On the tears of the Other: 
refugees, responsibility and the ethical 
corrosion of office

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Submitted in total fulfilment of the requirements for the degree of
Doctor of Philosophy
February 2017
Faculty of Arts
The University of Melbourne

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ABSTRACT

This thesis examines responsibility and the conduct of office in the contemporary, institutional setting of migration law and policy in Australia, with a specific focus on the use of mandatory immigration detention between 1992 and 2012. Arguing that the occupation of office is substantively a question of responsibility as an ethical undertaking, my thesis shows how a policy of mandatory immigration detention has diminished the ethical capacity of office. Yet, by attending to the damaging effects that this has produced, I am able to stress the importance of finding other ways of thinking with, and practising office. This is a distinct reading of mandatory immigration detention, which draws out office as a method of inquiry. Importantly, I stress responsibility as constitutive of lawful and ethical relations. This thesis argues for an appreciation of office as a form of service to the other.
DECLARATION

i. the thesis comprises only my original work towards the PhD except where indicated. The editorial assistance of Eris Jane Harrison has been provided for proofreading and formatting of the body of this thesis, in accordance with editing guidelines for doctoral theses at the University of Melbourne and standards issued by the Institute of Professional Editors.

ii. due acknowledgement has been made in the text to all other material used.

iii. the thesis is no more than 100,000 words in length, exclusive of tables, maps, bibliographies and appendices.
ACKNOWLEDGEMENTS

Completing a doctoral thesis is often described a lonely and selfish undertaking. Yet it was largely through the support and generosity of my family, friends and colleagues that this PhD has reached completion. I have been very lucky. Thank you.

I want to begin with specific thanks to my supervisors Julie Evans and Shaun McVeigh, even though the words on this page can never capture how grateful I am for being the recipient of your wonderful supervision and friendship. Your commitment and guidance was invaluable in shaping this thesis to its completion. Thank you Julie, for giving me a richer appreciation of history as a source of both limits and possibilities, for your critical eye in refining this thesis, for your many kindnesses and your endless encouragement to ‘go well!’ Thank you, Shaun, for your generosity, for enriching my understanding of how ethical life can be thought with institutionally and helping me to produce a more rigorous argument, and for such a refined ability to stretch me intellectually without giving me the answers, or so it seemed to me! You have both have occupied your office with grace, intelligence and care, going well beyond the limits of what is commonly expected. Thank you also to Robyn Eckersley in her role as Panel Chair, which was served attentively and efficiently, and to Head of School, Adrian Little, for your support throughout. I am also appreciative that I had access to a space in the School in which to work. This was invaluable.

As this thesis was undertaken part time, I wish to thank those supervisors who guided me through the early stages of candidature, including in its genesis as a Master’s thesis. Notably, I wish to thank Andrew Schaap and Mammad Aidani for thoughtful guidance, with special thanks also to Derek McDougall.

Over the duration, I have been fortunate to be part of a collegial community of postgraduate students, staff and colleagues. Thank you to the wonderful Nat Kamber, Margherita Matera, Dave Walker, Meribah Rose, Dan Bray, George
Vasilev, Kingsley Edney and Camille La Brooy, Erica Millar, Jon Dale, Jas Flore,
Sahar Ghumkhor, Maryse Helbert, Donna Lee Frieze, Anna Szorenyi, and many
many others. Your conversations and friendship made a difference.

Thank you to the extraordinary generosity and kindness of Liz Deane. Your
proof-reading and comments on this thesis and your encouragement went
well beyond anything I might have expected. Thanks also to the lovely Bec
Goodburn and Maria Giannacopoulos and to the kindness of Andrea Carson,
Sana Nakata and James Parker for offering support and thoughtful feedback on
chapters or elements of this thesis. I wish also to thank Maree Pardy, Tom Davis
and Lia Kent for their advice or input into this thesis at various times. And to
the academic staff in Criminology who have been such a wonderful team to
work with during my candidature, I look forward to continuing connections!

I am grateful for the space offered to me by friends and family in the country,
whether their own homes or in their holiday houses. These quiet stretches of
time away from Melbourne and from household responsibilities were so
important to the completion of this thesis. Thank you to the lovely Nat Kamber
and Mike Moodie for the use of their holiday house at Anglesea, to my dear
sister Annie and her partner Donna, and for the support of my sister-in-law and
brother-in-law Chris Bourchier and Wayne Gilmour, who all kindly offered a
study space, uninterrupted quiet and coffee when I needed it. Thanks also to
Heather Jarvis and Tim Dodd in generously offering me several study retreats
to their Venus Bay holiday house, and to our neighbours Helen and Richard
Condie for kindly handing over the keys to their home to use some quiet space
there while they were away!

Within the School of Social and Political Sciences, a special thanks is owed to
Philomena Murray for her enthusiastic support. I wish also to acknowledge
the friendship of Micaela Sahhar and Mohamad Tabbaa whose conversations
and thinking I have been enjoyed immensely. A special thanks to Juliet Rogers,
for your infinitely genuine interest and compassion in others. Thank you also to
Ann Genovese for your support, hospitality and mentoring. I am very grateful for the encouragement and advice of Juliet and Ann in my decision to approach Julie and Shaun to supervise this thesis. For the friendship and kindness of many colleagues and friends in the Law School, new and old: James Parker, Claire Opperman, Connal Parsley, Olivia Barr, Ian Duncanson and Judith Grbich, thank you.

This thesis and my time in the University generally has also been enriched by the School’s administrative staff. I particularly wish to mention Antigone Vasilopoulos, Mary Duffy, John-Paul Hougaz and Kate Farhall in the research office and Natalie Reitmier, Cathy Alizzi and Jo Helsby in the SSPS office – you have quietly the wheels of the School running, but I have also enjoyed your friendship and conversation most of all.

To anyone else not mentioned here whose presence has shaped this thesis or who has left a trace on it, even without intention, thank you.

My family has central to this thesis, providing me with foundations and support throughout, and I dedicate this thesis to you all. Whilst my father passed away some years ago, I am fortunate to live every day with his grace, kindness and intellect and with the optimism, compassion and generosity of spirit of my mother, as well as with their shared interest in the world around them. Thank you also to my dear brothers and sisters, Michael, Cathryn, Annie, Damian and John, for your friendship and the connections we have together. (And thank you also to my dear friend Lyn Komarzynski for moral support when I needed it!)

To my children, Claudia, Thea and Cael, thank you for your presence in my life, and for your help at support, especially as this thesis came to a close (including reading over chapters and checking my references!) I learn from you every day and am more proud of being your mother than anything else. Simply, I am a better person because of you. And lastly and importantly, thank you to
my dear husband Gary, who has patiently withstood the impact of this thesis on our life together, extending practical and moral support, whether cooking or providing take-away dinners, or doing the dishes! Thanks for being proud of me, for the flowers bought at exactly the right moment, and for your steady and calm influence in my life. I look forward to our life together.
## GLOSSARY

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAT</td>
<td>Administrative Appeals Tribunal</td>
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<td>ACM</td>
<td>Australian Correctional Management</td>
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<td>ANAO</td>
<td>Australian National Audit Office</td>
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<td>AHRC</td>
<td>Australian Human Rights Commission</td>
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<td>APOD</td>
<td>Alternative Places of Detention</td>
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<tr>
<td>ASRC</td>
<td>Asylum Seekers Resource Centre</td>
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<tr>
<td>CAT</td>
<td>International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.</td>
</tr>
<tr>
<td>CPA</td>
<td>Comprehensive Plan of Action</td>
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<tr>
<td>DeHAG</td>
<td>Detention Health Advisory Group</td>
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<tr>
<td>DIAC</td>
<td>Department of Immigration and Citizenship</td>
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<tr>
<td>DIBP</td>
<td>Department of Immigration and Border Protection</td>
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<tr>
<td>DILGEA</td>
<td>Department of Immigration, Local Government and Ethnic Affairs</td>
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<tr>
<td>DIMA</td>
<td>Department of Immigration and Multicultural Affairs</td>
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<tr>
<td>DIMIA</td>
<td>Department of Immigration and Multicultural and Indigenous Affairs</td>
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<tr>
<td>FCA</td>
<td>Federal Court of Australia</td>
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<tr>
<td>HCA</td>
<td>High Court of Australia</td>
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<tr>
<td>HRC</td>
<td>United Nations Human Rights Committee</td>
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<td>HREOC</td>
<td>Human Rights and Equal Opportunity Commission</td>
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<tr>
<td>ICCPR</td>
<td>International Convention on Civil and Political Rights 1966</td>
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<tr>
<td>IDAG</td>
<td>Immigration Detention Advisory Group</td>
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<td>IDC</td>
<td>International Detention Coalition</td>
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<tr>
<td>IMA</td>
<td>Illegal (or Irregular) Maritime Arrival</td>
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<tr>
<td>Acronym</td>
<td>Description</td>
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<tr>
<td>JSCM</td>
<td>Joint Standing Committee on Migration</td>
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<tr>
<td>JSCAIDN</td>
<td>Joint Select Committee on Australia’s Immigration Detention Network</td>
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<tr>
<td>MOU</td>
<td>Memorandum of Understanding</td>
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<tr>
<td>MRT</td>
<td>Migration Review Tribunal</td>
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<tr>
<td>RRT</td>
<td>Refugee Review Tribunal</td>
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<tr>
<td>SSCFAD</td>
<td>Senate Standing Committee on Foreign Affairs and Defence</td>
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<tr>
<td>UMA</td>
<td>Unauthorised Maritime Arrival</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>UNHRC</td>
<td>United Nations Human Rights Council</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<tr>
<td>UN WAGD</td>
<td>United Nations Working Group on Arbitrary Detention</td>
</tr>
</tbody>
</table>
**CONTENTS**

<table>
<thead>
<tr>
<th>ABSTRACT</th>
<th>iii</th>
</tr>
</thead>
<tbody>
<tr>
<td>DECLARATION</td>
<td>iv</td>
</tr>
<tr>
<td>ACKNOWLEDGEMENTS</td>
<td>v</td>
</tr>
<tr>
<td>GLOSSARY</td>
<td>ix</td>
</tr>
<tr>
<td>INTRODUCTION</td>
<td>2</td>
</tr>
<tr>
<td>CONTRIBUTION: OFFICE AS A SITE OF ETHICAL RESPONSIBILITY</td>
<td>2</td>
</tr>
<tr>
<td>MANDATORY IMMIGRATION DETENTION: A TEMPORARY, 'INTERIM' MEASURE</td>
<td>5</td>
</tr>
<tr>
<td>THINKING WITH OFFICE: METHOD</td>
<td>11</td>
</tr>
<tr>
<td>THESIS STRUCTURE</td>
<td>15</td>
</tr>
<tr>
<td>TERMINOLOGY</td>
<td>17</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>21</td>
</tr>
<tr>
<td><strong>PART ONE: Creating and Reading Practices of Office</strong></td>
<td>25</td>
</tr>
<tr>
<td>CHAPTER ONE: IMMIGRATION DETENTION IN AUSTRALIA – SHIFTING INSTITUTIONAL SETTINGS AND CONCERNS</td>
<td>26</td>
</tr>
<tr>
<td>THE REFUGEE CONVENTION AND AUSTRALIA'S RESPONSIBILITY FOR REFUGEE PROTECTION</td>
<td>27</td>
</tr>
<tr>
<td>PATTERNS OF EXCLUSION, CONTROL AND RESPONSIBILITY</td>
<td>34</td>
</tr>
<tr>
<td>1992 MANDATORY IMMIGRATION DETENTION: NORMALISING A 'CRISIS'</td>
<td>44</td>
</tr>
<tr>
<td>CONTRACTING THE FIELD OF RESPONSIBILITY</td>
<td>62</td>
</tr>
<tr>
<td>REshaping THE obligations of OFFICE</td>
<td>65</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>74</td>
</tr>
<tr>
<td>CHAPTER TWO: READING IMMIGRATION DETENTION AND OFFICE</td>
<td>77</td>
</tr>
<tr>
<td>TWO GENRES</td>
<td>78</td>
</tr>
<tr>
<td>CRITICAL SCHOLARSHIP</td>
<td>81</td>
</tr>
<tr>
<td>THE LIMITS OF CRITIQUE: TOWARDS A MORE GROUNDED ANALYSIS</td>
<td>90</td>
</tr>
<tr>
<td>A HUMANIST APPROACH</td>
<td>92</td>
</tr>
<tr>
<td>THE LIMITS OF A HUMANIST RESPONSE</td>
<td>97</td>
</tr>
<tr>
<td>INSTITUTIONAL ACCOUNTS</td>
<td>104</td>
</tr>
<tr>
<td>OFFICE THINKING</td>
<td>118</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>125</td>
</tr>
<tr>
<td><strong>PART TWO: Degrading Office – Practices of Detachment</strong></td>
<td>128</td>
</tr>
<tr>
<td>CHAPTER THREE: LEGITIMISING DETENTION – PRACTICES OF CATEGORISATION AND EXCLUSION</td>
<td>129</td>
</tr>
<tr>
<td>CATEGORIES AND THE WORK OF OFFICE</td>
<td>132</td>
</tr>
<tr>
<td>THE CATEGORY OF THE REFUGEE: ESTABLISHING RESPONSIBILITY</td>
<td>133</td>
</tr>
<tr>
<td>THE CATEGORY OF THE 'UNLAWFUL': THREE CASE STUDIES</td>
<td>139</td>
</tr>
<tr>
<td>THE CATEGORY OF THE 'UNLAWFUL': NARROWING THE FIELD OF RESPONSIBILITY</td>
<td>147</td>
</tr>
<tr>
<td>PRACTICES OF DEHUMANISATION</td>
<td>151</td>
</tr>
<tr>
<td>LAWFUL 'RESPONSIBILITY'</td>
<td>157</td>
</tr>
<tr>
<td>REMOTENESS FROM SUFFERING</td>
<td>162</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>165</td>
</tr>
</tbody>
</table>
'And that you sit as kings in your desires,
Authority quite silent by your brawl,
And you in ruff of your opinions clothed;
What had you got? I'll tell you: you had taught
How insolence and strong hand should prevail,
How order should be quelled…'

_St Thomas More_, by William Shakespeare
INTRODUCTION

How should we conduct ourselves in public life? There is an expectation that when we occupy positions of office, we are able to fulfil a certain sense of the responsibility which office holding entails. Office holding brings us into a set of relations and of obligations which are attached to those relations, whether we are talking about public servants, judges, politicians or migration officers. Taking up positions in public life requires careful attention to the obligations of office and to how those obligations are met. Historically, the value attached to office as a source of obligations increased as governments became more centralised and expanded their spheres of activity. This has been accompanied by a turn ‘to legislation’ as a means of regulating relations. Law has thus functioned in a tradition of office thinking as the foundation and source of obligations. This determines appropriate forms of conduct and skills enabling these obligations to be met. Office conceptualised in this way asserts the value of proper conduct in order to minimise the corruptibility and degradation of office. Ethical conduct in office is also shaped by our acknowledgement of responsibility and the manner in which we orient ourselves to others in the world.

CONTRIBUTION: OFFICE AS A SITE OF ETHICAL RESPONSIBILITY

This thesis produces a unique reading of mandatory immigration detention which points to the way that office has been conducted under this policy, while affirming the need to be reminded of the ethical significance of office as a mode of inquiry. The thesis is specifically concerned with how we might

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2 Ibid.
understand office and responsibility in a contemporary setting of migration law and policy in Australia under a policy of mandatory immigration detention. My central argument is that the occupation of office is substantively a question of responsibility, as an ethical undertaking. Under a policy of mandatory immigration detention, the ethical capacity of office has been diminished.

My argument is advanced through a close examination of some specific practices and experiences of Australia’s policy of mandatory immigration detention for those deemed ‘unlawful’ arrivals. If law is a source of obligations, then the Convention Relating to the Status of Refugees and Australia’s Migration Act 1958 (Cth) establish the contours of the responsibility of the office of migration in this country and the obligations which flow from this responsibility. Between 1992 and 2012 these obligations have been progressively disavowed.

There are three central interventions made by this thesis. Firstly, it offers a rethinking of institutional life and the occupation of office in a general sense. Secondly, it provides an original reading of mandatory immigration detention in Australia as a specific institutional concern through office as a method of inquiry. Lastly, it draws out the ways in which we can develop an ethical account of office through the radical, ethical philosophy of Emmanuel Levinas. Brought together, these three elements yield a particular and concrete account of ethical conduct in institutional life Australia under a policy of mandatory immigration detention.

This approach reveals that the effects of immigration detention extend beyond those being detained, to the practices, values and experiences of the institution and its office holders. The intervention this thesis makes pivots on this point. With some important emerging exceptions, objections to detention have emphasised experiences of suffering, breaches of human rights and the diminishing legal protections of those in detention rather than addressing its
impact upon those who implement the policy as an office concern. This is despite the dominant approach in the literature encompassing an implicit address to office to the extent that it addresses the experience of the refugee as the victim of impoverished and often inhumane institutional practices. Insofar as the literature addresses the failure of office, it has tended to do so by focusing on the failure of those in office to respond humanely to those seeking asylum.

While being underscored by claims that government is failing in its obligations to those seeking protection, the analysis tends to centre on this as a failure in relation to the other, rather than as being indicative of a poor understanding of what it means to live ethically in office. Attention to office remains under-theorised in this setting: responding to this gap can foster attentiveness to the impact of ethically bereft policies upon office, and help develop an awareness of practices and foundations which can support ethical conduct. Whilst this thesis speaks to criminology as a field of inquiry, it draws on literature and methods outside of this discipline to inform my argument and analysis. The genre of this thesis situates it within the humanities, rather than directly in social theory or sociology or professional ethics. Accordingly, this thesis utilizes sources which are drawn from a range of disciplines in order to draw out connections between my research and how other thinkers have addressed related questions, such as the work of David Luban on legal ethics, and Raymond Gaita on moral philosophy and the notion of office as vocation.

In proposing that office holding is concerned with responsibility as an ethical undertaking, I draw on philosopher Emmanuel Levinas’s conception of the

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ethical relation. Levinas argues that, in this relation, I am responsible to and
for the other, before myself, in service to the other.\(^5\) This is a responsibility
which is direct, immediate and limitless. Exercising responsibility to the other is
a condition of who we are as human subjects; it cannot be delegated to anyone
else if we are to be in an authentically ethical relation with the other. While
Levinas’s radical, transcendent ethic is commonly regarded as antithetical to the
work of legal and political institutions, I argue that he also invites us to use
his work in ways that deliver ethical capacity, rather than being narrowly
confined to a prescriptive account of his ethic which closes off this possibility. I
take up specific elements of a Levinasian ethic to pursue alternative ways of
thinking with institutions and office as a site of ethical potential. Specifically, I
draw upon his ethical work in relation to justice and what he terms 'the third' to
assert office as service to the other. A key challenge in working with Levinas is
the absence of structural accounts of institutional life within his work. Rather,
his work centres on how responsibility can be taken up or avoided in our
relations with others. I argue that this form of responsibility is helpfully
appreciated within institutional settings as service to the other.

MANDATORY IMMIGRATION DETENTION: A TEMPORARY,
‘INTERIM’ MEASURE

My specific focus is on the conduct of office in Australia between 1992 and
2012 under a policy of mandatory immigration detention for ‘unauthorised’
boat arrivals seeking asylum.\(^6\) These arrivals sought protection from Australia,
which has been a signatory to Refugee Convention since it came into force in
1951.\(^7\) Mandatory immigration detention began as a response to political and

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\(^6\) While immigration detention was first implemented as government policy in 1989, I have chosen to emphasise the
significance of 1992 because at this time the exceptional elements of the policy came to the fore. This is also when the
erosion of the capacity for reflection and judgement is intensified, through the *mandating* of detention. However, 1989
also marked pivotal shift in how refugees were to be categorised under law, through the introduction of a dual track
admission system based on whether refugees arrived onshore or through offshore processing.

\(^7\) The application of the Convention was extended in 1967, through the OptionalProtocol, to cover all refugees, rather than the
specific groups affected by post World War Two displacement. See the International Convention relating to the Status of
Refugees, open for signature July 28, 1951. 189 UNTS 137 (entered into force April 22, 1954) and theUnited Nations
media concerns voiced about the increasing numbers of persons arriving by boat without a valid visa – mainly from Indochina – seeking protection in Australia in the late 1980s. Driven by an explicit attempt to exercise effective border control and to minimise what was regarded as refugee ‘queue jumping’ by those arriving by boat, the Australian Government continues to detain all those arriving without prior authorisation, pending the resolution of their claims for refugee status.\(^8\)

The increasing reliance on immigration detention as a border protection strategy, even while administrative detention is not of itself a violation of human rights, has underscored the work of the United Nations in developing specific criteria and standards in relation to the use of detention.\(^9\) These guidelines state that immigration detention is accepted for administrative purposes only (that is, for the processing of claims); for the minimum period required for such processing; that children are only detained as a last resort; that detention facilities are humane. They explicitly reject the ‘mechanical’ application of the requirement that refugees apply ‘without delay’ for asylum, recognising the often highly insecure circumstances in which they find themselves and noting that Article 31 of the Convention stipulates that refugees should not be punished for the manner of their entry.\(^10\) Key concerns are that detention entails a deprivation of liberty, thereby undermining the right to seek asylum as a significant human right.\(^11\)

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\(^11\) See Introductory Note by the Office of the United Nations High Commissioner for Refugees, International Convention
Authority for the Australian Government to legislate for the detention of unauthorised arrivals is derived from Sections 51 xix, 51 xxvii and 51 xxix of the Australian Constitution, which detail the power to make laws in respect of emigration and immigration, aliens and external affairs. This power appears in the Migration Act 1958 (as amended). The object of the Act includes regulating ‘in the national interest, the coming into, and presence in Australia, of non-citizens’ and enabling the deportation of ‘non-citizens whose presence in Australia is not permitted under the Act’. The Migration Act describes detention as ‘being in the company of, and restrained by’ either an officer, or ‘another person directed by the Secretary of Australian Border Force Commissioner to accompany and restrain the person’ or ‘being held by, or on behalf of, an officer, where a person is in a ‘detention centre established under this Act’ or ‘in a prison or remand centre’ or ‘police station of watch house’ or a vessel from which a person is prevented from leaving, or any other place as determined by the Minister. Detention is defined by the United Nations High Commissioner for Refugees (UNHCR) as ‘confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.’ This thesis is specifically concerned with Australia’s use of ‘closed’ or ‘confined’ detention centres which curtail freedom of movement in heavily securitised and often remote and isolated spaces and locations.

Mandatory immigration detention was progressively legislated through a number

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12 Australian Constitution, Sections 51 xix and xxvii.
13 Migration Act 1958 (Cth). In 2012, the return to a policy of offshore processing saw a Bill introduced into the Australian Parliament to amend the Migration Act, enabling unauthorised maritime arrivals to be taken from Australia to Nauru or Manus Island for regional processing through the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill.
14 Migration Act 1958 (Cth), Section 5.
15 UNHCR Detention Guidelines. See also Daniel Wilsher, Immigration Detention: Law, History, Politics (Cambridge: Cambridge University Press: 2011) for detailed background and analysis of immigration detention, including in Australia.
16 I note that there are different forms of detention in Australia, which I detail in Appendix B. I am primarily concerned with Australia’s dominant reliance on “closed” detention settings to enforce its mandatory immigration detention policy.
of amendments to this Act. Under these changes, officers of the Department of Immigration and Border Protection have been granted powers to detain a person whom an officer ‘reasonably suspects’ to be an unlawful non-citizen.\(^{17}\) The relevant section of the Act defines an unlawful non-citizen as:

A non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen.\(^{18}\)

Typically, those detained have included individuals colloquially termed ‘boat people’ (or, in institutional language, ‘unauthorised’ or ‘irregular maritime arrivals’).\(^{19}\) This group of persons has attracted the most attention and public hostility, due to public perceptions of ‘queue jumping’ and illegality based on how people arrive in this country.\(^{20}\) Importantly for this thesis, legislative changes under this policy have limited the ability of Australian courts to order the release of those detained. Together with processing delays, this has often resulted in the prolonged detention of individuals, pending resolution of their refugee visa applications.\(^{21}\)

Widespread public support for a punitive detention regime has been driven by a dominant perception since the 1980s that those arriving by boat are either ‘bogus’ refugees – attempting ‘easy’ entry into Australia for economic gain\(^{22}\) – or that they constitute a security threat. These perceptions are discounted by the

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\(^{17}\) Sections 178, 189 and 196 of the Migration Act 1958 (Cth) have detailed, respectively, the terms under which someone can be held in detention, the powers of officers to detain a person, and the terms under which a person must remain in detention. Those subject to detention include unauthorised arrivals, and those who have overstayed their visa, those who have entered Australia without a ‘valid entry permit’ or who ‘enter without proper clearance in breach of health or character requirements’. See Joint Standing Committee on Migration, Asylum Border Control and Detention (Canberra: Australian Government Publishing Service, 1994): 1.

\(^{18}\) Migration Act 1958 (Cth), Section 14. The term also encompasses visa over-stayers, residents or other non-citizens who are to be deported for criminal offences, those deemed to be a security risk, and illegal fishers.


\(^{20}\) By ‘breaking’ Australian law, they are said to be ‘illegal’ because they are without authorisation and have not gone through the ‘proper’ channels. See Ann McNevin, “The Liberal Paradox and the Politics of Asylum in Australia,” *Australian Journal of Political Science* 42, no.4 (2007): 622.

\(^{21}\) Migration Act 1958 (Cth), Section 196 (3). For one of many discussions of the long term effects of detention, see Caroline Fleay and Lisa Hartley, “Released but not yet free: Refugees and Asylum Seekers in the Community after Long-Term Detention” Curtin University, Centre for Human Rights Education, December 2012.

reality that most applications for refugee status by ‘boat arrivals’ are approved, with a very high percentage of successful appeals against adverse decisions, as I will show in chapter one. Given this, prolonged detention appears to exceed the bounds of what is deemed appropriate as an ‘administrative’ response.

Successive Federal Governments in Australia have defended mandatory immigration detention as a purely administrative measure necessary for processing refugee applications, even while it has been a site of suffering and despair for those detained. The effects and underlying intention of mandatory immigration detention make the claim that this is merely administrative detention a difficult one to sustain: it has been characterised by excessive control, surveillance and manipulation. Its physical setting and practices bear striking parallels with a prison environment. Conditions are typically harsh and often inhumane, with an extensive record of human rights abuses in the centres. Since its inception, immigration detention has been the subject of extensive criticism by human rights advocates and by the Australian Human Rights Commission (AHRC) as I will detail in chapter one.

Some individuals have been detained for periods of up to five years and more, often in remote locations with minimal or no access to legal protections. Research into its effects consistently identifies a connection between prolonged immigration detention and depression and anxiety, which manifests in self harm, suicide and suicidal ideation, including among children. Concerns about breaches of the rights of the child – including allegations of sexual assault upon children and unaccompanied minors while in detention – have been the subject

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25 Joint Select Committee on Australia’s Immigration Detention Network, Final Report on the Immigration Detention Network 2012 (Canberra: Commonwealth of Australia, 2012); Palmer, Inquiry into the Circumstances; HREOC, Those who’ve come across the seas and HREOC, A Last Resort; Steel and Silove, “The Mental Health Implications.”
26 I will detail the progressive limitations on access to legal advice and procedural protections in chapters one and three.
of two major investigations by the AHRC in 2004 and 2014.28

Despite its introduction as a temporary, emergency response to specific groups of boat arrivals and the persistent evidence of its harmful effects, mandatory immigration detention has continued to enjoy bipartisan and widespread public support. Human rights-based objections have also failed to dismantle this policy or to productively shift the terms of public debate.

When introducing new laws to enable mandatory immigration detention, Minister Gerry Hand was keen, however, to stress the interim and emergency nature of immigration detention.29 He said at the time that mandating immigration detention was:

only designed to be an interim measure [which] refers principally to a detention regime for a specific class of persons. As such it is designed to address only the pressing requirements of the current situation.30

This statement suggests an underlying concern that mandatory immigration detention is not the sort of practice that is proper to the functions, obligations and indeed the responsibility attached to the office of migration, particularly for those seeking refugee protection.

Two central shifts under this policy are of particular interest for this thesis. Firstly, under the policy the purpose of the department has effectively shifted from administrative to punitive. Secondly, an expansion in executive power under this policy has been facilitated and accompanied by a contraction in judicial authority and oversight. These shifts have cumulative implications for

28 Disturbing evidence of sexual assault was broadcast in 2003 by Debbie Whitmont in “About Woomera,” Four Corners, aired May 19, 2003 (Sydney: ABC TV, 2003). Ongoing stories of continuing self harm and suicidal ideation amongst detained children were also reported in “The Forgotten Children,” Four Corners by Debbie Whitmont and Wayne Harley, aired on October 24, 2016 (Sydney: ABC TV, 2016). I stress these recent circumstances to highlight the persistent harms experienced under this policy.

29 The Migration Amendment Act 1992 introduced mandatory immigration detention and the Migration Reform Act 1992 universalised its application to all “unlawful arrivals.”

the institutional conduct of the department and are illustrative of Australia’s failure to meet its obligations under the Refugee Convention.

THINKING WITH OFFICE: METHOD

There are many different traditions in office thinking.\(^\text{31}\) Showing respect and conducting office as service to the other comprise ways in which we take up duties in public life as part of a tradition of office thinking.\(^\text{32}\) I take from these traditions the view that office is both a source of limit and of humanism. For example, the technique and skill involved in specific offices in contemporary life limit the conduct, persona and scope of office. Limits also ward against abuse of power and tyranny. Yet, the ethical conduct of office requires foundations which also entail respect for human dignity. As an ethic, this both exceeds the limits of office by asserting the value of human relations, while ensuring that we conduct ourselves within limits. Exceeding this limit can corrupt office as well as endanger human dignity.\(^\text{33}\) While it could be regarded as a constraint on the ethical, office understood as the ‘art of living with limits’ can also enable ethical relations to flourish where its foundations foster rather than undermine human dignity.\(^\text{34}\)

I will be referring throughout to the purpose of office and to what it means for office to be diverted from this. This is of both a general and specific interest. The purpose of office is important in the general sense in that it was read in early modern conceptions of office holding as opposed to the pursuit of self-interest and partiality.\(^\text{35}\) I read this general purpose of office as pivotal to the exercise of respect for others in which the preservation of human dignity is an exercise in responsibility. Following Shaunnagh Dorsett and Shaun McVeigh,
responsibility is best understood in lawful relations when it is:

aligned with forms of dignity, status and office and modes of civility and conscience. This language also sustains much of the critical understanding of lawful relations. If a jurisdiction crafts lawful relations, then one part of a critical approach is to humanise lawful relations.36

The purpose of office in a general sense is thus the sustenance and preservation of our humanity. In a more particular sense, specific offices are tasked with obligations which fulfil a discrete purpose. This creates clear fields of responsibility for office to meet its obligations but also imposes limits on office, as noted above. For example, the capacity for judicial office to fulfil its specific purpose has been limited under a policy of mandatory immigration detention. At the same time, executive office has exceeded its purpose and remit through the expansion of executive authority and its administration of punishment. For this reason, the unfairness and suffering which eventuate from this policy cannot be resolved by procedural changes or performance improvements undertaken by those occupying specific offices: ethical conduct cannot be nourished by an institutional setting which is marked by weakened, ethical foundations.

I pose office as a form of orientation to the other, practised through service and respect for human dignity, which provide such foundations for ethical conduct in office. Accordingly, the focus in my method is not on a ‘code’ of ethical principles or the minutiae of office holding: ethical conduct is irreducible to a manual or code of conduct, notwithstanding the importance of such codes. Importantly, I address the form and foundations of responsibility as constitutive both of our personal relations and of our occupation of office in institutional life.

This is significant, given the potential for, and actuality of violence which typically accompanies institutional relations and bureaucratic forms, violence

which is often most dangerous because it is hidden, as Slavoj Žižek has shown. A simple delineation between physical and structural, or systemic, violence can however, produce a flattened account of violence, as I will argue. While the latter is embedded within the laws, policies and institutions of society and is manifested through the social and other inequities and harms which structural forms produce, institutional violence can be limited when office is sourced in foundations which deliver, rather than negate, meaningful relations and respectful conduct. By holding to this possibility, we can start to imagine other ways of being in office in order to contest the effects of policies which are the source of harm. And we can locate alternative narratives and examples which can guide us in our thinking of what could be otherwise.

Beyond the question of how public office might conduct itself well, this directs the sorts of additional questions underlying my analysis. For example, how might we understand office as an exercise in responsibility? How has office conducted itself under a policy of mandatory immigration detention? What have been the effects of this policy on those ‘doing’ the detaining and how might this be understood as a diminished exercise of responsibility? What comprises an ethics of office which is attuned to respect as a key foundation of office, understood as service and orientation to the other? What sorts of foundations are critical to the ethical conduct of office in this setting and indeed, in other institutional contexts?

In examining the research questions above, I largely confine my attention to the practices and experiences of the Immigration Detention Network, including experiences undergone by those detained, by those working in the centres and those charged with the development, implementation and scrutiny of policies and laws which support mandatory immigration detention. This helps to reveal the complexity of this setting, showing the interplay between different forms of

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office and how this currently undermines hte. The empirical materials I draw upon reveal how this policy has shaped the conduct and obligations of those working in the network. My interest is in the transformation of the purpose of office in the everyday setting as well as with the exercise of judicial and executive office to reveal the effects of this policy upon the capacity for office to be conducted well in both an ethical and a technical sense. I will draw out the meaning of these two elements (the ethical and the technical) as the thesis progresses.

Sources are drawn from the Department of Immigration and Border Protection, the Parliamentary Library, the Parliament of Australia website, Senate Inquiries and Senate Committees, speeches, legislation, policy documents, media reports and narrative accounts and reports issued by the AHRC and the office of the Commonwealth Immigration Ombudsman, as well as from relevant international sources, such as those from the UNHCR and the United Nations (UN) Working Group on Arbitrary Detention (UN WAGD). My attention has been largely directed at those reports which provide an insight into the institutional effects of mandatory immigration detention.

While I draw attention to policies preceding mandatory immigration detention, the focus period for this thesis bookmarks the introduction of mandatory immigration detention in 1992 and the 2012 resumption of an earlier policy of offshore processing of refugees – a processing system introduced in 2001 but abandoned by the Federal Labor Government in 2008. The return to a policy of offshore processing in 2012 was framed as a move which might better meet Australia’s border protection objectives, although it has seen a return to appalling conditions, inhumane treatment and systematic human rights abuse.38

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38 This was the policy outcome reached with the release of the report of the Expert Panel on Asylum Seekers in August 2012, as I will explain further in chapter one. It was accompanied by the excision of the entirety of the Australian mainland and islands which were hitherto not excised under the 2001 legislation. However, the term ‘excision’ was not used to describe the change, even though the effect was the same.
Where relevant, I use selected material outside my specified focus period to emphasise continuities and differences over time and to pinpoint alternative approaches underpinned by an ethical responsibility. For example, material regarding Australia’s response to Vietnamese refugee movement in the 1970s is utilised to disclose an alternative response in refugee policy. The leadership of Prime Minister Malcolm Fraser in the 1970s – a period of mass Vietnamese refugee movement – shows that a harsh border protection regime has not always been regarded as an appropriate policy intervention to prevent unauthorised entry into this country, especially by refugees. Fraser’s reflections, gathered during an interview I conducted with him in 2011 (University of Melbourne Ethics approval number 1238572) constitute another important source.

The years between 1992 and 2012 have been marked by a steady contraction in Australia’s responsibility towards refugees who arrive by boat, despite discrete moments in which government policy appeared to resist this trend. The analysis of this period not only uncovers the persistence of a policy proposed as a temporary measure, but reveals its reiterative reconfiguration through a return to offshore processing. Under the return to offshore processing, the refusal to resettle refugees coming by boat constitutes a selective rejection of the lawful and ethical obligations to protect refugees based upon how someone arrives in this country.

**THESIS STRUCTURE**

I present my analysis in three parts, each consisting of two chapters. Part One maps out the context and creation of the practices and forms of office conduct under this policy, and examines the scholarly readings of mandatory immigration detention in Australia. Chapter one describes the background of migration policy in Australia, identifying the ways in which responsibility for refugee
protection has progressively contracted under a policy of mandatory immigration detention between 1992 and 2012. This reveals a history of shifting patterns of control and exclusion in this country. Chapter two extends and builds on this understanding of mandatory immigration detention through scholarly readings of the policy.

I have negotiated the vastness and disciplinary diversity of this literature by proposing that it is best understood as coming either from a lineage of critical scholarship or from what I loosely term a ‘humanist’ approach. I then consider alternative readings which underpin an appreciation of mandatory immigration detention from an institutional perspective. This provides a foundation for me to address the absence of a reading of this policy from the perspective of an ethic of office both as site and method of analysis.

Part Two begins my analysis from this perspective. My examination of how this policy has been enabled and implemented uncovers the consequences of a degraded exercise of office. Two specific elements shape my analysis: in chapter three, I address the work of categorisation as a practice of office which has become a source of harm through the category of the ‘unlawful non-citizen;’ in chapter four, I describe the harms and suffering which have been justified as the collateral damage of the category of the ‘unlawful’. These two chapters show that detention is illustrative of the ethically impoverished conditions of office in modernity identified by Zygmunt Bauman in his analysis of the Holocaust; they also affirm Scott Veitch’s argument that legal categories, as ‘the measure for, and the denial of, responsibilities,’ function to deny any suffering which eventuates from the application of law. However, chapter four complicates this analysis by showing that this suffering is not confined to those who are being detained – there are broader institutional consequences and

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effects which warrant our scrutiny and reflection. In observing that the damaging effects upon those detained are often also experienced by those ‘doing’ the detaining, I stress the importance of reading this policy through the lens of office as an ethical concern.

Part Three develops alternative ways of thinking with and practising office to contest the claim that once we step into office, ethical responsibility disappears.\textsuperscript{40}

I begin by developing a conceptual account of an ethics of office in chapter five. This adopts the ethical language of Emmanuel Levinas to draw out the ways in which we can think ethically with office. Chapter six applies this concretely, addressing specific instances where ethical conduct persists and continues to be asserted despite its degradation under this policy. Such examples show that while violence often inheres in institutional settings, office can also be faithful to its purpose of protecting, rather than undermining, human dignity.

The material is structured to provide a point of contrast between forms of conduct which corrode or alternatively uphold responsibility to others. I begin by identifying the weaknesses of the immigration detention system, and its impact on office holding, including the ethical effects of detaining refugees. Whilst Part One sets up the context for this analysis, Part Two draws on examples which largely affirm readings of office as complex sites of institutional violence. Part Three provides a point of contrast for these examples, proposing alternative ways of thinking with, and 'doing' office which reveal its ethical potential.

TERMINOLOGY

Responsibility and Obligation

When I speak of responsibility, I argue for a “thick”\textsuperscript{41} or deep sense of

\textsuperscript{40} This is the claim made regarding office by Veitch, \textit{Law and Irresponsibility}, 88.

\textsuperscript{41} In referring to ‘thick’ or ‘thin’ responsibility, I draw on the terms used by Michael Sandel to denote the constitution of the communitarian self in “The Procedural Republic and the Unencumbered Self” \textit{Political Theory} 12, no. 1 (1984): 81 – 96. I do not follow his argument here.
responsibility as an ethical undertaking, rather than one which is understood more narrowly as accountability to a rule or simply as role responsibility. When I refer to obligations, I refer to duties which are created through office and under law and policies, giving practical meaning and effect to responsibility. The relation between responsibility and obligations is one in which the former establishes the terms and conditions upon which obligations are created and exercised, thus marking out the contours of what I term a ‘field of responsibility.’ For example, the Refugee Convention establishes a responsibility to provide protection to those seeking refuge from persecution. The obligations of the Department of Immigration and Border Protection denote the ways in which this responsibility can be fulfilled. This ordinarily includes the obligation to provide legal advice and assistance to those seeking refuge, developing appropriate resettlement practices, and the effective and thorough processing of refugee visa applications. Many of these obligations are at the very least implied in the terms of the Refugee Convention and in Explanatory Notes to the Convention, in the International Convention on Civil and Political Rights of 1996 (ICCPR) and in Communications issued by the United Nations Human Rights Council (UNHRC) and the UNHCR. We can see already that there are obligations deemed appropriate to give full expression to the responsibility under the Convention. This thesis shows how the form and scope of Convention obligations have progressively contracted under a policy of mandatory immigration detention. Yet whilst there have been extensive, and well-founded critiques of the limits of the application, terms and implementation of the Refugee Convention, this thesis argues that the

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Convention provides a foundation for ethical institutional conduct, even if it has not always been upheld.\textsuperscript{45}

**Asylum seekers, refugees, detainees**

There are several terms used interchangeably in relation to those seeking refugee protection and who are being detained while awaiting the outcome of their applications, including ‘asylum seekers’, ‘detainees’ and ‘refugees’. Institutional classifications applied to those in detention have included terms such as ‘illegal non-citizens’, ‘unauthorised maritime arrivals’ and ‘irregular maritime arrivals’ (IMAs).\textsuperscript{46} I will follow this usage where the terms have been adopted by the Department of Immigration and Border Protection, while observing the instrumental function of these terms and their discursive effects.

A refugee is defined in the Convention as someone who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or
> who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it.\textsuperscript{47}

While the term ‘asylum seeker’ is used with increasing frequency, I have chosen to use ‘refugee’ in most instances for two reasons. Firstly, a very high percentage of those seeking asylum and who are detained are subsequently found to have


\textsuperscript{46} These terms appear variously in the Migration Act 1958 (Cth) and in departmental usage. However, there is a slippage in terminology: for example, the acronym IMA shifted from reference to ‘irregular maritime arrivals’ to ‘illegal maritime arrivals’ illustrating a subtle but significant discursive shift which has labelling effects.

\textsuperscript{47} Article 1 (2) of The International Convention relating to the Status of Refugees, open for signature July 28, 1951. 189 UNTS 137 (entered into force April 22, 1954).
a valid claim for refugee protection. Secondly, as the drafters of the Convention have asserted, a person is a refugee without having to be declared so. The term ‘asylum seeker’ is a relatively recent category, as I shall explain in chapter one, applying to those not yet granted refugee status by states which are signatories to the Refugee Convention. Asylum seekers are not granted the full range of protections available to ‘refugees’. Accordingly, the legal status of being a refugee can no longer be presumed, despite wording in the Refugee Convention which suggests otherwise. I resist this trend to affirm the status of refugee without qualification. I am mindful that we risk reducing personhood to little more than the experience of being a refugee, or an asylum seeker or a detainee, in which one is principally defined, for example, by their mode of arrival, their protection needs or their legal status. I explore some of the implications of this in chapter three, with a particular focus on what I call the category of the ‘unlawful’.

Institutional and Legal terms
The department responsible for the processing of refugee claims has undergone numerous name changes since it was first established. To avoid confusion, I have opted to generally refer to it as ‘the department’, using the current title in use at the time of writing and the title applying in distinct historical periods, where this is relevant or appropriate to do so. The ‘Immigration Detention Network’ is the term used by the department to refer to the full range of operations and services provided under a policy of mandatory immigration detention, using the shortened term ‘the network’ where appropriate. This term

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50 The current name adopted in 2015 is associated with an increasing focus on border control and the blurring of military, policing and migration functions. At this time, the department merged with the Australian Customs and Border Protection Service to form the new Department of Border Protection and Immigration, also incorporating the Australian Border Force.
is followed where appropriate because it communicates the diversity and complexity of agencies and service providers across the entirety of the immigration detention environment, including the extensive outsourcing and privatisation of obligations. In a more general sense, I will describe the scope of obligations, conduct and office roles in this setting as ‘the institutional life of migration’. For the sake of simplicity, I will tend to refer to the Convention Relating to the Status of Refugees as the ‘Convention’ and will also tend to refer to the Migration Act 1958 (Cth) as the ‘Act.’

Finally, rather than referring exclusively to the ‘official’ or the Weberian bureaucrat, office is a term I apply to those in positions of office in public life, whether as public servant, detention guard, doctor, judge or politician, immigration detention guard, migration officer, doctor, psychologist or social worker. I aim to address a diverse range of offices in the immigration detention setting. This helps to illustrate the effects of the more complex distribution of roles and responsibilities which has characterised the privatisation and offshoring of detention. These effects have impacted upon capacity of different offices to meet the obligations of office, in both an ethical and technical capacity.

CONCLUSION
This thesis re-describes a policy of mandatory detention as a story about what it means to hold office in which I approach office as a way of addressing some contemporary ethical concerns in relation to institutional life in migration policy and law. Importantly, reading immigration detention through the lens of office as a site of ethical responsibility is a method of analysis which elicits an appreciation of the ethical repercussions of this policy on those who implement it and not exclusively on those who are detained. It assists us in assessing the ethical conduct of office more generally in political, legal and social life. Such a conceptual approach has implications for how we might read the office of the judge or the politician. For criminologists for example, it uncovers potential for
how we might view the role and conduct of public officials and prison guards in the criminal justice system.

