

# Misinformation as Immigration Control

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## Abstract

It is wrong to force refugees to return to the countries they fled from. It is similarly wrong, many argue, to force migrants back to countries with life-threatening conditions. I argue that it is additionally wrong to help such refugees and migrants voluntarily return whilst failing to inform them of the risks.

Drawing on existing data, and original data from East Africa, I describe distinct types of cases where such a wrong arises. In “Misinformation Cases” officials tell refugees that it is safe to return, when it is not, and refugees return who otherwise would have stayed. In “Omission Cases” officials do not provide any information, true or false, on countries of origin, and refugees return but would not have, had they been better informed. In “Relevancy Cases” refugees are misinformed or uninformed, but would have returned even if better informed. In all of these cases, at least some state officials are blameworthy for their failure to inform refugees, and are engaging in a form of wrongful immigration control.

Every year, hundreds of thousands of refugees repatriate to their countries of origin (UNHCR 2012). Many return with little information on these countries, having lived abroad most of their lives. They instead rely on information from government officials, UN agencies, and non-governmental organizations (NGOs). At times, these officials, agencies, and organizations provide inaccurate information.

Consider the following case. Between 2007 and 2009, roughly 1,200 South Sudanese refugees in Cairo crossed the Sinai desert and into Israeli territory, where they were given temporary asylum. (Gerver forthcoming). Soon after, an NGO travelled from Israel to South Sudan on a fact-finding mission. The director met with ministers in the South Sudanese parliament, and saw clinics, markets, and solid buildings, taking photographs along the way. She then flew back to Israel and showed these photographs to refugees in a community centre, informing them that her NGO, Operation Blessing International (OBI), was working with the Israeli government to charter flights to South Sudan. She and government officials explained that Juba, secondary towns, and rural villages had housing, security, schools, universal healthcare, and income-generating opportunities.<sup>1</sup>

Nearly all returned to South Sudan, but found none of these amenities. Few had reliable shelter, medical care, regular meals, or clean water.

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<sup>1</sup> Interview with Bol, Juba, 21 December, 2013; Interview with Niko, Juba, 14 December 2013; Interview with Tareza, Juba, 25 December 2013

Most drank from contaminated rural wells or streams that flow along dirt roads in Juba. Some lived off the unreliable charity of distant relatives, or the occasional kind stranger in teashops which dot the corners of South Sudanese streets. Some started small businesses, but they mostly failed. An unknown number died or were killed in ethnic-based violence, and the majority were displaced within two years (Gerver forthcoming).

Current discussions on immigration ethics rarely discuss such cases, focusing instead on forced returns. Scholars argue that it is wrong to deport an individual to a country where they will be persecuted, or to another country of asylum where they will be unable to apply for refugee status (Miller 2005; Gibney 2004; Betts 2010). It is also wrong and illegal to deny refugees basic necessities, compelling them to return (1951 Convention; Chimni 2004; Barnett 2001; Bradley 2013; Long 2013; Fouda 20017), and wrong and illegal to intercept asylum seekers at sea, forcing them back to their last unsafe port of departure (ECtHR – Hirsi Jamaa and Others v Italy). It may similarly be wrong, and in some cases illegal, to deport “survival migrants,” individuals fleeing poverty, lack of medical care, or general violence (Betts 2010 and Gibney 2004).<sup>2</sup>

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<sup>2</sup> Though there are similarities between refugees’ legal and ethical rights, there are certain points of departure. Legally, it is widely accepted that an individual is only legally entitled to asylum if they are fleeing persecution, torture, or general violence. Ethically, it is widely accepted that an individual is entitled to asylum if they are fleeing any life-threatening conditions, including famine. See Gibney 2004; Miller 2005 and Hidalgo 2015.

Many refugees, asylum seekers, and survival migrants are not forced to return in the above senses. Instead, they are misinformed, as seen in repatriations to Uganda, Iraq, and Afghanistan over the last two decades (Strand 2011, Carr 2014; Walsh et al 1999; England-Nouri 2008). Sometimes, the misinformation is about the right to stay: immigration officials tell refugees they cannot legally stay when they can (Gerver 2014). Other times, government officials and NGOs say conditions are safe in a country of origin, when they are not (Strand 2011 and Carr 2014). With over half a million refugees repatriating annually, it is unclear who must provide accurate information, if anyone.

We could claim that lying is wrong, just as it is wrong to physically force refugees to return. But let us assume that officials and NGOs are not lying, because they themselves are misinformed. Unlike physically forcing an individual onto a flight, one can give misinformation without being aware that one is doing so. And unlike deportations, refugees and migrants can avoid the consequences of misinformation if they find information themselves. The question is not merely if individuals were misinformed, but whether agents helping them return have a duty to inform them.

I shall call these agents helping with return “repatriation facilitators.” They include NGOs working with the government, as well as civil servants working with immigration authorities. They pay for travel back to countries of origin, at times arranging travel documentation,

sometimes offering a modest stipend during the initial months of return. While a growing number of scholars argue that facilitators should refrain from assisting with forced returns (Barnett *ibid*; Gerver *ibid*), there has been little discussion on whether facilitators should refrain from assisting with misinformed returns.

This article defends the following claim: *If it is wrong to deport an individual, due to risks she will face, then governments and organizations have moral duties to inform this individual of the risks of voluntarily repatriating.* I shall defend this claim, and argue that it holds in four distinct types of cases.

