate. Arresting smugglers may lack narrow proportionality if the smugglers do not profit a great deal or place migrants' lives at significant risk.

More importantly, even if a punishment is narrowly proportionate, punishments can lack *wide* proportionality. Wide proportionality is lacking when the punishment significantly harms innocent individuals (May 2007, ch. 10; McMahan 2014, pp. 6–9; von Hirsch 2005). It might be wrong, for example, to place a felon in life-long prison if he were unable to care for his children, placing his children at risk. Laws intending to condemn exploitation are especially likely to harm the innocent. If I sell you a bottle of water for \$10 during a drought, I may be exploiting you, but the state should not arrest me if I am the only agent able to provide you water. The same may be true if I fail to ensure the water is safe. I may be acting recklessly, but the state should not arrest me if I am the only agent providing any water at all, and you will be safer with contaminated water than no water at all. Arresting me would cause you disproportionate harm, harm that does not seem justified for the purpose of condemnation alone. Similarly, arresting smugglers can cause disproportionate

harm to refugees, if smugglers are willing to provide transport that is safer for refugees than no transport at all.¹⁴

This argument suggests that states could fulfill the condition of wide proportionality if they criminalized smugglers in a particular way. They could criminalize smuggling but only arrest a very small number of smugglers as a symbolic gesture, such that the arrests would not decrease refugees' access to safety. More importantly, states could arrest a very large number of smugglers, but resettle a greater number of refugees simultaneously. If a state criminalized smuggling and prevented 1,000 refugees from reaching safety, the criminalization could be widely proportionate if it provided additional resettlement to these 1,000 refugees.¹⁵

Similarly, states could increase their aid to refugees living in camps abroad. Today wealthy states provide only a very small proportion of their Gross Domestic Product to help individuals dying from malnutrition, persecution, and general violence abroad. This is far less aid than they arguably have a duty to provide. If states dramatically increased their aid, at least providing enough to fulfil their minimal duties of justice, then states could ensure that refugees who failed to access asylum due to smugglers' arrests could access a type of asylum in a safe refugee camp abroad. As with the resettlement program, this would involve states giving enough aid to offset harms: if 1,000 refugees failed to access life-saving asylum as a result of a state's criminalization of smuggling, then this state could ensure its condemnation was widely proportionate by giving enough aid to protect these 1,000 refugees abroad.¹⁶

Some may argue that such resettlement and aid programs would be insufficient to fulfill states' general duties. States have duties beyond providing aid and resettlement to those worse off from criminalizing smuggling. States have duties to provide aid and resettlement to those who would be too poor to pay for

¹⁴ Aloyo and Cusumano (forthcoming, p. 11) similarly argue that, when smugglers help those they transport, the help they provide may justify decriminalization of exploitative smuggling. I believe the principle of proportionality helps explain why such decriminalization is justified.

¹⁵ This raises a further question. If the state arresting a smuggler in Libya caused 1,000 particular refugees to lack access to safety, it is not clear if the state ought to provide asylum to these particular refugees, or simply any 1,000 refugees in Libya. Given that we unlikely know which refugees lack transport as a result of a given smuggler being arrested, it seems sufficient to resettle any 1,000 refugees. This is because each refugee in Libya would, as a result of resettlement, have the same probability of being taken to Europe compared to a world where the smuggler was not arrested.

¹⁶ Some might argue that states have no real interest in sending aid or giving asylum to more refugees, in which case my argument would unlikely be applied in practice. However, it is still worth noting that state's particular justification for arrest – that smugglers ought to be condemned – is wrong from a moral perspective.

a smuggler even in a world of decriminalization. It is not enough for states to ask who is harmed from criminalization compared to a world without decriminalization, and then offset the harm through resettlement. They must ask who is made worse off today compared to a world where states do everything they can to help as many refugees as possible. State should resettle millions more, or work towards a global system where millions more can access true protection.