The orientation towards responsibility in institutional life that this delivers is especially important given the failure of human rights-based objections to dismantle mandatory immigration detention. But it also provides an alternative insight into many of the political and other issues confronting us in society from that offered by a liberal reading of human rights or indeed by critical scholarship. Importantly for this thesis, such an approach reveals office as grounded in time and place, enabling me to pinpoint shifts in the purpose and function of office over time. It directs my attention to a reading of laws and policies as either affirming, or undermining an ethic of office as well as to instances where we can identify office ‘done well’ so to speak, on the terms I have begun to describe.

Office practices in Australian migration policy are also significant given a colonial pattern of bureaucratic control and management of those deemed a threat to settler society, whether indigenous peoples, or those who did not comply with the racial criteria of 'whiteness'. Although this is not central to my inquiry, Australia’s penal and colonial history has shaped the conduct of office in Australia, making office a crucial site of analysis in the Australian context. Office practices in Australian migration policy are also significant given a colonial pattern of bureaucratic control and management of those deemed a threat to settler society, whether indigenous peoples, or those who did not comply with the racial criteria of 'whiteness'. Although this is not central to my inquiry, Australia’s penal and colonial history has shaped the conduct of office in Australia, making office a crucial site of analysis in the Australian context.51 This has been evident in the management practices accompanying settler colonialism such as population and enviromental control, and in early patterns of migration control.52 Australia was also the first Western liberal democracy to have a government department dedicated to migration.53 Adopting an institutional perspective not only recognises this context, but also delivers collateral benefits beyond its implications for the domestic setting alone, given

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53 Ibid, Jupp.
that immigration detention under Australian law has been identified by
governments in other parts of the world as the benchmark or ‘standard’ for
their border protection policies.\textsuperscript{54}

In making a turn towards obligation and responsibility, I do not disavow the
importance of rights or to diminish the experience of those in detention. Such
suffering demands our attention. Rather, my argument responds to this suffering
by shifting the focus from the position of the ‘refugee’ to the offices within the
institutional setting of Australia’s migration policy and law. Accordingly, the
focus comes from a different place and the acknowledgement of suffering is
made in order to shine a light on the practices of office which produce it and an
alternative reading of office which might alleviate it.

An important consequence of this is that it delivers an appreciation of the
ethical foundations of office and of lawful obligations which exist in institutional
life. This approach opens a space for re-imagining, or returning to office as a
site of conduct in which how we encounter others in public life is ethically
significant. Identifying alternative ways of occupying office in this domain is
critical to considering how the office of migration might discharge its
obligations in ways that both preserve human dignity and uphold the integrity
of office.\textsuperscript{55}

I began by observing that when we occupy positions of ‘office’, there is an
expectation that we are able to meet the obligations pertaining to that office.
Office holding brings us into a sphere of relations, in which obligations are
created and acquired. There must exist, however, a capacity for the obligations
of office to be met. The Refugee Convention is a key example of the way in

\textsuperscript{54} Susan Kneebone, “The Legal and Ethical Implications of Extra-Territorial Processing of Asylum Seekers: Europe Follows
University Institute for Public History, 2006); Adrienne Millibank, “World's Worst or World's Best Practice? European
Reactions to Australia's Refugee Policy,” People and Place 12, no. 4 (2004): 28 – 3. I am referring here to policy
responses to those who arrive without prior authorisation as well as those overstaying their visa.

\textsuperscript{55} See Raymond Gaita, \textit{Breach of Trust: Truth, Morality and Politics} (Melbourne, Vic: Black Inc. 2004) and David Luban, \textit{Legal
Ethics and Human Dignity} (Cambridge: Cambridge University Press, 2007).
which international law establishes the contours of our responsibility towards refugees. We should safely assume then, that the obligations of office which attach to signatory states to the Convention flow from this responsibility. This policy has been characterised instead by what I refer to as a contraction in the field of responsibility of the office of migration. Approaching this from the perspective of responsibility and the conduct of office throws a uniquely significant light on our understanding of this development. In chapter one, I start the process of examining how this has occurred, and the sorts of concerns which have accompanied it.
Part One of this thesis is concerned with the setting of the office of migration in Australia and with how office has been created and read under this policy. It points to the ways in which the institutional setting of migration and government responses to refugees, have been shaped by patterns of control and exclusion. The questions underlying this part of the thesis are: how have Australia’s history, laws and policies shaped the form and conduct of office in the institutional life of migration? What effects has a policy of mandatory immigration detention had on the exercise of office? What have been the dominant responses to this in the scholarly analysis? To what extent has this literature addressed this through an institutional lens?

Chapter one begins with an historical overview of Australian migration law and policy and its responsibility under the Refugee Convention. It then narrows its focus upon the practices and relations marking the introduction of mandatory immigration detention. In chapter two, I turn to the way this policy has been read and interpreted in the scholarly literature. I identify the limits and possibilities of this literature in understanding mandatory immigration detention from the perspective of an ethic of office.
CHAPTER ONE: IMMIGRATION DETENTION IN AUSTRALIA – SHIFTING INSTITUTIONAL SETTINGS AND CONCERNS

Introduction
As I noted in the introduction to this thesis, attention to the terms of the law discloses the obligations of office and the scope and nature of those obligations. Chapter one shows that this policy has been characterised by two pivotal shifts in office: firstly, there has been a shift in the balance of power and authority between judicial and executive office, marked by limitations on judicial authority and an expansion in executive power. Secondly, the institutional function of the Department of Immigration and Border Protection has been effectively transformed from an administrative to a punitive one, through the blanket categorisation of refugees arriving by boat as ‘unauthorised arrivals’ and their detention. However, this policy emanates from a history of control and exclusion in Australia.

There are two sections to this chapter in which I map out the obligations which have been created or disavowed under this policy. The first section describes the background and introduction of mandatory immigration detention as a way of drawing out the field of responsibility and scope of obligations characterising this policy. This is prefaced by an outline of the international context and the form and extent of responsibility in international law, with specific reference to the Refugee Convention. It also includes an illustrative account of Australian Government responses to migrant arrivals to
this country since its establishment as a settler colony by the British.\textsuperscript{56} I then detail the introduction of mandatory immigration detention in Australia, providing an overview of the historical, political and legal context and identifying patterns of increasing control and exclusion over refugee movement. By addressing this as a concern of office, we can trace the extent to which the field of responsibility towards refugees has contracted under this policy and the way it has reshaped office obligations: when mandatory immigration detention was introduced in 1992, it entailed a deferral of refugee protection. By 2012, the introduction of the No Advantage policy recommended by the Houston Panel was accompanied by the denial of any assurances of resettlement in Australia to anyone who arrives ‘unlawfully.’ This is a reiteration of a similar denial under Pacific Solution Mark 1.

The second section addresses the effects of the transformation of executive and judicial office produced under this policy to emphasise the way in which this policy has reshaped the obligations and conduct of office. I begin with an overview of the Refugee Convention and Australia’s response to refugee movement.

\textbf{THE REFUGEE CONVENTION AND AUSTRALIA’S RESPONSIBILITY FOR REFUGEE PROTECTION}

The foundational treaty on refugee protection, the Convention and Protocol Relating to the Status of Refugees was first signed in 1951.\textsuperscript{57} The genealogy of the Convention is linked to the Geneva Conventions and to international human rights treaties which identify protection as a key principle and set out the parameters of a responsibility to those who suffer persecution. They share foundational principles that international obligations exist towards those in need

\textsuperscript{56} The description of migration in Australia has typically failed to acknowledge the migration of settler colonists as migration, much less as ‘unauthorised arrivals’ in the history of migration in this country.

\textsuperscript{57} The definition has been generally regarded as being exceptionally narrow. See Catherine Dauvergne, \textit{Humanitarianism, Identity and Nation: Migration Laws in Canada and Australia} (Vancouver: University of British Columbia Press, 2005): 84.
and that the appropriate response is a humanitarian one. Following extensive jurisprudence on the Convention interpreting this treaty as centrally informed by responsibility (as noted above) I regard it as a document from which the obligations of the office of migration are derived. However, as an articulation of a responsibility to protect those fleeing persecution, it also draws on the basic human rights principles supported in other key international treaties.

Immigration detention powers are authorised locally in the provisions of the Migration Act 1958 and justified as central to Australia’s sovereign right to manage its border and control entry into the country. Yet Australia’s signatory status to the Refugee Convention, as well as to other key international human rights treaties, engages it in a suite of obligations which sit uncomfortably against a policy of mandatory immigration detention. And, although Australia has largely avoided the codification of most of these rights into domestic law, they are nonetheless presumed to stand as obligatory standards of treatment to those within its care, whether citizen or non-citizen. Mandatory immigration detention undermines the terms of Australia’s obligations under the Convention through the detention and effective denial of the right to seek asylum for refugees arriving without prior authorisation on Australian territory.

The Convention is premised upon the principles of ‘non-discrimination, non-penalisation and non-refoulement’ – the obligation ‘not to return’ a refugee to the place from which she flees. Article 33(1) states that:

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60 Political theorists Brian Galligan and Emma Larking have argued for an Australian Bill of Rights to increase protections under law, in light of the absence of codification of some rights, in “Rights Protection – Comparative Perspectives,” Australian Journal of Political Science 44, no. 1 (2009): 1 – 11.
61 Don McMaster, “White Australia to Detention: Restriction and Racism,” Mots Pluriels no. 21 (May 2002).
No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.63

While this is a relatively recent principle in international law, the gravity of responsibility it imposes points to it as customary, or even *jus cogens* law.64 Secondly, while more properly regarded as an obligation incumbent upon signatory states than an individual right, it is exercised as a right to protection, in the strongest of terms. As a non-derogable right, it cannot be diluted or diminished, regardless of manner of entry, illegal or not, and irrespective of a failure to formally recognise refugee status.65 Importantly, states cannot *refoule* until an application for refugee status has been determined not to be valid.66

Interestingly, Australia’s early ratification of this treaty facilitated the treaty’s coming into force, giving it a ‘unique and special relationship with the Refugee Convention.’67 Convention obligations are expressed in relevant provisions of Australia’s Migration Act 1958 through the granting of protection visas for those seeking refugee status, obtained through Australia’s Humanitarian Visa program.68 On these terms, it could be said that Australia does not breach the Convention: it does not *refoule* refugees until it has processed, or arranged for the processing of, a person’s claim for asylum, whether in Australia or elsewhere. Accordingly, it appears to honour its responsibility as a Contracting State to the Refugee Convention, even while it effectively penalises individuals based on how

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64 For a more detailed discussion on the origins and significance of the principle of non-refoulement see Goodwin-Gill and McAdam, *The Refugee*, 48, 202-208 and 218. This principle is also expressed in the Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment, as the authors note at page 208.
65 Rights inform the obligation of the state not to return as *refoulement* would constitute a potential denial of the political and civil rights of the individual.
they arrive. But this amounts to what I describe as a ‘thin’ exercise of responsibility, since the Convention prohibits penalties applied on the basis of ‘lawfulness’ from applying to those who arrive without prior authorisation or documentation.

Global refugee movement

While there are now greater limits imposed over how people move, there is also more movement of people now than ‘at most times in history.’69 Imposing limits has been attributed to the emergence of the nation-state and an accompanying imperative to demonstrate territorial control at the border generating constraints over (certain kinds of) migration and circumscribing the terms of that movement.70

To give a sense of the growing scale of movement, there were an estimated one million refugees internationally under the protection mandate of the United Nations High Commissioner for Refugees when the Refugee Convention came into effect in 1951.71 By 1976, when Australia began to accept high numbers of Indochinese refugees during the ‘first wave’ of boat arrivals described above, this had nearly tripled to 2.8 million persons.72 Between 1992 when mandatory immigration detention was introduced and 2012, there was an increase from 18.2 million to 35.8 million persons seeking protection under the UNHCR mandate.73 This number now exceeds 50 million persons. Importantly, the rate

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69 Michael Marrus, *The Unwanted: European Refugees in the Twentieth Century* (New York: Oxford University Press 1985): 8 – 10; See also Dauvergne, *Humanitarianism*, 3. As Hannah Arendt has argued in *The Origins of Totalitarianism* (London: George Allen and Unwin, 1951), 294 – 295, the development of the nation state has been accompanied by the loss of rights for stateless national groups because of the constitution of the modern nation state; without such protection, these groups tend to fall outside the realm of rights. For Patricia Tuitt the category of the refugee is the marker of modern Europe, in which the EU project can ironically only be successfully completed as a transnational movement by the ‘repudiation’ of the refugee category. See Patricia Tuitt, “The Modern Refugee in the Post Modern Europe” in *The Ashgate Research Companion to Migration Law, Theory & Policy*, edited by Satvinder Juss (Farnham: Ashgate Press 2013):26.
72 United Nations High Commissioner for Refugees, *The State of the World’s Refugees 1993: The Challenge of Protection* (UNHCR): 2–3, accessed 12 January, 2016 at http://www.unhcr.org/3eee0464.html. It is important to note that the UNHCR reports on the number of persons under its protection mandate. This includes refugees who have been granted refugee status under the Refugee Convention as well as asylum seekers who are making a claim for refugee status.
73 Ibid., 3.
of increase in forced migration is almost four times the rate of global population growth.74

**Australia’s response**

Australia has resettled almost one million refugees and displaced persons since 1945 under its humanitarian program.75 These places are typically offered to refugees processed through the UNHCR referral system in a transit country. Prior to a policy of immigration detention, Australia had traditionally offered automatic resettlement to anyone granted refugee status, regardless of how they arrived in this country.

The Australian Government has often proudly declared that it has a history of welcome and resettlement of refugees. Hence, in the face of criticisms for his government’s move towards harsh border protection measures in 2001, Prime Minister Howard asserted this historical generosity:

> We are a generous open hearted people taking more refugees on a per capita basis than any country except Canada. We have a proud record of welcoming people from 140 different nations.76

However, under current policies and quotas, Australia’s intake of refugees falls at just over ten per cent of the number processed in nations with a similar population and societal composition.77 Over time, the numbers of those being...

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75 Janet Philips, Asylum Seekers and refugees. See also Department of Immigration and Border Protection “A History of the department of Immigration: Managing Migration to Australia” (Canberra: Commonwealth of Australia, 2015) accessed October 11, 2016 [https://www.border.gov.au/CorporateInformation/Documents/immigration-history.pdf](https://www.border.gov.au/CorporateInformation/Documents/immigration-history.pdf). There are fixed annual quotas on the number of people who can be resettled in Australia under this and other visa categories. The Humanitarian program allocates places for persons who, as the name indicates, require protection for humanitarian reasons; this includes refugees.


granted refugee protection in Australia has also gradually declined as a proportion of Australia’s overall migration intake.\textsuperscript{78} Refugee intake thus both continues to constitute a small proportion of Australia’s migration intake overall, and fails to keep pace with the increase in migration to Australia in other visa categories.\textsuperscript{79} These figures are significant insofar as the contemporary political debate in Australia about the ‘problem’ of people arriving by boat largely ignores the growth in forced migration worldwide and the reality that the burden is also largely carried by developing countries which are least able to offer assistance.\textsuperscript{80} This begs attention because responses by Western liberal democracies are generally critical to the assurances of protection. Of course, this is not to say that Australia refutes its Convention obligations outright; it continues to admit refugees under its offshore program, and markedly increased its refugee intake after 2011.\textsuperscript{81} Yet ongoing displacement is an acute, global challenge: the ‘problem’ of refugee movement is unlikely to go away or to be resolved by deterrent strategies, such as immigration detention.\textsuperscript{82} Of concern is the shortfall between the number of places available for refugee resettlement among signatory countries and those seeking protection with these states. There are typically places available for only one per cent of refugees seeking resettlement, with insufficient resources to meet the need.\textsuperscript{83}

\textsuperscript{78} In 1976-77, at the time when the first wave of ‘unauthorised’ boat arrivals were granted refugee protection, annual migration intake sat at 70,000 comprising 9,326 refugees. Since then, the proportion of refugee intake, relative to overall migration intake, has continued to fall. See Department of Immigration and Border Protection, \textit{Detention Migration Programme 1953 – 1954 to 2013 – 2014. Spreadsheet 3.1 (DIBP systems and Department of Immigration and Citizenship, 2012)} accessed on February 20, 2016 https://www.border.gov.au/about/reports-publications/research-statistics/statistics/live-in-australia/immigration-detention. See also Australia’s Offshore Humanitarian Program: 2011 – 2012. (Commonwealth of Australia, Canberra, 2012): 2. This recalls Anne McNevin’s claim that under conditions of neoliberal globalisation, we are witnessing the privileging of some kinds of movement over others. See McNevin, “The Liberal Paradox,” 612, 617, 621 – 622.

\textsuperscript{79} Over a 14-year period, about 13,500 arrived by boat seeking refuge, compared to about 1.4 million ‘new settlers who arrived in Australia over the same period’ and ‘boat people’ comprised about one per cent of migration intake in that time. See AHRC, \textit{A Last Resort}, 2.

\textsuperscript{80} These numbers only relate to those registered with the UNHCR, which points to this as an underestimate of the full scale of the need for refugee protection. See Philips, \textit{Asylum Seekers and refugees}, 1.


While refugee approval rates in Australia for those deemed ‘unlawful’ arrivals are high, ‘they are [also] broadly consistent with UNHCR refugee status decision approval rates for similar caseloads in Malaysia and Indonesia.’\(^{84}\) There is thus no divergence in the patterns of refugee claims between those who wait in the queue and those who don’t. This raises an important point: it provides substantive evidence of the increased need for refugee protection as a regional and global concern. Importantly, it undermines the basis of any claims that Australia is being overrun by ‘boat arrivals’ making bogus refugee visa applications, driven by ‘pull’ factors such as a ‘soft touch’ through easy entry to Australia.\(^ {85}\)

**Detaining refugees**

In 1992, when mandatory immigration detention was introduced, there were 478 people in detention, of whom 421 were boat arrivals seeking refugee protection, most of whom were from Cambodia.\(^ {86}\) By the 2011-2012 year, there were 19,376 persons detained, including those in both community and ‘closed’ detention centres.\(^ {87}\) Whilst the majority of persons in detention had arrived ‘illegally’ by boat, approximately 90% of these are ‘successful in being granted a protection visa at either the primary or review stage’ and this can exceed 95 per cent for some reporting periods.\(^ {88}\) That is, most are found to meet the criteria to be granted refugee status. Notably, although a higher proportion of ‘unlawful arrivals’ submit applications for refugee status, there are

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\(^{88}\) When we compare successful approval rates, the granting of refugee status for those who arrive lawfully was between 47.4 and 51% between 2007 and 2012, with the grant rate for IMAs (that is, unlawful applicants) during the same period as considerably higher, at approximately 90%. See Department of Immigration and Border Protection (DIBP), *Asylum Trends – Australia: 2011 – 12* (Belconnen: Commonwealth of Australia, 2013), 19, 28.
more applications overall for refugee status being lodged by ‘lawful’ arrivals who arrive by plane, for example. And yet, the success rate for approval is significantly higher among ‘unlawful’ or ‘illegal’ entrants who arrive without prior authorisation. The review of claims and subsequent approval shows a high success rate for claims made by ‘unauthorised’ arrivals. This has implications for the significance of careful judgement, which I will explore in Parts Two and Three of this thesis. In the next section of this chapter, I map out Australia’s historical responses to show that these have fluctuated between responsibility and exclusion, with the latter underscored by a preference for control in the exercise of office.

PATTERNS OF EXCLUSION, CONTROL AND RESPONSIBILITY

1788: Control and Exclusion in a settler colonial society

Australia’s colonial origins as a penal settlement or British convicts precipitated an early history of military-style law, autocratic governance practices, violence against indigenous peoples and the dispossession of their land by British settlers. The harmful effects of this history have been the subject of substantive record, testimony and analysis. Importantly, as Australian theorist and historian Patrick Wolfe has observed, settler colonialism is distinct from other forms of colonisation: in settler colonial formations, the settlers always remain, achieving settlement not as an act of migration, but of conquest. Moreover, this is not a discrete historical event, but instead embodies a structure of unequal

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90 For example, the number of asylum seekers arriving in 2011-2012 totalled 14,415 of which 7,379 were classified as IMAs. Department of Immigration and Border Protection Asylum Trends. Even while the number of IMAs seeking protection had steadily increased from 2009 to 2012, the number of applications by persons arriving by air, with a visa, has also steadily increased during this period.
91 When we compare successful approval rates, the granting of refugee status for those who arrive lawfully was between 47.4 and 51% between 2007 and 2012, with the grant rate for IMAs considerably higher, at approximately 90%. DIBP, Asylum Trends, 19.
93 Veracini, Settler Colonialism, 3. Wolfe, Veracini and others noted above write within the discipline of settler colonial studies, as distinct from postcolonial studies.
relations between settlers and indigenous peoples that continues to underpin contemporary sovereignty in Australia. Importantly, this structure is constituted through a governing logic of the elimination of indigenous peoples,94 as a staged ‘mode of domination,’ it begins with the use of physical violence against indigenous peoples, followed by carceration and then assimilation.95 Accordingly, the violence of colonisation can never be fully addressed while this violence is founded on the sovereignty generating this governing logic, a logic which is both racialised and impelled by a desire to control social and physical space.96

From the mid-1800s, in some colonies, for example, ‘authentic’ full blood aborigines were placed under government protection and moved onto reserves (or ‘protectorates’) to ‘smooth the dying pillow’ on the presumption that they were a dying race.97 Those of mixed race were denied welfare support, adopted out, stolen from their families – in short, they were forcibly removed to be acculturated (absorbed) into white settler society.98 No longer exclusively violent in a physical sense, assimilation nonetheless preserved rather than discarded this logic of elimination, so ensuring the foundations of settler society.99 As historian and criminologist Julie Evans observes, the

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94 Wolfe, “Settler Colonialism.”
96 Wolfe, “Settler Colonialism.” For example, the Aboriginal Protection Act 1886 (Vic) reflected social Darwinist views that those of inferior races would eventually die out. It created legal categories for indigenous peoples on the basis of the racial identity ascribed to them by the government using eugenics to do so. Control over space thus has resonance for indigenous and refugee communities in Australia. See also Bain Atwood and Andrew Markus, The Struggle For Aboriginal Rights: A Documentary History (Allen and Unwin, Sydney) 2014: pp 7- 10, 12, and 33.
structural violence underlining the use of emergency powers and martial control to enforce these policies and laws was actively masked by appeals to their legality, as if this undoes the violence of law. Importantly, a recourse to exceptionality and emergency as a justification for institutional practices dehumanized and dispossessed indigenous peoples of their land and culture. The exceptionality of responses to indigenous peoples which characterised the practices and ethics of office at that time has had constitutive repercussions for contemporary institutional practices and forms of conduct in Australia.  

Settler colonial violence intersected with the use of military-style law to exert control over convicts as well as indigenous peoples. At the same time, Australia’s transition from penal colony to a free society has been described as one which was achieved through the ‘rule of law’, marked by a contest between the colonial powers and the judiciary, with the latter arguing for improved legal protections for convicts, such as trial by jury. Ironically, then, individual rights and freedoms were pursued in parallel with oppressive laws and often autocratic forms of governance; where the rule of law did prevail, it was erratic, revealing practical resistance to contemporary legal standards. And, for indigenous populations, living under (outside) the rule of law was a hostile and oppressive experience. Australia has a history then, both of endorsing the rule of law, while violating it. Immigration detention draws on this history and reflects this tension.

Racialised control and exclusion has historically been achieved through

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101 Neal, “The Rule of Law,” 85–113. In the absence of established political institutions, Neal shows that the court and the jury system acquired a particular significance in establishing and upholding the rule of law in colonial New South Wales.  

102 Ibid. Mark Rifkin describes the way that settler colonialism fostered a space which was both of law and beyond the jurisdiction of the sovereign. See “The frontier (as movable) space of exception,” Settler Colonial Studies 4 no. 2 (2014): 176–180. Evans makes a similar point in noting the paradox of law which often (though not always) functions outside the rule of law in the settler colonial setting in Australia. See Evans “Where Lawlessness is law,” 20–21.
institutional and legal practices of classification, quarantining, population management and emergency procedures and provisions which have set a model for future law making. Accordingly, contemporary laws and policies risk being drawn into this cultural logic of the ‘elimination of the native’. Critical criminologists have observed, for example, that past structural injustices and Australia’s penal history resonate in the present for indigenous peoples in the form of high rates of indigenous incarceration, deaths in custody, ongoing removal of indigenous children from their families and economic and social disadvantage within their communities. Australia, then, is a place with deep historical foundations in penality, coercion and racialisation which have similarly profound effects in the present and which exemplify the structural violence I noted in the introduction to this thesis.

I have dwelt on this background to emphasise that the contemporary exercise of office obligations under mandatory immigration detention has not emerged in a vacuum in Australia, nor solely as the effect of neoliberal, conservative forms of exclusion. Rather, the history of penality and coercion in settler colonial societies always remains available for appropriation, with implications for the practices and conduct of office. So, while a number of commentators have

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104 The important example that Wolfe points to, is the Native Title Act 1993 (Cth), which followed the Mabo decision. While the Act purports to overturn the legal fiction of terra nullius as a result of this decision, Wolfe contends that this doctrine (legal fiction) persists (and is indeed preserved) in the legislation. He observes that this occurs through the narrow terms on which native title can be claimed, and which have been decided by a settler colonial government. See Patrick Wolfe, “The Limits of Native Title’ Meanjin, vol. 59, no. 3, 129 - 144. For example, indigenous peoples must demonstrate an ongoing connection to land to lay a claim to it under the Native Title Act 1993 (Cth). Yorta Yorta scholar Wayne Atkinson’s research on the Yorta Yorta land claim, illustrates these persistent structural elements of colonisation in “Not One Iota: Reflections on the Yorta Yorta Native Title Claim, 1994 – 2002,” Indigenous Law Bulletin 5, no. 6 (2001). The claim was unsuccessful because the court did not accept that the Yorta Yorta people had maintained continuous connection with their traditional lands. Yet ironically, this connection with land was broken under the assimilatory policies of a colonial government introduced under the Aboriginal Protection Act 1886(Victoria).


106 See Zygmunt Bauman’s discussion of the ‘warehousing’ of those cast out as ‘human waste’ in modernity in Wasted Lives: Modernity and Its Outcasts (Cambridge: Polity Press, 2004). McMaster, “Asylum Seekers” and James Jupp, From White Australia, 4, 13 – 14. This is especially of interest given that Australia has set the benchmark for harsh border control measures Immigration Detention Networks Western liberal democracies. For a detailed analysis and discussion of Migration and Refugee Law in Australia see Bagaric et al., Migration
rightly observed that mandatory immigration detention draws on a history of strong institutional control over migration, it also reproduces the exceptional, military-style provisions invoked by settler colonies seeking to exert control over – and to mete out punishment to – indigenous peoples.108 For example, under a policy of mandatory immigration detention and of offshore processing, refugees have been sent to remote locations, quarantined in penal settings and denied access to legal protections in a manner which recalls particular patterns of governance in the history of settler Australia.

1800s-1945: A ‘White Australia’

As with the attempts to separate ‘authentic’ from ‘inauthentic’ aborigines, the role of the department also appears to be underscored by the (often racialised) sorting of authentic and inauthentic refugees.109 This surfaces as a defining narrative in contemporary public debates and a legitimising discourse for the prolonged detention of ‘illegal entrants’ which then finds its way into the legal categorisation of those who arrive at the border without prior authorisation as ‘unlawful.’ Mid-19th century migration patterns and responses also show that racialised divisions were in early evidence in Australian responses to immigration prior to Federation. Gold rushes in the 1800s attracted high numbers of Chinese to Australia with local community hostility to the Chinese evident in several colonies within the nation. 110 This led to the introduction of immigration restrictions in the 1880s.111 Britain had already encouraged migration by English settlers through assisted passages in the 1880s, with the aim of ensuring a racially
and culturally ‘white’ population.\(^{112}\)

After Federation, Australia introduced a raft of new laws. Among the first of these was the Immigration Restriction Act (Cth) of 1901, aimed at restricting ‘immigration and to provide for the removal from the Commonwealth of prohibited immigrants.’\(^{113}\) It embodied a policy of racial exclusion,\(^{114}\) enforced through what came to be termed the White Australia Policy, a discriminatory policy which effectively prevented entry to anyone who did not conform to racial criteria of whiteness.\(^{115}\) Concerns to populate the country with primarily British subjects\(^{116}\) have been underscored by this sustained attempt to preserve the cultural homogeneity of settler society as a white nation.\(^{117}\) However, the dictum ‘populate or perish’ and Australia’s image as a land of opportunity consistently attracted large numbers of immigrants, including those not meeting the settler government’s criteria of ‘whiteness’.

**1945–1976: Responsibility and refugee protection – Ending White Australia?**

Migration levels were relatively low between the two World Wars but the end of the Second World War marked a surge in immigrant arrival in Australia.\(^{118}\) In 1945 the Department of Immigration was established to administer laws concerning citizenship and migration.\(^{119}\) Australia first developed a policy on refugees at this time, largely in response to people seeking asylum from 112 Jupp, *From White Australia*, 16 – 17.

113 Taken from the full title of the Act.


115 Anyone who failed the test was deported. See Jupp, *From White Australia*, 8 – 9 and Snukal and Ramsay, cited in Stratton, *Uncertain Lives*, 46. The dictation test continued until 1958 although the policy was widely regarded as persisting until 1975 when the Racial Discrimination Act (Cth) was introduced and support for multiculturalism became a dominant policy objective. See Stratton *Uncertain Lives*, 45.

116 The legal category ‘British subject’ persisted from Federation until replaced by the new category of Australian citizen in 1949 under the Nationality and Citizenship Act 1948 (Cth).

117 As already noted, this was in the face of a sweeping failure to acknowledge diverse indigenous nations which existed prior to European settlement.


communist regimes. It also became one of the first signatories to the Refugee Convention. This signalled the recognition of the responsibility to offer protection, subsequently shaping Australia’s migration obligations under the Migration Act 1958, the first substantive piece of legislation incorporating provisions for resettlement and protection of refugees. Despite the resettlement of over 350,000 refugees between 1946 and 1976, the post-World War Two period was nonetheless underscored by assimilationist concerns that Australia not be ‘polluted’ by undesirable refugees, an anxiety which has arguably never been resolved.

The White Australia policy remained in place until 1972, when a radically reformist Whitlam Labor Government dismantled the remaining policies and laws which had until then supported it. The subsequent Fraser Liberal Government endorsed this change, going further to support an expanded immigration program. A period of high refugee intake followed the Vietnam conflict with the victory of the Viet Cong leading to massive numbers of South Vietnamese fleeing the country. The first boat of refugees was intercepted on 28 April 1976, close to Darwin in Northern Australia, with five men on board. This signalled the ‘first wave’ of what has come to be colloquially termed ‘boat arrivals’ in this country – persons seeking refuge in Australia by

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121 Australian political leader, Dr Evatt, head of the Australian delegation to the UN, was a key figure in the drafting of the Convention and in other human rights treaties, accessed December 29 2015 https://www.humanrights.gov.au/publications/australia-and universal-declaration-human-rights
122 While Australia has not codified these obligations, it moved to introduce relevant provisions into domestic legislation, including a refugee definition, defining Convention terms such as ‘persecution’ and ‘serious harm’ and introducing a visa category for refugees in the Migration Act 1958 (Cth), in order to give effect to this responsibility.
123 Price, “Immigration Policies” 101; James Jupp presents a somewhat different figure of 260,000 refugees arriving between 1947 and 1972 in From White Australia.
124 See Klocker and Dunn, “Who’s Driving.” During the 1970s and early 1980s Prime Minister Malcolm Fraser was able to diffuse these concerns, as I will show in chapter six.
127 Phillips and Spinks, Boat Arrivals, 1.
arriving by boat and without prior authorisation. Government responses marked a turning point in Australian policy on migration movement, with approximately 94,000 refugees from Vietnam, Laos, and Cambodia resettled during the following decade. 128 And despite widespread public and political opposition, Liberal Prime Minister Malcolm Fraser established both bipartisan support and a coordinated policy for receiving Vietnamese refugees via an ‘orderly departure program’ signed with Vietnam in 1979. 129 The effect was that the number of ‘boat’ arrivals was limited and no more than approximately 2,059 Vietnamese arrived in this way. 130

This marked both an increase in migration intake and a significant move away from the prioritising of European settlement at a time of robust multiculturalism fostered by the Whitlam Government. 131 These changes also occurred in tandem with broader social transformations in relation to indigenous, sexual and women’s rights, for example. Importantly for this thesis, such changes signalled a departure from discriminatory and exclusionary policies on migration. 132 But they did not necessarily reflect a transformation in societal attitudes towards migration across the board. 133 Discriminatory and conservative values persisted among political leaders and in the community. 134 Australia’s long-standing pattern of bureaucratic management and control over the orderly processing of

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129 This program featured cooperative agreements with neighbouring states, such as Thailand and Malaysia to take in Vietnamese refugees while awaiting processing by Australia. Evidence for Fraser’s approach at the time was recounted in an interview conducted with Fraser by the author. See Malcolm Fraser, Interview with Claire Loughnan (Melbourne, 19 October, 2012) and in Fraser and Simons Malcolm Fraser. Archival evidence, including a close examination of speeches and other public documents reveal that Fraser had a long-standing humanitarian position on this and other public policy concerns, as indicated in Fraser and Simons Malcolm Fraser, and by Nancy Viviani and Joanna Law-Davies, Australian Government policy on the entry of Vietnamese refugees 1976 to 1978 (Brisbane: Centre for the study of Australia-Asian Relations, Griffith University, 1980).

130 Philips and Spinks, Boat Arrivals.


132 Jupp, From White Australia. This is notwithstanding claims that pragmatic considerations still prevailed.

133 See Betts for her analysis of this shift in “Boat People.” I do not share her specific communitarian perspective.

134 Fraser and Simons Malcolm Fraser; Jupp, From White Australia, 106, 111 –113.
migration intake also illustrates the prevalence of a prior institutional and societal disposition against what is perceived as ‘queue jumping’ and thus an apparent disregard for process.\textsuperscript{135}

A marked shift in migration policy between 1992 and 2012 in relation to ‘boat arrivals’ is indicative of a deepening of this control with specific and concrete effects on the obligations of office towards refugees. This is notwithstanding fluctuations in the extent of control exercised, with clear examples of a willingness to embrace a more hospitable and ethical response to refugee movement at discrete periods in Australia’s history. That we have witnessed occasional departures from the dominant narrative has implications for how we might rethink institutional responsibility and the ethical conduct of those in office. This notion will be developed throughout the thesis and will be the subject of closer attention in Part Three.

1989: A return to control – the temporary introduction of immigration detention

In the 1980s, increasing numbers of Indochinese refugees began arriving by boat on Australian shores. These included Cambodian refugees fleeing the Pol Pot regime and Chinese students seeking refuge following the Tiananmen Square massacre, together with others seeking refuge from North Korea.\textsuperscript{136} These growing levels of refugee movement in the Asia-Pacific region prompted demands from a number of neighbouring states for a regional response aimed at minimising ‘clandestine’ migration movement, with a clear preference for what became termed ‘legal’ migration.\textsuperscript{137} Responding to these regional concerns, the UN developed a ‘Comprehensive Plan of Action’ (CPA) in 1989. This laid out regional cooperation on a resettlement and policy program, notably in relation

\textsuperscript{136} Mence, Gangell and Tabb, \textit{A History}, 60 and Jupp, \textit{From White Australia}, 51.
\textsuperscript{137} This plan effectively created a distinction between lawful and unlawful refugees. See Courtland Robinson, “Sharing the burden.”
to unauthorised arrivals. The CPA endorsed a new categorisation of persons seeking protection under the Convention: they would no longer enjoy automatic refugee status but were to be defined initially as ‘asylum seekers’ while awaiting screening and processing as refugees, prior to any assurance of access to Convention protections. While the CPA was underpinned by principles of shared responsibility, it led to burden shifting and altered the way that refugees were classified under law. It also diluted the intention of drafters of the Convention that refugee status be enjoyed, regardless of whether a person has been declared to be a refugee, by a state.

Adoption of the CPA by Australia’s Federal Labor Government in 1989 underpinned its policy to bar all ‘unauthorised’ boat arrivals from Indochina from the automatic grant of refugee protection under the Migration Act. Immigration detention was first introduced as a discretionary measure to facilitate this process. It made lawful the detention of a specific group of arrivals, notably Cambodian ‘boat’ arrivals who were seeking refugee protection.

This new, simplified distinction between lawful and unlawful non-citizens, enabled Commonwealth officers to detain anyone who they ‘reasonably’ suspected was an unlawful non-citizen. Two initial observations are made here. Firstly, this is the first time that detention is legislated as an ‘administrative’ measure aimed at categories of movement, while disavowing the punitive targeting of such movement, with a specific group of boat arrivals (from

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139 Courtland Robinson, “Burden Shifting.”

140 See HREOC, Those who’ve come across the seas, 22. It is important to note that while the power to detain had always existed in law, it was rarely used, and never feature in government policy. See Wilsher, Immigration Detention, 100.


142 This was enacted by the Migration Legislation Amendment Act 1989 (Cth).
Indochina) hereafter to be detained until granted lawful status, deported or otherwise removed from this country.\footnote{Migration Act 1958 (Cth) Section 196.} This legislative change gave effect to a policy of immigration detention. Secondly, this contracted the field of responsibility of office by facilitating the deferral of Refugee Convention obligations: the new category of asylum seeker delayed access to refugee protection until formal legal recognition of their status was confirmed by Convention states. Awaiting this recognition has typically been a prolonged, uncertain and agonising process in inhospitable and punitive settings.

**1992 MANDATORY IMMIGRATION DETENTION: NORMALISING A ‘CRISIS’**

The discretionary capacity to detain was removed in 1992 and made mandatory for ‘designated persons’ under the Migration Amendment Act of 1992. This exposes the reiterative influence of practices already in place. Such a move ‘gave the government authority – beyond doubt – to detain and hold in detention all IMAs until their claims to remain in Australia were resolved’\footnote{Gerard Hand, “Second Reading Speech, Migration Amendment Bill” (Canberra: Parliamentary Debates, Commonwealth of Australia, 5 May, 1992): Hansard, 2371. For a detailed discussion on the legal impact and effect of mandatory immigration detention since its inception, see Peter Billings, “Whither Indefinite Immigration Detention in Australia: Rethinking the Legal Constraints on the Detention of Non-Citizens,” UNSW Law Journal 38, no. 4 (2015): 1386-1420.}. The Migration Amendment Act of 1992 introduced mandatory immigration detention as a temporary (‘interim’) and emergency (‘pressing’) response to ‘address only the pressing requirements of the current situation’.\footnote{These changes were precipitated by the detention of seven Koreans in 1986 being declared illegal by a High Court decision in 1989 as it breached Constitutional restrictions upon executive power to take a person into custody and to inflict punishment. See Park Oh Ho v Minister for Immigration and Ethnic Affairs, (1989) 167 CLR 637. The Court granted that persons were legally detained under Section 198 of Act, but that detention was ultimately unlawful in these cases because it did not serve the purpose of deportation, but an ‘ulterior purpose’ of prosecution and punishment. I note that at this time, there were growing concerns by some politicians about what they regarded as increasing judicial activism together with ‘overuse’ of the courts to appeal adverse administrative decisions on refugee status.} At the same time that discretionary capacity was removed, some limits to judicial review were imposed.\footnote{Department of Immigration and Citizenship (DIAC), Submission to the Joint Select Committee on Australia’s Immigration Detention Network (Canberra: Department of Immigration and Citizenship, 2011) 24. IMA is the acronym for ‘Illegal Maritime Arrivals.’} These moves were supported by both major political parties and laid the foundations for the most ‘comprehensive reform of immigration legislation
in 30 years. Labor Minister for Immigration, Gerry Hand, remarked at this time:

I believe it is crucial that all persons who come to Australia without prior authorisation not be released into the community. Their release would undermine the Government’s strategy for determining their refugee status or entry claims. Indeed, I believe it is vital to Australia that this be prevented as far as possible. The Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community.

While a message of deterrence is inferred here, the government’s insistence that detention does not constitute punishment saw it subsequently amend the Migration Act in 1992 by removing any terminology enabling it to be construed as punitive. Minister Gerry Hand remarked:

References to powers of arrest will be removed from sections 92 and 93 and from a number of related sections to ensure that no confusion arises between the powers under the Act to take persons into what might be termed ‘migration custody’ and the power to arrest persons for criminal offences.

In 1994, the 273 day limit of detention was removed, and mandatory detention was extended to all those seeking refugee protection who arrived in Australia without prior authorisation. The removal of temporal limits facilitated indefinite detention.

The hardening of attitudes towards ‘boat people’ was exacerbated by the emergence of independent Member of Parliament, Pauline Hanson, in 1996 and her subsequent leadership of the fledging nationalist, right-wing party One

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147 York, Australia and Refugees, 39.
Hanson sought an end to multiculturalism, refused to acknowledge indigenous dispossession and proposed a return to a white, culturally homogenous Australia. As anthropologist Ghassan Hage has observed, a retreating welfare state, the de-unionisation of the workplace, economic rationalism and the ascent of neoliberalism in Australia fostered collective anxieties. This produced what he describes as ‘paranoid nationalism’ which underlined support for Hanson’s racially discriminatory proposals.

One Nation began to attract significant voter interest: both major parties were concerned about increasing electoral support for this fledgling party, and keen to adopt policies that they believed would stem voter drift to One Nation. Hanson’s conservative appeal thus saw both major political parties fighting for the conservative vote. In 2011, former Prime Minister Malcolm Fraser recalled that during the Howard Government, Labor Opposition Leader, Kim Beazley, had informed him that harsh policies against refugees were politically necessary to secure these votes. The words that Fraser recounts Beazley using were: ‘Malcolm you don’t understand, Howard has ripped so many rednecks out of the party, I am not going to let him rip out any more.’

Control over the border re-emerged as a central policy motif in this climate. Significantly for criminologists, this also signalled the emergence of what has been termed ‘the new penology,’ a key feature of which is the elevated use of punishment as a governing technique, as I will discuss in chapter two.
shift back towards exclusion also found fertile ground in a societal resistance to the disruption of ‘orderly’ processes and a desire to demonstrate control which had never entirely disappeared in Australia, but simply retreated from prominence. It evinces an historical continuity with control and a ‘commitment to a planned system’ which characterised the department’s institutional orientation in Australia’s migration program since its inception: this was perceived as being ‘undermined by unplanned (unauthorised) arrivals who may not be people in genuine need of protection.’ References from the early 1980s and onwards to onshore arrivals as ‘queue jumpers’ reveal this nexus between the assertion of sovereign authority and orderly entry; it underpins institutional control as a key orientation in Australia’s migration policy. The following statement by Senator Jim McKiernan, Chair of the Joint Standing Committee on Migration under the Labor Government in 1993, reflects this:

Australia as a nation has long asserted its right under international law to decide who shall enter and remain in Australia. We assert that right by way of a visa system established under the authority of the Migration Act 1958 (Cth) . . . It is well known that I support the policy of detaining non-documented arrivals . . . I believe it is the government and its authorised delegates and delegate bodies that should determine who should be admitted to Australia.

To concede that right to foreign nationals, from whatever country or region of the world, irrespective of political allegiances or whatever religious faith they follow, would be a direct attack on Australia’s sovereignty.160

This is not to say that this orientation towards strong, exclusionary border control practices is absent in the policies of other nation-states. However, the analysis and interpretation of Australia’s migration policies suggests that this

159 Jupp, From White Australia, 13 – 14; York, Chronology 15. In York’s view, there was substantively minimal change in policy direction after 1977, arguing that pragmatic, and not ethical concerns, have always been a paramount consideration. I do not adopt this view.

orientation is peculiarly and historically pronounced in Australia. In the above discussion, I have illustrated some of the shifts marking a policy of immigration detention under successive governments on both sides of politics. But the 2001 events and legislative changes accompanying the *Tampa* affair had especially profound implications for the obligations dispensed by the office of migration in relation to ‘unauthorised’ arrivals.

**The *Tampa* affair and the Pacific Solution 1: offshoring responsibility**

The introduction by late 2001 of the ‘Pacific Solution’ – a regional processing system for refugee protection claims made by ‘unauthorised’ maritime arrivals – further transformed migration law and policy. This saw refugees sent to regional, offshore processing centres in the neighbouring Pacific countries of Papua New Guinea and Nauru for the processing of their claims, even though they had technically arrived in Australia seeking refugee protection. Constructed as a disincentive to the irregular movement of refugees with the assistance of people smugglers, it led to many refugees’ being held in remote, inhospitable environments, in poor conditions, with minimal or no knowledge of when they might be released or where they might be resettled.

This regional processing system was a response to an attempt by 433 refugees to seek protection after being rescued from their sinking ship – the *Palapa* – in Australian waters by the crew of the Norwegian freighter, the *Tampa*, on 25 August 2001. On 27 August, the captain of the ship, Arne Rinnen, sought urgent medical assistance from the Australian Government because many of those rescued had collapsed from exhaustion; others needed attention to

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162 It is beyond the space of this thesis to address many disturbing events which have unfolded in relation to ‘boat people’ under this policy, including the numbers of persons who have drowned in the attempt to reach Australia, the deportations of refugees, and the manipulation of events to construe refugees in a negative light by the Australian Government. The latter was starkly evident in what has become termed the “Children Overboard Affair.” For more detail on these and other developments under this policy, refer to Phillips and Spinks, *Immigration Detention and Boat Arrivals*.