Section 1 describes what I call “Misinformation Cases.” When repatriation facilitators provide misinformation, I argue, they are culpable for the resultant misinformed returns. Section 2 describes “Omission Cases.” When facilitators merely omit information, they are similarly culpable, though their actions may be less wrong than in Misinformation Cases. Section 3 describes “Relevancy Cases,” where information seems irrelevant to refugees’ decisions to return. Even here facilitators act wrongly for failing to inform. Finally, there are “Blameworthiness Cases,” which cut across the above three cases. Facilitators may be unaware they are misinforming, and so lack the intent, motives, or foreseeability to know the consequences of their actions. In some such cases facilitators are still culpable for their actions.

Before presenting the above four claims, it is necessary to clarify my general methodology and assumptions.

My focus is on the moral culpability of repatriation facilitators. I shall assume that moral culpability requires three conditions, broadly conceived. First, it must be the case that agents have failed to fulfil various duties, which I shall specify in the next section. Second, there must be what Miller calls “outcome responsibility.” (Miller 2007: 96) The failure to fulfil duties must lead to some objectionable outcome, such as a reduction in security or autonomy.<sup>3</sup> Third, for agents to be culpable they must be blameworthy: it must be the case that they had wrongful intent, wrongful motives or, at the very least, could foresee the consequences of their actions. Sections 2 to 4 focus on establishing whether the first two conditions have been met: whether facilitators have failed to fulfil any distinct duties to find and disclose information, and whether this lead to uninformed returns or a reduction in autonomy. Only in Section 4 considers the possibility that there was no blameworthiness, and so no culpability.

Throughout this article I shall focus on normative, rather than legal culpability.<sup>4</sup> In particular, I will demonstrate that the duties I describe are

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<sup>3</sup> I assume that an agent can be responsible for an objectionable outcome without being culpable, but that one cannot be culpable without being responsible for an objectionable outcome. I put aside cases of “remedial responsibilities,” described by Miller as the responsibility to remedy past wrongs. It may be the case, for example, that states have a duty to help refugees who have returned due to misinformation, even if the state was not responsible for the outcome of misinformed returns.

<sup>4</sup> Further justifications are needed to establish whether the normative conclusions I reach are relevant within the legal sphere.

consistent with three competing normative theories: deontology, consequentialism, and virtue ethics. Deontological theories hold that we often do not have duties to assist others, if the costs are considerably high (Barry and Overland 2013). Whether we do depends on criteria other than the consequences of our failure to assist. Consequentialist theories, in contrast, hold that we can have very costly obligations to help if the benefits are substantial.<sup>5</sup> Finally, some virtue ethicists hold that individuals ought to be judged by their motivations, rather than only their actions or the consequences of their actions (Slote 2001). All three theories, I argue, ought to support the notion that misinforming refugees, either intentionally or not, is a form of wrongful immigration control.

Though I focus on misinformation, deportation is still highly relevant: I wish to explore whether, if it would be wrong to deport an individual, the government must inform this individual of the risks of returning. There is, of course, great disagreement as to who states should not deport, and so by extension there may be disagreement as to who states must inform. Some claim states only have a moral duty to avoid deportations that are contrary to international law. According to international law, it is wrong to force an individual back to persecution or, in some cases, back to inhumane treatment or general violence.<sup>6</sup> In

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<sup>5</sup> I shall assume a largely utilitarian form of consequentialism (See Singer 2015), but nothing I argue is dependent on this formulation of consequentialism.

<sup>6</sup> This is consistent with the legal principle of *non-refoulement* as outlined in the 1951 Convention relating to the status of Refugees. It is illegal to deport individuals to countries where they will be persecuted for their ethnicity, religion, political opinions or social identity. The principle of *non-refoulement* is broader under The European Convention for Human Rights, which holds that

contrast, others claim that deportations are wrong, even if legal, when individual will be at risk due to any life-threatening causes, including malnutrition or illness in their countries of origin (Gibney 2004 and Hidalgo 2015).

For simplicity, I will largely assume that *if a country has the capacity to accept individuals, it is wrong to deport them to any life-threatening conditions.* I call all such individuals “refugees.” Though I make this assumption, one needn’t accept this assumption to accept my theory regarding misinformation: my theory can be plugged into a range of assumptions. If you believe an individual should only be protected from deportation if they will face persecution in their countries of origin – the common legal standard – my theory is only relevant for cases where individuals return to persecution because of misinformation. If you believe an individual should be protected from deportation if they will face any life-threatening conditions, my theory is relevant for all cases where individuals return to any life-threatening conditions because of misinformation. My focus is on the duties to find information when deportation is wrong, and not on when deportation is wrong.

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forced returns are illegal if an individual will face inhumane and degrading treatment after being deported, including torture, or if they are being deported to a country where they will be unable to access refugee status. The principle of *non-refoulement* in the African Union bans any deportations to general violence. See the 1969 AU Convention Governing Specific Aspects of Refugee Problems in Africa; The 1951 Convention relating to the status of Refugees and MSS v. Belgium and Greece, §10 and §3.; and Gammeltoft-Hansen 2011: 196.



Throughout the article, I shall draw on several sources, such as government-reports on the feasibility of returns to Iran, Iraq, Eritrea and Afghanistan. This is done in order to show that misinformation in immigration control is not merely an abstract question, but of current global relevancy. However, my primary source will be research on misinformation in Israel, drawing upon 126 interviews I conducted with former refugees in South Sudan, Uganda, and Ethiopia. This case is especially useful because NGOs in Israel worked to avoid misinformation, traveling regularly to South Sudan. They still seemed to misinform refugees. As such, it was especially unclear whether the NGOs and officials acted wrongly, given the efforts they invested. Resolving this question requires us to consider not only whether misinformation occurred, but who has a duty to find information, given the costs involved.