This may be true. My point is merely that states commit the distinct wrong of issuing a punishment lacking proportionality when they make refugees worse off by criminalizing smuggling. This particular wrong can be avoided with aid or resettlement alongside criminalization. It is likely that states commit an additional wrong when they fail to resettle as many refugees as possible, or provide sufficient aid to ensure refugees' rights are protected.

4 Preventing inward migration

The above reasoning assumes there are only two considerations: the interests of society to condemn wrongdoing and the interests of refugees to gain protection. I argued that arrests solely to protect society's interests to condemn wrongdoing are unjust if this undermines refugees' interests to obtain protection. But there is a third interest: the interests of states to control immigration. Perhaps controlling immigration is just even if this places refugees' and migrants' lives at risk. This was the stance taken by Greek authorities in 2016 when arresting Salam Kamal-Aldeed and Mohammad Abbassi, two humanitarian workers saving refugees and migrants at sea. The authorities argued that Kamal-Aldeed and Abbassi's actions helped refugee and migrants enter Greek waters, and so arresting them was necessary to curb inward migration (Safdar 2016). Similarly, the EU Frontex Naval force blamed Medicine Sans Frontier (MSF) workers for involvement in people smuggling, as MSF helped refugees reach Europe safely by preventing deaths at sea. The EU conceded that MSF's actions were commendable, but nonetheless hinted that MSF was worthy of criminal sanctions because it increased inward migration.¹⁷

Some have responded to the above state claims by noting that preventing inward migration is often unjust, and so criminalizing smuggling is often unjust as well (Aloyo and Cusumano forthcoming, p. 17; Kukathas 2013; Landry 2016). While this may be true, I argue in Section 4.1 that preventing inward migration is

¹⁷ It is unlikely EU states will be legally entitled to arrest MSF workers at this time, but there is a possibility that future legislation will permit such arrests (see Robinson 2016).

justified at least some of the time, at least according to three major theories of immigration control. In Section 4.2 I argue that, even if preventing inward migration is just, arresting smugglers to reach this goal may not be.

4.1 Just immigration control

There is extensive debate over when a state is morally permitted to control immigration. This debate includes more views than I can address, but three are prominent. The *States' Rights View* holds that states have a strong right to control their borders, including the right to determine how many individuals they accept, whether they are accepting job-seekers from secure countries or refugees from insecure countries. One justification for this view is that all humans possess the right to decide with whom they associate. Just as members of a large club can ban potential new members, including potential members in dire need, citizens of a state can ban potential new immigrants, including potential immigrants in dire need. Similarly, just as a large club can select the members it admits, choosing those who hold particular characteristics while rejecting others, citizens can select the new members it admits, such as by selecting those with particular skills. If citizens hold this right then the state, comprised of citizens, holds this right as a collective agent. Though states hold this right, this right can be overridden: if a state learns of an individual fleeing life-threatening conditions, the state may have a duty to accept this individual if doing so involves no costs on the part of the state, and there is no other method by which the state could protect this individual.¹⁸ Just as club members do not have an absolute right to control entrance – if I am fleeing a murderer outside your club, you should let me in – citizens do not have an absolute right to control who enters their territory.¹⁹

There is a second view, which I call the *Good Samaritan View*. The Good Samaritan principle requires that we save others when doing so involves not only low costs, but moderate costs. As noted earlier, if I learn that you are dying from poison, I ought to offer you an antidote if I can at no more than moderate

¹⁸ I infer this exception from Wellman's stance, as Wellman holds that a state has no obligation to protect a refugee because such refugees could be helped in their home countries. If they could not be helped in their home countries, then no justification arises for failing to provide them protection. Miller holds a similar view (see Miller 2005, p. 202; Wellman 2008, pp. 128f.).