163 It is not my intention to explore the regional processing system as a separate element of migration policy, as this thesis is centrally concerned with the punitive elements of mandatory immigration detention as a systematic response to forced migration. This includes both onshore and regional, offshore centres.
infections, injuries and open sores, and one woman was pregnant.\textsuperscript{164} Medical assistance was not forthcoming from the Australian Government. This reluctance to offer assistance at sea signifies a refusal to be bound even to the most compelling obligations established by the law of the sea.\textsuperscript{165} The \textit{Tampa} sought to disembark the refugees by sailing into Christmas Island harbour, the nearest Australian territory, at their request. Entry was denied by the Australian Government.

On 29 August – while still in Australian territorial waters – the \textit{Tampa} was approached by the Australian navy ship the HMS \textit{Manoora}. Forty-five SAS\textsuperscript{166} troops boarded the ship, effectively taking refugees on board into Australian custody with the aim of transporting them to Nauru and Manus Island for processing; there was a clear intention that those from the \textit{Palapa} would never be resettled in Australia. On 31 August 2001, the Australian Government’s actions were challenged in the Federal Court by the Victorian Council for Civil Liberties, represented by Eric Vadarlis.\textsuperscript{167} On the same day, the government introduced a Border Protection Bill into Parliament for debate,\textsuperscript{168} giving retrospective powers to the Australian officials to board this or other ships and power to the Australian navy to expel any ship in its waters, using reasonable force to do so.\textsuperscript{169} The laws aimed to prevent any applications for

\textsuperscript{164} Conditions on the \textit{Tampa} were very difficult. The ship was registered for 50 persons, and only had life-saving equipment for 60. The ‘rescuees’ were held on the deck of the ship, in hot and crowded conditions. See Peter Mares \textit{Borderline: Australia’s response to refugees and asylum seekers in the wake of the Tampa} (Sydney: UNSW Press, 20012); Michael Grewcock, “Crimes of exclusion: the Australian state’s response to unauthorised migrants”, (Ph.D., University of New South Wales, 2007): 191; David Marr and Marian Wilkinson, \textit{Dark Victory}, updated 2nd ed. (Crows Nest, NSW: Allen and Unwin, 2004), 68, 93. \textit{Dark Victory} provides a thorough description and analysis of the events leading up to and during the \textit{Tampa} affair.


\textsuperscript{166} This refers to the Special Air Services (SAS), a unit of the Australian armed forces which is a highly specialised commando force.

\textsuperscript{167} Eric Vardalis was the claimant in the case \textit{Victorian Council for Civil Liberties v Minister for Immigration and Multicultural Affairs} (2001) FCR 452 (Federal Court of Australia, 2001) and in the subsequent appeal to the Full Bench of the Federal Court, \textit{Ruddock & Ors v Vadarlis} (2001) 110 FCR 491 (Federal Court of Australia. 2001). In representing the Victorian Council for Civil Liberties, Vardalis sought an \textit{order} from the court for those on board to be granted the right of \textit{habeas corpus}.

\textsuperscript{168} The Border Protection Bill, 2001(Cth).

\textsuperscript{169} Mathew, “Australian Refugee Protection,” 661.
refugee status being made by ‘unauthorised’ arrivals on board a ship in Australian territorial waters.

The Federal Court decision of Justice North found that the government had improperly exercised its powers by unlawfully detaining ‘asylum seekers’ and ordered their release.170 Drawing on the decision in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (hereafter referred to as Lim) he noted that under Australian common law an alien is not an outlaw, irrespective of whether a person’s presence in Australia is lawful or unlawful.171 In other words, detention must be statutorily conferred and subject to legal protections and judicial review.172 Justice North’s decision was overturned on appeal to the Full Federal Court. The Full Bench of the Federal Court found that it was within the powers of the Federal Government to expel those held on the ship from Australian territorial waters, so constituting the proper exercise of executive authority to determine the conditions of entry to the country.173 Supporting the lawfulness of the government’s actions, Justice French, of the Full Bench, remarked:

> The power to determine who may come into Australia is so central to its [Australia’s] sovereignty that it is not to be supposed that the Government of the nation would lack the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australia community, from entering.174

The case was being heard at the time of the terrorist attack on the Twin Towers that killed more than 2,000 people in New York on 11 September

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2001, with the judgement issued on 18 September. Generalised public perceptions of risk which followed the September 11 attacks arguably encouraged an expansion in sovereign power and control, and a resort to the virtually defunct prerogative power of the executive, appealed to by the government as crucial to sovereign protection in times of war and similar emergencies. This power is captured in Prime Minister Howard’s famous statement in the 2001 election campaign:

we will decide who comes to this country and the circumstances in which they come.

An intensification of control under these circumstances deepened the transformations already evident in the purpose and conduct of office in the institution of migration.

The Legislation: Excision, Interdiction and Limits to Judicial Review

The government moved swiftly to introduce retrospective legislation it had already prepared, providing statutory authority for the actions it took in relation to the Tampa and paving the way for increased executive power. Significantly, this expanded the powers of executive, administrative and military office. The legislation was easily passed by both Houses of Parliament in a changed world. The new laws marked an emerging reliance on the use of force and the arrogation of increasing executive power at the expense of a corresponding contraction in judicial authority, with distinct effects on office conduct. They gave powers to Australian naval officers to interdict ships at

175 See Marr and Wilkinson, Dark Victory, 145-147.
177 Border Protection (Validation and Enforcement Powers) Act 2001 (Cth); Migration Amendment (Excision from Migration Zone) Act 2001 (Cth); Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth); Migration Legislation Amendment Act (No 1) 2001 (Cth); Migration Legislation Amendment Act (No 5) 2001 (Cth); Migration Legislation Amendment Act (No 6) 2001 (Cth). See Nathan Hancock “Refugee Law – Recent Legislative Development.” Current Issues Brief No. 5 (Canberra: Department of the Parliamentary Library) (2001 – 02), 2.
179 It must be noted however that some of these moves, such as interdiction, and boat ‘turn backs’ which followed under the Abbott Liberal government had already been mooted in the 1970s but were quashed by PM Fraser. See Fraser and
sea and retrospectively validated these actions in the *Tampa* affair.\(^{180}\) Greater powers were also given to migration officers, with militarised operations now constituting a key element of government responses to ‘unauthorised’ migration, even though such powers are arguably beyond the scope of naval and migration officers.\(^{181}\)

Secondly, the Migration Amendment (Excision from Migration Zone) Act of 2001 excised over 4,600 islands and ‘offshore places’ from the migration zone.\(^{182}\) This effectively diluted Australia’s obligations to those seeking protection under the Refugee Convention since the excision excluded refugee protection provisions in the Migration Act from automatically applying to those arriving in these locations.\(^{183}\) Its objective has been to disable attempts by ‘asylum seekers’ to invoke the protection of the Refugee Convention through relevant provisions in the Act.\(^{184}\) This was achieved through the creation of a new category of arrival for unauthorised offshore entry persons who were ‘intercepted on their way to Australian in transit countries like Indonesia’, now to be denoted as ‘offshore entry persons.’\(^{185}\) Processing would instead take place in the neighbouring states of Papua New Guinea (PNG) and Nauru, with no assurance of resettlement in Australia.\(^{186}\) Thirdly, under the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001\(^{187}\), as amended by the Simmons Act, Spain would not be eligible for resettlement in Australia.

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\(^{180}\) This aimed to avoid the contestation of government action in the courts, enabling the actions to become retrospectively lawful under the Border Protection (Validation and Enforcement Powers) Act 2001.

\(^{181}\) As Pugh emphasises in “Drowning not Waving,” 58-59, under the customary laws of the sea, the master (sic) of a ship is presumed to be “best placed to exercise judgment about distress and are customarily accorded autonomy of decision in this respect.”

\(^{182}\) The relevant amendment to the Migration Act applied to ‘all islands that form part of Queensland’ and which are situated ‘north of latitude 20° south’, all islands which are ‘part of the Northern Territory’ and situated north of latitude 16° south, and all islands which are part of Western Australia and are north of latitude 23° south. Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth).

\(^{183}\) Migration Act 1958 (Cth) Section 46a.

\(^{184}\) I note that under the terms of the Convention ‘boat arrivals’ seeking protection are still considered refugees, despite the CPA and Australian law altering the terms of this status.

\(^{185}\) Mathew, “Australian Refugee Protection,” 664. The Australian Government had also sought to excise the entire mainland, for the purpose of applying for protection as an unauthorised arrival, but the Bill was defeated in Parliament. See also Kerr “The Red Queen’s Law,” 68.

\(^{186}\) Fran Kelly, “Major Parties agreeing on migration issue.” 7.30 Report, aired 24 September, 2001, (Melbourne: ABC TV); Bunworth, “Government to Appeal.” As stated by Kerry O’Brien in this report, the ‘opposition offered to help with legislation to break the deadlock.’ Some were resettled in New Zealand.
of 2001, the powers available to officers of the government to detain ‘offshore entry persons’ extended to the power to take them to a ‘declared country’ for their claims for refugee status to be processed. This was without a guarantee that such countries were signatories to the Refugee Convention.

Lastly and significantly, the effective exercise of Australia’s responsibility as a signatory state to the Refugee Convention was diminished through limited access to legal protections, such as limits to judicial review, amendments to the refugee definition in the Migration Act, and exclusions barring a person from being granted refugee status. A key amendment was the introduction of Section 474 into the Migration Act – the privative clause – which delivered immunity from judicial scrutiny for an expanded range of matters over which administrative office exercises lawful powers under the Act. Under these changes, an administrative decision under the Migration Act cannot be:

- challenged, appealed, quashed or called into question in any court, and is not subject to prohibition, mandamus, injunction or certiorari in any court on any account.

The effect of the privative clause is not so much to quash the capacity to seek judicial review, but rather to ‘restrict the available grounds on which judicial review may be sought’. Nonetheless, it has had substantial, adverse effects for the exercise of judicial office.

In many cases then, decisions about who can enter Australia and how, were thus ‘decisively removed from judicial review and oversight.’ After the

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187 Interdiction at sea was enforced through a Federal Government operation termed “Operation Relex”.
188 A new temporary visa category was also introduced ‘for offshore entry persons.’ See Mathew “Australian Refugee Protection,” 662 – 663. The limits to judicial review were effected through changes to the Administrative Appeals (Judicial Review) Act 1977 (Cth) and associated amendments to the Migration Act.
189 Section 474 Migration Act 1958 (Cth).
190 Bagaric et al. Migration and Refugee Law 335.
191 Against this, John McMillan, “Judicial Review of the Work of Administrative Tribunals- How Much is Too Much?” ALAL Forum 39 (2003): 26 – 31, argues that administrative tribunals need to be supported to do the work they are set up to do, free of what he describes as sometimes excessive judicial scrutiny, to the extent that it inhibits administrative office from meeting its obligations through developing administrative competency.
192 Pringle and Thompson, “The Tampa Affair,” 134. For a detailed discussion of the limits to judicial review with the introduction of the privative clause, see Duncan Kerr “The Red Queen’s Law: Judicial Review and Offshore Processing after
terrorist attacks of 11 September 11 2001, it became much easier to justify these expanded executive powers: state sovereignty and protection from external threat easily eclipsed human rights, especially the rights of the ‘other’. This showed how readily the principles underpinning the separation of powers and the role of the judiciary were subjugated to executive authority in a time of perceived crisis.

After the *Tampa* affair, there was a reversal of declining electoral support for the Howard Liberal Government with the federal election campaign dominated by debates over ‘unauthorised maritime arrivals’ and border protection. It was a period of elevated political rhetoric driven by bipartisan attempts to demonstrate strong border control policies fuelled by Pauline Hanson’s appeal to far-right views.

Institutional conditions and leadership at this time also fostered a culture of systemic abuse and disrespect of those detained. This was brought to light in 2005 when it was found that the department had wrongfully detained an Australian citizen and an Australian resident. The year before, Australia’s Human Rights and Equal Opportunity Commission (HREOC) had released a damning report on breaches of children’s rights in detention. I will briefly detail these findings below when I address the impact of detention upon children. For my purposes here, I emphasise the limited public or governmental impact of this report, which failed to generate improvements in children’s rights or to instigate any reforms to the system at all despite growing evidence of poor conditions and profoundly dehumanising strategies deployed by the

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193 Pringle and Thompson, “The Tampa Affair” 132 – 133. It also reinforced the capacity for ministerial intervention, as noted in Bagaric et al., *Migration and Refugee Law* 344.

194 See Howard’s statements at this time where he described the new bill as ‘unusual’ to meet ‘unusual circumstances,’ cited by Pringle and Thompson in “The Tampa Affair,” 133. See also Nethery, “Immigration Detention” ii.


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department.\textsuperscript{196} In contrast, findings of negligence and mismanagement accompanying two cases of wrongful detention sparked a number of reforms to the network.\textsuperscript{197}

\textbf{2005 Institutional failures and reforms: the Palmer Report}

In 2005, media reports revealed that the Federal Government had mistakenly detained an Australian resident, Cornelia Rau.\textsuperscript{198} An inquiry into this case by the Commonwealth Ombudsman, Mick Palmer, identified the department’s mishandling and ineptitude as central contributing factors to Rau’s wrongful detention. The announcement of this inquiry was followed very quickly by the notification of another case of wrongful detention as well as deportation of an Australian citizen, Vivian Alvarez Solon. This case was subsequently investigated by Police Commissioner Neil Comrie, whose report described the absence of good leadership and management in the department as ‘systemic’.\textsuperscript{199} The Palmer Report found that there was a failure in both cases to provide care or to exercise ‘demonstrable accountability’.\textsuperscript{200}

Both reports led to some significant reforms in a period otherwise characterised by persistent support for the policy, even though the foundations of the system remain unchallenged. The government quickly moved to investigate a further 200 cases of possible wrongful detention.\textsuperscript{201} Changes initiated by then Immigration Minister, Amanda Vanstone, included the establishment of a

\textsuperscript{196} This extended to the use of numbers, not names, in all communication between staff and detainees, and the concentrated efforts of the Howard Liberal government to avoid images of refugees being circulated in the media. See Mark Forbes and Kerry Taylor “Refugees denied human face,’ The Age April 18, 2002. Accessed 15 January, 2016 http://www.theage.com.au/articles/2002/04/17/1019020661365.html. The Age reported that military officers were warned, in some incidents involving refugees at sea, to avoid taking pictures of them which would be “humanising” or “personalising.”

\textsuperscript{197} I draw substantially here on Ann Orford’s important observation of this in her chapter “Biopolitics and the tragic subject of human rights” in The Logics of Biopower and the War on Terror: Living, Dying, Surviving 205 – 227, eds. Elizabeth Dauphinee and Cristina Masters (New York: Palgrave MacMillan, 2007).

\textsuperscript{198} This was revealed after the advocacy organisation, the Asylum Seeker Resource Centre (ASCRC), noted media reports regarding the disappearance of Cornelia Rau and brought it to public attention.


\textsuperscript{200} Palmer, Inquiry into the Circumstances, vi.

Health Review Panel, a national system for identity verification, and improvements to health service provision.\textsuperscript{202} Shortly before the release of a Senate report in response to the Palmer Inquiry, the Howard Liberal Government ‘quietly released one in five immigration detainees’ over a seven-week period, and introduced ‘changes to soften the mandatory detention policy’, including plans to release children from detention.\textsuperscript{203} A Detention Health Advisory Group and Advisory Panel to the department was established in 2006 to advise on appropriate responses and services to ensure adequate health care standards, demonstrating a clear recognition of a duty of care.\textsuperscript{204} Some of the centres which had been sites of significant unrest and violence were closed.\textsuperscript{205} In 2005 the Federal Government also established the office of the Immigration Ombudsman with an initial responsibility to review cases of detention of over two years and overseeing compliance with fair and effective management practices, such as transparency and adequate training of staff.\textsuperscript{206} Scrutiny of the conduct of office holders, and of the institutional failure of the department to meet its obligations had thus achieved significant changes which a damning human rights report had failed to generate.\textsuperscript{207} This points to the significance of institutional inquiry as a site of analysis.

However, despite the Palmer Report’s scathing attack, the Federal Liberal Government contemporaneously extended the number of islands excised from Australian territory to further limit unauthorised boat arrivals from seeking

\textsuperscript{202} Ibid.
\textsuperscript{204} Refugees in detention often have very specific and unique health care needs, due to prolonged lack of access to medical treatment, disabilities and other chronic, as well as treatable, conditions, and increasing rates of mental illness. See Bull et al “Sickness in the System of Long-term Immigration Detention,” Journal of Refugee Studies 26, no. 1(2012): 47 – 68.
\textsuperscript{205} See Phillips and Spinks, Immigration Detention.
\textsuperscript{207} Orford, “Biopolitics and the Tragic Subject.”
protection under the terms of Australian migration law in 2005. The following year, it also sought to excise the entirety of the Australian mainland from the operation of the Migration Act in relation to unauthorised arrivals seeking refugee protection.\textsuperscript{208} We can see then, that while some improvements were made, there remained a clear intention to maintain a policy of exclusion, which largely persisted in this form until the Rudd Labor Government was elected in 2007. This implies that the reforms are more usefully described as cosmetic responses. To this extent, they are neither able, nor evident of a will to address an underlying institutional malaise which damages office in the process that it damages human life.

\textbf{2008 New Directions: a more ‘humane’ policy but the policy remains}

The 2007 election of a Federal Labor Government began its term with new Prime Minister, Kevin Rudd, declaring that he would pursue a more humane approach to border protection.\textsuperscript{209} This saw the formal dismantling of the ‘Pacific Solution’ in 2008 and the development of a statement of ‘Immigration Detention Values’ underlined by respect for human dignity while ensuring effective border control.\textsuperscript{210} These values asserted that detention would only be used as a last resort and for the shortest practicable time, with children and families placed in community detention, allowing more freedom of movement and better access to services, including schooling in the community. This move towards community-based detention was accompanied by regular auditing to ensure that people were being cared for appropriately while being detained. Review

\textsuperscript{208} See Karen Barlow, “Parliament excises mainland from migration zone” ABC News (Canberra: ABC) accessed 20 December, 2016 at http://www.abc.net.au/news/2013-05-16/parliament-excises-mainland-from-migration-zone/4693940 As noted above, there was an earlier attempt by the Howard Liberal Government to excise Australia from the terms of the Migration Act in 2006 with the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.

\textsuperscript{209} It must be noted that during the election campaign Rudd had maintained a position which was strong on the rhetoric of border control, relaxing this once he was elected. This underlines the divisive nature of migration as an electoral issue, despite there being a general expectation that he would adopt a less punitive approach than that pursued by Howard.

processes were improved and the role of the Commonwealth Ombudsman was enhanced in relation to scrutiny of decision making by migration officers.\textsuperscript{211}

This was described as a ‘New Direction’ in policies on immigration detention and refugees arriving by boat. There was a collective sigh of relief among human rights advocates and those in the community who were uncomfortable with a policy of mandatory immigration detention, in the expectation that Rudd would initiate major, systemic changes. He did not.\textsuperscript{212} This is not to say that there was an absence of will to ensure a more humane system and to use detention for the shortest practicable time: there was clear evidence of improvements.\textsuperscript{213} These included better access to legal advice, notification of the reasons for continued detention, and improvements in the review of adverse assessments.\textsuperscript{214}

The Immigration Detention Network and a government commitment to a policy of strong border control continued. Excisions of over 4,000 islands from the terms of the Migration Act in relation to refugee protection were maintained.\textsuperscript{215} In its 2008 report on Immigration Detention Facilities the AHRC remarked:

The legal architecture of the mandatory detention system remains in place. There are fewer people in immigration detention and the number of long-term detainees is decreasing. However, some people are still held for long and indefinite periods.\textsuperscript{216}

\textsuperscript{211} The reforms instituted under a Rudd Labor Government included the introduction of the \textit{Migration Amendment (Immigration Detention Reform) Bill 2009}, aimed at greater ‘clarity, fairness and consistency’ for unlawful residents.


\textsuperscript{214} JSCM, \textit{Immigration detention in Australia: a new beginning}.

\textsuperscript{215} In the meantime, facilities at Christmas Island and other detention locations were significantly expanded to cope with increasing numbers of ‘unauthorised arrivals’ (although this had been initiated by the former Liberal Government under Prime Minister Howard). Department of Immigration and Citizenship, \textit{Annual Report} (Canberra: Commonwealth of Australia: 2009).

\textsuperscript{216} Australian Human Rights Commission \textit{Immigration Detention Report: Summary of Observations Following Visits to}
The end of offshore processing saw an increase in the number of refugees coming by boat and a subsequent increase in the number of persons in detention.\textsuperscript{217} This put pressure on the Immigration Detention Network to deliver adequate services and care.\textsuperscript{218} Continued electoral support for a tough border protection policy, delayed processing and consequent unrest among detainees as an effect of these delays saw a shift in Rudd’s position back towards a ‘tough stance’ on border protection. This stance was taken up by his successor, Prime Minister Julia Gillard, even while she initially moved to accommodate increasing numbers of ‘onshore’ arrivals. In the ensuing years, the network struggled to cope with higher numbers of boat arrivals, the growing complexity and risk profile of the ‘detainee’ population, overcrowding, and consequent delays in processing of visa applications.

In an attempt to minimise the duration of detention, the Gillard Labor government later relaxed its policy on unauthorised arrivals, enabling ‘eligible boat arrivals’ to be considered for bridging visas while in detention, and to be processed in the community.\textsuperscript{219} Two key developments in 2010 and 2011 prompted a return to offshore processing.

**2012 A return to Offshore Processing and Pacific Solution ‘Mark 2’**

A sinking boat carrying refugees to Australia which led to the deaths of over 50 individuals off the coast of Christmas Island in late 2010, prompted emotional reactions among politicians and despair in some sections of the community.\textsuperscript{220} Growing alarm was voiced about the risks incurred by refugees using the services of people smugglers and crowding onto unseaworthy boats to reach Australia in order to lodge a claim for refugee protection.\textsuperscript{221} This event

\textsuperscript{217} DIAC, Annual Report, 2009.
\textsuperscript{218} JSCAIDN, Final Report.
\textsuperscript{219} The government re-introduced a single processing regime for those seeking refugee status, regardless of whether arriving by boat, or with a visa by air, and extended access to the Refugee Review Tribunal to all persons seeking asylum. See Phillips and Spinks, Immigration Detention and Boat Arrivals.
\textsuperscript{220} The full extent and trauma of this event has still not fully emerged and perhaps may never be.
\textsuperscript{221} There have been similar, prior tragedies, notably the drownings of refugees from the vessel called “SIEV X” (Suspected
was followed by the 2011 rejection by the High Court of Australia (HCA) of a refugee ‘swap deal’ sought by Australia with the Malaysian Government. Under this ‘deal’, the Australian Government planned to send 800 ‘unauthorised boat arrivals’ who were being detained in Australian immigration detention centres, to Malaysia as a transit country. In exchange, Australia would accept from Malaysia, 4,000 ‘genuine refugees’ who had already been granted refugee status and were awaiting resettlement in signatory countries. This swap would effectively privilege those who had gone through the ‘proper’ channels over those who had ‘jumped’ the refugee queue and who were seen as trying to gain an advantage by arriving in Australia without prior authorisation. The matter was taken to the High Court, which rejected the policy on the basis that Australia could not guarantee human rights protections to those refugees it sent to Malaysia. The Australian Government turned to considering other options. A Panel of Inquiry (chaired by Air-Vice Marshal Angus Houston) was appointed to invite submissions and develop policy alternatives. Released in 2012, The Report of the Expert Panel on Asylum Seekers proposed a two-pronged approach aimed at deterring people from travelling in unseaworthy boats to reach Australia, while increasing the number of places available for those who went through the ‘proper’ challenges and applied offshore. All claims by unauthorised

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223 This was to occur over a four-year period.


225 This proposal was taken to the High Court on the basis that Malaysia would be unable to afford protections to those refugees who were transported to the country from Australia. See Plaintiff M70/2011 v Minister for Immigration and Citizenship & Anor and Plaintiff M2016 by his Litigation Guardian (2011) 244 CLR 144 (High Court of Australia, 2011). As a non-signatory state, Malaysia has no obligation to offer refugee protection.

226 Houston, Aristotle and L’Estrange, The Report of the Expert Panel, 9. Houston affirmed that the Panel considered that a ‘boat turn back’ policy had merit, noting that ‘it could constitute an effective deterrent against people risking their lives at sea. The other members of the Panel, Professor Michael L’Estrange was a former Foreign Affairs Secretary. Paris Aristotle is a long-standing advocate and advisor on immigration and refugee matters, and CEO of The Victorian Foundation for Survivors of Torture. He described his ‘change of heart’ on the decision to reintroduce offshore processing as driven by despair over very high numbers of people dying at sea. See Michael Gordon, “A change of heart,” Sydney Morning Herald accessed 18 January, 2015 http://www.smh.com.au/national/a-change-of-heart-20120814-24643.html
arrivals were ‘frozen’ under this policy, leaving ‘about 31,000 “asylum seeker” families and children in a legal black hole.’\textsuperscript{227} Offshore processing was reintroduced on Manus Island, in Papua New Guinea and in Nauru.

All boat arrivals entering excised zones without prior authorisation have since been sent offshore for processing, with no assurance of being resettled in Australia.\textsuperscript{228} This denial of resettlement under the No Advantage policy encompasses a further narrowing of responsibility towards refugees. By 2012, a policy of mandatory immigration detention had not only remained in place but was marked by persistent concerns which have remained substantively the same since it was first introduced in 1992. At this time, the entirety of the Australian territory was also excised for the purpose of the Migration Act. This last change attracted little attention: the groundwork had already been laid down for its acceptance by a similar proposal mooted by the Howard Government in 2006. These developments are significant in light of my earlier observation that once a pattern is established, the groundwork already exists in the public imagination (and indeed in office thinking) for this to be reiteratively produced.\textsuperscript{229}

Above, I have described the historical and contemporary policy context of mandatory immigration detention in Australia. However, running through my descriptive work in this thesis is a story being told about the impact of policy and legal changes on the orientation and obligations of office and the sorts of office practices and obligations which it has created or denied. Breaches in human rights have been central to objections to this policy, and they are the mark of an ethically degraded office.

\textsuperscript{227} AHRC, \textit{Forgotten Children}, 11.

\textsuperscript{228} This is the central plank of the \textit{No Advantage Policy}, implemented in pursuit of recommendations of the government-commissioned Expert Panel on Asylum Seekers, 2012.

\textsuperscript{229} There was amused alarm at this prospect in the 2000s but this was subsequently introduced with minimal publicity or opposition, at least politically. The Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012 was introduced to effect these changes as well as to resolve any objections might be pursued judicially. This was underlined by a desire by the executive to circumvent judicial scrutiny in the name of national (border) protection.
CONTRACTING THE FIELD OF RESPONSIBILITY

A breach of obligations and of rights

The AHRC, formerly known as the Human Rights and Equal Opportunity Commission (HREOC)\(^{230}\) has explicitly stated that regardless of the ‘lawfulness’ of detention, ‘international human rights law does not permit policies to deter . . . future unauthorised arrivals where those policies may result in breaches of human rights’.\(^{231}\) Yet both the AHRC and the UNHCR have highlighted systematic, routine and widespread breaches of human rights, with the AHRC consistently recommending reforms to the system to ensure respect for human rights norms and laws.\(^{232}\) Extensive evidence shows that the effects and experience of being detained constitute a breach of Australia’s obligations under the Refugee Convention as well as of international human rights treaties.\(^{233}\) These concerns have persisted over a 20-year period.

The 1998 Report, *Those who’ve come across the seas*, published by HREOC, was the first significant human rights-based report to stress the harmful effects of prolonged and indefinite detention.\(^{234}\) Many of the centres were found to be overcrowded, effectively functioning as prison-like, highly institutionalised environments, often in remote areas with minimal access to the ‘outside world’ and limited rights of access to, and protection of the law,’ including legal advice.\(^{235}\) Surrounded by razor wire and often in basic, dormitory style


\(^{231}\) Ibid., 68.

\(^{232}\) See also AHRC, *Immigration Detention Report* and AHRC, *The Forgotten Children*. These obligations are statutorily determined under the Migration Act 1958(Cth).

\(^{233}\) Ibid.

\(^{234}\) HREOC *Those who’ve come across the seas*, 4. Concerns centred on the ‘physical and mental health of detainees’, the failure to inform detainees of their rights or provide them with ‘access to legal advice’, delays regarding the processing of their visa applications, ‘use of force’, isolation, and the poor conditions overall in the centres.

accommodation, they were described as ‘chronically overcrowded’, with those detained experiencing frustration, anxiety and a sense of isolation.236 In 2013, the United Nations Human Rights Committee (HRC) detailed 143 ‘serious violations of international law’ resulting from the Australian Government’s indefinite detention of 46 Tamil refugees on security grounds.237

Deaths and suicides or suicide attempts, riots and breakouts have featured as disturbing outcomes of immigration detention, with hunger strikes and self-immolation often conducted as a sustained form of protest among detainees.238 The duration of detention is commonly regarded as the most significant contributing factor to anxiety, despair and mental illness. After two decades of the policy, reports persistently assert a ‘strong correlation between the rise in the average time in detention and the increase in self harming behaviour.’239

Objections to mandatory immigration detention on the basis of its impact upon children have been particularly pervasive, prompting some of the most trenchant criticisms of the network. A landmark report released in 2004 by the AHRC was devoted entirely to the effects of detention upon children.240 It found that management plans delivering care to children were often ‘formulaic’, rarely referring to children in detention much less acknowledging their particular needs.241 Children in detention typically have limited access to the educational and recreational opportunities which are crucial to child development. The report documented evidence of significant trauma among children, including

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236 HREOC, Those who’ve come across the seas, vii – ix, 65 – 84. See specific references to overcrowding at 72 – 73. Almost 20 years later, similar concerns were aired. See Allan Hawke and Heather Williams, Independent Review of the Incidents at Christmas Island Immigration Centre and Villawood Detention Centre (Canberra, 2011) and AHRC, Report: Immigration Detention on Christmas Island.


238 See Colin Neave, Suicide and Self Harm in the Immigration Detention Network (Canberra: Commonwealth and Immigration Ombudsman, 2013); Suicide Prevention Australia, Submission to the Joint Select Committee on Australia’s Immigration Detention Network (Suicide Prevention Australia, August, 2011); JSCAIDN, Final Report 42, 64.

239 Neave, Suicide and Self Harm, 2.

240 See HREOC, A Last Resort.

241 Ibid., 18. This has included: limited or inadequate education and health care, poor recreational opportunities.
allegations of child sexual abuse. The unique vulnerability of children and the significance of environmental protections and care to their development and well-being at each stage of childhood, throw the harms which detention entails into sharp relief.

There is a cumulative impact upon children who are detained that is related to their vulnerability as children, and it is compounded by prior trauma and by witnessing riots, hunger strikes, suffering, self harm and suicidal ideation among those being detained (often including family members). Such evidence is especially worrying when we consider the numbers of unaccompanied minors being held in immigration detention, and given that the Minister for Immigration and Border Protection has responsibility for them, under the terms of the Immigration (Guardianship of Children) Act of 1946. The persistence of these concerns is important to note: a second investigation into breaches of children’s rights in 2014 repeated the findings published ten years earlier, that detention of children is often brutal and is ‘fundamentally inconsistent’ with the objectives of the Convention on the Rights of the Child.

Breaches of human rights, including those of children, are not isolated. Rather they have been grave, extensive and diverse and are systemically embedded in the operation of the network. In 2013 the AHRC reiterated its alarm at their persistence despite more than ten years of periodical inspections of the centres. Objections to human rights breaches have similarly been extensive

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244 HREOC, A Last Resort, 849 and AHRC, The Forgotten Children, 46. This has not always been the result of actions of migration officers, as these reports have shown, although there have been documented cases of both departmental employees and contractors who have been complicit in the neglect and abuse of children.

and persistent, but without effecting substantive change. While some institutional concerns prompted reforms following the Rau and Solon affairs, the responses have been superficial. Nonetheless, it suggests the significance of addressing mandatory immigration detention from the perspective of office and I now turn to institutional concerns under this policy. As I emphasise in this thesis, I address human rights through the lens of office as a source of the protection of human dignity. The next part of this chapter describes the key shifts in office which I noted in my introduction. This highlights the incongruity between the responsibility applying to signatory states to the Refugee Convention and the obligations which have been limited under a policy of mandatory immigration detention. Significantly, it comprises what I refer to as a contraction in the field of responsibility for refugees. This has been enabled through changes to the practices and conduct of office in this domain, as I show below.

RESHAPING THE OBLIGATIONS OF OFFICE

I begin this section by describing the scope of authority and responsibility exercised by the department and its Minister, before considering the shift in executive and judicial authority which has characterised this policy. My aim here is to briefly draw out the ways in which focusing on office delivers a stronger appreciation of these shifts, in which key institutional changes have contracted the field of responsibility of office for refugee protection. Pivotal to this has been the increasing concentration of power with the executive branch of government, the deprivation of judicial review and an institutional dissonance marked by detention as administrative in name but punitive in effect.

As a signatory to the Refugee Convention, Australia has a clear responsibility to offer meaningful protection to refugees, including access to procedural fairness, as outlined above. This responsibility is given effect in the Migration Act
through the refugee definition in the Act, and the inclusion of relevant visa categories for those seeking refugee protection, notably under the humanitarian visa program.246 The Minister for Immigration and Border Protection has legislative and overarching responsibility for the orderly intake of migration and its regulation, although this is largely delegated to the officers of the department. This entails processing claims for protection, issuing visas and monitoring compliance by private contractors of their contractual obligations and the care of persons detained while awaiting the outcome of their applications.247 The Act gives effect both to the constitutional scope of executive power in relation to migration intake and Australia’s international obligations in relation to refugee protection. In the following discussion, I pinpoint some key ways in which the contraction in responsibility for refugee protection has manifested itself under a policy of mandatory immigration detention.

**Augmenting executive power and authority**

By declaring, in 2001, that ‘[t]he protection of our sovereignty, including Australia’s sovereign right to determine who shall enter Australia, is a matter for the Australian Government and this parliament’, Prime Minister Howard effectively privileged executive power and authority. He did so through a corresponding weakening in judicial authority and capacity. This marks a decisive repositioning of the executive power in regard to other arms of government.248 It consolidates a shift within Parliament towards domination of the representative chamber by the government of the day, changes which had,

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246 This program was commenced in 1977 under a Fraser Liberal Government.
247 The object of the Act is to regulate, in the national interest, the coming into, and presence in Australia of non-citizens.’ See Migration Act 1958, xvii. Migration Regulations provide additional detail on the day-to-day implementation of migration law. The Minister can exercise Ministerial powers to substitute decisions of administrative officers, including those of the Refugee Review Tribunal. Indeed, in the last 20 years, the powers of the Minister have increased significantly. See Kerri Carrington, “Ministerial Discretion in Migration Matters: Contemporary Policy Issues in Historical Context,” *Current Issues Brief No. 3 2003 – 2004*, (Canberra: Information and Research Services, Department of Parliamentary Library, 2003).
however, been mooted as early as 1994.\textsuperscript{249}

When the Liberal Party lost the 2007 Federal election in 2007, the incoming Minister for the Department of Immigration and Citizenship under a new Rudd Labor Government, Chris Evans, expressed specific concern about the scope of ministerial powers exercisable under the Migration Act. He stated:

I have formed the view that I have too much power. The act is unlike any act I have seen in terms of the power given to the minister to make decisions about individual cases. I am uncomfortable with that not just because of a concern about playing God but also because of the lack of transparency and accountability for those ministerial decisions, the lack in some cases of any appeal rights against those decisions and the fact that what I thought was to be a power that was to be used in rare cases has very much become the norm.\textsuperscript{250}

Evans is clearly worried here about both the arrogation of executive power and diminishing scrutiny and oversight, emphasising that this institutional incongruity is also peculiarly unique to the department. He observed that other portfolios and their departments retain clear limits upon executive, administrative and judicial functions and office. For example, the executive does not decide on the ‘merits of social security applications’; rather, this is an administrative function performed by the Department of Human Services. Yet, while the ‘Attorney General does not decide who goes to jail . . . the Immigration Minister does.’\textsuperscript{251} As Peter Billings has observed, these changes have expanded executive power to the extent that it can now ‘play god’:

statutory powers regulating the liberty of non-citizens (Immigration Detention Network other powers) enable Immigration Ministers to “play God”. In that role office-holders must ensure their powers are exercised responsibly – for the (humanitarian) purposes for which they were,

\textsuperscript{249} Pringle and Thompson, “The Tampa Affair”, 129.
\textsuperscript{250} Minister Chris Evans, Minister for Immigration and Citizenship, Senate Standing Committee on Legal and Constitutional Affairs. (Estimates Committee Meeting Minutes: Canberra Tuesday 19 February, 2008): 31. He refers here to Section 501 of the Act.
\textsuperscript{251} Ibid.
evidently, conferred. With effective judicial review effectively neutred, due to the breadth of the statutory discretion vested in the executive, political accountability mechanisms assume greater importance.252

This is illustrative of the emergence of a juridico-political order.253 Such an order sees the conflation of the political with the legal, under which the separation of powers under a Westminster system returns to a prior time when sovereignty was indivisible. In a practical sense, this has not only altered the form that sovereignty therefore takes, but it has also imposed considerable powers on ‘extraordinarily junior’ and inexperienced officers of the government.254

These exceptional and wide-ranging powers have been progressively granted through legislation granting extensive, non-reviewable powers to the executive and curtailing the role of the judiciary. As Prime Minister Howard declared in 2001, such powers:

will not be able to be challenged in any court in Australia . . . [and] officers and those assisting them, taking actions authorised by the bill will be protected from civil or criminal proceedings in respect of those actions.255

Howard was keen to avoid what he saw as excessive judicial activism, something he implicitly equated with an infringement of executive authority and, indeed, national sovereignty.256 However, limited scrutiny of both administrative and executive decision-making undermines the principles of a political system founded on the separation of powers. This is a significant shift. Despite the constitutional preservation of the jurisdiction of the High Court, the limitations these amendments imposed on access to appeal directly undermine the rule of

252 Billings, "Whither Indefinite", 1399.
253 See Stratton, Uncertain Lives, 143.
254 Pringle and Thompson, "The Tampa Affair", 135.
256 See Pringle and Thompson, "The Tampa Affair," 142. As Pringle and Thompson highlight on page 129, the shift after the Tampa Affair is not simply a concern about the loss of human rights; it becomes a question of how “the problem and scope of executive power came to be posed in the considerations of the Federal Court.”
law, augment executive power and can lead to unwelcome practical consequences for the High Court.  

Evans’ comments about excessive Ministerial power also brings to light an anxiety about the drift of the exception towards the norm. Exceptionality is always vulnerable to its normalisation which provides a compelling reason for its avoidance. In a concrete sense, his comments also emphasise that there are institutionally specific effects of the drift from the exception to the norm. The displacement by the executive of administrative functions encourages an erosion in the department’s ability to exercise judgement to the extent that ‘the department may eventually lose confidence in their own decision making.’ Yet it also removes the scope for such decisions, where they are made, to be subject to review.

Limitations on judicial scrutiny and review

Under the Australian legal system, anyone who is subject to decisions under administrative law can apply to have those decisions reviewed by a court under the Administrative Decisions (Judicial Review) Act of 1979.259 This is especially important for refugees, given the effect of a wrong decision, which can mean deportation, for example. It enables scrutiny of the exercise of powers by the executive and legislative branches of government, where appeals can contest the legality of detention and is a form of insurance against poor decision making. The delegation of ministerial responsibility to officers of the department typically relies on judicial scrutiny of decisions to guard against

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258 Minister Chris Evans, Minister for Immigration and Citizenship, Senate Standing Committee on Legal and Constitutional Affairs. (Estimates Committee Meeting Minutes: Canberra Tuesday 19 February, 2008): 83.

259 Relevant tribunals enabling merits review include the Refugee Tribunal, the Migration Review Tribunal and the Administrative Appeals tribunal. However the RRT has had no power to review decisions in relation to offshore applications for refugee status. See Bagaric et al., Migration and Refugee Law, 324 - 345.
abuse and concentration of power. Should their initial application be unsuccessful, applicants have been able to apply for merits review with the Refugee Review Tribunal.\textsuperscript{260} The objective of the Tribunal has been to ensure a ‘mechanism of review that is fair, just, economical, informal and quick’ and that the review process ‘is not bound by technicalities, legal forms or rules of evidence’ but ‘must act according to substantial justice and the merits of the case.’\textsuperscript{261}

However, refugees who have been held offshore have been unable to apply for a merits review by the Refugee Review Tribunal. While they can apply for a review of their application to the Federal Court or the High Court of Australia, these courts do not consider the substance or merits of the case, making findings only in relation to whether or not there has been an error in law made by the tribunal.\textsuperscript{262} Legislative and policy changes have increasingly curtailed this capacity for judicial scrutiny from 1994 onwards. Limiting court determinations in relation to administrative decisions have been framed as necessary for strong, defensive border protection strategies.\textsuperscript{263} The introduction of privative clauses into the Migration Act in 2001 further limited this review process for refugee claims, even while the High Court of Australia retained its original jurisdiction to interpret the constitutional validity of administrative and executive decision making and laws.\textsuperscript{264}

Yet, under Articles 16 and 31 of the Refugee Convention, the question of whether a refugee has arrived on excised territory, or is unlawfully present, or is not yet formally recognised as a refugee constitutes insufficient grounds for denying access to the courts. Doing so infringes the Convention prohibition on

\textsuperscript{260} More recently, the Refugee Review Tribunal was amalgamated with two other review tribunals, the Migration Review Tribunal, and the Social Security Appeals Tribunal into a single ‘one stop shop’, effective July 2015, accessed October 17, 2016. \url{http://www.aat.gov.au/about-the-aat/what-we-do/amalgamation-of-tribunals}

\textsuperscript{261} Migration Act 1985 (Cth), Section420.

\textsuperscript{262} Bagaric et al., \textit{Migration and Refugee Law}, 326.

\textsuperscript{263} Hugh Selby, \textit{Tomorrow’s Law} (Sydney: The Federation Press, 1985): 39 – 40. Selby notes that this was part of a ‘trend occurring in administrative law’ where adverse migration decisions were increasingly being contested in the courts.

\textsuperscript{264} Put simply, privative clauses limit the scope for judicial review of administrative decisions and actions.
penalties applied on the basis of ‘lawfulness’, as already noted.265 While the Australian Constitution establishes the jurisdiction and responsibilities of ‘office’ (thus ensuring a balance of power between the executive, legislative and judicial branches of government) limits on judicial scrutiny have contracted the space for the exercise of judicial responsibility and tipped the balance of power increasingly in favour of the executive.

Preserving judicial access is crucial because of a diluted obligation incumbent upon migration officers to provide legal advice. Legal assistance for an ‘unlawful’ arrival to make a visa application could be withheld until she makes a verbal declaration that she is seeking refugee protection, with a well-founded fear of persecution, thereby ‘invoking Australia’s protection obligations’.266 But those detained are often unaware of these specific steps that they need to take to invoke Australia’s Convention obligations.267 Migration officers are not obliged to automatically advise ‘unauthorised maritime arrivals’ seeking refuge of their rights or of what refugees need to do to satisfy Australia’s requirements for recognition under the Refugee Convention.268

Distorting the telos of office: administrative office and punitive practices

As already observed, successive Federal Governments have expressly rejected criticisms that immigration detention is a form of punishment. The stated objective of detention is to ensure that officers who exercise powers under the Migration Act to take persons into custody, can do so for specific purposes under the Migration Act related to migration processing and potential removal from Australia. During the focus period of this thesis, the validity of detention as a purely administrative measure has been persistently affirmed by the High Court of Australia, irrespective of the conditions or the duration of detention.

266 HREOC, Those who’ve come across the seas, 25.
267 Ibid., 25 – 26. See pages 26 – 29 of this report for a full discussion, which emphasises that under international law, or under the Act, the capacity to apply for a refugee visa is not contingent upon such specific requirements.
268 Ibid., 4.
In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, for example, the HCA determined that mandatory immigration detention amounts to no more than an ‘incident’ of executive authority. Immigration detention was held to be constitutionally valid (that is, lawful), when it facilitates the exercise of authority granted under the Australian Constitution to the executive branch of government to control the entry of ‘aliens’.269 In a subsequent case examining whether or not detention could be characterised as administrative or punitive, Justice Gleeson (following *Lim*) stated in *Al Kateb v Godwin* that:

mandatory immigration detention is a valid law with respect to aliens on the basis that a limited authority to detain an alien in custody is conferred as an incident of the exercise of the executive powers of excluding and removing aliens, and investigating, considering and determining applications for permission to enter Australia. So characterised, the power is not punitive in nature, and does not involve an invalid attempt to confer on the Executive a power to punish people who, being in Australia, are subject to, and entitled to the protection of the law.270

Defending it as administrative detention therefore theoretically brings policy and law into conformity with the Australian Constitution, and with the UN WGAD271 guidelines and Refugee Convention provisions.272 However, as already noted, immigration detention has been characterised by practices and experiences which closely resemble a prison setting. The privatisation of operations in detention has compounded the punitive experience and practices

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270 219 CLR 562 (High Court of Australia, 2004). While affirming that the laws are valid, the HCA has also been careful to note that its validity is preserved if the intention is to process visa applications or to deport persons. It has also taken care to note that those detained are still subject to law and its protections. Detention however could be construed as punitive if it exceeds what is reasonably expected as necessary for the purpose of confirming a person’s right to a visa, or pending deportation. See *Behroz v Secretary of the Department of Immigration and Multicultural Affairs* (2004) ALR 271 (High Court of Australia, 2004).