## 1. Misinformation

**Misinformation Cases** occur when repatriation facilitators falsely tell refugees there is food and physical security in their countries of origin, leading refugees to return who otherwise would have stayed. It is unclear if facilitators have committed a wrong against these refugees. Though they are giving false information, this is largely because they are dependent on existing sources. It may be overly-demanding to claim that facilitators ought to conduct their own research on conditions in countries of origin.

Such was the case in Germany, when in the 1990s the government told Bosnian refugees they would receive housing and employment assistance upon return, relying on information from official Bosnian government sources. None of these services materialized upon return (Walsh et al *ibid*). In 2005 UNHCR told Afghan refugees in Iran that it was safe to return, based on existing reports from Afghanistan. After return, refugees immediately faced violent attacks on the border during repatriation (England-Nouri *ibid*: 157-159). Three years later, the International Organization of Migration (IOM) in Norway told refugees returning to Iraq that there were income-generating activities, but most faced severe food insecurity and homelessness after returning (Strand *ibid*). We might believe that facilitators acted wrongly, as they ought to have invested more resources in finding accurate information. But perhaps facilitators must merely relay information they are told, rather than seek information themselves.

The same problem of misinformation continued into the 2010s. In 2011 the European Return Platform for Unaccompanied Minors (ERPUM) set up programs for the repatriation of Afghan youth living in Sweden, Norway, the Netherlands, and the United Kingdom. ERPUM case workers promised children access to safe living facilities, despite the Afghan government warning of widespread insecurity (Lemberg-Pederson 2015: 16-17). Caseworkers in Norway and Sweden were explicitly instructed to motivate children to return, telling them that

return was in their best interests, despite evidence to the contrary (ibid: 10).

More generally, misinformation is a problem not only in repatriation, but in the initial establishing of asylum claims. In 2014 the Danish Immigration Services issued a report claiming that the conditions in Eritrea were better than previously reported, and claimed that Eritreans would not face retribution or death if they attempted to flee the country (Danish Immigration Services 2014; UNHCR 2014). There is no evidence that such misinformation encouraged Eritreans to voluntarily repatriate, but individual officials may have rejected asylum claims, leading to the wrongful forced return of refugees, and raising similar questions concerning state responsibilities to gather accurate information.

When the OBI director in Israel began organizing return to South Sudan, she tried avoiding mistakes of past repatriations. She was aware that the vast majority of South Sudanese in Israel had never lived in South Sudan as adults, and so may have been uninformed about conditions in the country. She was also aware that, were she to determine whether repatriation was informed, there would be a conflict of interest, as she was facing pressure from donors to maximize the number who returned. She instead hired another organization, the Hebrew Immigrant Aid Society (HIAS), to independently determine if consent was informed. If HIAS felt that a refugee knew little about their rights in Israel, and little

about South Sudan, then HIAS would tell this to OBI, who would then reject the refugee's application.

Unfortunately, HIAS appeared to know little about South Sudan, and so largely failed in determining if individuals were uninformed. The HIAS training manual for staff only has a short page on the history of the country, and some information lacks any sources. For example, the manual states, without citations, that although South Sudan "might not have the same services as we have in Israel, their family is a significant factor for positive mental health." Many I interviewed after return found their extended family unhelpful. The manual also states, "Many applicants might not be aware of the entire situation in Sudan. Instead, they might only know about the circumstances in their village. This is OK." Villages often lacked basic services and employment, and so information on urban centres was essential.

There were different types of misinformation given before return. Thirty-six of 126 interviewed were wrongly told by various sources that they would be detained indefinitely if they stayed, unlikely the case for small children and mothers.<sup>7</sup> All respondents were told there was universal free healthcare in South Sudan, when this was not the case.<sup>8</sup> After return, three children of subjects in my sample died from illnesses, and of the total who returned, at least seven died of malaria within the first three

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<sup>7</sup> Interview with Sigal Rosen, Tel Aviv, 9 December 2012.

<sup>8</sup> Interview with OBI, Jerusalem, 6 October 2010

months, and at least twenty-two by the first year's end (Gerver forthcoming).

In total, sixty-eight of the respondents recall being told that South Sudan was a safe country. Almost a third were told this by government officials, and nine were told this by OBI or a UN official. In reality, internal ethnic-based fighting was continuous as of 2012, when most returned (Ferrie 2012; Al Jazeera 2011; MSF 2014; Small Arms Survey 2011). Of the 110 returnees whose conditions I could confirm by 2014, thirty-two adults and seven children had fled to UN IDP camps, thirty-seven had fled the country, and three adults and two children were killed.

For comparison, I also conducted interviews with twenty-nine individuals who returned, or were about to return, to Ethiopia, Guinea, Nigeria, Togo, Thailand, and Colombia. IOM, which facilitated their return from Israel, provided me their contact details. These individuals were better informed, but those returning to Ethiopia, including survival migrants, were roughly as misinformed as those I interviewed in South Sudan. They were told return was safe, but felt it was not, with four displaced after return, and others fearing displacement in the future.

Given the risks of return and widespread misinformation, what are the minimal obligations of repatriation facilitators?