¹⁹ This is consistent with the claim that states are permitted to select refugees above migrants, and are permitted to deport migrants while letting refugees remain.

costs.²⁰ Citizens ought to similarly help individuals by providing them asylum, even if this requires moderate costs.²¹ If accepting 200,000 refugees into the UK would cost each UK citizen 5 % of his or her income over the first five years, and this cost was moderate, then the UK would have an obligation to accept these 200,000 refugees. In accepting them, perhaps the UK ought not simply refrain from deporting those who have arrived, but ought to resettle refugees from abroad who are in particular need. This might involve refusing to accept some refugees who arrive via smugglers, and then resettling others instead who are more vulnerable. While the precise selection method is debatable, as is the threshold of obligatory costs, the general conclusion clear: moderate costs should be borne, but not high costs.²²

There is a third view, which I call the *Human Rights View*: states have a duty to accept all refugees or migrants, as these refugees and migrants have a human right to enter any state they desire. This right can be defended on utilitarian grounds if migrants are productive and earn higher salaries upon migrating, sending funds back to home countries and developing their home countries' economies. It can be defended on libertarian grounds if migration ensures that all possess the basic liberty of free movement. It can be defended on the grounds of freedom if migration ensures all access a sufficient range options to choose who they can love, worship, and work for (Carens 1997; Oberman 2016).

The Human Rights' view does not hold that migrants' right to migrate is absolute. The right to cross borders can be overridden by other more urgent rights (Carens 1992, p. 33; 1997, p. 7; Oberman 2016, p. 34). Proponents of the Human Rights view do not delve into when, precisely, other rights trump the

20 For similar accounts of this view, see Barry and Øverland (2012), Fabre (2006, chs. 1 and 2), Singer (1972), Waldron (2000), and Wellman (2005, p. 31).

21 See Betts (2010), Carens (2013, p. 201), Dummett (2001, p. 37), and Gibney (2004). Walzer somewhat holds this view, claiming that states have a right to determine who it grants entrance to, because citizens have a right to communal self-determination, but that states have an obligation to accept refugees when the costs are not high. However, he objects to states deporting those who do manage to reach the state's shores, even when non-deportation will involve high costs (see Walzer 1983, pp. 47–51).

22 It is worth noting that citizens may have no interest in helping refugees in reality, but it remains the case that citizens have a moral duty to do so (according to the Good Samaritan View) if they can easily save those who are in danger by providing them asylum, and if they are unable or unwilling to provide any other means of safety. It is also worth noting that the States' Rights View and the Good Samaritan View do not specify how states ought to select the refugees they have an obligation to accept. For example, perhaps states have an obligation to select those who are most in need, and those most in need may not have arrived at safe states with smugglers, in which case states have an obligation to refuse entry to some refugees who arrived via smugglers and then resettle other more at-need refugees instead.

right to migrate, but here is one possibility: states can permissibly deny entrance if the risks migrants would face if denied entrance would be less than the risks citizens would face if migrants were granted entrance. For example, if the Thai government limited the number of tourists arriving on any given year, this might be justified to prevent its transportation from being unsafely overwhelmed by the sudden influx of tourists. Similarly, former colonies may have a right to limit immigration from former colonizing countries to protect the basic rights of residents from foreign interests. In some cases the Human Rights view may even permit denying entrance to refugees. Imagine 200,000 refugees arrived in Rwanda within a two-year time period, and this led to 300,000 Rwandan citizens lacking life-saving treatment due to the overwhelming number of new arrivals accessing health clinics. Denying entrance could be permissible.

4.2 Criminalizing smuggling

If a state is permitted to prevent entrance some of the time – and all three of the above theories accept this claim – perhaps it is permitted to arrest smugglers some of the time. For example, according to the Good Samaritan View, a state is permitted to deny entrance to non-refugees and to some refugees, and we might therefore suppose the Good Samaritan View holds that states have a right to arrest smugglers who bring some immigrants and refugees. When scholars support arresting smugglers, they often appeal to such a claim. Indeed, even scholars who generally oppose arresting smugglers tend to assume that, when states are permitted to deny entrance, arresting smugglers would be justified. Such scholars focus on demonstrating that the state is not permitted to prevent entrance for many migrants and refugees, and so arresting many smugglers is wrong (Aloyo and Cusumano forthcoming, p. 17; Kukathas 2013; Landry 2016). Amongst both proponents and opponents of criminalization, there is a presumed link between permissible immigration control and permissible arrests.