271 UNHCR *Detention Guidelines*.

272 United Nations High Commissioner for Refugees, Executive Committee Conclusion No. 44 (XXXIV) *Detention of Refugees and Asylum Seekers* (UNHCR: 1986). Decisions of the High Court of Australia persistently state that immigration detention remains lawful. For example, see *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, (1992) 176 CLR 1 (High Court of Australia) and *Al-Kateb v Godwin* (2004) 219 CLR 563 (High Court of Australia, 2004).
of detention.

Since 1997, departmental obligations for day-to-day centre management have been outsourced through private contracts awarded by the Federal Government. The department provides the sites and facilities, with the contractor responsible for service provision, including an obligation to ‘guard, feed and transport detainees, ensuring that health, education and welfare needs are met, maintaining infrastructure, and ensuring ‘perimeter security.’

As early as 1998, the HREOC report conveyed its objections to the issue of private contracts because of the correctional practices being deployed in the centres. This extended to shackling, handcuffing, the administration of chemical restraints and random body and room searches, including between the hours of 6pm and 9am. At this time, security measures were described as being somewhat excessive and beyond ‘what is necessary to prevent escapes and to maintain order’, with concerns expressed about the ‘surveillance, the use of unreasonable force and the practice of isolating detainees in observation rooms.’ In 2008, the AHRC repeated its objections to privatisation, based on evidence of the systematic use of excessive force, breaches of personal dignity and privacy, and the use of correctional-style practices such as physical and chemical restraint, management (isolation) units, and random room and body searches, together with a generally punitive and harsh environment. It again expressed concerns in 2011.

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273 The first contract was formally awarded in 1999 to Australian Correctional Management (ACM), a subsidiary of US company Wackenhut, which manages prisons and migration detention in the US.
275 HREOC, Those who’ve come across the seas.
276 Ibid, x.
277 Ibid., v.
279 AHRC, Immigration Detention Report, 22, 35, 48. See also AHRC Summary of Observations.
280 AHRC, Summary of Observations.
The complexity of contractual arrangements for the management of the centres and the apparent willingness of governments to deflect responsibility for any criticism or violence in the centres, suggest that privatisation facilitates the subtle manoeuvring away from responsibility. Against such attempts to disavow responsibility, there remains a clear duty of care which government owes to those in detention. As the AHRC has remarked, it ‘bears ultimate responsibility for them, whoever is the actual service provider’. This view has been affirmed by refugee law jurisprudence and in numerous reports commenting on the privatisation of the centres.

Against the defence that this is merely administrative detention, all the evidence points to this as a deeply punitive setting. As a penal institution, immigration detention has altered the office of the department such that it no longer operates solely within the sphere of its legitimate purpose of administering government law. At the same time, the department has sought to distance itself from responsibility for the effects of punishment by executive office, and to remove itself from judicial scrutiny over its actions and decisions. This contraction in judicial capacity and authority has meant a loss in some fundamental procedural protections for those in detention. Importantly, it has altered the way that the rule of law is exercised, given that administrative processes and practices under this policy are more akin to those in the penal system, but without the protections that those in detention would receive if they were detained under the criminal justice system.

CONCLUSION

This chapter has tracked the course of mandatory detention in Australia from


282 HREOC, Those who’ve come across the seas, 62.

1992 to 2012, pinpointing key shifts in the policy, including the transition from discretionary to mandatory detention, the introduction of offshore processing and the excision of Australian territory. Excepting the Rudd Labor Government’s dismantling of the Pacific Solution ‘Mark I’ offshore processing regime in 2008, the period between 1992 and 2012 not only discloses the persistence of immigration detention, but marks an acceleration in its normalisation as a technique of border control.

This policy is thus at odds with the purpose of the department and with Australia’s obligations under the Refugee Convention. Yet Australia’s responsibility under the Refugee Convention has not so much been refused outright as diluted and curtailed while maintaining an illusion of responsibility. This is a sleight of hand which enables the state to preserve its claims that it is abiding by its treaty obligations while pursuing punishment as not only legitimate, but necessary for border protection. We can see, then, how the responsibility to protect refugees has been steadily delayed, weakened or eroded through a series of changes which reiteratively endorse immigration detention as a normalised and indeed a necessary response to unauthorised movement of ‘non-citizens’.

As I observed in the introduction of this thesis, office is a site of obligations and relations. Under a policy of mandatory immigration detention, changes to the Migration Act have reshaped the lawful relations between the Australian Government and those seeking refuge. An expansion in executive power, the dissonance between the administrative purpose and punitive function of the department, erosions in procedural protections and in judicial review and the privatisation of the Immigration Detention Network together signal a diminishing exercise of responsibility and the obligations of the office of migration. Throughout this thesis, I assert the significance of reading this policy through the lens of office as a site of ethical responsibility. Readings of this policy
have largely addressed this either from a human rights perspective or as symptomatic of the inevitability of institutional violence, although there is a developing body of work examining the impact of mandatory immigration detention upon those in office. An appreciation of immigration detention as the manifestation of the degraded exercise of office remains under-theorised, as I will show in chapter two.
CHAPTER TWO: READING IMMIGRATION DETENTION AND OFFICE

Australia’s policy of mandatory immigration detention has been subject to extensive academic scrutiny across a number of disciplines. The scope and interdisciplinarity of scholarly research in this area is an emphatic testament to the extensive impact of the policy. Moreover, the literature not only fails to endorse mandatory immigration detention, but much of it is at the very least implicitly critical of it. My central concern is with the effects of this policy upon the institutional life of migration in Australia, and the way in which immigration detention has contracted the field of responsibility towards refugees arriving ‘by boat.’ While this shift has been remarked upon in much of the literature, it remains under-theorised as a story about office as a site of ethical conduct.

In this chapter, I argue for alternative responses which address the policy from the perspective of responsibility as an institutional concern. Rather than focusing primarily on detention centres as sites of exclusion and suffering among those detained, my analysis in on the practices of those doing the detaining and the degradation of office it has produced. This facilitates an appreciation of the exercise or disavowal of responsibility as constitutive of office, while exposing a more concrete examination of office practices. Dedicated attention to the ‘office’ of migration as a site of inquiry is, however, also an orientation or method, as I stressed in the Introduction to this thesis. As I will show below, the scholarly literature on early modern office offers a productive foundation for developing office ‘thinking’ as such a method of inquiry. I start by addressing the dominant approaches in the literature before
turning to what I term ‘institutional’ readings. Notably, these include a growing body of criminological and jurisprudential analyses. These consider detention from the perspective either of state power or of the responsibility of the state. While these readings provide a basis for my approach, they fail to deliver an account which brings office and ethics together.

**TWO GENRES**

The introduction of immigration detention in Australia initially attracted scholarly attention in the social sciences – notably in political science. This emerged against the backdrop of the emergence of the ‘New Right’ in Australian politics from the late 1980s onwards and into the 1990s, as I outlined in chapter one. A merging of discourses of security, migration and criminality followed September 11. Together with the visibly penal aspects of the detention centres, this discursive trend drew attention from critical criminologists at this time.

Contemporaneously, researchers and professionals in medicine and the health sciences noted with considerable alarm the damaging effects of long term, indefinite detention upon those detained. Beyond Australia, a considerable body of international criminological scholarship has developed on the increasingly punitive responses to forced and other migratory patterns being adopted elsewhere, notably in Europe (including the UK) and the United States. Angela Mitropoulos has, however, stressed that mandatory immigration detention has taken a specific form in Australia through complex, privatized

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284 I will return to this in Part Three in order to examine the way in which these earlier conceptions of office might be brought to bear upon thinking ethically with office.
286 See Steel and Silove, “Mental Health,” and also Sultan and Sullivan, “Psychological.”

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arrangements, which generates diverse methodological responses as an effect of risk management:

Methodologically speaking, an analysis of migration detention requires an approach adequate to a field operating in simultaneously legal, economic, financial, medical and government registers, precisely because the unrelenting proliferation of contracts has made possible the assembly of generic, archipelagic organisational systems such as those of migration detention.288

Despite this diversity, there are – generally speaking – two broad ‘genres’ within which we can situate the literature. I say ‘generally speaking’ since there is emerging literature which focuses on the institutions of migration as a site of inquiry, together with an established body of refugee law jurisprudence on the detention of refugees. These latter areas of research are addressed separately in this chapter as an entry point into my discussion of the literature on early modern office. The terms I use to describe each ‘genre’ do not adequately capture the complexity and diversity of the literature. But, while there are scholarly differences within each grouping, organising the literature in this way is heuristically useful: it highlights the distinctive perspectives of each branch of the literature, furnishing a basis from which I pinpoint the contributions and shortcomings of each approach from the perspective of ‘office.’ I do not address the extensive literature on the security-driven and other anxieties which are said to underpin Australia’s restrictive policies on boat arrivals. Instead I largely confine my attention to literature addressing the impacts of detention and literature seeking to examine this critically from an institutional perspective, including as a form of state violence.

This chapter is arranged into three sections. I begin by addressing the critical scholarship which interrogates underlying dynamics of power, exclusion and

288 Angela Mitropoulos “Archipelago of Risk: Uncertainty, Borders and Migration Detention Systems,” New Formations 84 (2015): 165. This also suggests the value of approaching this from the perspective of office, which addresses each of these domains.
objectification characterising this policy. Turning then to what I term a humanist approach in the literature, I propose that this encompasses a range of perspectives: from human rights-based approaches, to narrative-based research, medical and health-related findings into the mental health effects of detention, and humanitarian and cosmopolitan readings of this policy. Despite its diversity, this literature is underscored by a unifying emphasis on the effects of detention upon those detained. Grouping these under a humanist rubric reflects this underlying commonality insofar as they furnish us with an appreciation of the failure of this policy to preserve human dignity, whether through compassion or human rights obligations. While some of the critical literature shares a concern for the human consequences of this policy, it is centrally preoccupied with the ideas, discursive practices and relations of power which underscore immigration detention.  

As noted by McPhail, Nyamori and Taylor, this sees a focus on immigration detention either from the perspective of ‘the construction of the state or the construction of refugees’. Claims that immigration detention constitute a form of state crime illustrate the way that these approaches can also merge. As criminologist Sharon Pickering has observed:

The naming of state practices as “crimes” serves important ideological and discursive functions. Being able to name “state crime” alters discourses surrounding the treatment of refugees and asylum seekers. It brings into focus the definitions and categories of who is considered a legitimate victim and how or what is considered a legitimate perpetrator.

In short, the violence of the state underpins the way refugees are discursively framed. While endorsing the important argument Pickering makes here, I am interested instead in developing an account of this policy which affirms the

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289 See Fiona Jenkins, “Bare Life: Asylum Seekers, Australian Politics and Agamben’s Critique of Violence” Australian Journal of Human Rights 10 no. 1 (2004): 79 – 95, in which she maps out the challenges of thinking through contemporary modes of politics which address the foundations of modern statepower.

290 McPhail, Nyamori and Taylor, “Escaping Accountability.”

humanity of those detained, at the same time that it seeks out examples of institutional life which support human dignity. This approach asserts that institutions and lawful relations are not a source of unremitting violence.

In the first part of this chapter, I identify the contributions and limitations of a humanist or critical reading. Arranging the literature as I do highlights two distinct orientations: the humanist literature assumes the somewhat unproblematic exercise of individual subjectivity whereas critical scholarship unsettles our assumptions about human subjectivity, and the capacity to access and exercise human rights.

CRITICAL SCHOLARSHIP

Exception and Biopolitics

Critical scholarship challenges the foundational assumptions and knowledge production within society such as an unquestioned belief in lawful and political authority.292 It discloses the discursive and other techniques of power which shape social relations and emphasises the inherent violence of law.293 There is a wide-ranging body of scholarship which adopts these critical readings in analyses of refugees and immigration detention in both the Australian and international context.294

Key theorists drawn upon in this scholarship are Foucault and Agamben. Both affirm biopolitics as the contemporary mode of governing, in which

293 See Giannacopoulos, “Mabo,” and Joseph Pugliese, “The Incommensurability of Law to Justice: Refugees and Australia’s Temporary Protection Visas,” Law and Literature 16, no.3 (2005): 285 – 311. I will deploy some of these readings of immigration detention further, in chapters three and four. I note that some of the critical criminological literature traverses both genres – offering both a humanist and critical reading. See Hodge, “A Grievable” and Jenkins, “Bare Life,” for example.
control over territory is eclipsed by control over life, and therefore over populations. Foucault initially refers to this as biopower and later in his work, as governmentality, a distinct mode of governing which can be traced from early modernity. Under this mode, the measure of good government is determined less by the exercise of territorial control and more by the demonstrated ability of governments to manage their own population while neglecting those who are outside its realm. This is a shift away from the individual to the body of the population as a whole. The accompanying reversal in the exercise of sovereignty from the power to ‘make die and let live’ to ‘make live and let die’ underscores the denial of legal and other protections ordinarily applying to those constituted as bios or as citizens and therefore subject to the power to make live. It is in this sense that immigration detention can be understood as the manifestation of the imperative to make some (such as citizens) live well and to simply allow others, who are deemed a threat to the sovereign, to languish or die.  

This is not to say that territory loses all significance. Rather, territorial control figures as a means of ordering and classifying which lives are to be fostered, and which are to be cast out. Significantly, for Agamben, biopolitics denotes the form of government which emerges when biopower intersects with a state of emergency, creating ‘zones of exception’. Accordingly, a key refrain in the literature on mandatory immigration detention has been that it is best understood through the deployment of Agamben’s theorisation of the ‘exception’ to the rule of law in times of emergency, as the embodiment of

295 For Foucault, this is also understood as biopower.
297 In Human Rights, 51 – 53, Lucy Fiske argues that those held in immigration detention are not simply “bare life,” but have agency and capacity for resistance, which is more adequately explained through Foucault’s analysis of power.
exceptional spaces for those on the margins of (or indeed outside) political life. Immigration detention centres are thus read as symptomatic of Agamben’s argument that crisis – recalling the ministerial language of emergency and interim measures endorsing mandatory immigration detention in 1992 – both enables and necessitates the separation of those who constitute no more than ‘bare life’ (those without political or legal status) from those who enjoy citizenship.

This is not simple coincidence. Agamben’s analysis renders visible the juridical forms which make the camp possible, through the division between political life (biōs) and bare life (ζωή), providing an assurance of government control. In doing so, he invites us to think carefully about how the camp is produced as the norm. If biopolitics is the contemporary mode of governing, then the organisation of life in this way is crucial to the demonstration of political power. It facilitates the normalisation of exceptional spaces – that is, the ‘camp’ – as the nomos of modernity, of which the Holocaust camp is an extreme example. In Agamben’s analysis, the camp reveals the form that law takes under conditions of modernity in which those in detention constitute a threat. Accordingly, they are cast out as a diminished form of humanity, lacking legal and political personality. The camp is this space without the ordinary rule of law, where those considered a threat to the state are excluded, while remaining under its control.

I will examine selected contributions which adopt this approach when I consider

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300 Agamben, Homo Sacer, 15, 18.

301 I note here the distinction between sovereign power from biopower. The former enforces a distinction between those exiled, and those included whereas the latter produces a blurring in these categories, and in so doing, produce an anxiety about who might be excluded/included in and outside of law. As Grinceri observes in “TheArchitecture”, sovereignty excludes whereas governmentality enforces compliance. See Agamben, Homo Sacer, 177.
the limitations of a humanist reading of immigration detention. For the moment, I note that we can appreciate the force of this argument in relation to mandatory immigration detention centres, as exceptional spaces where the ordinary rule of law has dissipated through restrictions to judicial scrutiny, poor access to legal advice, diminishing procedural fairness and the arbitrariness of detention. The excision of territory from Australia and from the jurisdiction of specified provisions of administrative law has been characterised as the manifestation of this mode of government. Immigration detention centres thus are said to function as zones of exception which are both inside, yet outside, political and legal space.

**Postcolonial and settler colonial studies**

However, critical scholarship has not been confined to these analyses. Immigration detention centres have elsewhere been described as sites which contain or ‘warehouse’ those who exist on the margins and who are superfluous to the economic sphere. More significantly for the purpose of this thesis, a history of settler colonialism has been regarded as contributing to contemporary patterns of exclusion in the form of immigration detention. Australia’s isolation as an island continent, with ‘boat arrivals’ represented as ‘hordes’ or ‘floods’ threatening to overwhelm ‘our’ shores is linked to prior governing practices under colonial governments, as I noted in chapter one. A key form of critique acknowledging this history is that of postcolonial and settler colonial studies, in which immigration detention centres are observed as this reiteration of an earlier, colonial violence enacted spatially, as discussed in chapter one.

Detention centres figure within this history as the legacy of exclusion and the ‘spatial segregation of groups,’ posed by postcolonial theorist Perera as

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302 Jenkins, “Bare Life” 82 – 83. What Jenkins argues here is that a recourse to human rights cannot be relied upon since law is inextricably bound to the political formations which give rise to immigration detention, as a space of exception.


symbolically and concretely connected to places of marginalisation in the form of missions, internment camps and quarantine stations in Australia.\textsuperscript{306} For example, Perera highlights the prior violences associated with the immigration detention centre at Woomera, in central Australia. Observing that the centre is the site of both the dispossession of indigenous land, and of ballistic missile testing under cooperative arrangements between the US and Australian Governments, Perera writes that the:

\begin{quote}
very ground carries a tortured and telling territorial history where colonisation, sovereignty, globalisation and international defence meet in profoundly uncomfortable ways. Itself, already colonised, making traditional owners alien, Woomera forms part of a connected history of the use of inland Australian military and defence purposes.\textsuperscript{307}
\end{quote}

This history resonates in the present. Drawing on Angela Davis’s work on the global prison network and its historical antecedents, Perera’s discussion elicits an appreciation of the intimate nexus between the camp and the prison as sites of historically racialised exclusion.\textsuperscript{308} Significantly, for Perera, it discloses an underlying racialisation, which Foucault argues is so central to biopower and which emerges from earlier practices of ritualised, colonial patterns of control over the racialised ‘other’ in the Australian setting.\textsuperscript{309} The persistence of these forms reveals historical continuities in which we can see the camp and the prison brought together. Despite any variance in the specific purpose and categories of person underlying the use of the camp, political scientist Amy Nethery remarks upon the:

\begin{quote}
striking consistencies in carceral policies and their implementation. Each specific example of administrative detention functions to regulate and control social and geographic boundaries in Australia.\textsuperscript{310}
\end{quote}

\begin{itemize}
\item[\textsuperscript{306}] Perera, “What is a camp.”
\item[\textsuperscript{307}] Ibid.
\item[\textsuperscript{309}] Perera, “What is a camp.”
\item[\textsuperscript{310}] Nethery, “Immigration Detention,” 78. See also Bashford and Strange, “Asylum-Seekers and National Histories of...
Immigration detention is thus attributed to an existing genealogy of territorial control in Australia, in which the excision of territory from the Migration Act as a normalised practice is read as both an intensification of these patterns and illustrative of persistent anxieties over the securitisation of the border.  

Punitive concerns

In tandem with the generalised shift towards a biopolitical mode of governing, other readings of immigration detention point to the increasing exercise of regulation and regularisation over human life, including that of the ‘unwanted’. For Galina Cornelisse, the camp excludes primarily not through expulsion but confinement, in which the contemporary use of detention substitutes removal for practices of containment as an exercise in sovereign control. Importantly for this thesis, Crock and Ghezelbash have argued that this encompasses a spatialised retreat from responsibility by government for those at the margins insofar as distance from the effects of government policy diminishes a sense of being implicated in the harms that the policy produces. The carceral features noted in the literature are especially noteworthy given the dissonance between the purpose and effect of this policy; immigration detention is enabled under administrative law yet communicates an unequivocally punitive message.

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312 Marrus, “The Unwanted.”


314 Mary Crock and Daniel Ghezelbash, “Due process and rule of law as human rights: The High Court and the ‘offshore’ processing of asylum seekers”, Australian Journal of Administrative Law 18 (2011): 102. I note that Bauman would concur with this reading. See Modernity and the Holocaust (Cambridge: Polity Press, 1989). For Cornelisse “Immigration Detention”, detention as containment or confinement also offers up possibilities to make appeals to the jurisdiction of the sovereign state. In Australia’s case, this is undermined by the use of offshore processing, which is a shift towards exclusion, not confinement. Containment rather than expulsion is nonetheless reflected in Australia’s narrow compliance with the non refoulement obligation: technically speaking Australia does not refoule refugees. Rather it circumscribes the terms of their movement through zones of confinement.
Containment as a form of spatial control is also read as going beyond the ‘mere’ loss of freedom in detention.

The form (and place) of containment are central to the message of punishment and deterrence which underscores it and its violent intentions and effects. For example, drawing on Foucault and Debord, cultural theorist Joseph Pugliese argues that the design of mandatory immigration detention centres in Australia (and specifically at Christmas Island) reveals a merging of panoptic, surveillant techniques with those of the spectacle.315 This merging of what might be otherwise understood as contradictory processes is effected through the visibility granted by the grid wire fence.316 According to Pugliese, this acquires a special significance for the management of ‘unlawful’ refugee arrivals; the spectacle rendered visible by the grid wire enables media (public) witnessing of ‘necessary suffering’ of refugees while the panoptic structure of the detention centre communicates a message of control and punishment upon those detained, and those witnessing detention.

This effect is reliant upon the imputation of criminality which an image of refugees within a prison-like setting generates. Combining the logics of the spectacle and the panopticon works to reassure an Australian public that government is meting out due punishment.317 In the same move that suffering can be understood as the unavoidable and ‘necessary’ result of refugee unlawfulness, it diminishes direct responsibility for the harms (violence) which might ensue from government policy.318 This is not, then, simply a spatialised retreat from responsibility, as noted above, but one which is achieved through the discursive construction of criminality. It is unsurprising then, that the penal

316 Ibid., 206 – 207.
317 Ibid., 212, 216.
318 These centres come to constitute a type of ‘no-mans-land’ that do not deem refugees to have arrived under legislation passed in Australia. The centres are in ‘Not-Australia,’ according to Perera, “What is a camp.”
aspects of the centres have drawn attention from critical criminologists, who argue that the interpretative tools of the discipline sharpen our appreciation of the punitive implications of mandatory immigration detention centres.

I stress the connections between a prior and contemporary pattern of exclusion and control in a penal settler colony such as Australia, because they have implications for the conduct of office insofar as they point to an underlying orientation towards punitive control. Significantly in the Australian context, immigration detention embodies strategies of regulation, incarceration and surveillance characteristic of penal institutions. Criminological analyses are attentive to the workings of this setting. For example, this form of regulation is most easily applied to ‘unauthorised maritime arrivals’ when they are discursively constructed as criminal, or at least as the risky or deviant other.319

This work delivers important insights into the normalisation of the largely uncontested classification of unauthorised boat arrivals as ‘unlawful’ and the justification for their suffering which follows from this. Importantly, as Pickering and Lambert have observed, the alleged criminality of ‘boat arrivals’ intersects productively with the discursive power of the language of deterrence, punishment and criminality.320 Government policy on migration can effectively utilise this language of criminalisation because it is already comfortably familiar in the social imaginary, emerging as a ‘convincing’ narrative.321 These discursive techniques appear increasingly crucial to the securitisation of the nation against uncertainty and vulnerability, necessitating more rigid systems of social control against perceptions of external threat and facilitating the blurring of criminal and administrative processes, as I will show in chapters three and four.322

321 Ibid., 77.
Much of the research has encompassed a focus on immigration detention as a breach of human rights, described by some as a form of state crime at the border.\textsuperscript{323} This research provides a reading of immigration detention through the conceptual lens of state crime, as a discrete criminological perspective.

Emerging criminological research is addressing the concrete effects and everyday institutional practices and forms of conduct in immigration detention, as I will describe below. Some of those writing within settler colonial studies have likewise attended closely to the concrete institutional and structural characteristics underscoring a policy of mandatory immigration detention, as I have noted in here and in chapter one. I will return to criminological scholarship in section three of this chapter, where I address its contributions to an institutional reading of immigration detention. At this point, I wish to stress that the critical literature outlined above implicitly challenges what I term a humanist approach for its failure to interrogate the ‘deeply problematic aspects of the sovereign power of the nation-state’,\textsuperscript{324} and to acknowledge the discursive and classificatory strategies which underpin the power to exclude. Much of the literature, therefore, provides important insights into the weaknesses of a predominantly human rights-based approach, which I will discuss below. Critical scholarship has highlighted the violence which characterises immigration detention centres and the subtly discursive way that this violence is obscured by the language of emergency, exception and necessity. Unmasking this violence is crucial in understanding how the suffering of others can be both justified and rendered invisible. At the same time, until recently, much of the analysis has overlooked the concrete complexities of everyday life in the centres. Neither has office has been assessed in this work as a source of ethical


\textsuperscript{324} Jenkins, “Bare Life,” 79.
responsibility, nor has there been a detailed analysis of the ways in which this policy has ethically degraded office.

THE LIMITS OF CRITIQUE: TOWARDS A MORE GROUNDED ANALYSIS

As noted above, the critical scholarship has generally tended to draw on Foucault and Agamben, often delivering an abstract reading which fails to attend to the complexities of this immigration detention, let alone to its institutional forms and characteristics. For Bosworth, these analyses overlook the ‘texture of the institutions’ and deliver an unproblematic reading of bare life.325

A number of analyses are contesting the abstraction of these readings of Agamben and Foucault, as well as pointing to the limited value of assuming that those in detention can be conceptually reduced to ‘bare life.’326 In this vein, Joseph Pugliese’s analysis of immigration detention complicates and disturbs our understanding of life in these centres. Pugliese reads those otherwise conceptualised as ‘bare life’ as expressing their trauma through their body, as the only site remaining of resistance.327 Acts of resistance such as lip sewing are, he says a form of testimony.328 However these acts are complex, read by Pugliese, as an ethical command in Levinasian terms, ‘voiced’ through the images of self harm. The loss of voice which is paradoxically communicated through the sewing of lips – ‘I speak, but cannot be heard’ – reflects back to the nation-state an image of its own violence upon the bodies of detained refugees. It is protest as bare life. It is an ethical command to ‘hear me’ which is executed in the only manner of political protest available – the body. Yet while this reveals the persistence of humanity, it also, paradoxically, signals the

moment in which law has suppressed this humanity.\textsuperscript{329}

In contrast, ethnographic research has shown that however contingent and fragile, relations can emerge in interactions between ‘detainees’ and officers, with some staff attempting to make life as bearable as possible for those detained, their actions underlined by ‘respect and fairness’ towards those facing an uncertain immigration status.\textsuperscript{330} This body of work contests the wholesale view of the faceless bureaucrat or migration officer who fails to recognise the humanity of those detained.\textsuperscript{331} Asserting the need for a more nuanced appreciation of everyday institutional life in immigration detention settings, Bosworth observes of her fieldwork in the UK:

Much of what I witnessed and was told about detention was negative. Some of it was shocking. Detainees and staff spoke frequently of depression, frustration, sorrow, fear and anger. They were, for the most part, unhappy; and detention centres were, without exception, vexing places. At the same time, however, many staff members sought to alleviate the anxieties of those whom they hold. Detainees also found some relief in these places…\textsuperscript{332}

A number of criminological and other studies into immigration detention have similarly pointed to this capacity for care and reflection which supports respectful human relations, despite the institutional setting.\textsuperscript{333} Aside from the important interventions mentioned above, critical scholarship tends not however, to address the ethical possibilities evident in the everyday practices and diversity of this setting. This is even while, for example, Foucault offers a conception of human life which refutes the abstraction of the liberal subjects,
asserting the centrality of the body as ‘grounded in a social and political community.’ I will examine these more closely in my discussion of the limits of humanist responses. I begin by outlining key elements of a humanist approach in contemporary analyses of immigration detention in Australia.

A HUMANIST APPROACH

A humanist approach is underscored by an assertion of humanity, whether through law, or through the exercise of compassion, a cosmopolitan ethic and the affirmation of the singularity of the other through personal narrative. I begin this discussion with a focus on human rights commentary and analysis in which a turn to law as the authoritative source of rights is seen as pivotal to the retrieval of human dignity and protection.

Human Rights

Human rights violations in mandatory immigration detention have been extensively documented with specific attention to the human rights conventions and obligations which Australia is legally compelled to uphold. Some of these readings argue that public support for mandatory immigration detention is only likely to shift through appeals to the legal instruments of human rights. A human rights-based approach has typically underlined jurisprudential responses to the limits to judicial review and to procedural fairness which have accompanied this policy, which I will discuss below. Others have pressed for a Bill of Rights to provide a stronger legal bulwark against human rights breaches. For legal scholar Galina Cornelisse, international human rights law

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336 For example, Savitri Taylor, "The Importance of Human Rights Talk in Asylum Seeker Advocacy: A Response to Catherine Dauvergne," *UNSW Law Journal*, 24, no. 1 (2001): 191 – 199. I note that I am not reading legal scholarship as normative per se. However I suggest that much of the human rights-based commentary is underlined by a view that protections can be afforded through human rights as a normative position to take. I also acknowledge much of the human rights-based literature is not confined to legal scholarship, as indicated in the examples I will draw upon in this section of the chapter.

337 Brian Galligan and Emma Larking, “Rights Protection – Comparative Perspectives,” *Australian Journal of Human*
is the optimal source of the destabilisation of territorial sovereignty; debates over state rights are best disrupted by the assertion of individual human rights as an overarching liberal value.\textsuperscript{338} For Savitri Taylor, merely ‘sympathetic frames of reference’ rest on ‘voluntary benevolence’: in lacking juridical force, they also divert attention away from the lawful obligations of states.\textsuperscript{339}

Human rights scholarship has also been pitted against a ‘humanitarian’ position.\textsuperscript{340} For legal scholar Catherine Dauvergne, a humanitarian approach has more ethical force than appeals to legally codified rights.\textsuperscript{341} Like Antigone appealing against the ethically inferior law of the King so that her brother may be mourned as a life worth grieving under God’s law, Dauvergne appeals to a higher order law, in the form of a humanitarian ethic. Yet, while often pointing to law as the source of rights, human rights scholarship also derives from foundations beyond the strict letter of the law itself and forms part of a broader liberal narrative; as Jenkins observes, human rights:

\begin{quote}
lie at the core of the liberal-democratic aspiration to secure equal treatment for all under the rule of law . . . they appear to combine humanitarian, juridical and political concerns almost seamlessly.\textsuperscript{342}
\end{quote}

However while Taylor, for example, places a faith in human rights as a source of vigilance over ‘the line dividing good and evil’ in our lawful conduct, Jenkins is attuned to the normalising dynamic of the exception and its power to override human rights.\textsuperscript{343} For Taylor, adherence to law is asserted as both institutionally and ethically significant even while she seems to privilege the legal force of

\textsuperscript{338} Cornelisse, "Immigration Detention."
\textsuperscript{339} Taylor, "The Importance", 196.
\textsuperscript{340} This at the heart of the debate between Taylor “The Importance” and Dauvergne, “The Dilemma of Rights Discourses for Refugees”, UNSW Law Journal 23, no. 3 (2000): 57 –74.
\textsuperscript{341} Dauvergne, “The Dilemma.” For humanitarian approaches, which were especially prevalent after the Tampa Affair, see Frank Brennan, Tampering with Asylum: A universal humanitarian problem, (St.Lucia, Qld: UQ Press, 2007) and Michelle Dimasi and Linda Briskman, “Let Them Land: Christmas Islander Responses to Tampa, Journal of Refugee Studies, 23, no. 2 (2010): 199 – 218. For an analytical response to the legal and political implications of this incident, see Peter Mares, Borderline: Australia’s response to refugees and asylum seekers in the wake of the Tampa (Sydney: UNSW Press,2002).
\textsuperscript{342} Jenkins, “Bare Life” 80.
\textsuperscript{343} Ibid., 82.
rights over their ethical force.\textsuperscript{344} Jenkins is instead concerned about the assumption that such vigilance will make a difference under contemporary conditions of modern sovereignty.\textsuperscript{345}

**Medical studies, suffering and social histories**

In contrast to a turn to human rights, research undertaken from the perspective of suffering has attempted to draw out the concrete and individual effects of immigration detention, either through personal narrative, or through detailed, longitudinal studies of the mental health of those who have been detained. As already noted in chapter one, studies into the mental health impact of detention have identified a consistent nexus between detention and anxiety, depression and suicidal ideation. This has been documented by health researchers over two decades, with conditions, uncertainty and isolation conclusively demonstrated as contributing to high rates of mental illness.\textsuperscript{346}

While affirming the findings of health sciences research as a measure of the suffering experienced in detention, others have sought to deploy personal narrative and story as a way of highlighting the personal experience of suffering.\textsuperscript{347} For example, in interviews conducted with men who had been detained at Curtin Immigration Detention Centre, sociologists Fleay and Hartley found that the detention experience was both profound and long lasting, with the effects on the men extending well beyond their release.\textsuperscript{348}

Narrative enables the suffering of those detained to come into view and helps to


\textsuperscript{345} Jenkins, “Bare Life,” 82, 88, 90.

\textsuperscript{346} For example, Steel and Silove, “The Mental Health” and Steel et al., “Two year psychosocial and mental health outcomes for refugees subjected to restrictive or supportive immigration policies,” *Social Science and Medicine*, 72 (2011): 1149 – 1156; Louise Newman, “Seeking Asylum.” Importantly, the findings of this research strongly suggests that the punitive setting of immigration detention, including the use of surveillant techniques, are intricately connected to suffering.

\textsuperscript{347} For example, see Julian Burnside, ed. From *Nothing to Zero Letters from Refugees in Australia’s detention centres* (Melbourne: Lonely Planet, 2003); Heather Tyler, *Asylum: Voices Behind the Wire* (South Melbourne: Lothian Press, 2003); Rosie Scott and Thomas Keneally, eds. *Southerly (Another Country)* 6, no. 1 (2004).

\textsuperscript{348} Caroline Fleay and Lisa Hartley, “Released but not yet free: Refugees and Asylum Seekers in the Community after Long-Term Detention” (Perth: Curtin University, Centre for Human Rights Education, 2012).
disrupt the construction of refugees coming by boat as undeserving ‘queue jumpers’: their individual humanity can appear in sharper focus through these stories. As a grounded account, these narratives contrast with the abstraction of human rights law, while revealing the singularity and uniqueness of the other which informs the spirit of human rights.

Much of the humanist research documenting the stories of individuals in immigration detention comprises social histories, reflecting ‘a tradition of writing about the lives of oppressed, exploited and marginal peoples whose stories would not otherwise be told’. For Amy Nethery, this is a ‘history from below’ which gives a voice to those otherwise silenced, or can act as an advocacy tool to draw attention to personal suffering. Social histories and personal accounts take a purely legal affirmation of rights to be problematic, though for somewhat distinct reasons from those articulated by critical scholarship. That is, human rights per se are regarded, firstly, as too abstract, eliding the concrete singularity of the other, and secondly, as lacking the ethical force of the immediate and concrete encounter with the other through hearing her voice, or her story. However, there remains a danger that narrative accounts can also have an essentialising effect on refugee identity.

An ethical relation, hospitality and cosmopolitanism

A number of authors have drawn on a cosmopolitan responsibility to the other to contest immigration detention. This work has typically drawn upon an ethic of hospitality. Drawing on Levinas, Pugliese asserts a radical

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350 Ibid., 50.
351 For a discussion of this risk, see Anna Szerényi, “The Face of Suffering.” As noted earlier in this thesis, Szerényi’s work illustrates the risk of “victim” narrative being mediated and essentialised through a colonising and patriarchal lens. Aidani expresses a similar concern about the use of the category of the “refugee” in “Existential Accounts.”
hospitality, in which he poses the voice of the other as a disruptive tool to challenge the privileging of the self, and therefore unsettle our ‘place in the sun’. This asserts the ethical power of the other in which the individuality and uniqueness of those seeking asylum provokes an intensely ethical and intersubjective relation in the face of suffering in detention.\textsuperscript{354} Such a radical encounter is said to undercut the institutional violence of immigration detention by not only returning the humanity of the other to the fore, but by disrupting our enjoyment of our ‘place in the sun’ as encompassing a radical obligation of hospitality.\textsuperscript{355} Such work is underscored by an appeal to responsibility.

However, these and other humanist responses tend to overlook the inevitable privileging of state rights and the rights of those with political membership, over the humanity of those seeking asylum at the border.\textsuperscript{356} Moreover, as Julia Morris and Anne Orford have separately argued, relying on better human rights standards can tend to reinforce, rather than challenge, immigration detention as a way of controlling refugee movement.\textsuperscript{357} I have already noted the failure of human rights literature or advocacy to dislodge the practice of mandatory immigration detention. Moreover, practically speaking, being a rights bearer is dependent upon being declared so in law and on this recognition being bestowed by the state. Against the view that human rights are a reflection of our humanity, I argue that our humanity is instead constituted through human rights: enjoying human rights is dependent on being recognised\textsuperscript{358} as human.

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\textsuperscript{354} Pugliese, “Subcutaneous Law.”

\textsuperscript{355} I gesture towards the work of Emmanuel Levinas here, which I will address in detail in chapter five.

\textsuperscript{356} This is the central point made by Jenkins in “Bare Life.” This observation can also extend to those adopting a Levinian perspective, since the use of his ethic has largely been through the lens of the singular, unique relation with the other. This is notwithstanding Pugliese’s important work in “The Reckoning of the Possibles: Asylum Seekers, Justice and the Indigenisation of the Levinasian Third,’ Australian Feminist Law Journal, 21 (2004): 23–34.


next section, I outline key critiques of a humanist response to show why a turn to responsibility offers a compelling alternative approach, drawing on selected critical literature outlined above, to do so.

THE LIMITS OF A HUMANIST RESPONSE
While rights and responsibility are intrinsically connected, exercising responsibility for those who demand rights can be undermined by the abstract formalism of human rights and by concrete relations of power. Rights are not enjoyed just because we are human. They are conditional upon the willingness of the state to grant them. And, they are conditional upon us being read concretely as a worthy bearer of human rights. Legal obligations are generated once these hurdles are crossed. In the next section, I isolate key explanations for the failure of a humanist approach to infiltrate ‘public or political discourse in any significant way’ in relation to this policy. Although I focus specifically on critiques of human rights, they might equally apply to approaches underscored by humanitarianism or by personal narrative. My central observation is that a humanist reading takes the recognition of humanity for granted; critical scholarship is instead attentive to underlying power relations which unsettle a straightforward understanding of who, or even ‘what’ it is to be human.

The ‘unauthorised maritime arrival’: an unworthy victim
In examining cases of humanitarian intervention by the West, Makau Mutua has argued that the human rights regime operates as a legitimising strategy for intervention in the global south, a strategy which is centrally dependent on what he describes as a ‘triptych’ of victim, savage and saviour. He proposes that the language and pursuit of human rights for the ‘other’ is dependent upon positioning the West as saviour, the victim as the recipient of rights, and the

360 Dauvergne, 'The Dilemma', 57.
culture of the victim as savage. However, refugees who arrive by boat are discursively constructed not as victim, but as illegal, deviant and indeed criminal, and so undeserving of rights. ‘Boat arrivals’ are framed as manipulators who seek to take advantage of Australia’s generosity by ‘jumping’ the refugee queue. In contrast, those who wait in the refugee queue are regarded as morally superior. In Peter Mares view, the attitude of the Liberal Federal Government in 2001 saw unauthorised arrivals as ‘underserving because they lack the virtue of patience.’ This trend complicates Matua’s understanding of human rights by showing that the status of victimhood is not straightforward. A refugee must be the deserving victim. As Anna Szorenyi has remarked, the binarisation of those seeking asylum into the deserving or undeserving, is emblematic of the colonising and paternalistic logic which Matua outlines. Some refugees accumulate more victimhood than others. For human rights to work requires that the other is framed as vulnerable, lacking agency and deserving of rescue by the West. Authentic victimhood is only established on the terms decided by those doing the rescuing.

It is at this juncture that recalling critical readings of immigration detention can help to elicit an understanding of why those coming to Australia by boat to seek refuge are less likely to be construed as the worthy recipients of human rights. Protections ordinarily extended to citizens are lost as an effect of these practices: not everyone is ‘read’ as the legible recipient of rights, and this is especially so for those produced as a threat at the border. In practical terms,

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362 Pickering, “Common Sense.”
367 Mutua, “Human Rights.”
368 Szorenyi, “The Face of Suffering,” and Lisa Malkki, “Speechless Emissaries.” There is a tendency, as Szorenyi observes, for refugee identity to be ‘constructed’ in the abstract, through an idealised image of the needy other. Importantly, she argues that this reflects the persistence of the colonising gaze.
369 Bishupal Limbu, “Illegible Humanity: The Refugee, Human Rights and the Question of Representation,” Journal of Refugee
human rights protections can be deferred or withheld from those who are classified as deviant or criminal. It is not simply that they are classified as unlawful under law, which in itself erases some rights (such as procedural fairness under law); this classification and the punishment which follows are fuelled by the discursive construction of refugees as deviant, criminal or as Nils Christie might argue, as a ‘suitable enemy.’ This move reframes the issue from being a refugee ‘problem’ to a problem of deviance.370

The effectiveness of human rights discourse is thus premised on a conception of the ideal legal subject, which delivers the basis for rights-bearing status.371 The weakness of this premise is most pertinent for those who are either legally or discursively outside the bounds of social and political community. Withholding rights has intensified in a post September 11 environment, in which the othering process has been heightened in response to ‘crisis.’ These developments disclose the fragility of refugee law and human rights law when pitted against domestic political interests in times declared to constitute an ‘emergency.’372 In this context, declaring refugees as risky or deviant others acquires greater significance in minimising their victimhood.

State rights v human rights

Refugees who lack legal recognition of their status are vulnerable without the guarantee and enforcement of human rights which the state delivers to those with legal status.373 In the face of state rights and sovereignty, the human rights of refugees under international law have then been posed as arguably

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372 This was evident in the Tampa affair, with the use of prerogative powers asserted as crucial to border protection in a post September 11 world.

373 See Shaunnagh Dorsett and Shaun McVeigh, on the lawful relations which emerge from status based recognition under law in Jurisdiction. This is even whilst human rights advocates, such as Taylor, nonetheless acknowledge the limitations placed on the enjoyment of human rights by state sovereignty. “The Importance,” 192.
‘so ineffective as rights claims that it might be appropriate not to consider
them as such at all’. Additionally, human rights appear considerably weaker
compared to state rights which have a much more robust legal foundation in a
system of law, such as a constitution. In the Australian case, this has been in ample evidence in High Court of Australia judgements regarding the constitutional validity of immigration detention, as well as in relation to access to procedural rights. The values at stake become the ‘legal values’ of the state and indeed, the rights of the nation. A question we might pose then, is not so much how human rights breaches can be permitted, but how power can be so mobilised in denuding humans of their rights, that any violence against them no longer appears as violence, a point I will explore in Part Two of this thesis.

Accordingly, critical scholarship can provide an institutional focus, although often an undifferentiated one, in which it accentuates the relations of power which diminish the humanity of those detained. It also reveals the violence of the law which facilitates suffering in detention. From a critical standpoint, any privileging of law without interrogating the limits of a law amounts to a misunderstanding of how sovereignty functions. If we read this through Agamben, a turn to law or human rights alone provides a limited guarantee of shifting the terms of the debate because of the likelihood that individual rights are eclipsed by the authority of the state. For my purposes, I show that the literature tends to draw upon Agamben in ways which offer a limited appreciation of the value of office as a site of obligations which might honour human rights, even while the later work of Agamben addresses this.

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374 Dauvergne, “The Dilemma.”
375 Ibid., 61–62.
376 Ibid., 62.
377 I follow Agamben’s observations here, in Homo Sacer, 177.
378 In his more recent works, Agamben considers the origins of the relation between duty and ethics in the western liturgical tradition and in the Aristotelian exercise of virtue, examining the conduct of office in accordance with rules and forms of conduct appropriate to office. Notably, see Opus Dei, and The Highest Poverty: monastic rules and form-of-life, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 2013). Agamben’s readings of Christian and Aristotelian
I want to return at this point to the claims made by Taylor that the key strength of a strictly legal approach to human rights is that it uncovers underlying inequalities in treatment under the law, and therefore is more effective than appeals to sympathetic humanitarianism. Yet, if we cannot be read as human rights subjects, any appeal to human rights cannot be assured of success. As highlighted extensively elsewhere, if we are not recognised as a ‘grievable’ life, then ‘universal’ and inalienable’ rights which are sourced in a natural law tradition will be overridden by the codified law of the sovereign. Emma Larking puts it this way:

one cannot be a full subject of law in a democratic community without also appearing before the law as the bearer of a legally constituted personality.

Access to human rights thus pivots on this question of recognition, as Ngaire Naffine argues. For Larking, the absence of recognition leads to the loss of legal equality, the preservation of which she sees as central to the integrity of law in a liberal system. Instead, refugees have become increasingly subjected to state power and exceptional laws which restrict them from coming under the protection of equality as a liberal principle.