There are a number of principles that can establish these duties. The Good Samaritan Principle holds that, if we can save a life at very little cost to ourselves, we ought to do so. This principle, which is highly intuitive, also tends to be accepted by a range of deontological, consequentialist, and virtue ethicists (Barry and Overland 2012; Gibney 2004; Athanssouli 2000: 219-220). In all of the cases cited, facilitators could have easily conducted at least some research themselves, reading existing reports on malnutrition and healthcare (Green 2012, Brown 2006, Cometto 2010), and warning refugees of the risk, preventing unsafe returns. Even OBI, who travelled to South Sudan, relied on information from ministers in the South Sudanese government, rather than independent sources.

Unfortunately, some information is not easily available, and is very costly to obtain. The World Bank and the International Labour Organization offer no employment statistics on South Sudan (World Bank 2014) and Médecins Sans Frontières cannot provide statistics on the location of health clinics in the country. There are also no recorded mortality rates from ethnic-based violence. Given the lack of available information, it is not clear if facilitators should conduct research themselves, such as interviewing past returnees in insecure areas.

We might claim that facilitators should conduct such research because our general duties towards others extend beyond Good Samaritan duties. We ought to help others in great need not only when it is costless, but

when it involves moderate costs, so long as we are far more able to bear the costs than others (Barry and Overland *ibid*; Singer 2015).<sup>9</sup> If an agent has greater access to information, then they ought to find this information and disclose this it, if this will significantly help others make informed or safer decisions (Miller and Wertheimer 2009). NGOs and government agencies may have greater abilities to travel regularly to countries of origin, interviewing past returnees, and hiring local research assistants if necessary.

Though greater ability to find information may seem a good reason to demand more from agents, this conclusion seems inconsistent with intuitions about cases outside the sphere of immigration. Imagine I am a car mechanic selling you a car. I could run a test that you are not able to run, ensuring that the breaks are functioning, and ensuring you do not find yourself in a car accident. It would seem unfair to claim I have a duty to run this test, while another car owner, who is not a mechanic, would have no such duty when selling you their car. While greater ability may be a reason to disclose what one knows, it does not follow that greater ability to obtain knowledge creates a duty to obtain this knowledge.<sup>10</sup>

There is another consideration, other than greater ability. We often have duties to keep our promises. If an NGO promises refugees that they are

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<sup>9</sup> This an approach supported by both consequentialist and deontological theories.

<sup>10</sup> Even if such demands would ensure optimal consequences, they may create unequal burdens and, as such, be unfair.

only assisting with informed returns, they have duties to find information, to ensure that return really is informed.

This argument, though relevant for many NGOs, is less relevant for governments officials, who rarely promise to ensure informed returns. In such cases, the value of promise-keeping seems irrelevant. We might still suppose that governments should avoid misinforming, because misinforming causes harms, and we should generally avoid causing harms to others. Two harms, in particular, seem apparent. Misinforming causes refugees to make decisions without full information. This undermines their ability to make autonomous decisions (Arneson 1994). Misinforming also causes refugees to return to unsafe countries who otherwise would not have, undermining their security.

This argument is sufficient to claim that governments ought to find accurate information when finding information involves moderate costs. It is not clear this establishes a duty to find information when this involves especially high costs. For, we do not wrong every person we cause harm to, if avoiding harm is very difficult. Imagine I purchase an airline ticket to Jonglei in South Sudan and ask the pilot if conditions are safe in the port of arrival. She says they are, because she has read this in the Sudanese Tribune. If the Tribune was mistaken, the pilot's false information may have causally contributed to my harmful decision to purchase the ticket, but it is not clear she has wronged me, given that it would be more costly for her to seek a more accurate source of



information. To establish wrongdoing, it is not enough to establish that the absence of information may cause harm, but whether we have a duty to find information to prevent harm.

There is a final consideration which, I believe, creates duties for governments to find information, even when doing so is costly.

We often have duties to know information that are derived from other duties, unrelated to informed consent. For example, drivers have duties to look in their rear-view mirror, to know if there is someone behind them. This is derived from their duties to avoid running others over (Smith 2014). Similarly, drivers may have duties bring their car to be inspected for faulty breaks in an annual inspection, similarly to avoid running others over. Sometimes, the information we have a duty to know also happens to be information we must disclose, in certain circumstances. If I have my car inspected and find the breaks are faulty, and I want to sell you my car, I should tell you about the faulty breaks. I know about the breaks because I have a duty to, in order to ensure safe driving, and once I know this information, I have a duty to disclose it in a subsequent sale. It is not that I have duty to know about the breaks in order to tell you; I have a duty to know and, by chance, this information is the sort I need to disclose because I know it. If I am negligent, and do not find out about the faulty breaks, and then sell you my car without telling you about them, it seems I am partly blameworthy for your decision to buy my car without full information. Were I to tell you, "But I

did not know about the breaks,” this would seem a poor excuse. For, I had a duty to find out about the breaks to be a safe driver.

We may apply similar reasoning to return migration. States have various duties which create derivative duties to know. States have a “Responsibility to Protect” others from great harm, as outlined in the 2005 UN World Summit (UN 2005). States also have due diligence obligations to prevent human rights violations abroad, and to avoid committing human rights violations. This includes the obligation to avoid deporting individuals to countries where they might experience inhumane treatment (*Osman v. United Kingdom*, cited by Gammeltoft-Hansen 2011: 196). These general obligations create duties to know about conditions in foreign countries. Immigration officials coordinating return may also have agent-specific duties to know about countries of origin to establish who is a refugee amongst those who do not wish to return. Ignorance about South Sudan, for example, may lead immigration official to unjustly reject asylum claims. If states fail to find information that is necessary to fulfil these general duties, their ignorance may be a poor excuse for their failure to disclose risks to refugees voluntarily repatriating. Even if it is questionable whether states ought to invest costly resources in ensuring informed repatriation, it seems clearer they ought to invest costly resources in preventing mass atrocities and establishing who is a refugee. And these duties create derivative duties to know about certain countries, creating duties to disclose information about these countries.