This link is far from certain. The right to block entrance – whether to decrease the number entering or control who enters – is not necessarily the same as the right to arrest individuals assisting with entrance. When the latter entails far more coercion, then greater justification is required. To demonstrate this point, imagine a hospital lacked the capacity to accept more than a given number of patients per month, or lacked the capacity to accept particular patients suffering from particular ailments. The hospital therefore required that some patients leave and others never enter, depending on how many it could

help and the illnesses it could treat. Though the hospital may be permitted to force some patients to leave, it does not follow that the state would be permitted to arrest third parties assisting patients in arriving. It would seem wrong, for example, for the state to imprison cab drivers giving lifts to potential patients, or to arrest caretakers who drove patients to the hospital doors. It would be wrong even if the hospital were permitted, once the driver and caretaker arrived with their patient, to prevent the patient from entering the hospital.

The reason such arrests would be wrong is that they would lack proportionality. Not only is imprisonment often a more serious form of coercion compared to preventing entrance, it entails coercion against additional individuals besides prospective patients. The more individuals are coerced, and the more serious the coercion, the more substantial the humanitarian end must be for the coercion to be proportionate. Preventing overcrowded hospitals does not seem, most of the time, to be a substantial humanitarian end. This is especially true if arresting the cab drivers and caretakers would prevent patients from entering who really do have a right to enter, perhaps because their ailments are relatively quick and easy to treat.

Similar conclusions can be reached with smuggling. Even if preventing the entrance of migrants is a proportionate response, because states sometimes have a right to control their borders, it does not follow that arresting smugglers is a proportionate response. Even if Greek authorities have a right to decrease the number of migrants and refugees arriving at their shores, refusing them visas, they do not necessarily have a right to arrest aid workers like Salam Kamal-Aldeed and Mohammad Abassi. Such arrests lacked proportionality in the narrow sense, as imprisoning Mr Kamal-Aldeed and Mr Abassi involved serious coercion against individuals with humanitarian motives, and they lacked proportionality in the wide sense, as many refugees had a right to reach Greek territory, given their need for asylum.²³

Of course, in many cases states prevent refugees and migrants from entering using extreme coercion, and this hardly seems proportionate either. Throughout Europe officials have shot, suffocated, killed, restrained, and forcibly sedated tens of thousands of migrants attempting to enter or remain (Fekete 2009; Weber and Pickering 2013, pp. 110–128). It would be odd to claim that preventing entrance is proportionate but arresting smugglers is not, given that violence is possible against both migrants and smugglers.

²³ There are presumably some refugees whose presence would cost the state nothing, and whose lives would be saved, and so even States' Rights proponents would accept that they have a right to enter.

While violence is possible against both, it is not inevitable. There are some mechanisms for decreasing inward migration that do not depend on extreme violence, such as refusing to admit refugees and migrants onto transport vehicles, literally locking the doors and placing barriers in front of these vehicles, never firing a shot or forcing anyone into cells. Given that such limited mechanism of coercion could exist, it is worth noting that, if these mechanisms were justified, it would not follow that arresting smugglers would be as well. And if current levels of violence against migrants and refugees were necessary to prevent entrance but unjustified, my argument may simply extend to changing such practices as well.

All of this points to a general conclusion: determining proportionality requires not only determining how many individuals states must accept, or whether states are permitted to select the individuals they accept; it requires determining what level of force states are permitted to use and against whom. In other words, determining a permissible immigration end is not the same as determining a permissible immigration means.