There is thus a fundamental and abiding tension between the expectation that states exercise care and respect for human dignity and that they protect their own territories with whatever force is required, whether through law or otherwise. Individual rights are fragile under conditions of crisis: the demonstration of sovereign control acquires greater urgency and pre-eminence

conceptions of ethics and duty offer an important contribution to an understanding of office, but are beyond the scope of my focus here, where my concern is with the specific elements of responses to ‘unlawful’ arrivals in Australia between 1992 and 2012.


380 Larking, Refugees and The Myth, 135

381 Naffine, Law’s Meaning, 19, 55 – 56.

382 Larking, Refugees and The Myth, 137, 145 – 146.
over individual rights at these times. Accordingly, despite appeals to hospitality as a marker of a cosmopolitan ethic, this is limited by the persistent nexus between sovereign authority and territorial control. For Elaine Kelly, this extends to cosmopolitan approaches. In her analysis, the offer of hospitality by the Howard Liberal Government was curtailed by the invocation of democracy as embodying a concomitant right to exclude. Effectively this suggests, in her view, that democratic states are inevitably communitarian ones.

Importantly, human rights display their ‘impotence’ in the face of contemporary forms of state power, terror and counter-terror, and globalisation. The exceptionality of immigration detention is illustrated by the loss of the most central human right, that of human liberty, which is described as the ‘sharpest technique’ states have available to them in preserving the ‘global territorial order of sovereign states.’ Despite this, it seems that we have little choice other than to turn to law, since ‘[r]efugee law is the sole legal constraint on state sovereignty in regard to people entering territory.’

**Turning towards responsibility**

So, how might a turn to responsibility, as the other side of rights, assist in ensuring that refugee protections are realised? As I have explained when introducing the Australian context in chapter one, the Palmer Inquiry into the wrongful detention of Cornelia Rau and Vivian Solon identified institutional incompetence in its failure to protect an Australian citizen and resident. The report’s findings prompted reforms to the Immigration Detention Network

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385 Cornelisse, “Immigration Detention.”
386 Ibid, 238. Although, as Cornelisse notes, the distinction between a limit on liberty and its withdrawal is not always an easy one to draw.70.
which extensive human rights advocacy and research had failed to achieve. For critical legal scholar Anne Orford, the biopolitical mode of government that this revealed is marked by a tension between the role of the state in implementing a policy of immigration detention, and liberal support for human rights. This sees territorial control privileged over the rights of those at the margins. There are two key points she makes. Firstly, despite human rights advocacy, human rights have negligible persuasiveness for those regarded (as Larking would put it) as ‘beyond the pale of law.’ Secondly, when we make an appeal to government on the basis of human rights for the excluded, it has the effect of reinforcing biopower, rather than challenging it. This is a caution against placing too much faith in human rights; the worry, as Julia Morris notes, is that more humane standards will simply entrench immigration detention as a practice, leading to what she terms the detention ‘improvement complex’.

In her view, ‘international human rights policy and practice are imbricated in the expansion of detention’, effectively endorsing the ‘overlapping bureaucratic, economic and political interests motivating the expansion of migration enforcement.’

Examining humanist responses (and human rights specifically) at some length is significant, given my central claim that a turn to responsibility as an institutional concern demands our attention. Both humanist and critical readings of immigration detention in Australia have not yet addressed this policy from the perspective of the ethical conduct of office as a mode of analysis. In the discussion which follows, I explore emerging research on the institutional settings of migration which endorses this as a productive site of inquiry. This provides a foundation for me to argue for a more grounded, institutional reading of mandatory immigration detention. I will then conclude with a

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388 Larking, *Refugees and the Myth.*
389 Orford, "Biopolitics and the Tragic Subject."
390 Morris, "In the Market."
391 Ibid., 52.
discussion of selected literature on early modern office holding. This will contextualise my approach in moving forward in Part Two of this thesis.

INSTITUTIONAL ACCOUNTS

Turning to institutional readings of immigration detention sharpens an appreciation of three key insights in the literature. Centrally, this is drawn from critical criminological readings as well as from other disciplines such as anthropology and law.392 Critical criminological readings have identified the blurring of the criminal and administrative realms, breaches of human rights as a form of state crime, and the corrosion of democracy under the ‘new penology.’ The emerging, global prominence of detention as a form of border control over forced migration has been posed as intricately connected to globalised inequities and the shifting function of the state under conditions of global mobility and neoliberalism. For others, these global transformations invite a rethinking of penality and migration to uncover what underlines these shifts and to identify elements of commonality and difference between control over forced migration and punishment under criminal law.393

Blurring the purpose of office

As I stressed in chapter one, mandatory immigration detention in Australia has been marked by an evident shift in the purpose of the Department of Immigration and Border Protection from one which is constitutionally administrative to one which is effectively punitive. Criminological research into parallel trends elsewhere has highlighted the consequences of this change. Described alternatively as ‘immcarceration’ or ‘crimmigration’, these trends are marked by an increasing overlap between prisons and immigration detention centres, with migration and criminal law illustrating emerging intersections.394

392 See Hall, Border Watch and McPhail, Nyamori and Taylor, “Escaping Accountability.”
393 For example, see Aas and Bosworth, The Borders and Sharon Pickering and Julie Ham eds., The Routledge Handbook on Crime and International Migration (London: Routledge,2014).
Criminologist Julie Stumpf’s research in the US revealed that this blurring of migration (administrative) law and criminal law (crimmigration) has two key effects. Firstly, those prosecuted for migration breaches are subject to the punitive elements of criminal law without receiving the protections which ordinarily apply under criminal law. Secondly, the absence of procedural protections under migration law is now spilling over into criminal law more generally, so that it is also effectively transforming the criminal justice system. She observes:

Crimmigration law is a developing trend toward integrating criminal justice and immigration systems. This integration tends to generate more severe outcomes, limit procedural protections, and encourage enforcement and adjudication processes that segregate non-citizens.

In another analysis of the North American setting, Jennifer Chacón warns of the normalisation of ‘the ongoing erosion of the procedural rights of these criminal defendants’. She describes the effects of the blurring of the criminal and administrative realms in relation to migration:

Such procedural moves can be framed as nothing more than an extension of long-standing limitations on the due process rights of noncitizens in immigration proceedings. However, it is important not to lose sight of the legal distinctions that separate the criminal from the civil realm. The prosecution of these offenses should not be allowed to reshape the criminal sphere to look more like the less rights-protective civil system where immigration enforcement has typically been centred.

The Australian case differs somewhat from the US example, in that the latter is centrally targeted at illegal migrant workers rather than refugees. Accordingly,
the diminishing protections here flow from the application of administrative, rather than criminal, law. Nonetheless, both share a common punitive turn in the administrative sphere towards forms of incarceration typical of the criminal justice system but without the protections embedded in criminal law. The normalisation of this shift in executive authority and purpose from administrative to punitive is a move which is poised dangerously close to the edge of what we might deem acceptable under a liberal legal system. As noted in chapter one, this is reconstituting the way that executive power functions, through the amount of power it allocates to itself and the limits to judicial scrutiny.\(^400\) It thus has a bearing upon how we might ‘think’ with immigration detention as an institutional concern. The blurring of the administrative and the punitive also underscores the institutional dissonance noted by Bosworth in her study of UK Immigration Reception Centres. Importantly, these manoeuvres cannot be understood in isolation from the substantive shift in how states govern,\(^401\) identified by critical criminologists such as Jonathon Simon, David Garland, Malcolm Feeley and others as a new mode of governing through a criminal model.\(^402\)

**The ‘New Penology’**

For Garland, the imperative to punish which accompanies contemporary neoliberalism is ‘grounded in a new structure of social relations’ described as the ‘new penology’.\(^403\) Social relations have been reshaped by a rise in the allocation of responsibility to individuals and a corresponding withdrawal by the state from

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\(^{403}\) Garland, *Culture of Control*. 

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service provision and responsibility. Garland observes:

The paradoxical outcome is that the state strengthens its punitive forces and increasingly acknowledges the inadequate nature of this sovereign strategy. Alongside an increasingly punitive sentencing structure, one also sees the development of new modes of exercising power by which the state seeks to ‘govern at a distance’ by forming alliances and activating the governmental powers of non-state agencies.404

In the gap that emerges from this retreat from direct responsibility, the role of government is one in which protection by the state assumes critical importance, with punitive responses becoming part of the arsenal of governing. This relies upon the cultivation of fear as a governing resource. It facilitates more rigid systems of social control against external threat, exemplified in the emergence of the ‘regulatory-punitive state’ which, while typically directed at the ‘enemy within’, has nonetheless been extended to the foreigner.405 As a way of ‘governing’ migration, it similarly reassures the populace that ‘something is being done’ at the border.406 As Leanne Weber has pointed out, the shift towards this new penology is characterised by an ‘actuarial mentality’ to manage risk through ‘surveillance and preventative measures…targeted at risky groups identified by statistically derived profiles, coupled with the use of prison to incapacitate, rather than to reform or deter.’407 Control figures crucially in this shift.

For Garland, Simon and Feeley, the increased value of punishment is derived from this message of protection and control.408 This provides a compelling explanation of the persistence of a policy of mandatory immigration detention in Australia, despite sustained objections to the suffering which it produces. And it underscores the intention and effect of the carceral architecture of

404 Ibid., 173.
406 Garland, Culture of Control, 132.
408 This is notwithstanding variations in the theorisation of the new penology in the literature.
immigration detention centres which I have pointed to earlier. The benefit for
the state is that it is able to reinforce its authority as valid and legitimate. In
this process, ‘[t]he politicisation of crime control has transformed the structure
of relationships that connects the political process and the institutions of
criminal justice.’ In part, this explains the shift from a juridico-legal model to a
juridico-political one, as cultural historian Jon Stratton observes. The latter
alters the lawful foundations of society through greater proximity between law
and executive authority and the corresponding attenuation of the relation
between law and judicial authority. The expansion in executive power that this
has produced has also resulted in a ‘narrowing of debate and a striking
convergence of the policy proposals of the major political parties’.

The threat which the new penology centres on is the ‘shared’ or ‘suitable’ enemy,
in Christie’s terms: the political confluence noted above is thus an effect of
the need to demonstrate solidarity when faced with a shared enemy. For Garland
and others, this is (as noted above) indicative of a shift in social relations which
positions those who are criminalised against those who are not. Importantly,
however, Weber observes (following Johnston and Shearing) that this shift does
not mark a simple dualism between old and new penology. Rather, the new
penology which is focused on risk and control also deploys traditional forms of
social conservatism such as an emphasis on law and order. The emergence of
policies marked both by actuarialism and punishment work in tandem. Punitive control and risk control intersect in a neoliberal setting of increasing
individualisation and global threat to produce a distinct mode of governing.

An accompanying withdrawal by the state for responsibility for harm intensifies

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409 See Grinceri “The Architecture” for his discussion of the function of design and aesthetics for social and political ends,
including architecture as a discursive tool in the management of populations, where he analyses the design of
concentration camps and Australian immigration detention centres. Importantly, Grinceri points to the way in which
design and space communicate a message of exclusion.

410 Stratton, *Uncertain Lives* 143.


412 Weber, “Policing the Virtual Border”, 78.

413 Ibid.
under these conditions. The punitive shift this effectively entails is constitutive of both social and institutional relations to the extent that the appearance of ‘institutional legitimacy’ as well as bipartisan consensus, has:

allowed successive governments to evade responsibility for the systemic and extensively documented abuse within detention centres by employing elaborate techniques of denial . . . 414

In the Australia, the effects of this punitive turn are evident in the transformation and expansion of executive power under a policy of mandatory immigration detention and in the contracting out of the operation of the centres to private companies, which constitutes a form of governing ‘at a distance’. 415

These shifts affect how office is conducted and the sorts of practices that office holders in the institution of migration adopt, or avoid. In short, the withdrawal from responsibility by the state becomes achievable through the substitution of departmental responsibility with the responsibilisation of non-citizens. 416 Weber and Pickering’s 2014 research shows that coercion and control no longer emanates directly from the state, but is exerted indirectly through ‘intent management’ to create a confluence between government policy and the intentions of refugees, for example. In simple terms, this sees government facilitating conditions and environments which are sufficiently challenging and inhospitable that they induce refugees to either ‘voluntarily’ elect to be returned to their country of origin, or refrain from making the attempt to reach Australia in the first place. 417

This creates the illusion that the state is governing at a distance, enabling it to avoid responsibility for any harms that a policy of ‘intent management’ produces. In actuality, the state actively manipulates the intentions and actions

416 Ibid., 18.
417 Ibid., 22 –24.
of refugees by encouraging individual actors to give effect to state policy as a personal *choice*. At the same time, Weber and Pickering show that such a move fosters the capacity for government to deny responsibility for any individual decisions to return. This signals the evolution of ever more diffuse and complex patterns of irresponsibility practices.418 Moreover in a recent analysis of accountability practices, McPhail, Nyamori and Taylor found that the institutional setting, practices and obligations which characterised the privatisation and off-shoring of immigration detention, reveal the tension between control and responsibility when services managing immigration detention are contracted out and exercised in sovereign territories outside Australia.419

**Immigration Detention and the State**

The ability of the State to retreat from responsibility for harms of its own making is indicative of its full range of coercive powers. We can see one effect of this in the normalisation of mandatory immigration detention since its inception, and the range of harms produced in this setting. We might expect that practices and forms of conduct in the institutions of liberal democratic societies reflect the meeting of obligations, rather than their deferral, denial, or deflection to others. This is a critical concern for this thesis given that the disavowal of responsibility reveals a shift in how the state governs, and to what ends.

A state crime approach thus provides an important critical lens, since it shifts the focus back to the culpability of the state in relation to the harms it produces. With Pickering, Grewcock emphasizes that human rights breaches, and the use of punitive techniques by administrative office together comprise institutional and normative deviance, as the markers of ‘state crime.’420 For both of these

419 McPhail, Nyamori and Taylor, “Escaping Accountability.” This is notwithstanding the attention in this research to conduct as a form of accountability.
authors, these shifts away from responsibility are enhanced by the privatisation of immigration detention which go hand in hand with the privatisation of prisons and encourage the blurring of distinctions between immigration detention centres and prisons. As a phenomenon, these prison ‘camps’, says Orford, ‘offer major business opportunities for the global detention industry’ at the same time as they enable a withdrawal, at least in part, of government responsibility. Similarly, Grewcock has noted that the legal devolution of ‘detention arrangements’ has assisted ‘the Australian Government to try and avoid responsibility for them.’

The accompanying devolution of state responsibility for harms has impacted on those working in these settings. More recently, criminological work has examined the concrete and everyday complexity of immigration detention centres experienced by those working and living in the centres. Others have undertaken fieldwork and participatory research to develop a deeper understanding of the practices and relations which characterise these settings, including research into the way that those in office manage their roles in this setting. As an example of this, Weber’s research among British port officials uncovered what she saw as surprising results. Expecting to find officials who would present strong and unwavering justifications for detaining unauthorised persons, she instead discovered a much more nuanced, complex account of office, in which migration officers commonly exercised discretion in their roles. Importantly, Weber’s research suggests that office is not inevitably bereft of ethical possibilities, nor can it be homogenised into a realm

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421 See Grewcock, “Slipping through the Net” and Orford, “Biopolitics and the Tragic Subject.”
422 Serco which has the contract for Australia’s immigration detention centres, also manages prisons, as does other companies like Wackenhut. For a brief comment on the global prison network, see Davis, “Masked Racism.”
423 Orford, “Biopolitics and The Tragic Subject”, 214.
424 Grewcock, Border Crimes, 204, footnote 397.
426 Bosworth, Inside Immigration Detention.
427 Weber, “Down that Wrong Road” and “The Detention of Asylum Seekers.”
dominated so much by role responsibility that the capacity for an ethics of office marked by care, impartiality and proper conduct is diminished. This is central to the claims made in this thesis that institutional life is more complex than is commonly proposed in critiques of state violence. This is notwithstanding my accompanying observations that the harms of immigration detention constitute a form on state crime, as described above by Grewcock. While this thesis speaks to the literature on state crime insofar as it highlights the state as a source of harm, it offers a more complex reading of state complicity in the perpetration of injustice, by uncovering the possibilities within institutions for complex ethical responses. This indicates that even in the midst of state-sanctioned violence, some of those working in these settings also struggle with the harms which they witness. My aim in this thesis is thus to describe how the withdrawal by the state from responsibility of harms of its own making, strains the capacity of office holders to meet their obligations.

To elaborate, Bosworth’s detailed ethnography of immigration removal centres in the United Kingdom uncovered them as sites of ‘institutional dissonance’ in which an obligation of care for those being detained exists in tension with a potent message of punishment and control. Rather than task division and fragmentation inevitably displacing ethical responsibility, Bosworth’s research suggests that the impoverished exercise of office in these settings is instead the effect of ‘split governance’ and ‘institutional dissonance.’428 This is marked by confusion over role, the diffusion of responsibility and a distortion in the purpose of the office of migration. As she observes, many migration officers were disturbed and unsettled by the trauma and suffering they witnessed, regarding themselves as ethically implicated in witnessing life in detention. Alexandra Hall’s fieldwork research similarly demonstrates that while much of the everyday experience of detention is marked by practices of resistance and

428 Bosworth, *Inside Immigration Detention.*
control, corporeal and affective relations between detainees and officers also emerge. She attributes these moments of affective disruption of an otherwise punitive relation to the potential of a cosmopolitan, ethical response.\textsuperscript{429} Yet relying on these moments of affect harbours a risk that ethical conduct is reduced to random events. I emphasise that I am instead interested in how the foundations of office might support rather than undermine human dignity.

Importantly, the institutional readings of Bosworth, Weber and Mountz take us away from interpretations drawing on Agamben’s paradigm of the exception and the camp, which tend to assign an equivalence between the Nazi concentration camps, such as Auschwitz, and immigration detention. As Bosworth and Mountz have argued, we need a better understanding of the role and actions of the ‘migration officer’ in attempting to comply with the demands of their job, often in difficult and ethically fraught circumstances: many of those in positions of office conduct themselves in ways that resist the notion that those detained are regarded as no more than ‘bare life’.

I push for an alternative understanding of mandatory immigration detention which enables an appreciation of the forms of ethical conduct which are denied under this policy, as an institutional concern. In what follows, I begin to address mandatory immigration detention as a story about office. This delivers an insight into the concrete effects of this punitive turn, as well as into how those in office have responded to it.

I turn firstly to jurisprudential accounts which deliver an appreciation of this as an exercise in responsibility which is grounded in law as the source of obligations.

**Jurisprudential Accounts: Refugee Law**

‘Administrative’ immigration detention has been subject to extensive analysis...
centering on an analysis of the human rights implications of this policy, as well on relevant case law regarding its constitutional validity. Included in its sight has been the failure to afford procedural, legal protections, such as the right to *habeas corpus*, the right of an appeal process and access to legal advice. In contesting the lawfulness of ‘administrative’ detention, such accounts have drawn on UNHCR guidelines and the Drafting Notes for the Convention. A number of these readings therefore conclude that the Convention must be read in conjunction with other human rights treaties which have a bearing upon treatment of those in detention, both to deliver ‘normative consistency’ and to ensure that its full meaning and heritage is appreciated.430

The aim of refugee law jurisprudence has typically been to recover a complex and dynamic interpretation of refugee law that will most effectively deliver refugee protections.431 With some important exceptions, key concerns have accordingly centred on how to make refugee law work better, in ways that deliver on its promise and are faithful to its original intention, that is, the spirit of the law.432 A key focus has been on harnessing refugee rights more solidly to law to bolster their enforceability.433 Those adopting this position argue that the problem does not lie with refugee law *per se*, but with a failure to commit to its effective interpretation and enforcement.434 While there are intersections between these readings and the human rights scholarship addressed earlier, I distinguish between the two on the basis that the jurisprudence on

432 See Hathaway and Foster, *The Law of Refugee Status* 11, where the authors argue for greater flexibility in the implementation of the Convention. See also Guy Loescher’s argument that the Convention is underpinned by a charity model, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (Oxford: Oxford University Press, 1996). Others, such as Larking, *Refugees and the Myth* and Tuitt, “Rethinking”, adopt an explicitly critical reading of the political, legal and discursive construction of the refugee definition and of “refugeehood.”
433 Guy Goodwin-Gill and Jane McAdam, *The Refugee*.
refugee law typically reads this as a document of responsibility and obligation.\footnote{See Kneebone, Refugees,10, in which she remarks on the significance of the Convention as a treaty of responsibility, as both a legal and an ethical obligation. She stresses that this marks a point of contrast with migration law insofar as the latter does not rest on an ethical commitment.} I make a distinction here between this jurisprudence and an approach such as that advanced by Savitri Taylor insofar as this work emphasises responsibility over rights. That said, there are similar criticisms which can be advanced of the claims made in this work. As Goodwin-Gill remarks, there are more than adequate provisions existing in refugee law for states to evade, defer or deny their obligations.\footnote{Guy Goodwin-Gill, “The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations,” UTS Law Review 9 (2007):33.}

Attention must therefore be devoted to an analysis of why the shift away from rights is occurring, and of the actions of states, and their obligations under law.\footnote{Ibid., 29.} In light of the offshoring of Convention obligations under the Pacific Solution Mark 2, Goodwin-Gill emphasises that this raises a ‘compelling question’ about the exercise of protection as a responsibility.\footnote{Ibid.} A failure on the part of signatory states to the Refugee Convention to follow through on a responsibility already committed to, reveals an absence of ‘good faith’.\footnote{The Vienna Convention on the Law Treaties, opened for signature May 23, 1969. 1155 UNTS 331 (entered into force January 27, 1980). This Convention asserts ‘good faith’ as a principle of international law.} At the moment that the state violates refugee law, then it is responsible for that violation, and it cannot separate action from responsibility:

no state can avoid responsibility by outsourcing or contracting out its obligations, either to another state, or to an international organisation.\footnote{Goodwin-Gill, “The Extraterritorial Processing”, 33 – 34. Hathaway has similarly argued this. See also James Hathaway and Michelle Foster, The Law of Refugee Status, 33 – 36.}

This includes the establishment of offshore ‘processing’ detention centres. Hathaway and Foster have similarly observed that:

[S]ome states have sought artificially to circumscribe the extent of their jurisdiction as a means of avoiding their duty to honour refugee rights…ranging from the establishment of fictitious ‘international zones

\footnote{Ibid.}
from which arriving refugees have been unlawfully expelled without consideration of their status, to efforts to ‘excise’ parts of territory for migration control purposes.441 Australia’s policy of offshore processing signals an attempt to divert the responsibility which it has accepted as a Convention signatory, or to do ‘indirectly what it is not permitted to do directly’, even while this cannot be diluted under the terms of its commitment to the Refugee Convention442 These readings warn against states overstepping the mark, especially since indefinite detention as a form of deterrence is ‘unlikely to be either legitimate or humane.’443 For this reason, objecting to indefinite immigration detention amounts to an appeal to principles which are much ‘weightier’ than those accessed under the right to ‘legitimate exceptions’ in the Refugee Convention.444 These are duties which are complex, cannot easily be traded away with impunity and are therefore of a higher order. In short, the deprivation of liberty of an individual and the withdrawal of refugee protection take ethical precedence over the right of the state. This is a duty the state has to those seeking refuge.445 The Refugee Convention is, therefore, a way of holding states to account and so amounts to an assertion of responsibility which is incumbent upon states, especially in those which either ‘deny protection’ or ‘recognition as a person under law’, undermine human dignity, or who or ‘seek to avoid censure by operating out of sight of the law or by outsourcing practice to profit-driven entities.’446

As already noted, refugee lawyers and scholars have thus consistently stressed that the Convention is a document of responsibility. For Goodwin-Gill and

441 Hathaway and Foster, The Law of Refugee Status, 27.
442 Goodwin-Gill and McAdam, The Refugee, 457. See also Goodwin-Gill “The Extraterritorial,” 33 – 34.
444 Ibid., 215.
McAdam, the very term refugee ‘imports’ legal obligations. The Convention itself does not stand alone, but sits within an ‘overarching protection framework’ which includes:

refugee law, human rights law, humanitarian law, international criminal law and the law of the sea . . .

There are however serious limitations to relying on jurisprudential accounts as a means of contesting detention, especially when states seem able to exercise their sovereign rights with impunity. Other limitations emerge through the terms of the Convention, such as the narrow definition of persecution. This tends to privilege persecution which can be demonstrated in the public (political) sphere. This limits the potential for protection being granted to those subjected to violence within the home, for example, or those subject to mistreatment, exclusion and persecution on the basis of their sexuality. Women are especially disadvantaged by this. Additionally, and often relatedly, the administrative process accompanying the determination of refugee claims is fallible and often defective. Demonstrating that a person has a ‘credible’ claim can be undermined by pre-formed judgements by migration officers, including whether or not the person is regarded as a reliable witness and whether or not the story is told in a manner which confirms the applicant as appropriately vulnerable and therefore credited with being subject to persecution.

Nonetheless, the jurisprudential literature does offer an important reminder of responsibility as the central lynchpin on which the Refugee Convention rests. It behooves us to take this up in any analysis of the place of mandatory immigration detention in policy and law. I stress these views because, notwithstanding the weak enforceability of responsibility under international

449 See Tuitt, False Images and Spijkerboer, Gender and Refugee Status.
law, I am drawn to it as it sharpens our appreciation of rights to protection as centrally a concern about how we treat others.

The accounts I have outlined above affirm the responsibility of states as a question of law. However, as they stand, they do not deliver the institutional account of responsibility which I am seeking. The jurisprudence on refugee law arrives at this position without ever settling adequately on what it might mean for institutions to ensure that they meet this responsibility. In other words, the obligations are asserted as central to the fulfillment of law, without a corresponding analysis of how a failure to protect in this way might impact on everyday office practices, how responsibility can be nourished, or the sort of thinking that might be needed to retrieve practices of responsibility. I start this work in what follows.

**OFFICE THINKING**

Earlier in this chapter, I have briefly pointed to some of the criminological analyses of detention from an institutional perspective. Some of these have pinpointed the concerns which accompany the transformation of administrative law and function, such as the merging of punitive with administrative purposes. Others have evinced an appreciation of institutional settings as more complex and differentiated than is commonly assumed. However, while they make important contributions, they leave unsatisfied a fulsome consideration of both the ethical potential of office and of the significance of office as a method of inquiry. My aim is to develop an institutional account in which office and ethical concerns are brought together, with responsibility in the foreground.

The ethnographies of immigration detention focus on office (or rather, institutional life) as a site of inquiry: the next section helps to illuminate this as both site and method. In emphasising the purpose of office, I turn to readings of early modern conceptions of office provided by Conal Condren David Saunders and Jeffrey Minson, to provide a foundation for developing an
alternative account of institutional conduct.\textsuperscript{450} I preface this with Max Weber’s account of bureaucratic office, and legal authority.

**Bureaucratic office**

Max Weber’s analysis of the bureaucratic sphere and the delineation between political and bureaucratic office posits legal domination as the mark of modern government, in which the exercise of power and legitimate authority is sourced in law. This has implications for the way office is conducted. Under a political system which is characterised by legal domination, obedience is thus understood as not to a person but to the law, to rules and regulations which represent ‘abstract norms.’\textsuperscript{451} A system of legal authority facilitates impartial and predictable decision making, and enforcement of law.\textsuperscript{452} As a form of ‘legitimate domination’, legal authority denotes the limits of power and imposes a check on bureaucratic abuse of office.\textsuperscript{453} An ethics of office is here understood as the fulfillment of ‘the impersonal duties of office’ and strict adherence to process in a setting marked by neutrality and formalism.\textsuperscript{454} This ethos of office has been widely regarded as an affirmation of obedience to the job at all costs.\textsuperscript{455}

Yet, it is also an expression of vocation. The work of the official is ‘without regard to person’ and so it:

> represents vocational work by virtue of the impersonal duties of office . . . not allowing personal motive or temper to influence conduct, free of arbitrariness and unpredictability . . . following rational rules with strict formality.\textsuperscript{456}


\textsuperscript{453} Ibid., 2 15-16, 20

\textsuperscript{454} Weber, *Essays*, 100.


\textsuperscript{456} Weber, *Essays*, 100.
Here Weber recalls an earlier conception of office which was informed by careful conduct and the absence of personal agenda. He emphasises that a system of legal authority is also characterised by distinctions between bureaucratic and political office:

the kind of responsibility determines the different demands addressed to both kinds of positions.457

In other words, different offices entail distinct obligations, and attributes and skills to meet those obligations. It thus helps to understand office as a sphere of responsibility in which there are lines of demarcation indicating the limit of responsibility and power and denoting particular obligations which apply to specific offices.458 On this reading, an official:

who receives a directive which he considers wrong can and is supposed to object to it. If his superior insists on its execution, it is his duty and even his honor to carry it out as if it corresponded to his innermost conviction, and to demonstrate in this fashion that his sense of duty stands above his personal preference. It does not matter whether the imperative mandate originates from an “agency”, a “corporate body” or an “assembly”. This is the ethos of office.459

A Weberian account of office is, then, centrally concerned with obedience and role division. It is a highly circumscribed and almost mechanistic account of office which has provided the foundation for contemporary critiques of role fragmentation and detachment in office: these critiques regard the bureaucratisation as the source of evil at its most ordinary because of the ethical detachment it produces from the effects of our actions.460 Weber’s observations about role division and the fragmentation which accompany modern bureaucracy, have been taken up as core themes in contemporary critiques of bureaucratic role division and fragmentation. This has dominated

457 Ibid., 114.
458 Ibid., 115.
459 Ibid.
460 See Bauman, Modernity.
how we think with and about office to the extent that there is an assumed, causative relationship between role division and a contraction in ethical conduct in office. The important interpretations of Weber’s analysis by Hannah Arendt and Zygmunt Bauman trace the source of the proliferation of evil acts to the machinery of contemporary government, in which responsibility is dispersed through role division and fragmentation. As they show, the capacity for evil flourishes further under conditions of obedience to legal authority.461

**Ethical conduct: the persona of office**

In what follows, I sketch out some earlier accounts of office which are less dominated by a focus on the technical exercise of office and by rule obedience, and more attentive to the conduct and the *persona* of office.462 By *persona*, I mean the character or personality of office. In other words, when we step into office, it is expected that we occupy that office with a fidelity to the character of that office and are able to exercise the skills appropriate to the *telos* or purpose of office. Occupying office is poorly understood when we remain confined to the frame of obedience and role responsibility as its constitutive feature: its ethical appreciability emerges through the cultivation of the attributes of office which are not necessarily constrained by obedience but are rather more properly informed by the proper allocation and performance of the obligations of office and supported by ethical foundations.

As Saunders comments, early state building was characterised by increasing levels of legislation and adjudication—both ‘juridical activities’—in which ‘legal officers’ were at the epicentre of profound disputes over where to draw the boundaries between the administration of state and concerns of empire and church.463 The use of legal categories is a central component of this shift, in

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461 Bauman, Modernity; Arendt, Eichmann; Veitch, Law and Irresponsibility.
462 Here I rely particularly on Conal Condren’s reading of early modern office. However, I note that Weber was also acutely aware of the need to cultivate qualities which were appropriate to office. The difference lies in Weber’s predominant focus on role division and obedience under a system of rational, legal authority, compared with the personal development of specific virtues, which Condren emphasises in early modern conceptions of office.
463 Saunders, “The judicial”, 140–141.
which categories often performed a beneficial function in ordering responsibilities and delivering protections under law. As the burden of office increased, so there was a need for the codification of ‘their duties, rights and relationships’. This was an attempt to delineate clear spheres of office holding as a way of allocating roles and responsibilities, and there are parallels here with Weber’s account insofar as Weber observed clear distinctions between different offices, notably between bureaucratic and political office. But the description provided by Saunders shows that office in early modernity entailed more than simple compliance to a rule. It also required the development of a persona of office which would give form to the exercise of responsibility, as I have noted above.

Determining the sphere (or parameters) of office and the conduct appropriate to each office informed the development of the persona of office. This entailed the creation of clearly defined offices, in which the scope of obligation was carefully mapped out. In the continual reiteration of duties, those in office were expected to develop competence and expertise. As I have already suggested, particular human virtues were likewise regarded as key elements in the conduct of office, with the result that the persona of office had a moral dimension; the lack thereof would leave office ‘misleadingly incomplete.’ Condren provides an early, pre-modern example of the care and conduct expected of office in even the most ordinary of roles, which provided a template for office holding in early modernity:

The shepherd became a potent image of office in the western world. In polemical and occasional literature his evocation was mechanical, even wearisome. It was vital that the shepherd not abuse his office, neglect his sheep, let them wander haplessly . . .

464 Condren Argument and Office, 57.
465 Ibid., 81.
466 Ibid., 84.
467 Ibid., 19.
The exercise of care and a rejection of neglect and abuse in the conduct of one’s obligations are clearly conveyed in this description. For Condren, office was viewed in early modernity through the lens of ‘care, accountability, telos and limitation.’ That this encompassed a telos indicates that office was constituted through proper purpose and conduct, exercised within such limits. This recalls my earlier discussion in the introduction of this thesis, of the centrality of purpose and limits in our understanding of office.

The identification of the telos of office provided a foundation for the construction of an ‘idealised persona.’ The content of persona entailed the ‘qualities and capacities’ to advance this purpose in a meaningful and ethical way. I stress however, that these contrasted somewhat with those identified by Weber, who emphasised obedience to authority and rigid adherence to rule and role responsibility. Rather, these early modern accounts identified charity, self-restraint, duty, love, learning, humility and disinterest, qualities as the virtues of office. For example, ‘humility was a form of knowing one’s place and duty as insurance against interference.’

Failure to meet the obligations of office, whether through ‘neglect’ or inappropriate conduct, was a serious matter, with skill, care and conscience held in high regard. The skills and attributes which attached to distinct offices were critical, so that the purpose of office could be met. For example, ‘learning and disinterest’ were specifically required of the office of the judge. The persona of judicial office rested on the cultivation of impartial conduct in the faithful fulfillment of duties. Against this, bribery and self-interest would

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468 Ibid., 84.
469 See Minson “Stephane Toussaint” 19, where he describes an office-based humanism as constituting the art of living within limits.
470 Condren, Argument and Office, 84.
471 Ibid. 85 – 86.
472 Ibid.
473 Selden, cited in Condren, Argument and Office, 86.
474 Condren, Argument and Office, 59,62.
475 Saunders, “The Judicial”; Condren Argument and Office, 141.
demean or diminish the office. Moreover, ensuring that office holders were fit and proper persons to comply with the conceptual persona of their office and to act within the constraints of office was significant: office bearers ‘knew the burdens of their sphere and understood the consequences of neglect or excess.’

Importantly, developing an account of office also provided people with a predictable and reliable sense of place and status in society, or roles and duties. Office thus fostered a ‘formal relational identity through responsibility . . . No man, wrote Edmund de Bohun, is without office, no aspect of life without rule.’ So while office entailed serious obligations, it also brought people entry into social relationships, giving expression to the scope and nature of relationships. On this account, argues Condren, if we merely think of office as people filling a role, ‘we do disservice to the extensive complexities involved.’

In contrast, critiques of office holding – as advanced by Arendt, Bauman, Milgram and others – regard the functionalism and role division of modernity as a site of ethical loss and erosion of social relations. I will examine these critiques further in chapters three and four. I note at this point that relying solely on these analyses to deliver us an appreciation of office holding circumscribes our appreciation of the ethical potential of office. As I have already suggested, occupying office is an ethically important practice, encompassing much more than compliance with a fixed set of rules and a conception of duty which is simply rule-bound. This is office understood as service. As I will argue in chapter five, this points to ways of thinking with

476 Condren, Argument and office, 57.
477 Ibid., 62.
478 Ibid., 54.
480 Ibid. But neither was there always a clear delineation between roles: conflicting views over the roles and expectations nonetheless often persisted, leading to antagonism between different spheres of office, not unlike the experience of office in the institution of migration. See also Saunders, “The Judicial,” 41-42.
responsibility as both a relational and institutional concern.

CONCLUSION

Within the literature on mandatory immigration detention, there has been no sustained analysis which identifies office as a site of ethical conduct. Even for those who have incorporated an institutional perspective into their work, the focus has centrally been on the impact of this policy upon those who are detained.481 Where the focus has been on office, this has extended to the practical exercise of office or to the ways in which suffering is legitimated or to the moments of compassion and humanity which emerge in recognition of shared vulnerability.482 These are important contributions. But my task is somewhat different. Instead, I aim to develop an account of office which reveals the potential for conducting oneself well which is sourced in office itself and its foundations.

There are three key observations I make in relation to the literature. Firstly, while some of the literature deploying critique addresses the exercise of power and authority at an institutional level, the abstraction underlying these responses inhibits us from a concrete appreciation of immigration detention in its everyday complexity. The effect of these accounts is that institutional life tends to be either squeezed out of the picture, or presented as a homogenous, abstract entity. Secondly, the failure of human rights to disrupt the debate, the dominance of state rights and the precariousness of recognition as the worthy subject of human rights impel us to consider an alternative approach. I argue for a reorientation towards responsibility, which I locate in the occupation of office. In this endeavour, I also run against the trend in humanities scholarship, where the language of ethics and office are not typically brought together.

481 See, for example, Bosworth, Inside Immigration Detention; Hall, Border Watch; Mountz, Seeking Asylum and Ugelvik, “Techniques.”
Indeed, sociological critiques of office and of institutional life tend to assert the impossibility of ethical conduct by office holders in modern, bureaucratic societies.\footnote{Bauman, Modernity.} This has been particularly evident in the critiques of role responsibility, which typically draw on Hannah Arendt’s observation that what was remarkable about the atrocities of the Nazi regime was that these could have been perpetrated by ordinary men, whose defence could be simply that ‘I was just doing my job’ or ‘I was just following orders.’ The repercussions of this analysis for how we think about state harms have been extensive, and led to a preoccupation with modernity, bureaucracies and indeed with institutional life generally, as antithetical to even the possibility of ethical conduct.\footnote{See Veitch, Law and Irresponsibility and Bauman, Modernity.} Whilst Weber and Arendt draw out the ways that the potential for violence is enabled in complex, bureaucratic structures, I am interested in how we might retrieve the possibility of ethical conduct in these settings.

Emerging research has disclosed the concrete ethical challenges facing those working in the network. I want to add to this important research by arguing for office thinking as a mode of inquiry. There are three claims I make in this endeavour. Firstly, I argue for a reading of immigration detention in which responsibility practices, and not just human rights, are viewed as critical. Secondly, I argue that a focus on the practices of office enables a more nuanced reading of this terrain than that afforded by critical scholarship, in which the complexity of office holding and institutional responsibility in immigration detention is flattened out. Lastly, I mark out office as a site where such responsibility is located, and in which ethical conduct is possible. This final claim is especially significant because it contests the underlying position in the work of Hall, Weber, Bosworth and others that moments of empathy can create alternative possibilities. I argue that the ethnographic literature is conducted without a fulsome appreciation of how an ethic of office can shine a
light on the institutional setting which normalises inhumane practices. Accordingly, I am interested in an ethical response which is not reliant upon chance or individual encounters but can be sourced in an institutional setting which might foster such an ethical response, in the limits of office and in its humanist orientation.

This chapter began with an account of immigration detention which is read as a story of suffering among those detained or alternatively, as the effect of power relations and a discursive violence. I have ended with an overview of how we might read office otherwise, as being historically and ethically significant. This overview of historical accounts of office holding thus offers a prelude to the story of the office of migration in chapters three and four. Here I begin to examine the practices of office under a policy of mandatory immigration detention, as well as their consequences, not just for those detained, but for those doing the detaining. My central message is that these practices illustrate a ‘thin’ understanding of responsibility as accountability to a role. This not only discloses the substitution of technical responsibility for ethical responsibility, but also reveals that such a substitution renders even technical responsibility difficult to discharge well. I begin in chapter three by examining the techniques of categorisation and exclusion which mark an ethically diminished exercise of office, and which have been critical to the justification of mandatory immigration detention, and the harm it produces.
As I showed in chapter one, a policy of mandatory immigration detention has been accompanied by expanded executive powers, the loss of judicial review and a distortion in the purpose of administrative office. In Part Two of this thesis, I aim to show how this has been both the effect of this policy. It has also been necessary to its implementation. This has had distinct, concrete effects on the role and obligations of office, as well as on individuals who occupy office. Part Two of this thesis is concerned with the questions: How has mandatory immigration detention been justified? What have been the experience and effects of practices which legitimise suffering in detention? How might we understand this as illustrating an impoverished understanding of responsibility? These questions are underlined by a concern to draw out the ways in which office has been shaped by this policy.

Part Two begins the work of addressing this policy through the lens of office. This is achieved through examining two specific practices and effects of this policy upon the office, starting with the work of categorisation as a technique of exclusion, and then turning to the suffering which is generated and justified by this. I then draw out the way that this policy also produces suffering among those implementing the practice. In this analysis, I show that the policy replicates the critiques of modernity offered by Bauman and others. However, a closer look at the impact of this policy indicates that office, and those occupying office, also suffer when the purpose of office is undermined and its ethical capacity eroded.
CHAPTER THREE: LEGITIMISING DETENTION – PRACTICES OF CATEGORISATION AND EXCLUSION

Introduction

Part One of this thesis mapped out the introduction of mandatory immigration detention in Australia and observed that the scholarship has failed to address this from the standpoint of office as an ethical undertaking. A key concern I raise is that immigration detention has distorted the purpose of office. My aim in this chapter is to begin to show the effect of this distortion on the practices of office. Of particular significance for this chapter is the way that the category of the unlawful has contracted the field of responsibility of office. This signals an exercise in ‘accountability’ as a ‘thin’ exercise in responsibility. It is consistent with a narrow understanding of role in the terms described by Bauman in his critique of modernity and is illustrative of the ethical detachment attributed to role division.485

In progressively contracting the field of responsibility invoked under the Refugee Convention, the category of the ‘unlawful non-citizen’ has enabled the withdrawal of rights encompassed under the rule of law, denied protections which would ordinarily apply to persons seeking refugee protection, and determined the scope of office obligations. There are three interventions which this chapter makes in relation to the effects of this on the exercise of responsibility towards refugees by office. Firstly, I argue that deploying the category of the ‘unlawful non-citizen’ encourages us to regard any human rights breaches which occur as simply the consequence of the category, as the neutral exercise of law. Secondly, following Catherine Dauvergne, I examine the consequences of category of the unlawful in its failure to

485 Bauman, Modernity; Arendt, Eichmann and Veitch, Law and Irresponsibility.
communicate to us anything about the content of this category. As she has observed, such categories are seemingly empty of meaning, in that the phrasing – the unlawful – centrally communicates a relation to law.486 As she notes:

Although the term “illegal” is precise in its relationship with the law, it is empty of content.

Yet this term is also imbued with meaning insofar as its effects are wide ranging and profound: it undermines the moral value of those so categorised and is a catalyst for exclusion.487 This also has a reductive effect on the identity of those so categorised. Lastly, mandatory laws which lead to the immigration detention of those categorised as ‘unlawful’ inhibit the capacity for discretion and reflection in the exercise of office. Constraining office from exercising careful judgement undermines its ethical foundations and has effects on how office is conducted. I draw on three case studies, the indefinite detention of Tamil refugees, the wrongful detention of Cornelia Rau, and the wrongful detention and deportation of Vivian Solon, to illustrate these points.488

A two-tiered, discriminatory system

As noted in chapter one, mandatory immigration detention was facilitated by the introduction of a two-tiered system, establishing two categories of non-citizens – lawful non-citizens, and unlawful non-citizens. These categories crucially determine the scope of obligations incumbent upon the office of migration. The mandatory immigration detention of ‘unlawful’ refugees means that the protections ordinarily extended to refugees under the Convention can be effectively eroded. While this is not an explicit refusal of refugee protection, it has nonetheless led to protracted detention, often with very harmful effects,


487 Dauvergne, Making People Illegal, 15 – 17.

488 A number of Tamil refugees who were indefinitely detained due to adversesecurity assessments were subsequently released although three remained in detention as at 18 May, 2016. See Ben Doherty, “Australia’s indefinite detention of refugees illegal, UN rules,” The Guardian, 18 May, 2016, accessed on December 11, 2016 https://www.theguardian.com/law/2016/may/18/australias-indefinite-detention-of-refugees-illegal-un-rules
as already indicated. The category of the ‘unlawful’ effectively positions individuals beyond the reach of specific legal protections. Limits on access to the rule of law had earlier been proposed by a 1994 Parliamentary Joint Standing Committee on Migration which urged that:

consideration be given to implementing a new refugee determination process which would provide refugee claimants with access only to the two tier administrative process, and which would close off access to review and appeal in the higher courts, save for the right of access to the High Court which is guaranteed in the Australian constitution.\(^{489}\)

This system inaugurated differential treatment for people arriving, depending on how they arrive in this country.\(^{490}\)

There is an implied expectation that judgement is exercised in applying the category of the ‘unlawful non-citizen’. Section 189 (1) of the Migration Act details the powers of migration officers to detain unlawful non-citizens upon forming a reasonable suspicion:

If an officer knows or reasonably suspects that a person in the migration zone...is an unlawful citizen, the officer must detain the person.\(^{491}\)

The discretionary capacity of the migration officer is preserved rather than removed by this provision. However, the word ‘must’ appears to have become privileged over the obligation of careful judgement exercised in forming a reasonable suspicion, or knowledge of the person’s status.\(^{492}\) The evidence indicates that migration officers typically interpret this as both an expectation and an obligation to detain.\(^{493}\) As observed in the Palmer Report:

[b]ecause of the use of the word ‘must’, the section has been viewed as a

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\(^{489}\) Joint Standing Committee on Migration, Asylum Border Control and Detention (Canberra: Commonwealth of Australia): 1994, xiv.