To clarify this point: I am not arguing that we must disclose all information we have a duty to know. If my neighbour wants to know about the faulty breaks in my car, despite expressing no interest in buying my car, I have not wronged the neighbour when I misinform her. For, were I to know about the breaks, I would have no duty to tell my neighbour about them, even if it would make her happier. Rather, the argument is that, when we have a duty to disclose information we know, to ensure informed consent, it is not an excuse to say, "I did not know" if we ought to have known.

This reasoning would also imply limits to the demands we place on facilitators. No facilitator should be required to risk their lives by traveling to an insecure area to find out if refugees' lives will be at risk from return. For, they would have no such duty to risk their lives to fulfil their other duties as state officials. But if information is not extremely dangerous to obtain, officials should try to obtain it, if they have other duties that require this information. While they cannot disclose information they do not know, they can choose to know more information, which they can then disclose.

## 2. Omission

While Misinformation Cases involve facilitators providing false information, **Omission Cases** involve facilitators providing no

information at all, true or false. It is not clear if facilitators have acted unethically, given that there was no explicit misinformation.

Consider the case of Iraqi nationals who returned from Norway with the help of IOM, funded by the Norwegian government. A subsequent IOM report found that those who returned were never told of the risks of return, such as the likely inability to secure a reliable income (Strand *ibid*). Similarly, Iraqi refugees in Denmark recalled not being told information on the security situation in Iraq (Bak Riiskjaer and Nielsson 2008: 7) and refugees returning to Sierra Leone from the UK were never informed of the risks of homelessness, common after return (Carr *ibid*). Refugees returning to Sri Lanka were never warned of security risks, with many arrested, detained, and some tortured and killed by police after repatriation (Carr *ibid*). In all of these cases, at least some individuals returned who otherwise would not have, had they more information. It is not clear if facilitators are acting quite as unethically as in cases of misinformation, as they may simply assume that refugees have information. More generally, perhaps acts of omission are not quite so egregious as active acts of misinformation.

In Israel, OBI intended to disclose all risks, but information omissions were common. Refugees were never informed that they could not re-enter Israel once they left,<sup>11</sup> as it was assumed they knew this. In general, HIAS assumed refugees had information from family members in South

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<sup>11</sup> Interview with S, an OBI and HIAS Staff member, Tel Aviv, 28 April 2012

Sudan, or from their own memories, and so did not seek out and disclose information on health, food insecurity, or the death toll in Unity State, Jonglei, and other areas of concern.

HIAS's assumption that individuals had information was not completely invalid. Most I interviewed knew they could not re-enter Israel once they left, and families and personal memories really were the best sources of information for those who went back. Of the nine I interviewed who found full employment after return, eight had been told by family members that there was employment before return. However, it was also the case that, of the nineteen who were told by family that they would find employment and shelter if they returned, eleven did not. Information from family was the best source, but not a very good source in absolute terms.

Given that information may be lacking amongst some, do facilitators have a duty to provide information?

A central reason we might suppose facilitators have no duty to disclose information, or a lesser duty, is that there is a general distinction between doing and allowing, or "positive" and "negative" acts. An example of a positive act would be injecting arsenic into a victim, and a negative act merely letting a stranger die of arsenic poisoning, rather than calling an ambulance. Even if both are impermissible, it seems the former deems a

person more culpable than the latter. In a similar manner, perhaps giving false information is worse than merely failing to inform (Mahone 2006).

There are three reasons to believe that such a positive/negative distinction is normatively relevant. The first reason is that positive acts tend to indicate stronger causal relationships to upshots compared to negative acts (Callahan 1989).<sup>12</sup> If someone injects arsenic into a victim, then her actions are necessary and sufficient for the resulting death. If, in contrast, an individual merely fails to save the victim of poisoning committed by another, the failure to call an ambulance is not sufficient for the death: the perpetrator's injecting of arsenic is also necessary. If a refugee has accurate information, and is then misinformed, they may suddenly believe a falsehood they did not before, and so the misinformation is necessary and sufficient for the outcome of an uninformed return. In contrast, if a refugee already holds false information from other inaccurate sources, and a facilitator never provides accurate information, the facilitator's omitting information is not sufficient for the refugees' false belief: the refugees' other inaccurate sources are also necessary for the uninformed return. Because most normative theories view causing harm as one criteria (thought not the only) for determining culpability,<sup>13</sup> then most theories ought to generally hold positive acts as worse than negative acts.

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<sup>12</sup> Such a reason would also be supported by deontologists and virtue ethicists who care about avoiding negative consequences.

<sup>13</sup> Even theories which view virtuous motives as primary still determine the rightness of motives partly based on the extent of causal harm. If, for example, a virtuous person is one who cares

Some have criticized this distinction concerning negative and positive acts, arguing that many paradigmatic negative acts indicate greater causal harm (Howard-Snyder 2011). It certainly seems that omitting information often does causally contribute to a false belief in a similar manner to misinforming. If a refugee has no information at all on their country of origin, and interprets being told no information as a sign of safety, the information omission is necessary and sufficient for the resulting false belief of safety.