If one believes states have expansive rights to control their borders, there are likely many instances where the ends of immigration control are just but the means are not. Consider the States' Right View. According to this view, Greece would be permitted to prevent the entrance of refugees to avoid moderate costs, such as the costs of schooling refugee children. It seems consistent with the States' Rights View that Greece, even if permitted to prevent entrance in such a scenario, would not necessarily be permitted to prevent entrance by imprisoning all aid workers saving refugees' lives at sea and bringing them to shore. The coercion involved – imprisonment – is not proportionate for the benefit obtained – saving the state some money for schooling. At least, this is a view that is left open from the States' Rights View. We might imagine an even more extreme example, where Greece decided to execute smugglers whenever this contributed to preventing the entrance of at least one refugee. Proponents of the States' Rights View would likely oppose such a policy, even if they thought that some lower level of coercion was always justified to prevent the entrance of refugees creating moderate costs.

To account for proportionately, we might imagine versions of the States' Rights and Good Samaritan Views that functioned like a sliding scale. The former view could hold that extreme levels of coercion were justified to prevent major increases in inward migration, but only lesser coercion would be justified to prevent small increases in inward migration, with the level of coercion correlating with the number of individuals (or the costs of such individuals) entering. Similarly, it could hold that higher levels of coercion were justified to prevent the entrance of a migrant who held characteristics particularly

undesirable for citizens, but only lower levels of coercion were justified to prevent the entrance of a migrant with characteristics that were more desirable for citizens. For example, a state could perhaps use detention against a very racist non-refugee immigrant attempting to enter, if citizens felt the characteristic of racism was particularly objectionable, but could only use a tall border wall to prevent a refugee from entering. To be clear: I am not endorsing either of these policies. My point is merely that differential levels of coercion are consistent with the States' Rights View, and so the States' Rights View could claim that some coercion is non-proportionate. It could therefore oppose arresting smugglers even if preventing the entrance of migrants was just.

The Good Samaritan View might similarly specify a proportionality rule, supporting moderate levels of coercion to prevent an influx of refugees that entailed extremely high costs for citizens, but only lesser levels of coercion to prevent an influx of refugees that entailed high-but-not-extreme costs for citizens. Here, too, the costs and the level of coercion would be correlated, such that states would always be permitted to use some coercion when accepting refugees entailed more than moderate costs, but they would not use high levels of coercion whenever accepting refugees entailed more than moderate costs.

The above does not provide a precise formula for determining proportionality, and arriving at a precise formula will not be easy. Just as we disagree as to who states can deny entrance to, we will disagree as to how much coercion is justified in denying such entrance. We can nonetheless accept the distinction I raise: it is one thing to claim states can use coercion to turn away migrants and refugees, and another to claim they can use any level of coercion to turn them away. Therefore, it is one thing to claim states have a right to control their borders, and another to claim they have a right to imprison smugglers in controlling their borders.

5 Conclusion

This article has considered the validity of two common justifications for criminalizing people smugglers. The first related to condemnation: smugglers who recklessly provide insecure journeys are failing in their duties to ensure safety, and those who charge a great deal of money are exploiting those they help. If smugglers who are reckless or exploitative are worthy of condemnation, and if states arresting these smugglers are expressing condemnation, then states have good reason to arrest reckless and exploitative smugglers. Though they have one good reason, this reason is not sufficient if, in arresting smugglers, migrants and

refugees will face even greater risks in home and transit countries. While smugglers may be worthy of condemnation by the state, imprisonment is not a widely proportionate response for such condemnation.

Imprisonment could be proportionate if states took a symbolic approach, arresting a very small number of smugglers, such that condemnation would be expressed without impacting refugees' access to clandestine migration to safety. States could also simultaneously resettle refugees to safety and arrest smugglers, such that the refugees who would have reached safety via smugglers would have an alternative means of doing so. Under both policies, states could potentially condemn smugglers without placing refugees at risk.

The second justification for arresting smugglers was to decrease inward migration, a goal accepted by a range of theories of immigration ethics. If a range of theories support immigration control some of the time, we might suppose these theories support states' right to arrest smugglers some of the time. I argued that, in determining if arrests are justified, it is not enough to determine if using coercion to decrease inward migration is justified; we must consider how much coercion is justified as well. Arresting smugglers might entail too much coercion, and thus be a disproportionate response for a justified end.

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