\(^{490}\) This contravenes Guideline 5, of the UNHCR Detention Guidelines.

\(^{491}\) Migration Act 1958 (Cth), Section 189.

\(^{492}\) Against this, Justices Gray and Lee have stated (in Goldie v Commonwealth (2002) 188 ALR 708 (High Court of Australia, 2002) at 710 – 711) that there is an onus upon officers of the department to exercise care in establishing a suspicion of unlawfulness, including efforts to establish the basis for such a suspicion through investigation.

\(^{493}\) Palmer, Inquiry into the Circumstances, 21.
mandatory provision in its entirety. What has not been fully appreciated is that s. 189(1) operates in a mandatory way only after an officer has formed the requisite ‘reasonable suspicion’ that a person is an ‘unlawful non-citizen.’

Importantly for this thesis, careful decision making is crucial, as the wrong decision to detain has profound consequences for individuals, including prolonged detention or deportation and return to their country of origin. In the next section, I describe three case studies where the use of the category of ‘unlawful non-citizen’ reveals a degraded exercise of office, in order to draw out the ways that responsibility can be disavowed through law, as Veitch has argued. I begin with a brief discussion on the function of categories.

CATEGORIES AND THE WORK OF OFFICE

Categorisation is an important function of office since legal categories do not always deliver injustice: they can create as well as deny responsibility. Categories are useful, assisting us to make sense of the world so that we can negotiate relationships and tasks in a manageable and meaningful way. We classify the people we work with, our family and friends, as well as those beyond our own communities; these distinctions circumscribe the limits and possibilities of our conduct towards others. Similarly, in law and in institutional life, categories organise relations and most importantly, distribute rights and responsibility, protections and obligations. Indeed, a ‘stable system of legal categories is an essential element of our community’s commitment to the rule of law.’

Categories also determine the scope and content of office. The category of the judge, for example, encompasses a set of obligations and practices which we

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494 Palmer, Inquiry into the Circumstances, 22. See also, the submission by A Just Australia, Protection not Punishment: The Reception of Asylum Seekers in Australia, Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia (Canberra, July 2008) 4. This recommended that staff be provided with ‘training and guidelines’ on what is meant by a ‘suspicion of unlawfulness’ including on the need to investigate whether a continued basis for this suspicion exist.

495 Birks, “Equity.”

expect will be reliably demonstrated. This entails a particular relationship with a jury, for instance, in which the judge has an obligation to guide and inform jurors on matters of law, but without directing them in their decision. It also relies upon the development of skills and expertise to do so. Categories therefore communicate something about the ‘field’ of responsibility of office. Ideationally, this entails compliance with the ‘rule of law’, establishing predictable, stable relations where we are all equally aware of the rights and obligations we enjoy under law. Insofar as we all bear a relation to the law, these relations are also determined by the way that we are categorised under law. In other words, they are determined by how we are recognised (or not) under the law. This establishes the contours of office responsibility.497

Categories are also united by the ‘purpose for which human beings use them.’498 The underlying purpose of refugee (humanitarian) visa categories in Australia’s Migration Act is to give effect to refugee protection through Convention obligations. In contrast, categories which are based on a person’s mode of arrival – that is, by boat – create an arbitrary line between the lawful and the unlawful, the intention of which is subjection to penalty and the infliction of ‘necessary suffering.’499 In short, detention in a penal setting is realised through the category of the unlawful. Following Condren’s analysis of office, outlined in chapter two, this comprises a distortion of the telos of office. It brings administrative office into a field of governance for which it is not equipped nor with which it is familiar and it dilutes the obligations which flow from the refugee category in the Convention.

THE CATEGORY OF THE REFUGEE: ESTABLISHING RESPONSIBILITY

Before I begin, I emphasise that this is a story about the ways that these

497 I am following the terminology of Ngaire Naffine in describing the way that legal categories establish moral and political contours, determining who matters, and who doesn’t, under law. Naffine, Law’s Meaning, 13.
499 I follow Pugliese’s terminology here. Pugliese “The Tutelary.”
obligations have been diluted between 1992 and 2012, where the record of compliance with the Convention has been poor.

Yet as already observed in chapter two, I regard the Refugee Convention as a statement of legal and ethical responsibility. How a person is classified is therefore critical, given the growing trend by states to classify refugees as ‘prohibited or illegal immigrants’ in order to avoid protection obligations.500 How one arrives at a potential place of refuge, whether authorised or not, is rejected in the Convention as a basis either for the refusal of protection or the imposition of penalties. This presses home my earlier point that law establishes the terms of our relations, the field of responsibility in which those relations are conducted, and the obligations which follow from this. The story of welcome or its denial to refugees is then, also a story of office holding.

A suite of obligations flows from refugee status, even for those without the ‘right to have rights’, since a person’s refugee status is not reliant on legal recognition: a person is recognised as such because she is a refugee.501 Yet, while refugee law jurisprudence502 (and, indeed the Convention) affirms that obligations exist regardless of formal legal status, refugee protection becomes materially significant through legal recognition.503 This recognition was undermined both by the endorsement of the UN CPA in 1989 and by changes to Australian law from 1989 onwards, as noted in chapter one.504 The limits on protections which flow from the category of refugee offer a

500 Guy Goodwin-Gill and Jane McAdam, The Refugee, 265.
501 I draw on Hannah Arendt’s well-known notion which she develops in “The Decline in the Nation State and the Rights of Man,” in The Origins.
503 I stress however that the assumption that refugee status exists independently of law has also been subject to important critical analysis by Patricia Tuitt, “Transitions,” by Dauvergne, Making People Illegal and by Emma Larking, Refugees and the Myth.
504 This is a key consequence of the introduction of the category of the ‘asylum seeker,’ which introduces a distinction between those seeking protection status, and those granted it. This has diluted the intentions of the drafters of the Convention. I stress that the assumption that refugee status exists independently of law has also been subject to important critical analysis by Patricia Tuitt in “Transitions,” as well as by Dauvergne, Making People Illegal and Emma Larking, Refugees and the Myth.
point of contrast for those classified as unlawful since how we are recognised in law determines the form and scope of office conduct. Other than compelling states to abide by the non-refoulement principle, it theoretically ensures that those so categorised are entitled to protections under law, and exemptions from unfair treatment. Such protections are illustrative of the value attached to this category given that refugees are without the political status enjoyed by citizens which would normally deliver such rights.505

The Refugee Convention is simultaneously a source of lawful limitations on state rights where this might restrict or prevent access to protection. For example, Convention drafters cautioned that judgements on refugee status be made with care and that classificatory processes not penalise people unfairly.506 In Australia, the Fraser Liberal Government’s policy of blanket protection for Vietnamese refugees in the 1970s, aimed at ensuring a prompt and effective response to protection needs, is illustrative of this deeper reading of responsibility which is not dependent upon formal legal recognition of refugee status while upholding the category of the refugee. While it is a legal document attending to rights and responsibility, the Convention is also a ‘status’ based instrument, which rests on principles of ‘non-discrimination, non-penalisation and non-refoulement.’507 The next section outlines the protections and obligations which attach to office through categories in the Refugee Convention and related guidelines.

**The rejection of penalties**
The Convention responds to the unique circumstances of refugees, many of whom flee their country of origin without identifying documentation. This is

505 As Tuit reflect in False Images, the definition is also very narrow. She points to an embedded privileging of those who are better able to traverse state borders in pursuit of protection. Those with limited means to do so (women, children, and the impoverished, are typically far less able to access these rights.


often crucial to avoiding detection in fleeing persecution. As the drafters of the Convention note, ‘the seeking of asylum can require refugees to breach immigration rules.’ Barring penalties on the basis of how people arrive responds to this reality that ‘lawful’ movement might prove elusive for refugees.\textsuperscript{508} Convention drafters were thus keen to ensure that protection ought not be ‘compromised by unauthorised or unlawful arrival.’\textsuperscript{509} Article 31, “Non-discrimination on basis of unlawful presence” declares that:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life of freedom was threatened in the sense of article 1, enter or are present in their territory without authorization.\textsuperscript{510}

Accordingly, classifications which lead to penalties contravene the Convention. Principles encompassed by the rule of law, including access to procedural fairness, apply irrespective of whether or not a person has been recognised as a refugee and of the ‘legality’ of their presence, whether or not one is refused entry, expelled or detained.\textsuperscript{511}

**Non-discrimination and procedural fairness**

Non-discrimination extends to fair treatment under law, including unimpeded access to the judicial system of states in which they seek protection. Precisely, Article 16, Section 1 of the Convention states that:

A refugee shall have free access to the courts of law on the territory of all


\textsuperscript{509} Introductory Note, International Convention relating to the Status of Refugees, open for signature July 28, 1951. 189 UNTS 137 (entered into force April 22, 1954), 3. It must be noted that the penalties, strictly speaking, are meant to be withheld in relation to persons in the first country of asylum, which might not apply in the case of Australia. Secondly, penalties are presumed to relate to fines or prohibitions on visas, but not necessarily detention. That said, a significant body of jurisprudence on this points to detention, even for those in a second country of asylum, as constituting an unfair penalty on the basis of how one arrives. See, for example, Hathaway and Foster The Law 28 and Guy Goodwin-Gill, “International Law and the Detention of Refugees and Asylum Seekers”, International Migration Review, 20, no. 2 (1983): 193.


\textsuperscript{511} For a discussion on the prohibition on penalties based on mode of arrival, or absence of “authorisation” see Goodwin-Gill and McAdam, The Refugee, 223, 225 – 226, 233. Also, see UNHCR, Detention Guidelines. The Refugee Convention states that, ‘subject to specific exemptions,’ asylum seekers should not be ‘penalised for their illegal entry or stay, note 24, above.
Contracting States.\textsuperscript{512}

UN Detention Guidelines assert that those detained must be advised of the basis for their detention, and have access to legal counsel and to ‘prompt’ judicial review, which includes the power to order release ‘or to vary conditions of release.’\textsuperscript{513} The guidelines note that the authorities who detain persons carry the ‘burden of proof to establish the lawfulness of the detention’ and that it must be ‘justified according to the principles of necessity, reasonableness and proportionality.’\textsuperscript{514} While there is not an explicit obligation on states to implement procedures for assessment of refugee status, the reference to ‘non-discrimination’ in Article 31 in the form of access to judicial review and procedural fairness contains an ‘implicit message in that disputes concerning juridical status must be able to be brought before the courts.’\textsuperscript{515}

**Meaningful access to justice**

Article 16, Section 2 of the Convention declares that:

A refugee shall enjoy in the Contracting State in which he has habitual residence, the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from cautio judicatum solvi.\textsuperscript{516}

Importantly, the provision of administrative assistance in domestic law depends upon the ‘judicious use of administrative discretion’.\textsuperscript{517} The capacity of refugees to contest decisions of administrative law in the judicial system, with the same expectation of meaningful access underpins the principle of equality before the law.\textsuperscript{518}

\textsuperscript{512}Open for signature July 28, 1951. 189 UNTS 137 (entered into force April 22, 1954).
\textsuperscript{513}UNHCR Detention Guidelines, Guideline 7 “Decisions to detain or to extend detention must be subject to minimum procedural safeguards,” 47 (iii): 27.
\textsuperscript{514}Ibid., “Indefinite detention is arbitrary and maximum limits on detention should be established in law.” Guideline 6.
\textsuperscript{515}Goodwin-Gill, International Law, 147.
\textsuperscript{516}Article 16 (2) International Convention relating to the Status of Refugees, open for signature July 28, 1951. 189 UNTS 137 (entered into force April 22, 1954).
\textsuperscript{517}Goodwin-Gill and McAdam, The Refugee, 455. Also see Article 25 (1) of the Convention which stipulates that refugees shall be advised by signatory states of their right to access assistance.
\textsuperscript{518}Pieter Boeles, Fair Immigration Proceedings in Europe (Martinus Nijhoff: The Hague, 1997): 74; Goodwin-Gill and McAdam
Absence of judicial oversight is also a serious breach of the International Covenant of Political and Civil Rights (ICCPR), which supports a ‘fundamental guarantee of liberty and freedom from arbitrariness,’ and ‘effective independent review’ in appeals of administrative decisions, and in the determination of the merits of a case. United Nations Guidelines affirm access to the rule of law as central to Convention obligations to refugees.

It is thus expected that those in detention are informed of their legal rights, including the right to legal advice, indicating that rightful access to courts of law entails a broader function of office than the requirement of habeas corpus. The UNHCR has stipulated that the Convention stresses the notion both of responsibility to provide this, and the expertise needed to exercise it properly, which has serious implications for the conduct of office in this domain. Unimpeded access to courts thus relies upon the capacity of the office of migration to provide services which render procedural fairness as meaningful, in which the details of their case are known to the person, and where there exists a right to submit evidence and to appeal against an adverse decision. The use of the terms ‘competent, independent and impartial’ in relation to courts and tribunals give practical effect to this intention. These protections are also available under related treaties. Importantly for the purpose of this thesis, free access to courts of law extends to legal remedies which have a ‘judicial

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519 HREOC, Those who’ve come across the seas 50. Also see Article 9 of the ICCPR, opened for signature December 19, 1966. 999 UNTS 429 (entered into force March 23,1976).
520 As noted in HREOC, Those who’ve come across the seas, viii and 51 –51.
524 Goodwin-Gill and McAdam, The Refugee, 413,448.
526 Savitri Taylor, “Australia’s Implementation of its Non-refoulement Obligations” UNSW Law Journal, 17, no. 2 (1994). Taylor strongly endorses the value of broader international human rights conventions than the Refugee Convention, on the basis that they offer more robust procedural protections for refugees than those available under the Refugee Convention.
character’, together with those of any other ‘competent administrative authorities:’ that is, where refugees are both considered as ‘persons before the law’ \(^{527}\) and where there is a capacity for judgement exercised well. \(^{528}\)

**THE CATEGORY OF THE ‘UNLAWFUL’: THREE CASE STUDIES**

Following legal scholar Susan Kneebone, the case studies described below reveal the ‘extraordinary and persistent lengths to which the Australian Government has gone to keep ‘asylum seekers’ beyond the reach of the rule of law’, \(^{529}\) even while it can do so through law, as Agamben has shown. \(^{530}\) Arendt first observed this in relation to refugees in 1958, noting an accrual of categories applied ‘to those who lived outside the pale of law…’ \(^{531}\) The abandonment of some groups or individuals is thus made possible through the stripping of rights and protections, \(^{532}\) in which such categories are illustrative of an expanding vocabulary of exclusion. I will describe this through three case studies below, before turning to an analysis of how these examples illustrate the effects of the category of the ‘unlawful’.

**Tamil Refugees**

A long-standing civil war between two distinct ethnic populations in Sri Lanka – the Tamils and the Sinhalese – saw many Tamils fleeing persecution under a dominant Sinhalese government. \(^{533}\) Despite the official end of the war in 2009, the consolidation of Sinhalese political authority and power has been accompanied by less overt, yet persistent persecution of the Tamil minority. \(^{534}\)

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\(^{527}\) United Nations High Commissioner for Refugees, Executive Committee Conclusion, 22 (XXXII), 1981. The UNHCR stresses that refugees seeking protection are to be considered as ‘persons before the law.’

\(^{528}\) Booies, *Fair Immigration*, 64. Stress is added.


\(^{531}\) Arendt, *The Origins*, 277, 299.


\(^{533}\) The conflict began in 1983 and formally ended in 2009.

Accordingly, ongoing unease has seen their exodus continue, with many Tamils officially recognised as refugees by the UNHCR and granted entry visas; others sought protection in Australia from 2010 by arriving without prior authorisation to make a refugee claim in offshore places as unauthorised ‘boat arrivals.’ By this time the Federal Government’s Pacific Solution Mark 1 had ended, reopening the possibility of resettlement in Australia for ‘boat arrivals’. However, many refugees were still being mandatorily detained in Australia while awaiting determination of their refugee claims. Accordingly, by 2012, a number of Tamil refugees had already been detained for up to two and a half years when over 54 Tamil individuals (including children) were issued with ‘adverse security assessments’ by the Australian Security Intelligence Organisation (ASIO). This was despite refugee status already having been approved. The assessments leading to their indefinite detention were based on their alleged connections to the terrorist organisation, the Tamil Tigers, which had fought in the civil war.

Importantly, these security assessments were only issued to persons who had applied for refugee status as ‘offshore entry persons.’ That is, they were only applied to ‘unlawful’ arrivals who came by boat. No such assessments were undertaken of Tamil refugees who had arrived with prior authorisation, through processing conducted under the UNHCR auspice. This distinction subjected those who had been classed as ‘unlawful arrivals’ ‘to a special regime established by executive power under Section 61 of the Australian Constitution.’

Despite being later granted protection visas, the blanket application of the category ‘security risk’ persons to all 54 boat arrivals indicates that there was no attempt to examine each individual case on its own merits. The UNHCR

536 Ibid., 687.
537 Ibid., 686.
538 Ibid., 691.
539 The case of a young woman and her family who were indefinitely detained because of an adverse security assessment.
report into human rights violations of Tamil refugees by the Australian Government noted a failure to:

provide any lawful, individualised justification for detaining [persons] upon their arrival to determine whether each of them presented a risk of absconding, lack of cooperation, or posed a prima facie security risk there. All were automatically detained merely because they were ‘unlawful non-citizens’ in an ‘excised offshore place’. The statutory framework does not permit an individual assessment of the substantive necessity of detention.540

While this universal category was similarly extended by Australia to Vietnamese refugees, in 1976 this was effected in order to facilitate protection, in which the rule of law and procedural fairness were preserved.

A number of the Tamil refugees were released after a decision of the High Court which made a finding of unlawful detention of two Sri Lankan asylum seekers on the basis that the blanket application of a category based on mode of arrival prevented them from gaining access to full protections under law. Importantly, while this decision did not rule that immigration detention was unconstitutional, it did rule that there were limits on the withdrawal of protections from those detained and found that the government had exceeded these limits.541 The decision affirmed the need for procedural fairness but not challenged the legal foundation for mandatory immigration detention.

The dual track system of discriminating on the basis of mode of arrival continued, however, as key to government policy.542 These cases illustrated the way in which the application of categories on the basis of a group identity

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(Tamils as security risk or unlawful persons) exposes the ‘distinction between administrative and judicial incarceration’ insofar as judicial incarceration (presumably) ‘treats people as individuals with each assessed for their crimes and imprisoned accordingly.’

In the former, human dignity is preserved; in the latter, it is eroded. This discloses the contrast between administrative and criminal detention, with the former lacking the protections and high standards of proof which are central to the criminal justice system in a liberal democracy.

The reason for these protections is straightforward: the withdrawal of individual liberty is a fundamental breach of individual rights. The decisions noted above express this. However, the return to offshore processing in 2012 has led to an attenuation in these protections, as an effect of complex and unclear lines of accountability and responsibility.

**Cornelia Rau**

Cornelia Rau was born in Germany, arriving in Australia in 1967 at the age of 18 months. She had a mental illness which required specialist care. In 2004, when the family had not heard from her over a prolonged period, they became concerned. Her family’s efforts to find her through the police missing persons register, were fruitless. She came to public attention some time later through a refugee advocacy group, the Asylum Seeker Resource Centre, based in Melbourne.

In the meantime, in March 2004, immigration officers in North Queensland were notified that Rau might be someone of interest. She seemed disoriented and unable to clearly communicate who she was and where she was from.

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543 Nethery, “Immigration Detention” 145.
544 See Saul, “Dark Justice,” for an extensive analysis of this, as well as Taylor’s analysis of the loss of procedural protections more generally in “Australia’s Implementation,” 453–457.
545 See, for example, McPhail, Nyamori and Taylor, “Escaping accountability.”
546 This was reported by Andra Jackson in the *Sydney Morning Herald*, “Aid sought for ill, nameless detainee,” 31 January, 2005. See also, the investigative account by Debbie Whitmont, “Anna’s Story,” *Four Corners* aired 19 May, 2005 (Sydney, ABC TV: 2005).
547 Palmer Inquiry into the Circumstances, viii.
When interviewed by the staff of the department, she claimed that she was a German tourist, giving her name as ‘Anna’. She was subsequently detained by migration officers who determined that they had a ‘proper and lawful basis for forming a ‘reasonable suspicion’ under Section 189(1) of the Act that she was an ‘unlawful non-citizen’.

‘Anna’ was detained for a period of ten months by the department, including being held in a prison in Brisbane, in north-eastern Australia. Attempts to verify her identity were unsuccessful and indeed, appear to have been half hearted. She was forcibly removed under sedation to Baxter Immigration Detention Centre. Despite a clear need for psychiatric care, Rau was not afforded clinical support. Communication between the police, the department and a Brisbane hospital was later described as sloppy, with poor assessment of her condition and a failure to act on recommendations by relevant professional staff to provide appropriate care. While ‘Anna’s’ condition deteriorated, her symptoms were at times described as no more than ‘behavioural’. She was regularly subject to solitary periods of confinement and removed to her room by guards in riot gear. When eventually discovered by her family, Rau was released from detention and committed to psychiatric care.

**Vivian Alvarez Solon**

Vivian Alvarez Solon was born in 1962 in the Philippines, marrying an Australian, Robert Young, in 1984. Two years later, she became an Australian citizen. She had one child by this marriage and a subsequent child by another

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548 Then coming under the name ‘Department of Immigration, Multicultural and Indigenous Affairs’ (DIMIA).
549 Palmer, Inquiry into the Circumstances, 50 –51.
550 Ibid., 52.
551 Ibid., 107 – 108.
552 Ibid., 15.
553 Disturbingly, video footage of her release indicate that even when she was found to be a lawful resident, the guards continued to treat her with considerable lack of regard for human dignity, see Whitmont “Anna’s Story.” For a detailed and thoughtful analysis of this case, see Robert Manne, “The Unknown Story of Cornelia Rau,” *The Monthly* September, 2005 accessed on February 20, 2016 [https://www.themonthly.com.au/monthly-essays-robert-manne-unknown-story-cornelia-rau-often-she-cried-sometimes-she-screamed-she-be](https://www.themonthly.com.au/monthly-essays-robert-manne-unknown-story-cornelia-rau-often-she-cried-sometimes-she-screamed-she-be)
relationship following divorce from Young. In the following years, Solon had an unsettled life. Early in 2001, she failed to collect her youngest son from child care. Her former husband made persistent attempts to locate her.

She was found by police in March 2001, having fallen into a drain in Lismore in a disoriented state, drunk and ‘dirty’. She was also in severe pain. After initial admission to a psychiatric unit, she was hospitalised for spinal surgery. What occurred afterwards amounted to a litany of failures by the Australian Government and the department to perform their duties with care and diligence, especially for someone who so clearly needed it. On the basis of advice from the psychiatric ward to which she was admitted, the department concluded that she was probably an illegal immigrant, even though she had been an Australian citizen for 15 years. Relying upon an unfounded assumption, it was also presumed Solon was a sex slave who had been smuggled illegally into the country. It was resolved that she be deported to the Philippines. This was despite both her persistent statements that she was a citizen and a missing persons report issued by police in relation to her ‘disappearance’ by Robert Young.

When Solon arrived at Manila airport after her deportation, there was no one to greet her and ‘no one seemed to care.’ She was eventually collected at the airport and taken to a half-way house before being ‘settled’ into a hospice for the dying for the next four years. In 2005, after news of her wrongful deportation began to emerge, she was returned to Australia. While there has been extensive

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554 There were reports that she was physically assaulted. She claimed that she was knocked off her bike by a car. The precise circumstances are unclear. See Sydney Morning Herald, “The Lies that kept Vivian Alvarez Solon hidden for years,” August 20, 2015, accessed January 20, 2016. http://www.smh.com.au/news/national/the-lies-that-kept-vivian-alvarez-hidden-for-years/2005/08/19/1124435144969.html

555 Ibid.


attention to Rau’s case, the story of Solon has been described as the sorrier of the two. Her detention and subsequent deportation – despite being an Australian citizen – was described as characterised by ‘systemic failures’ and failures of management which ‘can only be described as catastrophic.’

The Inquiries

The public outcry and media response to these two cases was marked by the incredulity at the level of departmental incompetence which led to the deportation and detention of a lawful citizen and resident. Two Commissions of Inquiry followed. The Commonwealth Ombudsman, Mick Palmer, investigated the Rau matter, with Solon’s case initially brought under the scope of this inquiry when news of it broke at this time. It was later the subject of investigation by Police Commissioner Neil Comrie. Both the Palmer and Comrie reports noted a failure to exercise due care and diligence in classifying these women as ‘unlawful non-citizens’: their detention was based on a ‘suspected’ status of unlawfulness. Importantly, the Comrie report noted that the decision to detain Solon:

was not based on a reasonable suspicion: the relevant inquiries were neither timely nor thorough and there was a lack of rigorous analysis of the available information. Accordingly, this action was unreasonable and therefore, by implication, unlawful.

An obsession with meeting performance targets was unaccompanied by careful consideration of whether there was a sound, verifiable basis for detention. Once the category was applied, the effect was one of mandatory detention. This failure to exercise careful judgement has arguably been compounded by earlier legislative reforms curtailing judicial oversight of administrative decisions, as

559 Ibid. It was clear that the department was aware of her wrongful deportation, but kept it quiet. No-one took responsibility.
561 Ibid., xv.
562 Palmer, Inquiry into the Circumstances, 24.
563 Comrie, Inquiry into the Circumstances, xi.
564 Palmer, Inquiry into the Circumstances, 21.
noted in chapter one, as well as by an enforcement-based approach. No migration office made an individual decision to deport Solon, the decision was presumed to have been made, with officers acting on an assumption that they were merely being legislatively compliant. The report noted that the action taken by the department to deport Rau was neither based on a decision, nor on any one person taking responsibility for the action.565

The inquiry into Rau’s deportation was described as sufficiently serious as to comprise a breach the Australian Public Service Code of Conduct.566 Yet the Palmer Report found that the contract which the government had signed with the private provider of immigration detention at the time, ‘imposes particular responsibilities on the Commonwealth with regard to duty of care for each and every person in immigration detention…’ It stressed that ‘responsibility is clear.’567

Observing that migration officers were obsessed with fitting people into categories in the pursuit of institutional goals and obligations, the report observed that this was worsened by the lack of adequate training or understanding of their office.568 As Thomas Spijkerboer illustrated in this study of women and refugee assessments in the Netherlands, women who do not fit the ‘mould’ of gender stereotypes, or whose stories appear inconsistent or incredible, are disadvantaged.569 Doubts about the credibility of women is compounded by ethnic identity.570 Most importantly however, his research shows that gender is produced as an effect of the refugee determination process and indeed of refugee law, in which the image of the ‘normal’ woman is pitted against those who depart from the norm. This is accentuated by the

565 Comrie, Inquiry into the Circumstances, 32.
566 Ibid., 81.
567 Palmer, Inquiry into the Circumstances, 41. Stress is added.
568 Ibid., 25.
569 Thomas Spijkerboer, ‘Stereotyping and Acceleration: Gender, Procedural Acceleration and Marginalised Judicial Review in the Dutch Asylum System’ in Proof, Evidentiary Assessment and Credibility in asylum procedures, ed Gregor Noll (Leiden, Martinus Nijhoff), 88. See also, Spijkerboer, Gender and Refugee Status.
570 Ibid., 81 – 82.
intersectionality of gender and ethnic identity: women are reproduced through the refugee determination process in particular kinds of ways.\(^{571}\) Both Rau and Solon were arguably vulnerable to the characterization of refugee processing which Spijkerboer draws out.

THE CATEGORY OF THE ‘UNLAWFUL’: NARROWING THE FIELD OF RESPONSIBILITY

These cases are a potent reminder that categorisation is not an empty exercise, but one in which the effects of the categories we deploy can be profound, and they highlight the implications of a lack of care and judgement in the discharge of office. For example, in the Rau and Solon cases, poor office conduct was spurred by a lack of understanding of legislative responsibilities of officers under the Act, and wrongly held beliefs that a suspicion of unlawfulness meant that detention was ‘absolute’.\(^{572}\) The orientation of the department was centrally preoccupied with detaining anyone who might fall into the category of unlawful non-citizen. This was accompanied by minimal follow-up or sense of urgency in ensuring that the person’s identity was established promptly.\(^{573}\)

This is profoundly important, given the margin for error and the consequences of a wrong ‘decision’, as the administrative nature of detention meant that it was ‘not subject to review.’ We can return at this point to Leanne Weber’s findings noted in chapter two, in relation to the exercise of discretionary capacity by migration officers. In cases where identity is not clear cut, those responsible for establishing someone’s identity, ‘fact finders’ for example, can determine the parameters of evidence, so that what gets seen and not seen is not a matter of objectivity, but is determined by the person doing the searching.\(^{574}\) It is not solely a question of what evidence is collected, but of how

\(^{571}\) Spijkerboer, Gender and Refugee Status. This book makes a valuable contribution in its detailed analysis of the process undertaken by migration officers to ‘verify’ identity of refugee applications.

\(^{572}\) Palmer, Inquiry into the Circumstances, 25.

\(^{573}\) Ibid., 56, 60.

\(^{574}\) Weber, “Down that Wrong Road”, 255.
this is interpreted and what gets left out of consideration.  

For the Tamil refugees, the effects of being classified as unlawful, together with their categorisation as being of ‘security concern’, were significant, entailing a sweeping loss of protections. As legal scholar Ben Saul notes, there was no capacity for review of security assessments. Those subjected to security assessments lost a legally enforceable right to challenge the terms of their detention or even to be informed of the security concerns comprising the basis for their detention. Saul described these trends as the ‘vanishing point of procedural fairness’. This constitutes a breach of Convention provisions which stipulate that, where there are any grounds for the claim that a security risk exists, these grounds are substantive and they are clearly communicated. People have a right to know the reasons for their detention or deportation. This placed the Tamil refugees in a precarious situation, especially given that these persons had already been classified as refugees. It was unlikely that they could be settled in a third country because they were classed as a security risk, but neither could they be refouled to their country of origin: they had already been accepted as having a well-founded fear of persecution.

In the cases of Rau and Solon, the Palmer report observed that the department’s approach appeared to be ‘process rich’ and ‘outcomes poor’, with the overarching concern, even in a setting marked by significant complexities, focused on ‘the achievement of quantitative yardsticks rather than qualitative performance.’ In short, there was a failure of office ‘to deliver the outcomes required by the government in a way that is firm but fair and respects human

575 Ibid., 256.
577 Saul, “Dark Justice”, 8, 10, 25.
580 Palmer, Inquiry into the Circumstances, “Introduction.”
581 Ibid.
dignity.⁵⁸² According to the report, the key focus of the department’s enquiries was to establish Solon’s identity with a view to ‘her removal from Australia’ and with scant willingness or capacity to reflect on the consequences of this decision.⁵⁸³ This highlighted a departmental culture that seemed to ‘stifle original thought, inhibit individual action, and discourage wider consultation or referral.’⁵⁸⁴ The exercise of judgement in office was not only degraded, but absent. For Grewcock, the harms experienced in these cases reflect the systemic nature of institutional breaches of human rights. Importantly in his analysis, the challenge is whether or not the state is able or willing to meaningfully investigate such breaches. In his view, the findings of the Palmer report reveal that the capacity of the state to investigate itself when it has been the source of harm, is severely limited.⁵⁸⁵

Given that Rau and Solon were ultimately found not to be unlawful non-citizens, we might well ask: what does this matter, except to indicate the negligence on the part of the department? These examples are illustrative of the gravity of the obligations incumbent upon the migration officer, throwing into sharp relief the consequences of being categorised as ‘unlawful’ when there is an absence of care both in the categories we craft, and in how we apply them. It shows the need for the work of migration officers to be more closely scrutinized, especially as examination of their practices often reveal unfounded (and gendered) assumptions about the credibility and identity⁵⁸⁶ of those caught up in the immigration detention system. This was clearly the case in the wrongful detention of Cornelia Rau and Vivien Solon but also evident in the detention of Tamil asylum seeker Ranjini.⁵⁸⁷

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⁵⁸² Ibid.
⁵⁸³ Ibid., viii.
⁵⁸⁴ Ibid., 54.
⁵⁸⁷ Ranjini was a Tamil mother who was indefinitely detained on the basis that she presented a ‘security’ risk by the Australian government, as discussed earlier in this chapter.
Of course, Rau and Solon were not refugees arriving by boat. The point I emphasise is that, in the eyes of the Australian Government and of many within the public, such treatment was both justified and neutralised for refugees who arrive without authorisation. Most importantly, as Claire Connor has highlighted, there were numerous and disturbing examples of maltreatment of refugees were being addressed in court cases. But the press was not interested in any of this until the Rau and Solon cases came to light. These cases suggest that the category of the ‘unlawful’ is deployed not only without due diligence, but without an appreciation of what this might mean for the individuals so subjected unless the individual is the political responsibility of the state. Not only did this suggest a pattern of simplistic compliance with orders but it showed how responsibility has been narrowed through the application of categories which neutralise the suffering of certain kinds of bodies. In the case of the indefinite detention of Tamil asylum seekers, it demonstrates the effects of risk categories which position people beyond the reach of legal protection, on the basis of their membership of a group. I refer here not just to the group of ‘Tamils’, but the group of those who arrive without authorisation.

For Bauman, this entails cumulative processes of exclusion which begin with naming practices. Such practices of exclusion and othering end with the justification and normalisation of human suffering. The next section of this chapter examines the ways that suffering is justified under mandatory immigration detention as a practice in detachment which is dominated by a narrow understanding of role, and of responsibility, and enabled through the category of the ‘unlawful’.


PRACTICES OF DEHUMANISATION

As I described in chapter two where I discussed Max Weber’s analysis of bureaucratic rationality, under conditions of modernity and legal authority, obedience in office is owed not to a person, but to law. This functions under liberalism as a system of ‘abstract rules’. In Bauman’s analysis, this is accompanied by role fragmentation, rule-based compliance and the substitution of technical for moral responsibility. For Bauman, this enables ethical detachment to flourish, since our absorption into the rule can encourage unreflective conduct through removing effects ‘from the field of vision’. It is ethnically significant because it is facilitated by the progressive dehumanisation of the other through bureaucratic processes of classification and separation, in which those making decisions or applying the rule do not see the other. This was especially evident in the Rau and Solon cases. In both cases, migration officers demonstrated an obsession with performance criteria and a disposition towards both women as unreliable witnesses. This precluded them from engaging with the particularity of their stories, from seeing them as individuals. As the Palmer Report noted, there was an ‘excessive focus on auditing compliance, with misdirected performance measures – to the exclusion of even noticing the tragic outcomes that are actually being delivered.’ The report goes on to observe that this emphasis on operational compliance was accompanied by a tendency for staff to see themselves only as ‘bit players’, with no-one holding ‘continuous responsibility.’ For Bauman, this emphasis on process over people enabled the Holocaust, arguing that the concentration camp was not a special case, but the product of the perfection of authority in modern bureaucracy, lawful compliance, technical efficiency and the state’s monopoly

500 As understood and articulated by Max Weber.
502 Bauman, Modernity, 101
503 Palmer, Inquiry into the Circumstances, 64.
Bauman’s sociological analysis of institutional life begins with Hannah Arendt’s significant analysis of the war crimes trial of Eichmann in Jerusalem. Eichmann was the embodiment of the ‘perfect bureaucrat’, for whom to be ‘law abiding means not merely to obey the laws but to act as though one were the legislator of the laws that one obeys.’ In the merging of identification with role and the rules attaching to role, those in office develop a diminished capacity to reflect on the laws which are being enforced. These aspects of Eichmann’s office persona and his collusion in Nazi war crimes led Arendt to conclude that unimaginable evil is not confined to visible signs of monstrosity, but flourishes in the most ordinary of settings. Such observations troubled her. She notes of Eichmann that his view was that:

[t]his was the way things were, this was the new law of the land, based on the Fuhrer’s order: whatever he did he did, as far as he could see, as a law-abiding citizen. He did his duty, as he told the police and the courtroom over and over again; he not only obeyed orders, he also obeyed the law.

The banality of evil starts with those in public office relying on the defence that they are simply doing their job. For Arendt, a diminished sense of ethical responsibility emerges as an effect of this bureaucratic role division. Indeed, in Bauman’s analysis, the Holocaust was unthinkable without bureaucracy. This point has particular significance for this thesis given that the foundations for extreme violence are located in the mundane adherence to rules and legal authority. It can become virtually impossible for us to ‘know or feel’ that we are ‘doing wrong.’ Arendt cites the comments of the District Court of Jerusalem, which described it in this way:

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594 Bauman, Modernity, 14, 13.
595 Arendt, Eichmann, 137.
596 Ibid., 134.
597 Bauman, Modernity, 17.
598 Arendt, Eichmann, 276.
the extent to which any one of the many criminals was close to or remote from the actual killer of the victim means nothing, as far as the measure of his responsibility is concerned. On the contrary, in general the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands.\textsuperscript{599}

For Arendt and for Bauman, physical and conceptual remoteness makes it easier to inflict suffering; there is an inverse ratio of readiness to inflict cruelty, and proximity to those who are subjected to it. In the case of Cornelia Rau, she was not recognized as someone worthy of compassion. Following Arendt, this suggests that we are less likely to harm the person we touch.\textsuperscript{600} Not only are we less able to appreciate the effects of our actions and decisions under modern conditions of role division, the probability that we must confront the faces of those whom we harm is also more remote.

The official treatment of ‘unlawful’ refugees can be considered in this way. Indeed, for Arendt, the concern is that such thoughtlessness can wreak more havoc than all the evil instincts taken together.\textsuperscript{601} This is precisely the point gestured to in the Palmer Report in relation to Rau and Solon; the report observed that the department demonstrated ‘rigid attitudes and processes’, leading to ‘an environment in which people were unwilling to accept ownership of matters beyond their immediate responsibilities’, regardless of how important or serious the matter was, or the need for ‘continuity in its management’.\textsuperscript{602} Role division and classificatory processes have adversely shaped the field of responsibility in which the office of migration functions in relation to those who come by boat.

**Discursive exclusion**

A simplified way of understanding the mechanisms which enable ethical...
remoteness is to frame this as occurring through two distinct, yet related, processes of discursive and spatial exclusion. Discursive exclusion refers both to practices of classification in law, and to its effects in how we imagine the other, leading to the justification of spatial exclusion and segregation of those classified as risk. This synthesises Bauman’s argument that the disavowal of responsibility is effected through several stages. He describes it as achieved through the:

social production of distance, which either annuls or weakens the pressure of moral responsibility; substitution of technical for moral responsibility, which effectively conceals the moral significance of the action; and the technology of segregation and separation, which promotes indifference to the plight of the Other which otherwise would be subject to moral evaluation and morally motivated response.603

Likewise, the legal classification of boat arrivals by the department provides a basis for screening out those deemed undesirable or risky604 or for deferring or denying refugee protection. Under ‘bureaucratic management’, ‘human objects lose their distinctiveness’, becoming intelligible not as ethical, but as technical concerns.605 This harbours a surplus effect: it produces subjectivities which are the effect of the relation between power and knowledge, in which the authority of law produces a ‘truth’ about the other as deviant, ‘irregular’, or criminal.606 The indefinite detention of Tamil refugees illustrates this process of ‘criminalisation’ through the attribution of risk and deviance.

These discursive effects can influence office. As Leanne Weber notes in her study of migration officers in the UK, the slippage from ‘unlawful’ to ‘criminal’

604 Indeed, the term ‘screening out’ is commonly used in relation to visa applications and was increased by the department in 2012, after the High Court case reviewing the indefinite detention of Tamil refugees on security grounds. See Australian Human Rights Commission, “Tell Me About: The ‘Enhanced Screening Process” accessed on 12 December, 2016 https://www.humanrights.gov.au/sites/default/files/document/publication/enhanced-screening.pdf
in the perception of the subjectivity of detainees has allowed some officers ‘to be influenced by factors not included in the guidelines, such as the perceived criminality of applicants’. For Jonathon Simon, the actuarialism that accompanies these new forms of punitiveness also undermines the possibility of identity. We can see this play out in the types of categories deployed: the ‘unlawful’ communicates risk yet it empties the subject of identity. In the case of Tamil refugees, their perceived ‘riskiness’ underpinned their classification as ‘security concern non-citizens’ at the same time that it erased their individual subjectivities. I emphasise at this point that these persons had already been granted refugee status, despite arriving by boat. Other Tamils who had sought refugee protection through authorised channels were not treated in this way. Tamil refugees who arrived ‘unlawfully’ were framed as a terrorist threat. The imputed criminality this entailed became the basis for their continued segregation and removal, not only from community but from legal protections.

As Bauman states, to be effective, such screening also requires an initial segregation, in which persons:

are cut off from the network of personal intercourse, transformed in practice into exemplars of a category . . . Until, that is, they . . . [ceased] to be those “others” to whom moral responsibility normally extends, and lost the protection which such natural morality offers.

For those Tamil refugees who were indefinitely detained, this was facilitated through their discursive othering as a ‘terror’ risk. The category of the ‘unlawful’ thus has the potential to stray beyond the bounds of its meaning under law, with unlawfulness narrated as threat or criminality, and producing a psychological and – indeed spatial – distance between those doing the categorising and those subjected to it. A key consequence is that those so

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607 Weber, “Down that Wrong Road”, 252.
609 Bauman, Modernity, 189, 25.
categorised are less legible as human rights subjects, as I have argued in chapter two.

Spatial exclusion
Deploying classification as a dehumanising exercise which constructs the other as threat to the population is thus crucial to the capacity to marginalise and exclude. Beginning as a term in law, it both justifies, and functions as a precursor to the screening out those regarded as risky subjects, through spatial exclusion.610 This prior exclusion under law through the crafting of migration categories facilitates the alienation of ‘unlawful’ refugees from society. As the indefinite detention of Tamil refugees show, under such conditions ‘risk, in the form of “dangerous” populations, is most effectively managed, not through normalisation, but spatialisation marked by a well-mapped exclusion and isolation through mechanisms of classification’.611

Bauman’s mapping of the progressive enabling of the Holocaust accentuates the way in which categories function as a condition for spatial exclusion. He observed, for example, that for the Holocaust to occur required that Jewishness had to be re-articulated so that it appeared as a category – otherwise ‘they’ would merely move among ‘us’.612 It is worth noting that the classification of individuals on the basis of an imputed group identity (in this case, their mode of arrival) also draws on a prior history of repressive categorisation in Australian society, as noted in chapter one. This is evidenced by Aboriginal reserves, quarantines and alien internment camps which have dominated the contours of colonial, settler society.613

This ‘spatial segregation of groups’ functions as a technique of control which also determines who has a legitimate, or ‘illegitimate’ claim to ‘status’ within

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610 See also Agamben, Homo Sacer, 177 –179.
612 Bauman, Modernity, 52.
the nation, through ‘identifying, classifying and managing’ people at the border. Brown’s analysis of the new penology shows that the increase in carceral techniques as a function of power is also reshaping social relations. As she reflects, this leads to ‘a new discourse of punishment, whose racial divisions and abusive practices are revised into a technical, legal language of acceptability’ one in which we are increasingly insulated from punitive practices which intensify social divisions. Conceptual remoteness – the other is no longer viewed under law as ‘human’ – provides a critical condition for the imposition of physical remoteness. When we are less able to appreciate the other as human as a result of the categories we apply, then the abandonment of the other to the camp is more easily facilitated: we are soon unable to see their suffering as suffering. Physical remoteness accelerates this process when it is accompanied by psychological distance.

**LAWFUL ‘IRRESPONSIBILITY’**

Narrowing the field of responsibility to refugees through the category of the ‘unlawful’ occurs not as a discrete event, but through a series of ideational and other shifts which cumulatively function to justify acts of ‘irresponsibility’, beginning with the work of categorisation. Thus the state is able to effect exclusion, not just through the border per se, but through the terms it uses to classify people. Dauvergne refers to these practices as amounting to ‘resiling from refugee law.’ Resiling from refugee law – or for the purpose of this thesis, contracting the field of responsibility in relation to refugee obligations – is achieved in law through the way in which definitions and categories in refugee law are used.

**Classification as a neutral exercise**

The application of the category of the unlawful refugee appears as the neutral

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614 Nethery, "Immigration Detention," 145.
615 Brown, ‘The New Penology’, 120.
616 Veitch, Law and Irresponsibility.
617 Dauvergne, Making People Illegal, 54
exercise of authority. Office is engaged in discrete but interrelated processes which together can produce harm as a form of structural violence, at the same time as this violence is hidden from view through the claim that it emanates from law. Yet early modern accounts of office suggest that the application of categories marks a distinction between the brutal exercise of power and office, with the latter instead characterised by the efficient and careful administration of ‘justice’. The reliance on categories as this dispassionate exercise of authority – that the definitions are merely mechanistic – suggests a shift from visceral responses and violence to impartiality and fair treatment. The failure to acknowledge the care needs of Cornelia Rau was symptomatic of this narrowing of responsibility, perceived as simply no more nor less than the necessary effect of law.