Even if omitting information can causally contribute to false beliefs as much as misinforming, there is a second reason omitting may be less wrong than misinforming. Some facilitators can legitimately expect refugees to have information, and so can legitimately fail to disclose information. This is the assumption we often hold in other relationships where informed consent is necessary (Manson and O’neill 2007: 68-96). If a surgeon tells a patient about an incision, it is reasonable to expect patients to know that the incision will be made with a scalpel. Doctors can assume that patients make inferences about incisions necessitating scalpels, because patients know, in general, that surgery involves scalpels. Perhaps it is reasonable to expect refugees to know about the countries they are returning to, either because they grew up in these

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about others, it seems that caring involves, at least some of the time, caring about whether one’s actions will cause harm. See Slote 2001.

countries, or because they can infer from general news stories that there is limited security, food, and healthcare in their countries of origin.

The problem with this approach is that it is difficult to know what it would be reasonable for refugees to know. Every refugee has their own life experiences and their own distinct access to information, some more accurate than others. Every refugee is returning to a different socioeconomic circumstance, village, and family network, with different language skills, resources, and expectations. All surgery is fairly similar in some ways, so our knowledge of it is, as well, and our expectations of others' knowledge, as well. The same cannot be said about refugees and the places they return to.

There is a final way that positive acts may be distinct from negative acts. Positive acts are generally costless to avoid (Bennett 1998). It is costless to avoid injecting arsenic into a victim, as this involves merely keeping the arsenic at home. It is more costly to save the victim of arsenic, as this involves calling an ambulance. When saving a life is very costly, then many deontologists would conclude that refraining from saving the life is permissible. Virtue ethicists may similarly conclude that a virtuous individual can at times fail to save others, given the costs involved. In immigration control, it would be costly for an official to find information compared to merely avoiding false information, as the former involves finding information, while the latter involves merely keeping one's



mouth closed. The official, as such, is less culpable of omitting information compared to misinforming.

Nonetheless, omissions can often be as costless to avoid as avoiding active acts (ibid; Kagen 1991: 114-115 and 231-270) and, even when avoiding omissions is more costly, it can still be relatively costless. When HIAS and government officials failed to tell refugees about widespread ethnic-based killings in Unity State and Jonglei, they could have easily changed their actions by searching the internet for "death toll in Unity State" and "death toll in Jonglei," relaying this information without great effort. Similarly, when Swedish and Norwegian case workers failed to inform children about the risks of returning to Afghanistan, they could have easily told them that the government of Afghanistan had warned of its inability to ensure protection (Schuster and Majidi 2013).

Even when negative acts are significantly costly to avoid, they may still involve culpability. We can be culpable for negative acts that involve costs expected of us to bear, given our unique position, or our other duties, as described in the previous section. If governments and NGOs ought to have information because of their other general duties, then we can expect them to bear the costs of finding and disclosing this information. If they do not, they may be acting wrongly, even if slightly less wrongly compared to actively misinforming.

### 3. Relevancy

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

Consider the case of Simon, a father of three who was approached by OBI in 2012. The organization told him it was safe in South Sudan, but he knew this was not the case, having lived in South Sudan relatively recently. He wished to return despite the risks, and so accepted OBI's free ticket home, boarding a flight for Juba with his wife and children in 2012. Slightly over a year later, the South Sudanese Civil War broke out, and he witnessed eleven small children taken out of their houses and killed. He quickly fled with his family to an Internally Displaced Persons (IDP) and, despite remaining in the camp as of 2016, feels OBI's poor knowledge had no impact on him, because he himself knew the risks, and returned regardless. He does not regret his choice and so, perhaps by chance, OBI did no wrong, or a lesser wrong.

Consider, also, the case of Yasmin. Unlike Simon, she had no accurate information when she returned, and upon reaching her home village of Aweil she was surprised to find no reliable clean water, no free

education, and no safety for her children. She says that she would have returned even if she had been given more information. She runs a restaurant today, and is happy to be close to her family.<sup>14</sup>

In such **Relevancy Cases** it is not clear if facilitators are culpable for failing to provide information. Though Simon and Yasmin were never informed of risks, this had no seeming impact on their lives or choices.

We might claim that NGOs and immigration officials did not know that Simon and Yasmin would have returned regardless, and so their actions were still problematic. Alternatively, we might believe in moral luck. OBI failed to inform Simon about the risks, but Simon happened to know about the risks. By chance his consent was informed, and his life unaltered, and so OBI did no wrong, or a lesser wrong.

Even if we believe in moral luck, there is reason to believe Yasmin did not give her valid consent, and really did make her choice based on false information. Yasmin may say today she would have returned, but this may partially be because she cannot turn back time, and so may as well view her decision as optimal. It may be that, had she been told information in Israel, she would not have returned. In the case of Joseph, we know that he would have returned even if OBI had given him more information, because he had this information before return, and still returned.

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<sup>14</sup> Interview with Yasmin, Aweil, 30 March 2012

Even if we take Yasmin's claim at face value – and accept that she really would have returned even if better informed – there is an additional consideration in cases like that of Yasmin.

One of the values of informed consent is that it reinforces the autonomy of the consentor, giving her control over her decisions by allowing her to deliberate over what she feels is best. If an agent lacks control over her choices, such as a doctor forcing a patient to accept surgery, then the patient's autonomy is undermined, even if, by chance, the patient would have accepted the surgery had she been given the choice (Groll 2012). The same may be said about misinformation. If an agent lacks information, she is not in control of her decision-making, because she cannot truly reflect on the different risks involved in her decision. This would be true even if, by chance, the decision she reaches without information is the same one she would have reached had she information. In this sense, though Yasmin's preferences were fulfilled, her autonomy was still undermined at the time she returned, because she could not make a fully informed decision.

We might argue that, even if Yasmin was not in control of her decision, she at least gave her "hypothetical consent." This is the consent an agent would have given, had she been fully informed (Waldron 1987: 139). Such consent is not true consent, and so Yasmin was wronged, but perhaps she was not quite so wronged. If she would have consented

regardless, the act of misinformation did not set back her welfare or interests, and so the consequences less harmful. The misinformation also did not significantly undermine her autonomy, because her preferences were, in a sense, autonomous: They were the preferences she would have developed had she been fully informed.

Even if hypothetical consent has some value in reducing wrongdoing, there is reason to believe that Yasmin did not even give her hypothetical consent. In discussing hypothetical consent, we must consider not only how one would act if given more information, but how one would act if they knew they were given false information. Imagine a patient is told there are no risks to surgery, and so consents. The surgery goes well, and she wakes up, goes home, and browses Google scholar, finding that the surgery was, in fact, quite risky. The patient may feel legitimately wronged. She may think, "had I known about the misinformation I was receiving, I would not have consented to surgery with this particular doctor. Instead, I would have gone to another doctor for this surgery." In determining hypothetical consent, the relevant counterfactual is not only what we would do had we full information; it is what we would do, had we known that we were given false information.

Even if refugees would have returned had they been given full information from a given NGO, this does not mean they would have return via this particular NGO, had they known this NGO was misinforming them. This reasoning is reflected in the actions of some

refugees in Israel. These refugees knew they were being misinformed by OBI and, out of principle, rejected the NGO's assistance, paying for their own flights and arranging their own travel documentation.<sup>15</sup> When considering what information is relevant, it is not enough to ask, "Would the refugee have consented if they were informed?" We must also ask, "Would the refugee have consented, had they known, at the time of consent, that they were being misinformed?"

In Joseph's case, we know that he was prepared to accept OBI's services despite the misinformation he received. In Yasmin's case, we do not know if she would have been prepared to accept such services had she known she was being misinformed. She may today say she would have returned via OBI even if she knew she was misinformed at the time, but we cannot know what she would have truly done at the time. We must take her memories at face value for this consideration, as well. And the more we rely on memories, the less we can be certain that information really was irrelevant for the choice made, and for the consent obtained.

In general, we cannot travel to a counterfactual world and see how refugees would act. Except in rare cases like that of Simon, it is difficult to establish what information was irrelevant. To be safe, NGOs and government officials should change their policies to ensure information is available to all refugees. Just as medical professionals set general standards for informing patients, facilitators should set general

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<sup>15</sup> Discussion with George, Juba, 1 January 2013

standards for informing refugees, telling all about the risks prior to returning.

#### 4. Blameworthiness

When NGOs and officials speak with refugees, they rarely know they are misinforming or omitting information. Because they are not aware they are misinforming or omitting information, perhaps they are not blameworthy for their actions.

In normative theory there are extensive disagreements as to the conditions for blameworthiness, but three theories are prominent.

Some deontological and virtue ethicists argue that one can be blameworthy for lacking morally important desires or motivations in one's actions (Smith 2011; Slote 2001). If I fail to call an ambulance to save a person in need right near me, I am blameworthy for her death either because I lack the important desire to save her or because I lack the general motives in life to care about others in great need.<sup>16</sup> We might conclude that officials are similarly blameworthy if they fail to inform refugees because they lack a desire to help refugees at that moment, or lack motives in life to care about refugees. This would be true even if

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<sup>16</sup> Strictly speaking, virtue ethicists may not couch this in terms of "blameworthiness" but simply in terms of non-virtuous motives. There is much debate over what constitutes a non-virtuous motive. Regardless, it seems clear that one lacks a virtuous motive if one fails to call an ambulance for an individual in urgent need. See Slote 2001

officials are not aware they are misinforming and not aware they lack important motives or desires.

Some consequentialists and deontologists argue that, to be blameworthy, one needn't hold morally objectionable desires or motives. It must only be that one foresees, or ought to foresee, the probable consequences of one's actions (Bennett 1998 and Jackson 1997). NGOs and officials are blameworthy in this sense, if a reasonable person could foresee that failing to find information would increase the probability of an uninformed repatriation, or an unsafe return that would otherwise not take place. This would be true even if NGOs and officials are unaware they are misinforming refugees.

Finally, a range of deontological theories argue that, to be blameworthy, one must intend one actions, rather than hold certain motives or foresee certain consequences. For one to intend one's actions, two conditions must be met. First, one must be in control of one's actions (Tognazzini and Coates 2016). To be in control, one must be aware of what one is doing. If one is not aware of what information is true, as in the cases described, then one is not aware one is misinforming or omitting information. Second, to wrongly intend an action one must have a particular aim (Smith 2011: 14). If one wrongly intends to omit information, then one omits information to bring about some objectionable aim, such as the aim of uninformed repatriation. It is not



clear that NGOs or officials have any aim in mind, let alone an objectionable one.

There is one reason that there is intent even when NGOs and officials are not aware they are misinforming and have no aim in misinforming. Misinformation in immigration control may be a type of “tracing case.” Tracing cases occur when one’s unintentional act is the result of an earlier intentional act. If a doctor fails to warn a patient about the risks of an operation because she earlier intentionally failed to read the latest medical journals, then she is culpable for her failure to warn the patient (Smith 2011). Similarly, if at an earlier time facilitators intentionally failed to find information, and this lead them to unintentionally give false information, then they are culpable. UNHCR openly states that it does not conduct extensive post-return monitoring (Morris and Michael-Salomons 2013). When UNHCR told Afghan refugees in Iran it was safe to return, it may not have known it was misinforming, but it knew it was earlier failing to find information on previous returnees. Similarly, when the German government told Bosnian refugees that there would be sufficient services upon return, it did not know about conditions in Bosnia, but perhaps it intentionally avoided finding out information, with the aim of encouraging more to return. More generally, if facilitators have an interest in more returning, they may choose to neglect using more rigorous research methods to learn about risks of return, or the rights of refugees to stay.