But violence does not disappear; it simply emerges in a new form which is more difficult to detect and to counter. This form of power is arguably much harder to resist, because it can be defended on the basis that the government is merely following ‘due process.’ It is also hard to pinpoint any underlying violence because the use of categories is embedded in institutional processes, including law, and thereby remain largely invisible as a function of power and as political strategy.

However, because ‘political resistance’ to the classificatory practices accompanying the new penology is less likely, it makes them an extremely ‘efficient’ practice for governments to deploy. Accordingly, categories develop a degree of immunity to normative objections. The capacity for an appeal to ethics, or to individual difference and singularity is diminished, if not entirely foreclosed. Their effectiveness is enhanced by a metrically driven account of management in which performance indicators and auditing processes provide a

measure of rational, effective and ‘neutral’ service delivery, amounting to what Simon calls, following Foucault, a ‘regime of truth, a way of exercising power.’ 621 Under the guise of their neutrality, government is able to divert attention away from its own responsibility towards the culpability of refugees who failed to comply with migration law. 622 This is the essence of Žižek’s claim that when we focus on subjective violence, objective violence disappears from view. 623 In this way, responsibility shifts: it disappears from office. 624 The effect of this spatial distancing is intensified when the categories we craft are effectively empty of meaning.

The ‘unlawful’: an empty category
The classification of legal personhood has an instrumental value: it imports meaning into relations and distributes rights and obligations. There remains however, an underlying potential for violence through the categories we craft and how we apply them. Importantly, the category of the ‘unlawful’, or what Dauvergne refers to as the ‘illegal’, is peculiarly distinct insofar as it is empty of meaning even while it arranges relations by instituting the ‘binary categorisation of division between us and them . . ’. 625 Oddly, classifying someone as ‘unlawful’ constitutes a denial of ‘legal presence in spite of ‘physical presence’. 626 The ‘unlawful non-citizen’ communicates nothing of the particularities of the person, except to denote her position as outside the protection of the law, and beyond the realm of political community, producing a division between those who are recognised and those lacking recognition. In Larking’s terms, this locates the ‘unlawful’ beyond the pale of law and its protection. 627

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622 This is pivotal to Vietch’s argument in Law and Irresponsibility.
623 Žižek, Violence.
624 Vietch, Law and Irresponsibility.
625 Dauvergne, Making People Illegal, 16.
626 Goodwin-Gill and McAdam, The Refugee, Preface.
627 Larking, Refugees and the Myth.
So while empty of content, the category of the unlawful is potently expressive. In the shift from verb ‘unlawful’ (or ‘illegal’ as Dauvergne shows) to noun, ‘the unlawful’ as an ontological state is a category permeated by ideas about transgression and risk.\(^{628}\) As a risk category, the unlawful non-citizen is applied to those seen as threat to the integrity of the border, evidenced by their refusal to respect the laws and processes of the state. In mapping out the literature on the new penology, Michelle Brown recounts the logic behind the categorization of persons based on their group rather than individual identity, as central to the use of punishment as a way of managing the future, but at a distance.\(^{629}\)

The actuarialism which underpins the new penology, seeks to exert control over disorderly movement of refugees through the differential treatment of ‘unauthorised’ arrival. Importantly, the establishment of a risk category enables us to:

> separate punishment as an institution from the primary motives and reasons which underscore its invocation: retribution – and a retribution that is more generally grounded in revenge. The vengeance which underlies the implied calm reason of systematic, procedural, proportional retribution cannot be repressed and will often defy a rational logic of any kind. To privilege an actuarial logic above such close-to-the-ground motives for punishment obscures the nature of punishment itself.\(^{630}\)

This also explains the psychic processes underlining the slippage between unlawful, criminal, deviant and undeserving which I have already highlighted. There is a surplus effect which strays beyond the apparent intention of the category. And yet, as noted, their apparent legal neutrality means that we can dismiss categories as being no more or less than the dispassionate application of law. This enables the term ‘the unlawful’ to perform the work of the

\(^{628}\) Dauvergne, *Making People Illegal*, 16.
\(^{630}\) Ibid., 113.
sovereign which the sovereign cannot admit to: that is to exclude those whom it has a responsibility to protect. The proliferation of actuarial modes of governing and the use of risk categories have not only led to diminishing access to legal protections, but are reconfiguring social life such that we are increasingly remote from ‘the social realities of isolation and exclusion, all conducted in a manner and on a scale which exacerbates the fundamental class, race, and gender contradictions and divisions of democracy.’

The apparent neutrality of risk categories suppresses public debate and dilutes opposition, especially at a time when sovereignty is under threat. It also develops reiterative power: when a category such as ‘unlawful non-citizen’ is codified in law, it is hard to dislodge, because law is always underwritten by sovereignty. Asserting rights for the ‘unlawful non-citizen’ tends to be fruitless because doing so ‘requires creating a space for those individuals whom states are exercising considerable resources to erase.’

Because the category of the ‘unlawful non-citizen’ has no content as such, it is also malleable. This is even while, as noun, it denotes not an act, but a group identity defined by mode of arrival. The detention (and punishment) of some groups of refugees, notably those who arrive by boat, or those who, like the Tamil refugees, are deemed a potential terror risk on the basis of group identity can be understood as exemplary of this trend: individual specificity is obscured by the aggregation of individuals as part of a group with a shared risk calculation, a central effect of this is that people lose their humanity. The emptiness of such risk categories unleashes the potential for the misuse or abuse of categories and facilitates the orientation of office towards practices which are not commensurate with its purpose. In other words, the absence of meaning and

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631 Ibid., 120.
632 Dauvergne, Making People Illegal, 18.
633 Ibid., 26 – 28.
precision in the construction of this category subtly enables the office of migration to be diverted from its administrative role and engages it in the production of suffering.\textsuperscript{635} The following section will draw out the way that the suffering which eventuates appears either as merely collateral damage, or is rendered invisible.

**REMITENESS FROM SUFFERING**

Our capacity to avoid implication in harm is easier when suffering no longer appears as harm.\textsuperscript{636} Once excluded or sealed off, so to speak, those refugees who are classified as unlawful become remote from us and their experience of suffering is made much more difficult to see, let alone communicate. For this reason, the category ‘the unlawful non-citizen’ is discursively powerful. Because it denotes transgression, it legitimises suffering by diverting attention away from the state and towards refugees as being blameworthy due to their failure to obey ‘due process’. On Bauman’s terms, they become ‘psychologically invisible.’\textsuperscript{637} This suffering is produced as the necessary penalty for breaching positivist law and is invisible as suffering because it is the collateral effect of this breach.

Research into immigration detention centres in Norway revealed that migration officers also deploy elaborate techniques to legitimise their role in immigration detention centres, often through narratives which label those detained as a threat or as criminal. This enables them to neutralise the harm experienced by those in detention whilst making an appeal to higher authority in order minimise any personal responsibility for harm: responsibility is not only mediated but disavowed.\textsuperscript{638} In these accounts, as in the experience in Australian immigration detention, remoteness from the suffering of others is produced through processes of classification and labeling, including in law. This is a pivotal reason

\textsuperscript{635} Australian of the Year, Dr Patrick McGorry, has famously described immigration detention centres as ‘factories for the production of mental illness.’ See “Close Detention Centres: Australian of the Year.” ABC News, aired 26 January, 2010 (Melbourne: ABC TV, 2010).


\textsuperscript{638} Ugelvik, “Techniques.”
why a turn to human rights fails. The other is not recognised, as Larking shows, as equal, or indeed, as a ‘grievable life’.

**The loss of judgement and imagination**

In the Rau and Solon cases, the Palmer Inquiry found that there was a desire to withdraw from responsibility for making judgements, even though the exercise of a ‘reasonable suspicion’ that someone is unlawful is ‘an exercise in personal judgement.’ Yet, when exercised poorly, legal scholar David Luban remarks, a decision can emerge as a *mis*judgement:

> [W]e make one decision, and it expands the harm incrementally. Harm can only continue if it no longer seems to violate any principles.

This is precisely why the category of unlawfulness is so dangerous, because there are no obvious principles which are being violated. This has far-reaching consequences. For Brown, these trends towards actuarialism in punishment practices undermine our capacity for reflection and discretion, both of which are uneasily mapped onto a classificatory, risk-based model.

The obligations of the department under a system of immigration detention are grave ones, wherein the failure to conduct oneself well ‘is a weakness because every day that passes in process affects people’s lives.’ For the purpose of this thesis, how we apply categories under the law has the potential not only to produce suffering, but to shape the sorts of relations we enter into, in social and not just legal contexts: correspondingly, it establishes the scope and nature of office obligations. In doing so, it can also undermine the capacity for judgement at the same time as it renders the need for judgement more pressing.

Role division arguably produces a failure of imagination, an incapacity to think

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639 See Butler, “Violence, Mourning, Politics”, 38 – 49.
640 Palmer, Inquiry into the Circumstances, 189.
641 See Luban, Legal Ethics, 258
643 Palmer, Inquiry into the Circumstances, 171.
beyond the scope of our own narrow office fields. Human suffering is, therefore, less and less the result of oversight of ‘broken promises’ but the product of something far more disturbing: suffering due to ‘promises fulfilled, bargains kept, and jobs well done’, in which they can appear as acts of responsibility.\textsuperscript{644} In such circumstances, judgement appears to be replaced by compliance with the role. Demonstrating precisely these sorts of concerns about role fragmentation and the substitution of technical for moral responsibility, the report into the Rau and Solon cases described staff as having a dulled ‘sense of urgency’, seeing themselves only as ‘cogs in a wheel’ and, as such, distanced from the effects of their action or inaction.\textsuperscript{645} The emphasis was on ‘ensuring operational compliance’ and was marked by a systemic reluctance among staff ‘to accept ownership of matters beyond their immediate responsibilities.’\textsuperscript{646}

Critically, institutional complexity, and the diversity of office both enhance the deflection of responsibility and complicate the attribution of guilt. Who is responsible? And how is criminal responsibility to be attributed to the actions of the state as the source of legal authority? Eichmann’s defence was that he had not, personally ‘killed a Jew’. Moreover, for Arendt his preference for following orders over any ethical obligations, reflected an inability for Eichmann to ‘know or feel that he is doing wrong.’ Arendt provides an insightful yet troubling reading of Eichmann’s words to highlight the risk posed by a Weberian obedience to legal authority. He ‘did his duty…he not only obeyed orders, but he also obeyed the law.’ She remarks that ‘[t]his uncompromising attitude toward the performance of his murderous duties’ was presented by Eichmann as his defence, and therefore given greater weight than moral consciousness. As she observed of Eichmann, he appeared less as criminal and more as someone marked by ‘thoughtlessness’ and ‘lack of imagination…to put the matter

\textsuperscript{644} Veitch, \textit{Law and Irresponsibility}, 50. Stress is in the original.
\textsuperscript{645} Palmer, \textit{Inquiry into the Circumstances}, 171.
\textsuperscript{646} Ibid, 82. and 165.
colloquially, [he] never realized what he was doing.\textsuperscript{647}

Yet remoteness from the effects of our actions through role obedience only tell part of the story. The effects of role division are compounded where there is a failure of imagination, or reflection, and especially so when this loss of judgement is fostered by the legal categories we deploy. Careful judgement is significant to the extent that judicial reflection can restore ethical conduct. It is for this reason that I turn to Levinas and scholars of professional legal ethics, such as David Luban, to elaborate an ethical reading of office conduct.

In this vein, I argue that the categories we craft in law require attentiveness to their potential consequences, both in relation to the violation of ethical principles, and the loss of judgement that they might facilitate. This is not just a case of blind obedience. As an immigration officer recounted in the Solon case:

\begin{quote}
In the compliance area, people on the whole are a bunch of cowboys, under so much pressure to deport people. All proper processes have broken down. They put their energy into picking up people and deporting them without proper investigation . . . There is a desire among officers simply to ‘give government what it wants’.\textsuperscript{648}
\end{quote}

This observation suggests that the application of the category ‘unlawful non-citizen’ has been influenced by a departmental culture which is overly keen to adopt an enforcement model. For Luban, this can produce a cognitive dissonance which limits us from appreciating the effects of our actions.\textsuperscript{649} It leads to degraded judgement and can produce decisions which are ‘morally repugnant.’\textsuperscript{650}

\section*{CONCLUSION}

Migration categories – like all legal categories – are central to the sorts of

\textsuperscript{647} Arendt, \textit{Eichmann}, 287 – 288.

\textsuperscript{648} Margot O’Neill and Tom Iggulden, “Family breaks silence over deportation.” May 9, 2005, Lateline ABC http://www.abc.net.au/lateline/content/2005/s1363610.htm

\textsuperscript{649} Luban, \textit{Legal Ethics}, 114.

\textsuperscript{650} Ibid., 259.
obligations with which office is charged. They are best effected when they constitute a teleological expression of office, when there is a convergence between the function of the office, its purpose, and the categories it deploys, as I noted in chapter two. But like office, categories are ethically sound when their purpose does not undermine human dignity and access to legal protections. The category of the unlawful has opened a space for the denial of procedural protections at the same time as it functions as a legitimising tool for the imposition of harm. This was thrown into sharp relief in the case Tamil refugees indefinitely detained under adverse security assessments, despite having already been granted refugee protection. These effects demonstrate that the categorisation of refugees as ‘unlawful non-citizens’ is not a meaningless exercise for those to whom it applies, even while it is linguistically empty of meaning. It produces concrete effects upon those subjected to it. In the case of Cornelia Rau and Vivian Alvarez Solon, it illustrated that suffering fails to appear as harm for those classified as unlawful.

I stress that categories encompass both an expressive and a functional capacity which also impact on the work and conduct of office. That is, they communicate something about the purpose of office and its intentions, and they do some of the ‘work’ of office. The ‘unlawful’ gives effect to a policy of mandatory immigration detention by reconfiguring the obligations of the department towards punishment over protection. The categories we craft are both shaped by, and shape, the conduct of office and, in doing so, define the scope of office obligations. Yet, in ordering our relations, categories can also be a source of responsibility, with the category of the ‘refugee’ in refugee law an example of this.

In matters concerning membership or exclusion from community, the stakes are typically high, and so we might expect that the conduct of office is attentive to this. Both the categories we make and the way we apply them, engage office in
important work, in which the exercise of judgement is critical. This chapter has argued that the discursive construction of the ‘unlawful’ instead positions individuals beyond the reach of care and protection which would ordinarily apply to refugees, whilst diminishing the capacity of office for such care and for reflection and judgement. In chapter four, I narrow my focus to the experience of immigration detention as sites of suffering which are justified through the categorisation of the ‘unlawful’. This continues a mapping of mandatory immigration detention through office practices of detachment.
CHAPTER FOUR: LEGITIMISING SUFFERING – THE HARM THAT HURTS US ALL

Introduction

In chapter three, I argued that the category of the unlawful non-citizen uncouples responsibility from office despite Convention protections which are presumed to apply to those seeking refuge. As a seemingly empty category denoting no more nor less than a category of arrival, the ‘unlawful non-citizen’ has effects which are nonetheless imbued with meaning. This chapter explores the neutralisation and acceptance of suffering which is legitimated by categories as part of what I term ‘practices of detachment.’

While the focus here is on immigration detention centres as sites of punishment and the source of suffering, the stories of harm and suffering I expose are not solely as a testament to the ethical implications of suffering for those detained, but for those doing the detaining. I begin by repeating my argument that despite being deemed administrative detention, immigration detention centres look and feel like punishment, producing what Bosworth terms an ‘institutional dissonance’ between the purpose of the department and its border protection practices. The suffering which occurs is the effect of a complex intersection of this dissonance, prior trauma and personal experiences of detention. In the second part, I turn my attention to how this suffering impacts on officials and on the department generally. This is not just a concern about what it means for office to be engaged in suffering in these concrete ways. It also raises questions about how we understand office as a source of obligations and responsibility given that the tradition of office is founded in respect for human dignity and lawful relations which affirm humanity. This applies to those in office as well as those whom office serves.
THE EXECUTIVE AUTHORITY TO DETAIN: THIS IS NOT PUNISHMENT?

Immigration detention has been enabled under Australian law since the first laws on migration. However, the ability to detain was rarely used and it was not implemented as a policy until 1989. Those who had arrived in Australia but were awaiting the processing of their visa applications, were typically housed in ‘open’ centres, in independent, family-based accommodation.\footnote{This is compared to ‘closed’ detention centres, which have tighter security and surveillance.} Detention was more transparently administrative, designed to effect deportation or to process visa applicants promptly.\footnote{This is notwithstanding the practice of segregating and detaining ‘enemy aliens’ and Australia’s history of regulation and marginalisation of those classified as a threat or as diverging from the norm of Australian identity. See for example, the research of Bashford and Strange, \textit{Isolation}.}

The constitutional validity of immigration detention rests on the defence that it is administrative detention, since only courts can authorise punishment. As noted in chapter one, in \textit{Lim} the HCA determined that detention is lawful insofar as it effects an incident of executive authority under the Constitution, that is for the processing of visa claims and the verification of identity. The judgement stated that the time spent by a person in immigration detention:

\begin{quote}

is limited to what is reasonably capable of being seen as necessary for the processes of deportation or necessary to enable an application for an entry permit to be made and considered.\footnote{Justices Brennan, Deane and Dawson in \textit{Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs} (1992) 176 CLR 1. (High Court of Australia, 1992). 176 CLR 1 at 33.}
\end{quote}

Several High Court challenges to the validity of detention have centred on what constitutes ‘reasonably’ necessary detention in the government’s pursuit of deportation or processing of entry claims. In these cases, the administrative purpose has been upheld as valid, irrespective of the harshness of detention, its duration or the foreseeableability of a date of release. For example, in \textit{Behrooz v Secretary of the Department of Immigration and Multicultural Affairs}, the HCA found that the relevant criterion for punitive detention was an intention of deprivation
of liberty, and not the characteristics of that deprivation, however harsh or inhumane. Justice Callinan remarked:

The question whether the law authorizing detention (and saying nothing about the conditions of it) is reasonably capable of being seen as necessary for a legitimate purpose within the aliens power, cannot be concerned with a qualitative assessment of the conditions of detention. It is concerned therefore with the purpose of the law authorizing detention.654

The reasonableness test was also addressed in *Al Kateb v Godwin* in which the HCA upheld that, even while detention of the applicant had no foreseeable end date, it could not be concluded that it was unlikely that he would ever be released.655 This is notwithstanding the equally persistent interpretation by the Court that detention must be constrained within its statutory limits, notably that detention is for the shortest time possible for the purpose of determining the outcome of an application for entry into Australia or to effect removal, that is, to fulfil administrative objectives.656 I stress that in subsequent cases the HCA has determined that release of a person from detention is necessary when there is no foreseeable date of release.657

Importantly for this thesis, the constitutional validity of administrative detention rests on tenuous grounds if we accept that it is punitive in intention and effect. A finding of guilt under criminal law must be discharged by a court for a person to be lawfully held in custody. If it amounts to an excessive or inappropriate exercise of executive power then the use of immigration detention exceeds the boundaries of the *telos* of the office of migration. I will briefly pinpoint the basis of this claim before turning to its effects upon those working within the

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654 208 ALR 271 (High Court of Australia, 2004) Justice Callinan at326.
656 This was first established in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1. (High Court of Australia, 1992). See Billings, “Whither Indefinite” 1401.
657 I stress that in subsequent cases the HCA has determined that release of a person from detention is necessary when there is no foreseeable date of release. In *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 197 ALR 241 (Federal Court, 2003) found that the detention of Al Masri was found to be unlawful because there was no foreseeable date of release.
THE ACTUALITY OF PUNISHMENT AND HUMAN SUFFERING

Immigration detention limits freedom of movement, has been described as arbitrary and entails extensive human rights breaches, as outlined in chapter one. The design and appearance of the centres, together with procedures, recruitment strategies and everyday practices in the centres, communicate a punitive message and have been modelled on designs used in the criminal justice setting. A number of the centres comprise elements of ‘Supermax’ prisons: they are heavily gated and securitised, using razor wire and sophisticated surveillance techniques.\(^{658}\) The visual impact of Baxter Immigration Centre in South Australia has been described as ‘severe’, with the Palmer Report observing that:

Baxter is a corrections-style facility. It was constructed to redress the detention problems experienced at Woomera. Unavoidably, its appearance is severe. It looks like a prison. In many ways, the activities that occur in Baxter are similar to those in any Australian correctional institution; the untrained observer could not tell the difference. Baxter is effective in its purpose of containment.\(^{659}\)

The penal effects of detention architecture – it feels like a prison setting – are compounded by correctional-style procedures and practices which are pervasive and systematic.\(^{660}\) Mealtimes and recreation follow an institutional routine. Lockdown times are not uncommon. Correctional practices extend to the use of physical and chemical restraints and isolation units.\(^{661}\) As early as 1998, the AHRC noted that:

\[\text{at various times, segregated blocks have prevented those in detention from communicating with others in the centre, nor are they able to}\]

\(^{658}\) Pugliese, "The Tutelary", 208.

\(^{659}\) Palmer, Inquiry into the Circumstances, 67.

\(^{660}\) HREOC, For those who’ve come. This report noted that at the time, those employed as ‘guards’ ‘only had correctional experience,’ page 63. It also noted that isolation, coercion and force feeding were often used as control techniques, page 120.

\(^{661}\) Ibid and see also JSACDN, Final Report, 64,122.
contact a lawyer or receive visitors. This isolation has also placed them at
greater risk of human rights breaches due to the lack of visibility and
therefore accountability for their treatment.\(^{662}\)

Given the experience of prior trauma and torture for many of the detainees in
their country of persecution, the inappropriateness of isolation units also has
been described as entirely unsuitable in this setting, failing even to meet
‘Muirhead’ standards.\(^{663}\) This is especially disturbing given the numbers of deaths
in immigration detention.

The privatisation of the operation of the centres from 1998 onwards under
the Howard Government fostered a correctional model. Contractors managing
the centres, such as Australasian Correctional Management (ACM), G4S and
Serco, have extensive experience in correctional settings, including those where
prisons also function as immigration detention centres.\(^{664}\) They typically bring
their expertise in the correctional services sector to the detention network.
Recruitment patterns indicate a history of employing former custodial staff, who
are likely to transfer correctional skills and experience to a setting which is
notionally not a punitive one. Those without correctional experience have
undergone training programs ‘based on correctional services curricula’.\(^{665}\)

This culture of control, combined with a detention population with complex

\(^{662}\) AHRC, For those who’ve come, 130.
\(^{663}\) JSCAIDN, Final Report; Hawke and Williams, Independent Review; AHRC Summary of Observations; Palmer Inquiry into the
Circumstances, 89. Muirhead standards were developed in response to the number of indigenous deaths in custody in
Australia which provoked a Royal Commission, as noted in chapter one. These standards were developed by Justice
Muirhead who presided over the Royal Commission into Aboriginal Deaths in Custody. They were developed for
implementation in the criminal justice system, to ensure adequate observations in cells for the care and monitoring of
persons in custody.

\(^{664}\) This was notably the case for the company, Australian Correctional Management (ACM, which managed the centres from
1999 to 2003, given that its parent company, Wackenhut, manages numerous US prisons which also hold ‘illegal’ migrants.

\(^{665}\) Palmer, Inquiry into the circumstances, 65. The 1998 report by HREOC, Those who’ve come across the seas, contains
extensive references to the correctional setting, practices and policies in Australian immigration detention centres.
Michael Flynn and Cecilia Cannon present a detailed account of the global trends in this area in “The Privatisation.”
They note that privatisation has not always had negative effects, page 3. The Australian case has, however, been
characterised by a pattern of inhumane treatment of detainees by private guards, page 5. This is unsurprising: officers
employed in the early 2000s as guards by private company G4S, undertook correctional style training. Serco has
constructed immigration detention centres based on the design of Category B prisons and ACM’s parent company,
Corporation Wackenhut, has extensive contracts for prison management in the US. This is not to say that all detention
centres are alike: some have much more pleasant and amenable surroundings, with greater freedom of movement and
social activity than others. See Bosworth’s observations of this, in Inside Immigration, 64. This similarly applies to the
Australian setting.
care needs and anxiety over their visa applications, has often fuelled significant unrest. Incidents of self harm, hunger strikes, and protests, including lip sewing, riots and escapes have been disturbingly regular features of Australia’s history of mandatory immigration detention. These events were particularly prevalent from 2000 through to 2002 at Woomera and Baxter immigration detention centres but have also emerged between 2010 and 2012 and beyond. Rather than opting for less regimented supervision to relieve tension, centre management have usually responded by increasing disciplinary tactics, including ‘excessive use of force’, comprising constraints such as cuffing and shackling as well as chemical restraints. This is especially disturbing given that many of those detained are already particularly vulnerable, having suffered prior trauma, including torture in their home countries. Importantly this has had systemic effects, as noted in the Palmer Report:

[T]he confrontational history of immigration detention in Australia has left its mark on the nature of immigration detention facilities and the way they are run. There is a very narrow field from which people with relevant experience can be recruited, and the links to a correctional facility were apparent at Baxter.

This statement suggests that the nature of the centres – confined, securitised and effectively punitive – has encouraged and indeed required the recruitment of appropriate staff who are able to apply their background and skills drawn from working in criminal justice settings. While the punitive message conveyed by these settings has been underlined by a deterrent purpose, its effect has also been to foster unrest which then generates an acceleration in techniques of

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666 Riots at Manus Island detention continued to feature, with detainees living in difficult conditions. Manus has been a site of several deaths of detainees. See Geoff Thomson “The Manus Solution” Four Corners, aired 28 April, 2014 (Sydney, ABC TV, 2014).
667 HREOC, Those who’ve come, 100–101.
668 For example, see Louise Newman, “Seeking Asylum – Trauma, mental health and human rights: An Australian perspective, Journal of Trauma and Dissociation 14, no. 2 (2013): 213–223; Zachary Steel et al., “Psychiatric Status of Asylum Seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia,” Australian and New Zealand Journal of Public Health 28, no. 6 (2004): 527–536, and Neave, Suicide and Self Harm 52 – 53. This is also despite the presence of staff who attempted to resolve the conflict in humane and respectful ways.
669 Palmer, Inquiry into the Circumstances, 65.
control and punishment as a response. Evidence of extensive office abuse and objectification of those in detention was pervasive.

Following ongoing unrest and complaints about the treatment of those detained by the private contractors under the Howard Liberal Government, a new Federal Labor Government entered into new contractual arrangements with global service company Serco in 2009. The new contracts were underlined by basic standards ensuring respect for human dignity. An AHRC standards framework detailing departmental obligations, including the duties of migration officers and detention staff under Migration Regulations and the Migration Series Instructions was an attempt to bed down some basic standards of protection for those detained. Despite some improvements, reports continued to emerge that the department ‘had failed to ensure that Serco staff were sufficiently trained and therefore competent and confident to perform their roles.’ Neither did the centres depart from a correctional model, with the AHRC noting in 2008 that the Christmas Island Immigration Detention Centre ‘looks and feels like a high-security prison’ with facilities ‘contained within an oppressive series of caged and fenced compounds and walkways … [D]espite there being some open grassy areas, the excessive amount of wire fencing surrounding each compound makes one feel caged in.’

Given the relation between unrest and excessive control, it is somewhat ironic, assuming that the intention is to diffuse unrest, that the department moved to a more highly securitised, and correctional model as a means of ‘managing’

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670 HREOC, For those who’ve come.
672 This was a key platform of the “New Beginnings” policy of the Rudd Labor government.
674 AHRC, Human Rights Standards. That such standards were mooted are indicative of the normalisation of this practice, something which warrants further reflection. I also emphasise the argument put by Julia Morris that detention becomes as an effect of improvements in human rights standards. See “In the Market”, 52.
675 JSCM, Summary of Observations, 60 –63.
676 AHRC, Immigration Detention on Christmas Island.
the detainee population.677 This impacts on how those detained – and those ‘doing the detaining’ – experience this environment, as I shall explain further below. As I explained in chapter two, Pugliese argues that the design of the centres has been underpinned by a ‘telegenic logic’ which conveys a visual message of inflicting ‘necessary suffering’678 through a minimalist and often brutal, appearance.679 The significance of the penal architecture of immigration detention centres in this respect cannot be overstated. As he remarks, the carceral ‘aesthetic’ of the centres functions to:

semitically reproduce particular moral effects that will actually impact on, and perhaps modify, the behaviour of the inhabitants . . . 680

It is not surprising, then, that the physical setting produces harmful effects on those within the confines of detention, including those working within it. The penal design communicates a message of deterrence, a reminder that the sovereign state can and does assert authoritative control at the border.681 In his analysis of the schematic design of the centre, Pugliese pinpoints its disciplinary effects, in which:

the mobilization of carceral and military aspects of architecture in the design of these immigration prisons functions to convey, in tutelary terms, “an object lesson in the purpose of law” – that is, that undocumented refugees and asylum seekers entering the Australian nation will be duly detained, disciplined and punished.682

But, while grid wire fencing and secure gating communicates sovereign power through the visibility of ‘necessary suffering’, I want to extend Pugliese’s important argument. It is not simply that this is a warning of punishment communicated through ‘tutelary architecture’. Given the persistent declarations

677 It must be stressed that the increase in accommodation and secure facilities at Christmas Island were begun by the previous Howard Liberal government.
679 Ibid.
680 Ibid., 207.
681 See also Pickering and Weber “New Deterrence.”
that detention is not punishment, we can also regard the design and visuality of the centres as expressively doing the work that policy and law must disavow. Beyond constituting a spectacle of suffering as an assurance of border control, it necessarily performs a function that the law cannot. The violence of law then becomes encoded within the materiality of immigration detention centres, in their design, practices and procedures. Detention delivers to the scene of immigration detention that which is unspeakable in law. That is, the physical environment and setting must communicate a punitive message of deterrence and indeed of violence to ‘unauthorised maritime arrivals’ seeking asylum onshore, in the absence of any capacity to admit to this as punishment (violence) under law.

This suggests that penal practices and settings are absolutely crucial to the enforcement of a policy which cannot be constitutionally read by those objecting to it as lawfully punitive in its intention, or purpose. Such a shift also begs reflection in the light of the human rights constraints upon the excessive use of force which emerged post-2005. Accordingly, it is possible to interpret the penal design of the facilities at Christmas Island as a conduit for a punitive message which not only law disavows, but which the implementation of new standards can make more difficult to communicate.683 That suffering persists despite improvements in conditions, including the provision of improved health care services, testifies to the impact of this message.684

Suffering and self harm
The experience of being detained, including such things as the physical setting, treatment by officers, and the extent of control, the use of force, handcuffing, isolation cells and surveillance amount to breaches of the

683 I note that at the time of writing, the brutality of treatment of those in offshore processing has reversed the attempt by a Labor Government to improve standards of treatment. The design and physical setting of the centres, including the barrack style accommodation at Manus Island, with lack of privacy and appalling conditions, testify to the significance of the setting in communicating a message of punishment.
684 The irony evident here is that suffering must be both visible as communicating state power, and yet invisible as harm which must be resisted.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Notably, detention has impacted particularly adversely on children, with effects ranging from difficulties in maintaining a ‘normal’ routine to witnessing acts of extreme violence. Allegations of systemic sexual abuse of those in detention, including children, have continued to circulate with alarming regularity. The AHRC asserted that no place of detention, no matter how well run, is a place for a child: they are ‘traumatising places which subject children to enormous mental distress’. In their research, Mares and Jureidini found that:

children in detention have prolonged exposure to multiple development risk factors, including experience of personal and interpersonal violence, parental mental illness, inadequate parental protection and comfort in a context described as developmentally impoverished.

This is especially troubling in the case of unaccompanied children, towards whom the department has a legal obligation of care under the Guardianship Act, as noted in chapter one and discussed below. Ten years later, the release of first report into children in detention, the 2014 AHRC report, The Forgotten Children, repeated the same concerns. Mares and Jureidini observed that children in detention displayed post-traumatic stress disorder, experienced high levels of anxiety and suicidal ideation. Importantly, they noted that staff caring

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685 Opened for signature December 10, 1984. 1465 UNTS 86 (entered into force 26 June, 1987). For detail on how this has effected children, see AHRC, A Last Resort, 9; HREOC Those who’ve come across the seas, 90 – 92, 93 and 96 – 97. The report of the “People’s Inquiry” – Human Rights Overboard – by Briskman, Latham and Goddard, provide extensive detail on this. See especially 138 – 58 and 345 – 359.
686 AHRC, A last Resort, 331 – 336. The Flood report which was commissioned in response to allegations of sexual abuse of a boy in Woomera Detention Centre in 2000 (Phillip Flood, Report into Immigration Detention Procedures (Canberra: Department of Immigration and Multicultural and Indigenous Affairs, 2001) also contained disturbing details of child sexual abuse, cited in A Last Resort. For other findings on the impact of detention upon children, see Zwi and Mares, ‘Sadness and Fear.” As the time of writing this thesis, and over more than two decades, immigration detention and ‘processing centres’ have been sites where allegations of the sexual abuse of children is commonplace. See also Whitmont and Harley, “Forgotten Children.”
688 Mares and Jureidini “PsychiatricAssessment”.
689 See the Guardianship of Children Act 1946 (Cth) (IGOC Act).
690 See AHRC, The Forgotten Children.
691 Mares and Jureidini, “PsychiatricAssessment.”
for children in this setting felt that they were unable to assist.\textsuperscript{692}

For adults and children, there is a direct correlation between the length of time someone is in detention and mental illness,\textsuperscript{693} a correlation which remains ‘robust’ even after accounting for other variables and is exacerbated by prior trauma.\textsuperscript{694} Deteriorating mental health emerges after three months of detention,\textsuperscript{695} often manifesting in clinical depression, mutism and disengagement.\textsuperscript{696} The absence of dispute regarding the nexus between detention and mental illness was noted in a 2012 report of the Joint Select Committee on Australia’s Immigration Detention Network: it reported that of the full range of submissions received, not one had ‘put forth arguments to the contrary’.\textsuperscript{697} A review of immigration detention processes and standards of care at Villawood (the Hawke-Williams Review) conducted in 2012, and followed by investigations by the Immigration Ombudsman in 2013, was in response to a disturbing number of suicides and suicide attempts in the network. For example, the Hawke Williams review investigated 11 deaths at Villawood, four of which were suicides.\textsuperscript{698}

Evidence also shows that since prolonged detention contributes to anxiety, the greater the probability that this then spills out into riots, hunger strikes and mass breakouts with a ‘clear link’ between prolonged detention,
overcrowding and these sorts of incidents. Notification of negative assessments of individual’s claims for protection visas exacerbate anxiety levels amongst the general detainee population.

INSTITUTIONAL DISSONANCE AND COMPLEXITY

Based on the discussion above, I propose that harm is produced as a result of these ‘institutional and personal dynamics’ which converge with personal experiences of distress by those detained. Refugees in detention are confused by a setting which communicates a message of punishment while remaining notionally administrative. It is concretely experienced as retributive. This fosters what Bosworth refers to as institutional dissonance, a disjuncture between the purpose of the institution and the actuality of the work that it does. It unsettles refugees’ sense of self, with immigration detention widely regarded as ‘punitive, hostile and unfair’. In a 2011 interview a Salvation Army teacher working in the network observed that those detained were often confused, seeking clarity over:

the uncertainty of “I’ve been singled out for this and what did I do?” They would just go crazy thinking “Was it because I was helpful? Was it because I offered to interpret for people? Was it because I never gave them any trouble? Was it because I’m healthy? Is it because I don’t have a family? Why? Why? What did I do? What is the reason?” And I would just tell people “I don’t know. God knows. There’s no reason.” But people

699 JSCAIDN, Final Report 33; Hawke and Williams, Independent Review, 36, which details the number of ‘IMAs’ in detention for more than 3 months, often awaiting reviews of initial, adverse assessments.

700 This included the decision by Federal Labor Government in 2010 to suspend the processing of refugee claims for Sri Lankan and Afghan nationals. See Fleay and Briskman, Released but not yet free 7 – 8. These authors note that due to backlog of claims that the suspension had generated, the time that refugees spent in detention was being prolonged by months. At this time, there were also reports of inconsistencies in the processing of protection applications, adding to the length of detention for those whose negative claims decisions were subject to review. The 2012 JSCM report into the strains and unrest in the system, revealed growing evidence of an adverse impact on mental health as a consequence of prolonged detention, including on the health and safety of those working in the centres. This evidence has been said to be incontroversible, as noted above.

701 Neave, Suicide and Self Harm, 45.

702 This is a key conclusion reached by Bosworth in her research into ‘Immigration Reception Centres’ in the UK, published in 2014. It is a persistent theme which emerges in reports issued by the Australian Human Rights Commission. For example, see ARHC A Last Resort 328 – 330, 372, 388.

703 Silove and Steel, “The Mental Health.”
can’t just accept that because the difference is so huge …\textsuperscript{704}

Many children similarly conveyed a belief that they were being punished, with children witnessing their parents being ‘chemically’ or ‘physically restrained with hand and leg cuffs, physically assaulted and refused blankets and shelter.’\textsuperscript{705}

The confusion and perceptions of injustice are important to note: mandatory immigration detention communicates a powerful message which does not appear comprehensible to a person seeking refugee status from a signatory state which claims to welcome refugees. The dissonance between the scope of obligations attaching to the institution of migration and the \textit{actuality} of practices within immigration detention provokes a crisis of identity.\textsuperscript{706} Asking ‘why am I here’, ‘why am I being punished’ or ‘am I a criminal’ is testament to the profound contradiction between what detention is ‘meant’ to be, and what it is and points to the salience of identity in these centres including among staff, as Bosworth has shown.\textsuperscript{707}

I emphasise this institutional dissonance by highlighting institutional factors which complicate the experience of the detention environment.\textsuperscript{708} Imprisonment in Australia is purposively implemented by those in office whose obligation it is to enforce custodial sentences. We can assume that those incarcerated are subject to the restrictions set out in the Crimes Act of 1914 in relation to the arrest and conviction of persons for criminal offences, have had access to a fair trial, and are sentenced on the basis of a finding of guilt, for a fixed term, which is definite. The deprivation of liberty is also accompanied by other procedural protections designed to ensure that the loss of freedom is the central

\textsuperscript{704} Debbie Whitmont and Janine Cohen, “No advantage”, \textit{Four Corners}, aired May 6, 2013 (Sydney: ABC TV, 2013).
\textsuperscript{706} Bosworth, \textit{Inside Immigration Detention}. This not only provokes a crisis of identity, it produces a crisis within the institution.
\textsuperscript{707} Ibid., 178. See also Ugelvik’s discussion of how staff in these centres manage this dissonance in “Techniques”, 215 –236.
\textsuperscript{708} This is absolutely not to say that other forms of suffering are not endured in the criminal justice system. However, there are more protections in the criminal justice system and incarceration has been imposed following a sentencing process in a court of law. The distinction is significant.
right infringed, thereby preserving *bios*, or political life.

The experience of being detained in immigration detention is akin to punishment but without the procedural protections which a criminal prosecution would deliver, such as certainty of release and fundamental human rights. This culminates in progressively deteriorating mental health, as noted above. Officials are likewise employed to administer a processing centre which has all the punitive hallmarks of the criminal justice system but without its protections. So we witness two layers of confusion: among those detained, and among those whose job entails work which they didn’t sign up to do. This results in role confusion for migration officers, despair among those detained, and a sense that something is acutely amiss in the institutional life of migration.

The diverse composition of the ‘detainee’ population intersects with the stress of being detained, prior trauma and social isolation, to create challenges which are peculiarly complex in this setting. It requires the careful calibration of roles and obligations to ensure that the care people need can be delivered. In its report released in 2012, the JSCM observed that sometimes the private contractor ‘struggled’ to meet its contract obligations, either due to inadequate facilities, lack of staff, or poor staff to detainee ratios and the risk profile of those detainees. At times, some staff were required to go on ‘suicide watch’ with no training in this area.

These trends show that it is increasingly difficult to dispense adequate care or to take responsibility for it, given the complexity and the gravity of the harms that detention produces. In their 2001 landmark study, Steel and Silove found that the:

> close association between administrative procedures and psychological reactions is particularly worrisome, as it endorses the concern that these

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710 Ibid., 64.
procedures, in themselves, act to undermine the psychological well-being of detainees.711 This suggests that administrative processes in this environment are inherently harmful, insofar as they are accompanied by anxiety about the outcome of their claims for protection: the administrative procedures themselves constitute a source of harm in the way that they are exercised. The combination of this with a confined environment, the prior vulnerability of the detention population, uncertainty and lack of clarity about the future, produce a toxic environment which is not conducive to care.

In the discussion that follows, I illustrate the consequences and effects of detention, in which the performance of office obligations takes the department into terrain which is arguably beyond the scope – or indeed the capacity – of their office to address. This is in part a consequence of the distortion of the purpose of office. Harm is not limited to those who are detained but spills over to those holding office as an effect of the tension between the administrative ‘legality’ of immigration detention and its punitive reality. This suggests the need for a more complex reading of suffering, which addresses the effects of this institutional dissonance.

**Beyond the limits of office**

High rates of mental illness and self harm in mandatory immigration detention centres place significant demands on staff in all areas, from guards, to migration officers and health workers. They must be able to respond to complex and sometimes chronic health care needs, as well as disturbances, self harm and the exposure of children to sexual and other forms of abuse and violence. As observed in the Palmer Report, ‘managing’ this policy is challenging for staff. The workload is high, and ‘case complexity’ requires that staff address many

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711 Steel and Silove, “The Mental Health,” 61 – 62. The authors found that those in detention applying for refugee status typically experienced prior traumas as a result of persecution, which the refugee processing system and detention exacerbated.
issues which are both ‘sensitive and difficult’.\textsuperscript{712} This is compounded by overcrowding, poor processes, the anxiety of detainees and poor access to medical staff and to legal advice.

The capacity to care adequately for detainees is extraordinarily difficult given that the obligations of office must also be met under conditions of rapid and extensive policy and legislative change. Staff are under pressure when ‘policy, procedures and enabling structures [are] being developed on the run.’\textsuperscript{713} Often, procedures (and resources) are inadequate to the task of identifying those requiring specialist care. For example, under the contract with Australian Correctional Management (ACM) in the 1990s, processing was rushed, with ACM being subject to monetary penalties if the two nurses in the compound were unable to process detainees for health checks within 48 hours of arrival. Given that many refugees came with illness, disabilities, exhaustion and sometimes undiagnosed diseases, this was an onerous task. It also required staff to follow through on risk assessment of detainees, given increasing incidence of self harm and suicide attempts. Disturbingly, the need for staff to undertake ‘suicide watch’ has been a persistent feature of what is said to be an administrative system.

Rather than address the source of these harms, the response has often been focused on addressing inadequate training and poor management.\textsuperscript{714} Emphasising the gravity of this responsibility in such an environment, the Palmer Report stressed that the department had failed to meet its obligations.

It had not provided:

an immigration detention centre environment that is required by the policy and described in the contract. It is too simple to just blame GSL or

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{712} Palmer, Inquiry into the Circumstances, viii.
\item \textsuperscript{713} ibid., viii – ix
\item \textsuperscript{714} Palmer, Inquiry into the Circumstances.
\end{itemize}
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DIMIA: the situation is both complex and demanding.\textsuperscript{715}

A subsequent report by the AHRC in 2008 again stressed that pressures emerging directly as a result of the setting were chronic.\textsuperscript{716} Such observations resurfaced in the 2013 report of the Commonwealth and Immigration Ombudsman, noting a lack of communication, miscommunication and inconsistencies in the incident reporting.\textsuperscript{717} While the Detention Health Framework was established as a way of ensuring more adequate care for people in detention, there appears to have been poor implementation of the Psychological Support Program developed under its guidance, with ‘insufficient training of staff’ and delayed responses to concerns about medical confidentiality.\textsuperscript{718} In 2013, increasing numbers of persons detained, together with policy changes, put more strain on the network, to the extent that ‘establishing appropriate processes and functions to support detention centres in these circumstances was difficult.’\textsuperscript{719} These concerns have thus not diminished since the release of the first pivotal report on the network in 1998.

The evidence repeatedly points to the incapacity and limits of the Immigration Detention Network in being able to provide the requisite level of care for the harm it produces. This is even at times when there have been more health care workers and the introduction of more detailed set of procedures and protocols. Evidence of persistent experiences of harm, irrespective of improved conditions, suggests that managing ‘well’ entails more than just a staffing manual. While sustained delivery of adequate care is exceedingly difficult, the complexity of care needs are exacerbated by institutional complexity. This is characterised by ill-
defined roles, role overlap and an incapacity on the part of many in office to fulfil the purpose of their office.

These elements are an effect of the institutional incoherence of the Department of Immigration and Border Protection under a policy of mandatory immigration detention. The conflict of interest between the department’s obligation to care for unaccompanied minors under guardianship law, and evidence of ongoing detention of minors is emblematic of this tension. This is especially worrying, given that the Migration Act states that minors shall only be detained ‘as a measure of last resort.’