We might argue, though, that not all intent is wrongful intent, and so not all tracing cases are equal. In Israel, the director of HIAS did not conduct research on South Sudan because he thought refugees already had information.<sup>17</sup> His intentions seem pure: they were never to encourage misinformed returns, even if he intentionally did not find information.

The Israeli government also established its own repatriation scheme, helping several thousand refugees return to Sudan and Eritrea by 2015. Like the HIAS director, the official heading the scheme never researched the risks of repatriation. He chose to not find information because he wanted to avoid being “patronizing,”<sup>18</sup> arguing that it would be disrespectful to tell refugees about their own countries. For this reason, he never learned how many had been killed after return,<sup>19</sup> or the likelihood that others would be killed.

If this official and the HIAS director can be taken at their word, they did not intend the outcome of refugees being misinformed, even if they intentionally did not find information. Let us consider if this is sufficient for us to conclude they were not culpable.

For the HIAS director, there are reasons to believe he was culpable. It is true he believed refugees had their own information, but he still chose to never validate this belief. The director did not just intentionally neglect

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<sup>17</sup> Interview with Director of HIAS-Israel, Jerusalem, 11 December 2012

<sup>18</sup> Interview with Voluntary Return official, Tel Aviv, 7 August 2013

<sup>19</sup> *ibid*

to find information on South Sudan; he intentionally failed to find out if his belief about refugees' knowledge was correct. And we do not know why the HIAS director intentionally failed to find out whether his belief about refugees' knowledge was correct. It may be that his motivations were to encourage return, or at least ensure good working relations with OBI, which wanted to encourage return. If so, then his intentions were problematic.

The government official's reasons for his actions were not based on any false belief about refugees' knowledge. He wanted to avoid being patronizing. Many refugees really may feel patronized if told about their own country. As such, we may think the civil servant's intentions were not as problematic.

But though it is true that the official's reasons for his actions were to avoid being patronizing, reasons can be derived from other reasons. The civil servant perhaps chose to avoid being patronizing because this would cause more to be misinformed, and so more would return. If so, then his ultimate intention was not to avoid being patronizing, but to encourage return.

The above analysis assumes we can know the intentions of other agents. Clearly, we cannot reach inside their minds and learn about their aims and reasons. Nonetheless, we can still find evidence of intent, if not decisive certainty. Repatriation facilitators are often in a position where

they have an interest in more refugees repatriating, to meet their annual targets. From this, we can conclude that facilitators should not have targets they must reach. Such targets give facilitators reasons to intentionally fail to find information, leading to uninformed repatriations.

## 6. Conclusion

When the director of OBI showed photographs from South Sudan to refugees in Israel, she could have distributed information on the lack of healthcare, security, and universal education. Finding some of this information would be costless, and Good Samaritan duties require such costless acts.

When finding information is costly to obtain, and when there are few reports on countries of origin, facilitators may still have duties to disclose accurate information. NGOs have duties to find information derived from their promises to ensure informed returns. States make no such promises, but have duties to find information derived from their general duties to help prevent atrocities abroad, and ensure protection of refugees. Such duties create a duty to know about conditions abroad, which in turn creates a duty to disclose information to those repatriating. Even when facilitators merely fail to disclose information, rather than actively misinforming, they may still be culpable. Their silence can

interpreted as a confirmation of safety by refugees who return as a result. This conclusion can be supported not only by consequentialists, who wish to avoid any acts that lead to negative consequences, but by deontologists, who may view acts of omission as less problematic than acts of commission. Failing to inform refugees can be viewed as a positive communicative act that implies security, encouraging refugees to return who would have otherwise stayed. Virtue ethicists would likely agree that information should be disclosed. A virtuous person has the motives to ensure refugees obtain safety, and such safety is difficult to obtain if refugees are never told of the risks of returning.

Some refugees claim that they would have returned even if warned of the risks. In reality, however, it is difficult to know if refugees really would have returned had they been better informed. When refugees today say they would have returned, these feelings about the past may be the result of their inability to change the present. Given our inability to be certain that misinformation had no impact on refugees' decisions, we ought to still hold NGOs and officials accountable for misinformation.

Many repatriation facilitators acknowledge that information could have been more accurate, and that their actions were wrong from a consequentialist perspective. They may nonetheless claim they did not intend to give false information, and were not driven by objectionable motives. Given the importance of intent for deontologists, and of motives

for virtue ethicists, we might suppose facilitators' are not blameworthy according to these normative theories. To establish the validity of this claim, it is not enough to establish if misinformation was intentional, or the result of objectionable motives, but whether earlier failures to find information were intentional, or result of objectionable motives. If facilitators chose to avoid finding information in order to encourage return, then they are blameworthy for their earlier motives and intent, even if they unwittingly gave misinformation.

Regardless of whether facilitators act intentionally and are blameworthy, they still act wrongly when failing to inform refugees of the risks. Such failures mean refugees will take the irreversible decision to return, regret doing so, and find themselves again displaced, without asylum, or without basic food and clean water. Just as preventing deportations is essential in some cases, so is preventing misinformation, to ensure more ethical immigration control.

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