The sheer scale of changes to migration law to implement a shifting policy environment, together with complex arrangements for service delivery resulting from the privatisation of immigration detention, have undermined the meaningful realisation of obligations to those detained. A number of reports and accounts by professionals working within the centres have gone further, suggesting that the processes, institutional structure and resources of the Immigration Detention Network undermine the possibility of delivering a duty of care. Poor leadership has worsened this. In 2005, the Palmer Report noted that staff at Baxter:

> seem to be hampered by the fact that policy and direction are dictated from Canberra, allowing little or no local authority for managers to exercise discretion or control to overcome emerging difficulties.

Clear lines of accountability are also hampered by conflicts of interest in relation to the care and protection of children. As noted in 2014:

> There is a fundamental conflict of interest between the Minister as guardian of unaccompanied children in detention centres and the Minister as the

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720 I follow Bosworth’s analysis here in *Inside Immigration Detention*.
721 See Section 4A of the Migration Act 1958 (Cth).
722 Neave, *Suicide and Self Harm: AHRC For those who’ve come; Palmer, Inquiry into the Circumstances* and Whitmont and Cohen, “No advantage.”
person who makes decisions about visas. No other person has been appointed to fulfil the protective role of guardian, leaving unaccompanied children in detention centres without any independent advice or support.724

Privatisation introduced an even more complex layer of obligations and roles, sometimes producing overlapping obligations which have not always been clearly mapped out.725 The pressure to reduce costs and maximise profit, the limited transparency on the terms of the contracts and the tendency for government to minimise the acknowledgement of its responsibility in the event of things going badly awry, have constituted central criticisms of the privatisation process.726 Findings by the Australian National Audit Office (ANAO) of inconsistency in service delivery point to ‘sufficient strategic direction and national management oversight in response to the growth across the network’ often leading to ‘tensions within the detainee population’ which unsurprisingly leads to ‘disturbances’ to ‘good order’.727

One effect has been a perceived overlap in roles, or a tendency for staff to engage in practices which are outside the scope of their office with the outsourcing of obligations to private contractors blurring the roles and functions of staff within the centres. For example, as more services are separately ‘contracted out’, there have been reports of an unclear distinction between the MSS Security and Wilson Security Guards and Serco Officers.728 Security staff


725 JSCAIDN, Final Report 56, 66, 78 and 158, regarding responsibility for management of the centres. The difficulties in extracting information from Serco as a private provider were revealed in research by Kenny and Fiske into the use of regulation and force feeding of in “Regulation 5.35” 427. For findings relating to the exercise and dilution of accountability, see McPhail, Nyamori and Taylor, “Escaping accountability.”

726 See Flynn and Cannon “The Privatisation.”


have been called upon to respond to the care needs of ‘clients’ even though this would be undertaken by health staff as a usual practice. In response to the criticism that this is not their role, John Moorhouse, former Deputy Secretary of the department, acknowledged in the department’s submission to the Joint Select Committee on Migration that security staff:

should not be dealing with clients. But I am pleased that, as any other Australian would when they saw someone in a situation of need they helped. You do not say “It’s not my job; I’m going to wait for the right person to come along.”

Such a statement discloses the difficulties of working in this setting. While the Palmer report found that the basics for providing care existed, it stressed that centres were incapable of meeting the standards ‘required by policy and described in the contract.’

In this light, the cautions issued by Orford and Grewcock are warranted: privatisation has subtly diminished the way that responsibility is acknowledged by government for the events, treatment, services and decisions that are made in the centres. At times the department has signalled an implicit but unspoken desire not to be held responsible, noting that they have faith in Serco, and that it’s not ‘appropriate’ for them to intervene, to say ‘We don’t trust you to make the appropriate judgements and we’re going to monitor your deployment of staff and tell you how to do the work.’

But it is not simply that privatisation makes it easier for government to recede from the field of responsibility. The disavowal of responsibility is also illustrative of a diminished understanding of responsibility as simply accountability to a role. Importantly, the allocation of responsibility for harms that occur cannot be, nor

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729 That is, detainees, or rather, refugees.
730 JSCAIDN, Final Report, 55. See also footnote 178. The report remarked that the centres seem “ill-equipped to deal with what they are dealing out there” especially in relation to mental health of detainees.
731 Palmer, Inquiry into the Circumstances, 64.
732 JSCAIDN, Final Report, 56. Also see footnote 181 of report. Statements cited here are from John Moorhouse, Deputy Secretary of the Department at the time.
should be, devolved from government. Responsibility otherwise tends to become divisible and alienable, in marked contradistinction to the indivisibility of sovereignty. But, while privatisation might facilitate this, role overlap and role confusion between local police forces, the International Office of Migration (IOM), the department, and Australian Protective Services was a feature even prior to contracting out. Whether privatised or not, it is unclear whether providing adequate care can ever be meaningfully achieved in immigration detention. Even with the best of intentions the level of care required to respond to diverse care needs far exceeds that demanded in other settings.

DEGRADING OFFICE: THE SELF HARM THAT HURTS US ALL

As noted above, both those detained and those doing the detaining experience confusion as a result of the institutional dissonance of these settings. In its 2011 report, Comcare noted that the institutional environment affects staff as well as those detained, with Serco officers having to undergo exposure to the ‘deaths of detainees and the stress of having to deal with it’, including talking people out of suicide every single day, all day, every day. Others were seriously disturbed by the systematic and routine sexual abuse of children by other detainees, which was neither appropriately dealt with by the department, nor responded to promptly. The trauma of witnessing despair and violence in detention and the impossibility of forgetting is illustrated by detention staff:

You can’t walk away from a place like this and forget it. The riots, the frustration, the lack of support from head office, seeing strong people break down – and I’m talking about detainees and staff. Seeing people

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733 This has potentially significant implications which I am unable to fully develop here.
734 This is implied in a number of the reports, which suggest that the complexity of the setting contributes to these concerns. Privatisation exacerbates this, but is not the cause. As Flynn and Cannon have observed, in some instances, privatisation can improve standards. That said, there is a degree of complexity which privatisation has introduced in the Australian setting, which has adversely affected the way responsibility is exercised.
735 It has been observed that “the level of provision of health services needs to reflect the fact that people in detention, by virtue of their particular circumstances, typically require a higher level of mental health care than the community at large.” JSCAIDN, Final Report, xii.
737 Whitmont, “About Woomera.”
change over a very short period of time, knowing that those people would never be the same people again . . . I see colleagues that I wish I could’ve helped more. Um . . . I see things that I wish I could’ve done a little bit better and I didn’t . . . women crying out for help, innocent people just wanting to be helped. And, you know, trying to get them that help. Of having to order staff to go in and do things where you weren’t sure they would come out okay on the other side.738

Many of the patients visiting a local doctor in the Woomera township were workers from the Woomera detention centre, ‘who just couldn’t cope with what they saw’; this led to:

a lot of alcohol abuse; people would drink to try and cope with what they saw. Saw a lot of relationship difficulties and marriage break-ups and it’s, it was a very toxic environment for a lot of the officers.739

This is even while Mr John Moorhouse, Deputy Secretary of the department in 2012, recognised the unusually difficult environment that Serco and DIAC staff work in:

It is not something that most people in the working community have to face in their job; it is a profoundly challenging thing to have to deal with people who are self harming.

That there is a need for adequate staff support, and to minimise these challenges through improvements to facilities and behaviour management and reduction in self harm.740

That there have been cases of suicides among staff, and not just detainees, is indicative of ‘how terribly out of control the system has become’ in which staff are overwhelmed and inadequately trained and supported.741 This leaves a mark. Since the policy’s inception in 1992, the experience of working in mandatory immigration detention has culminated in suicide attempts, broken marriages, and

738 Ibid.
739 Ibid.
740 JSCAIDN, Final Report, 69. See also footnote 238 in the report.
the need for counselling and support to address the pain of witnessing. Working within this setting has led to self harm, suicidal ideation, depression and relationship breakdowns. The suffering of detention spills over beyond those who are being detained.

As I have outlined above, a number of accounts by guards, migration officers and other detention staff demonstrate that witnessing such harm and violence, and being unable to address it, has affected them so profoundly that it has impacted directly on their capacity to fulfil the obligations of their office. This has led to a number resigning for reasons of personal distress or because they feel unable to fulfil the objectives of their role. In some cases, they have admitted that this has caused changes in their behaviour which they would rather forget. In short, the harm of detention is neither limited to those detained, nor is it necessarily resolved as soon as one leaves the environment: it can produce indefinite suffering and trauma. A damning report by the Comcare in 2011 stressed that the system was having a severe impact on the health and safety of those working in the system. The report made a number of recommendations in relation to overcrowding, staff training and risk management. Yet the capacity of the department to respond to these concerns was not evident.

‘MANAGING’ HARM
In the preceding section, I showed that the repercussions of mandatory immigration detention in Australia are much deeper than commonly presumed, penetrating the institutional life of migration and those who work within it. An institutional dissonance thus has important, substantive consequences for the obligations of those working in office. As one report has noted, it discloses ‘an enduring tension between containment and care.’

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742 See, for example McDermott, “The Guard’s Story” and Whitmont “About Woomera.”
743 Palmer, Inquiry into the Circumstances, 65.
Institutional dissonance is marked by the distortion of the purpose of office from one which is avowedly administrative but effectively punitive. Practices of surveillance, regulation and control which are so central to the prison, as Foucault has shown, compound the experience of being in detention as an experience of punishment closely mirroring the prison environment. This conflict in its purpose has shaped the recruitment of staff and the nature of their obligations to reflect a penal setting, as noted above. As I suggested in the introduction to this thesis, this also positions too closely together things which we would ‘normally’ expect to be kept apart: the conduct of office and the field of pain and suffering. Aside from the mental anguish experienced by many staff, the nature of the environment is also such that staff are being asked to do what is not within the scope of their office to do. Doing their job well technically and ethically is seriously compromised as a result of the setting and the organisational culture.

A number of staff, whether guards, migration officers or health care professionals have recounted that they were not prepared for the difficulties, both personally and professionally of working in such an environment. While health care workers are doing their best, they do so in circumstances that render them unable to do their job well. This has included an expectation that medical staff dispense medication compulsorily to those in detention and engage in other acts of ‘non-consensual treatment’, such as force feeding and forced injections of sedating and psychotropic medications.\textsuperscript{744} Such non-consensual medical treatment is authorised under the Migration Regulations, despite constituting a breach of ICCPR Article 10.\textsuperscript{745} As Louise Newman, chair of the Detention Health Advisory Group (DeHAG), noted in her submission to the JSCAIDN in 2012, this can so compromise their professional commitments to their office.

\textsuperscript{744} See Kenny and Fiske, “Regulation 5.35,” on the legal and ethical implications of force feeding detainees on hunger strikes.

\textsuperscript{745} This states that ‘all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’
that it raises ‘ethical dilemmas’ for medical staff, especially under new laws imposing a gag on those working in the centres.\textsuperscript{746} Newman noted that the effect of such conditions is that those:

working within the system … are intrinsically being compromised in that the system mitigates against them providing care in the way that they would expect to practise it. In fact, professionally, in terms of our ethical obligations – these are international standards – currently it is very difficult to practise at the appropriate level.\textsuperscript{747}

As Briskman and Zion have shown, members of staff are expected to demonstrate loyalty to the department as their primary obligation, yet this creates a tension between the ethical obligation staff have to professional codes of conduct and their undertakings to their employer to refrain from speaking out, as noted above. The professional obligations of staff are typically spelt out in codes of practice and of ethics which pertain to doctors, social workers and others in similar professions.\textsuperscript{748} For example, in a television documentary examining detention conditions at Manus Island, a doctor employed to work at the centre recounted everyday practical obstacles to his ability to care for detainees. The lack of adequate resources, such as oxygen and other medical equipment, saw him having to ‘steal’ such equipment from a local hospital.\textsuperscript{749} In other situations, the lack of adequate staff saw detainees go untreated, often for very serious and life-threatening illnesses.\textsuperscript{750} This is not to mention the harm and

\textsuperscript{746} New rules introduced under the Australian Border Force Act 2015 enforced a ‘gag order’ on those working in detention, including health care professionals, to prohibit them from talking publicly about the conditions in detention. As Louise Newman, former chair of the DeHAG noted “From July, doctors will no longer be able to fulfil their ethical and professional obligations to report mistreatment of detainees.” A jail sentence could result from speaking out without authorisation. See Louise Newman “Detention gag orders make it impossible for doctors to do their job,” \textit{The Conversation} June 9, 2015 accessed February 3 2016 https://theconversation.com/detention-gag-orders-make-it-impossible-for-doctors-to-do-their-job-42809

\textsuperscript{747} Louise Newman in ISCAIDN \textit{Final Report}, 92, see footnote 319.


\textsuperscript{749} Geoff Thomson, “The Manus Solution” \textit{Four Corners} aired 28 April, 2014 (Sydney, ABC TV, 2014). While this source is outside the focus period, the material is relevant to the impact of the re-introduction of the Pacific Solution.

\textsuperscript{750} A disturbing example of this concerned the death of Hamid Khazaei, a 24 year-old Iranian refugee. While being held in the Manus Island immigration detention centre, Reza developed a treatable infection. He died shortly after, in August 2014, as a result of a failure by the department to administer adequate and timely medical care. See Aisha Dow, “Four Corners: Doctors blame asylum seeker Hamid Khazaei’s death on Immigration’s delays,” \textit{The Age}, April 26, 2016 accessed on December 15, 2016 http://www.theage.com.au/federal-politics/political-news/four-corners-doctors-blame-asylum-seeker-
suffering which those working in the centres witness on a daily basis yet must both remain inured to it, and refrain from speaking about, as noted above. This points to the complexity of these settings, whilst also revealing the potential for personal reflection, and an ethical orientation by those occupying office.

How staff manage their conflicting loyalties to their employer or to their profession is varied, ranging from denial to collusion or compliance. Others have responded by resisting through quiet acts of kindness. Some have simply departed the institution, with their own health compromised or in an attempt to advocate once outside the institution. For others, in similar settings elsewhere, staff manage this conflict through developing techniques of legitimation of their actions, which replicates the findings of Milgram and of others such as criminologists Sykes and Matza, as shown in Ugelvik’s research into Norwegian immigration detention centres. While Ugelvik argues that these narratives function to maintain a thin ethical boundary between the general public and those in detention, I argue that ethical distress has nonetheless been experienced by many (though not all) of the officers whose narratives I draw upon in the Australian context. Noting these effects and responses is not to overstate the compassion and despair experienced by those working in the immigration detention network. Clearly, there are many staff who remain in their positions, and as Briskman and Zion outline, there are many who become complicit in the harms of detention, expressing hostility towards those in detention. But I emphasise that this is not the case for all. My aim in highlighting staff resignations is to illustrate the strains to which staff are subjected under this policy. As I have remarked elsewhere in this thesis, especially in chapters three and four, a policy of mandatory immigration

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751 See Briskman, Zion and Loff, “Care or Collusion.”
752 Ibid.
753 See Ugelvik, “Techniques,” in which he applies the theory of Sykes and Matza in explaining offender narratives, to explain the justification of suffering inflicted by the actions of detention officers.
754 See the documentary film by Eve Orner Chasing Asylum, 2016, which includes accounts by guards and others working in the network, who have struggled with their role.
detention has effects which go beyond those detained. Under such conditions, how responsibility is met and acknowledged is variable. There are alternatives ways of responding to the pressures to which office is subjected, not all of which are ethically bereft. But regardless of how staff respond, my aim is to draw out the ways in which mandatory immigration detention puts office under pressure.

Additionally, I stress that the responses described above illustrate that office holding in sites like detention centres is not reducible to the criticisms commonly levelled at institutional life. In what follows, I wish to sketch out a response Bauman’s critique of modernity and then offer an alternative interpretation which draws on my discussion of office in chapter two. There are two clear effects of this which we can see emerging in the above discussion. Firstly, the suffering which is produced by immigration detention places demands upon those working in the centres which is often beyond their capacity to address. Relatedly, the toxicity of these environments, for reasons I shall describe below, circumvents even the best attempts of migration officers, guards and health care workers to do their job well. Disturbingly, when children are confined in such a ‘closed environment’, it is exceedingly difficult to insulate them from exposure to suffering, self harm and the use of force, much less sexual abuse. Attempts to render care while people remain in such environments will inevitably remain frustrated, given that immigration detention is a central contributing factor to the mental harm and suffering which the network then seeks to address. In short, the environment is both inadequate to the task and, arguably, so damaging, that even with the best intentions and efforts of staff working in the centres, an adequate duty of care cannot be rendered. In other words, the experiences of detention as punishment produces the harms which the system seeks to address. At the same time, this analysis reveals the limits of Bauman’s critique of modernity.
AGAINST CRITIQUES OF OFFICE AND ROLE RESPONSIBILITY

Commonly critiques of office locate the propensity for violence not in the state’s legitimate monopoly on its use but in the detachment produced as an effect of role division under conditions of modernity, as I have noted in chapter three. On this reading, role division and task fragmentation facilitate a capacity for ethical detachment from the effects of our actions. This produces an understanding of responsibility framed as *role* and *rule* responsibility, in which the other retreats from ethical view, as I have already shown. There emerges a concentration of structural and functional division which diminishes our proximity to the suffering of the other. Inflicting suffering while being at ‘peace with oneself’ is enabled through the remoteness resulting from ‘functional specialization.’755 This is a trend which is arguably evident in the infliction of punishment in mandatory detention and marked by the deflection of responsibility for the effects of this policy by private contractors and government. For Scott Veitch, it highlights the split ‘between intention and consequence’ so that responsibility is confined solely to the task at hand, something stressed by the Palmer Report.756 As shown in chapter three, suffering is generated by the cultivation of ‘practices of detachment’ associated with the category of the ‘unlawful’. To repeat my earlier discussion, the use of this category has effects which justify harms to the extent that they are not perceived as amounting to human suffering. Suffering is merely the collateral (and necessary) damage of border protection.

 Remarkably, however, the accounts of those working at the centres, and in the department, convey a message which is not exclusively one of role detachment and strict, unthinking obedience to role, but sometimes a deeply intersubjective experience of exposure to the suffering of others. It also reveals a more complex account of office holding than contemporary critiques of ‘office’ and role

755 Veitch, citing Bauman, in *Law and Irresponsibility*, 44.
responsibility commonly present: using role fragmentation to explain the horrors of modernity relies on this as a story of detachment at the same time that it overlooks the ethical significance of a person’s role. Many of the reports have disclosed examples of staff struggling to provide care in a setting which is profoundly unable to deliver it.757

Contrary to the view that role fragmentation produces unreflective obedience, immigration detention in Australia reveals frustration that the tasks of those in office are beyond the capacity of their office to discharge, including, importantly, when this entails care of others. As Alan Clifton, Operations Manager between 2000 and 2001 at Woomera Detention Centre reflected, attempting to persuade a detainee not to commit suicide was ‘never part of my job description…I’d never been trained for that.’758 This sort of care is highly specialised, and requires intensive and lengthy training. Nonetheless, consistent reports remind us of the ‘good people who were trying to do the best they could under difficult circumstances’.759

This comment bears dwelling upon. Contemporary critiques of office push forward the idea that modernity and role fragmentation produce levels of detachment which make unthinkable brutality possible. While Australia’s mandatory immigration system is characterised by this level of fragmentation insofar as decisions are often made at a distance with minimal regard for their effects, this only tells part of the story. Migration officers, guards and health workers have been disturbed and unsettled by the trauma and suffering, not only by what they witnessed, but by their corporeal encounters with those they held and touched. These accounts affirm office as a site of both functional and ‘moral’ responsibility.760
Even should proximity deliver greater ethical responsiveness, the development of hostility to detainees by those working closely with them undoes the claims made by Bauman on this score. Proximity, rather than always engendering an ethical sympathy, can also produce resentment and violence. While Bauman’s critique rests on an association inferred between evil and distance, a corollary of this argument is that the classification of individuals as deviant or unworthy has the effect of creating a normative or ethical distance. But this is not comprehensively illustrated by the evidence. Against Bauman’s claims that the imperative of doing a job well can lead to a disregard or lack of concern for the other, the accounts of migration officers above reveal that life within settings like migration detention are complex places of both love and hate.

Detention centres are also, then, sites which have produced hatred and enmity towards refugees, by individuals who would normally regard themselves as compassionate and empathic. As one person, employed at a centre remarked:

I hated them and I wanted to run them over. I wanted to strangle them. I thought “This is me, a compassionate person turning into an absolute monster.”

If we are preoccupied with a reading of office as inevitably violent or distant from others, we elide the complexity of relational experiences of detention centres and most especially, lose an appreciation of what this means for office, for those occupying office and for institutional life.

The discussion above demonstrates that when detention is experienced as punishment, and enforced through the deployment of penal policies, and techniques, it affects us all. Managing it requires increasing levels of complexity and obligations on the part of Serco, migration officers, guards and health care workers, with correspondingly complex lines of accountability and

761 Quentin McDermott “The Guard’s Story” Four Corners aired 15 September,2008 (Sydney: ABC TV, 2008).
communication. The complexity of the Immigration Detention Network illustrates the critical importance of clarity in ‘office’ relationships, in which obligations which are appropriate to office are both transparent and supported by appropriate training. That the department is obligated to provide specialist care to those who suffer as a result of its own policies is profoundly ironic, since the punitive experiences of detention have effects which are beyond the capacity of the network to address.

It is therefore improbable that the harm that is produced can be addressed while people remain in detention: at best, it is managed. That the department has a particular and unique responsibility for unaccompanied minors under the Guardianship Act throws this into sharp relief. As *A Last Resort* observes in relation to children:

> the detention of children in immigration detention centres simultaneously increases the risk of harm and limits the options available to address that harm.\(^{764}\)

This exposes the constraints of giving care in such a setting while revealing that such environments are sites which produce the need for care. The gravity of this responsibility has not been lost on at least one Minister in this portfolio. Reports noted that Minister Chris Bowen reflected that in his role as Minister in 2012, he

> often struggled maintaining role of guardian of unaccompanied children with his ministerial position, saying that he had considered changing legislation to create distance between the minister and the consequences of the decisions they make. “I had looked at an alternative method,” he said. “Ministers for Immigration make life and death decisions every day. It is a responsibility which I’m sure would weigh heavily on every minister.”\(^{765}\)

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\(^{762}\) Often, this is through force, such as chemical and physical restraint, as I have noted above.

\(^{763}\) Neave, *Suicide and Self Harm*, 45.

\(^{764}\) AHRC, *A Last Resort*, 12. Stress is added.

But office is not necessarily and unremittingly detached from the consequences of its actions, nor removed from an obligation to care, or to be attentive to the other, or to exercise judgement free of personal agenda, in an ethically disinterested way. What we detect in some of these accounts is an institutional environment which has actively contracted the field of responsibility within which office is able to function. The harmful effects I have highlighted above have been produced by immigration detention, whilst requiring that the network adapt to these effects. It must find ways of responding to the harms of its own making. Institutional changes have enabled, or even necessitated, suffering; but they have also reshaped the department to the extent that it is less equipped to ‘manage’ and far less alleviate, this suffering. The net effect of this is that we witness a doubling of the contraction of responsibility through the limited capacity of office holders, even with the ‘best intentions’ of doing their job well.

CONCLUSION
There are several interventions this chapter offers. I have shown that mandatory immigration detention in Australia has had effects on office which are beyond the capacity of office to address. This has led to some staff acting in ways that undermine the codes of conduct of their profession. How they manage this tension is often varied and complex.

This chapter has provided an account of immigration detention which discloses the ways that mandatory immigration detention does not ‘merely’ harm those detained: it is a harm that damages ‘us’ all: it degrades office and it harms those occupying office, often in concrete, physical ways.766 This discussion has implications for how we think with and conduct ourselves in office under the conditions of role division in modernity which Bauman critiques. Against

766 “The self harm that’s hurting all of us,” The Age, Editorial, 1 August, 2011.
Bauman, the accounts I have drawn upon show that we can hate, as well as love at close range. Yet, I argue that these accounts also suggest that role division and fragmentation are not an inevitable source of violence: rather, I argue that they reveal the significance of the ethical foundations of office. When these foundations are fragile, it is less likely that office can be conducted well, ethically speaking.

Further, against the use of Agamben in analyses of immigration detention, these accounts show that the ‘camp’ is not a place of unremitting brutality. Moments of human kindness continue to surface. Contrary to the ‘banality of evil’ which Arendt attributed to wrongful obedience under conditions of role division, many staff have struggled to do their job well. However, this is not in the terms asserted by Eichmann whose claim – ‘I was just doing my job’ – was a way of disavowing responsibility. In the examples I have sketched out above, the problem seems to be rather that either ‘I cannot do my job well’ or ‘this is not my job, or was not meant to be my job.’ The disjuncture between detention centres as being places of care or control impacts on the technical and ethical capacity of office. A policy of mandatory immigration detention both exceeds the boundaries of office of the department, and has transformed the persona of office, its obligations, conduct and purpose. Suffering in these centres cannot be resolved by procedural manuals. Role here is not a narrow undertaking, but is ethically constituted. This is illustrative of Weber’s claim that, when moral responsibility is undermined, it is much more difficult to discharge technical responsibility.

By commencing with a delineation of practices which disclose the narrowing of responsibility accompanying the category of the ‘unlawful,’ I am furnished with a point of contrast for Part Three of the thesis. Here, I develop an alternative reading of the conduct of office which uncovers its ethical potential. An ethics of office entails the careful cultivation of an office persona: this
delineates and limits the scope of our authority so that we act within the limits of our office, and in accordance with the expertise we require in order to do our job well. This is a significant contribution to how we think about those working in the immigration detention setting. I have referred to moments of empathy and kindness in many of the accounts of office holders in these centres. However, in challenging this policy, I argue that we need to ground the conduct of office in something more than the possibility of random acts of human kindness. Instead, when office rests on ethical foundations, acts of kindness, respect and service become constitutive elements rather than random ones. This is important, given the institutional and legal context I established in chapter one, in which I argue that a responsibility to offer protection, and to do so with care, is central to Australia’s obligations under the Refugee Convention.
Part Three provides an alternative account of office as one which is ethically constituted. This is achieved conceptually and concretely. I argue for an understanding of office as an ethical orientation or form of conduct, which is informed by specific attributes of care, reflection and disinterestedness. This part of the thesis asks: how can we think ethically with office in ways which protect rather than negate human dignity? What tools does Levinas offer us, in rethinking office as a site of service to others? What historical and contemporary practices and forms of conduct can we draw upon to give concrete form to this conceptualisation of office as a source of ethical responsibility? In chapter five, I begin by developing a conceptual account of an ethics of office, using the work of philosopher Emmanuel Levinas to do so. This work then serves as a foundation for a concrete exposition of office in chapter six, in which I detail examples of office conducted ethically. These accounts show that while institutions can be a site of violence, we can also locate persistent accounts of those who resist the ethical degradation of office.
CHAPTER FIVE: LEVINAS – THINKING OTHERWISE WITH OFFICE

Introduction
The preceding two chapters have described the ethical degradation of office under a policy of mandatory immigration detention, identifying practices of detachment which foster a growing remoteness from responsibility for the harms that detention produces. This is emblematic of the claims made by Bauman that under conditions of modernity produce institutions which are ethically bereft and prone to violence. However, as I showed in chapter four, this reading of office overlooks its ethical possibilities. Examining mandatory immigration detention through the lens of office helps both to uncover the institutional effects of this policy and provide an insight into the significance of ethical conduct.

In this chapter, I aim to show that the harms associated with role division do not lie with task fragmentation and rule-based compliance necessarily. A central observation I will make is that Bauman’s critique of role responsibility fails to consider the significance of the foundations and content of the role. What I argue for in this chapter is a different way of thinking about and with office, in which it is understood as an expression of service to others. Levinas’s phenomenology assists in this rethinking because of the way in which he privileges responsibility for others (and indeed, the ‘other’) as the source of our subjectivity. Exercising responsibility well encompasses more than superficial rule compliance and fulfillment of procedural obligations: it rests on the ethical content and foundations of office conduct and can be appreciated as a form of orientation in our conduct towards others and in society. This

767 Bauman, Modernity.
delivers a more meaningful account of office holding than one which relies on procedural manuals and performance criteria. Better procedures are simply inadequate to the task of justice under conditions of institutional dissonance and the degradation of office, as I showed in chapter four.

I begin by providing a short exegesis of his phenomenological ethic before eliciting the pertinence of Levinas’s work and the intervention his conceptualisation of ethic makes to an understanding of office. A Levinasian approach avows the significance of relation and orientation to the other, which delivers a deepened appreciation of the way that laws and policies shape our relations in public life. Further, while asserting the fundamentally singular relation, Levinas accepts that the unmediated and infinite responsibility he avows is necessarily limited when we enter society and shift from the ‘I–thou’ relation to the many. This entry into society is what he refers to as the ‘reckoning of the possible’, that is, the necessity of judgement, calculation and measurement when we enter society.

This chapter will identify specific elements of Levinas’s ethics, such as responsibility for the radical difference of the other, their unknowability and the imperative to act responsibly. However, I aim to show how Levinas’s conceptualisation of responsibility provides a way for us to reconsider office as the site of ethical conduct and social relations. This work critically extends contemporary analyses of early modern office holding and foregrounds a concrete account of ethical office conduct in chapter six.

A RADICAL ETHIC

The singular other: unsettling the sovereignty of the self

For Levinas, the ethical relation embraces the primacy of a ‘non subsumptive relation with the other.’768 The other is not a concept, says Levinas, but is a

‘being and counts as such.’ She is irredeemably unique and unamenable to reason, knowledge or assimilation. Any attempt to subsume the other within my own being, to presume a knowledge of the other, is a form of violence. For Levinas, to move beyond such violence of the universal claim to knowing the other is to call ‘into question of the same’. As Levinas writes:

We name this calling into question of my spontaneity by the presence of the Other ethics. The strangeness of the Other, his irreducibility to the I, to my thoughts and possessions, is accomplished as a calling into question of my spontaneity, as ethic.

For Costas Douzinas and Ronnie Warrington, a Levinasian ethic uncovers the violence of law in its subsumption of the uniqueness and particularity of the other.

Through our encounter with the other ‘our place in the sun’ is disturbed. Levinas suggests’, says Manderson, ‘that ethics asks of us never to be entirely settled, never to be at home in our world, always to be in movement and in question. This ethic has been described by Derrida as a ‘treatise’ on hospitality. Derrida writes:

Absolute hospitality requires that I open up my home and that I give not only to the foreigner (provided with a family name, with the social status of being a foreigner, etc.) but to the absolute, unknown, anonymous other and that I give place to them, that I let them come, that I let them arrive, and take place in the place I offer them, without asking of them either reciprocity (entering into a pact) or even their names. The law of hospitality commands a break with hospitality by right, with law or justice as rights.

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769 Ibid, 6.
Hospitality, on these terms, is a response given without conditions or questions being asked.

This is akin to a condition of hostage in which the other’s needs come before my own.774 There is no equivalence of exchange in the relationship which I have with the other, since the relationship has never been contracted in the first place.775 The asylum seeker can neither be reduced to categories, nor to a relationship in which consent or contract is presumed.776 The face of the other, as an appeal to what Levinas calls ‘egoism’, challenges the rigidity and comfort of our rules and expectations and requires an openness to difference as a heteronomous responsibility.

I am as it were ordered from the outside, traumatically commanded . . .777 It is when I am called, that I turn and respond and in this process, am named as one who is responsible. In the demand to respond to the unknowability of an ‘other,’ I am forever at the service of the other.

**Suffering**

Confining the other to an object of knowledge cultivates the invisibility of the suffering of the other, as I showed in chapter three. The evidence of suffering experienced by asylum seekers held in long-term and indefinite detention has attracted Levinasian analyses of immigration detention to expose this vulnerability.778 Pugliese poses this vulnerability in facing the other as a deeply personal responsibility, in which he questions his own position as individual and as scholar in his response to the voice of the asylum seeker as ‘other’. On his reading, we always risk a violence to the other when we speak ‘for’ her and

774 Levinas, *Otherwise*, 127.
775 Ibid., 47.
776 Ibid., 87–88.
778 For example, McCann and Stratton, “Staring into the abyss” and Nicolacopoulos and Vassilacopoulos, “On the Other Side of Xenophobia.”
not to her in the sense of Levinas’s ‘me voici’: here I am, for you.\textsuperscript{779} As noted in chapter two, Pugliese describes acts of self harm by detainees, such as lip sewing, as bearing witness to suffering in detention and as an ethical disruption of a system that prevents speech, which ‘juridically eviscerates’ it as a totalising and unmitigated violence.\textsuperscript{780} As Pugliese shows, immigration detention is much easier to justify for those who are both conceptually and physically invisible. The refugee as other is not recognised ethically as one who suffers.\textsuperscript{781}

Generalising the particularity of refugees diminishes the capacity for relation, since it is by witnessing the suffering of the other \textit{as suffering} that we enter into an intersubjective relation with the other. The needs of the other challenge the autonomy of the self insofar as vulnerability highlights our connections with others.\textsuperscript{782} Indeed, our dependence on others opens us up to responsibility. This relation emerges not between representatives of a group or genus, so to speak, but on terms which are themselves singular. As an ethical imperative to respond responsibly, an intersubjective relation is founded on this unrelenting and concrete responsibility to and for the other.\textsuperscript{783} For Levinas, this responsibility is experienced as suffering; it is akin to the sensation of giving not just our own food but giving the food from our mouths, a ‘tearing away of bread from the mouth that tastes it, to give it to the other. Such is the coring out of enjoyment.’\textsuperscript{784} This concrete experience of vulnerability prompts the demand that I respond to the other’s suffering through the face to face encounter with the other. In the call to response, I suffer for the other. As Levinas has observed ‘in the responsibility we have for one another, I have always one more response to give, I have to answer for this very responsibility.’\textsuperscript{785}
Reconciling ethics and the violence of the state

Liberal notions of justice presuppose the ‘formal equality and interchangeability of each subject.’ Social policies, regulations and laws are framed according to ‘equality’ of treatment and procedural fairness. Accordingly, there are clear and understandable restrictions on the extent to which the state is able to encounter the singular other, which, Levinas says, is needed to preserve the ethical response. This radical ethic appears startlingly problematic for the exercise of politics within any large scale political community, including representative, liberal democracies.

Against the violence of the state which treats all refugees as a homogenisable generality, the singular other is thus an interruption to my sovereign enjoyment, marking the emergence of the ethical relation. The ‘face’ functions as a motif which communicates the absolute uniqueness of the other in this relation. In this encounter with the singular other, Douzinas and Warrington observe that I am:

immediately and irrevocably responsible for the other who faces me. A face in suffering issues a command, a decree of specific performance: “Do not kill me”, “Welcome me”, “Give me Sanctuary”, “Free me”.

This radical ethical relation is one in which I cannot choose to act: the other impels me to respond without thought or calculation. An ethical response to the other’s difference requires a direct, unmediable and singular response without expectation of a reciprocal justice. As Manderson writes:

The other chooses us because, in the face of their vulnerability, we are singled out as the one or ones who can most make a difference. There is no deferral. No one else will do, and we cannot simply hide behind some pre-existing role to shirk our responsibility. It is all up to us and up to now . . . But no one can do this for me. The rule cannot tell me whether

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786 Wingenbach, “Refusing,” 222.
788 Levinas, Otherwise, 10.
I ought to obey it on this occasion.\textsuperscript{789}

This un-mediable, infinite and potentially overwhelming responsibility to the singular other seems entirely at odds with the demands of large-scale contemporary societies. In this respect, Levinasian analyses of border protection law and policies have generally argued that institutional responses are unremittingly violent: the unknowability of the face of the other, so central as a motif for the ethical relation in Levinasian theory, is effectively erased.\textsuperscript{790} As Connell Parsley has observed, drawing implicitly on a Levinasian ethic:

the refugee who presents themselves to Australia in their historical, political particularity and in their individual humanity, is subject to a ‘violent erasure’. They become simply the category of ‘arrival’.\textsuperscript{791}

A considerable body of scholarship has addressed the question of how such an ethic can be reconciled with, or rendered meaningful in the realm of politics, society and law.\textsuperscript{792} The relation between policies and ethics has been conceptualised alternatively as the necessary ‘interruption’ or ‘disturbance’ of politics or as one in which the ethical is always and already present in the political.\textsuperscript{793} For Critchley, Levinas’s ethic reveals that ‘when politics is left to itself without the disturbance of ethics it risks becoming tyrannical.’\textsuperscript{794}

Accordingly, a responsibility for the radical difference of the other disrupts the violence of politics and law.

\textsuperscript{789} Manderson, “Proximity”, 701.
\textsuperscript{790} See Douzinas and Warrington “A Well-founded Fear,”; Parker, “Spirited Away”; Parsley, “Performing the Border”, 64. I note that Parsley indirectly channels a Levinasian ethic through his reading of Derrida in this article.
\textsuperscript{791} Parsley, “Performing the Border,” 64.
\textsuperscript{794} Critchley,”Five Problems.” 182.
Political theorist Madeline Fagan contests what she describes as the arbitrary separation of politics, law and ethics which posit Levinas’s ethic as this ‘interruption’ to politics. In her analysis, the presence of the third is a reminder that the ethical relation is always present in political life. Accordingly, the key question is the form of ethics which might support political practice.795

However, for Amanda Loumansky the ethical can only be preserved in the nudity and immediacy of this ‘face to face’ relation: it disappears at the precise moment that the direct self-other relation is mediated by the arrival of others.796

Given that effective management of populations turns on the capacity to calculate, measure and adjudicate among competing obligations to the many, fulfilling such a radical ethic is a difficult. However, how are we to incorporate a responsiveness to the other which avoids the violent erasure of the other, is direct and infinite and which demands that we encounter the singular other on her terms? Relatedly, how could a highly personal, individual and un-mediable demand from an unknowable other be met in a realm where the function of politics requires predictability and compromise between many competing interests in the service of ‘the good’, however that is defined?

I propose that we can conceptualise office as a site of ethical conduct through two key elements of Levinas’s work. Firstly, I draw on his conception of ‘the third person’797 which signals the beginning of social relations, of judgement and the mediation of competing obligations, arguing that office can be thought of as the site of what Levinas terms ‘the third’. Secondly, I argue that his claim that justice, while not the same as love, must nonetheless come from love, provides an opening into thinking with office ethically, with regard to others.798

796 Loumansky, “Reply to Fagan.”
797 Levinas, Otherwise, 210.
798 Emmanuel Levinas, “The I and the Totality,” in On thinking of the other: Entrenous, trans. Michael B Smith and Barbara
Taken together, I argue that these two elements of social relations and justice comprise what Levinas terms ‘good violence.’ The distinction Levinas makes between ‘good’ and ‘bad’ violence is significant: a certain violence is inevitable in the world of law and politics. Yet, a good violence maintains responsibility for the other. A ‘good’, inevitable violence can be inflected with care, good judgement and attentiveness (or reflection) upon its effects. These central aspects – care, judgement and attentiveness to consequences – pivot on an orientation to the other. Importantly, as Herzog emphasises, the state exists to protect those who are in need. Accordingly, ‘good’ violence is not only necessary for an ethical responsibility to be exercised but can entail openness to the other and to difference, even while it is exercised within limits. Care in judicial conduct is one example of this. To care for another, who remains unknowable, illustrates the way that ethical conduct can be sustained by officials even when their duty is to their office role and persona. This chapter shows how we might negotiate this ‘reckoning of the possible’ in institutions where judgement, calculation, and even violence are both necessary and unavoidable, while preserving the ethical relation.

**A ‘GOOD’ VIOLENCE**

Levinas’s discussion of violence must be understood in the context of what he takes violence to be: the reduction of the absolute singularity of the other, the comprehension of the other. Any moves which involve this are violent. This is the claim that Douzinas and Warrington rely upon in their critique of the judge. Yet, Levinas also accepts that a certain violence is inevitable in the realm of politics, law and the state. Justice necessarily involves a violence, given that we ‘live in a world of citizens and not only in the order of the Face to

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799 Levinas, *Otherwise*, 43.
800 Herzog, “Is Liberalism.”
801 Levinas, *Otherwise*, 158.
802 Douzinas and Warrington, “A Well-founded Fear.”
Face.\textsuperscript{804} Even so, the legitimacy of the state is determined by its encounter with the face which imposes a \textit{limit} on its violence. Levinas writes:

A state in which the interpersonal relationship is impossible, in which it is directed in advance by the determinism proper to the state, is a totalitarian state…Whereas in Hobbe’s vision—in which the state emerges not from the limitation of charity, but from the limitation on violence—one cannot set a limit on the state.\textsuperscript{805}

Ethics ‘set the standard by which all politics must be judged’, and this serves to ‘remind the state of its purpose.’\textsuperscript{806} Ethics in a world of the many is both limited \textit{and} necessary. Politics without love is always at risk of what Levinas would regard as a ‘bad violence.’\textsuperscript{807} While the state is incapable of honouring the \textit{exceptional} quality of the face as face, the possibility that love might ‘watch over justice’ is not erased.\textsuperscript{808} In short, the ethical relation does not disappear with the state. As Levinas reflects:

There is a certain amount of violence necessary in justice, but if one speaks of justice, it is necessary to allow judges, it is necessary to allow institutions and the state, to live in a world of citizens, and not only in the order of the Face to Face.\textsuperscript{809}

Despite the ethical demand, there is an imperative to engage in the world beyond the intimacy of the self-other relationship, which introduces the violence of the state. Yet, sustaining the legitimacy of the state requires that this violence is limited by the love which the state itself has circumscribed and that we undertake, therefore, the ‘reckoning of the possible’ on these terms. Even while the state limits charity (and hence the interpersonal) the legitimacy (or rightfulness) of the state is made possible when it allows for the interpersonal.


\textsuperscript{805} Ibid.

\textsuperscript{806} Peperzak, \textit{Beyond} 24.

\textsuperscript{807} Levinas, “Philosophy” 105.

\textsuperscript{808} Ibid., 108.

\textsuperscript{809} Ibid. 105.
The rightful state is determined by its openness to the other and to difference. For Manderson, this signals a meaningful relation with the law. 810

Levinas does not, however, claim that the rightful state is one which is both steeped in and overwhelmed by this interpersonal responsibility. Rather, he argues that the state becomes totalitarian when this relationship is impossible. He remarks:

There is an element of violence in the state, but the violence can involve justice. That does not mean that violence must not be avoided as much as possible; everything that replaces it in the life between states, everything that can be left to negotiation, to speech, is absolutely essential: but one cannot say that there is no legitimate violence. 811

Contemporary societies rely upon institutions which enable the negotiation of competing demands; this requires that choices are made. How we make decisions and choose to act is important. While accepting that living in a society is inevitably marked by competing obligations, Levinas asks that, at the very least, we aim for a ‘good violence’ which preserves relations. I locate such a good violence in the form of conduct which comprises the occupation of office.

Hence, while institutions are incapable of the intersubjective relation which Levinas describes, the capacity for reflection and imagination in office, as a response to being ‘in relation,’ can nonetheless preserve a quality of the ethical. Indeed, to presume that the immediacy of the face-to-face relation is critical to an ethical, loving relationship also overlooks the potential for proximity to be the source of hate, as I showed in chapter four. Moreover, the exercise of reflection as part of an ethical relation can yet occur in forums where the ethical is deemed impossible. 812

811 Levinas, “Philosophy”, 105. Stress added.
812 Douzinas and Warrington, “A Well-founded Fear.”
In relying on literal translation of the ‘face to face’ I therefore argue that we overlook its deeper, illustrative significance. While the face-to-face highlights the immediacy of this relation, it is not confined to it. For example, the pain and suffering of the other can appear even when the encounter is not physically immediate. To think otherwise is to underestimate the intensity of the call of the other as encountered through the stories, narratives and images of the other which resist abstraction. The risk of essentialisation which is present, as I noted in chapter two, can be guarded against through an orientation to others, in which an openness to others is preserved. Against Douzinas and Warrington’s analysis, I argue that the capacity for reflection and imagination is central to the ethical relation, even though it is not always assured and cannot meet its absolutely radical demands. My approach seeks, then, to move beyond dominant responses which extend Levinas’s ethic to affirm institutional violence. This provides a significant intervention into the literature by proposing that Levinas consideration of the ‘third’ is critical to the exercise of responsibility in office. I turn now to Levinas’s discussion of justice and love to disclose how we can preserve the ethical relation in the realm of the third. Together with Gaita’s understanding of office as vocation, the third and justice which comes from love deliver a concretisation of the ethical relation.

THE ‘THIRD’: RECKONING THE POSSIBLE

Two pivotal elements in Levinas’s work offer guidance in thinking ethically with office as a ‘good violence’ as indicated above. Firstly, his formulation of ‘the third’ can be understood as ethically constituted through office. Secondly, the foundations of an ethics of office can be located in Levinas’s reflections that justice, while not the same as love, can nonetheless come from love. This enables me to pinpoint the qualities which would support justice from love, as a foundation for the occupation of office. Levinas commonly makes this

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813 In this claim, I contest the view taken by Amanda Loumansky in “Reply to Fagan.”
814 Gaita is not explicitly referring to Max Weber’s analysis here, though the undertones of Weber’s argument are clear.
distinction between justice and love, but without clearly articulating how a
good violence might be practised. I argue that these two elements – justice as
the third, and love – can help to elucidate ethics of office in a concrete way.

The move from the world of the intimate relation inaugurates the recognition
that we live in a society of the many. We must now account, not just for the
self and other, but for those many others beyond this relation. And, while the
third person heralds the need to consider other ‘others’, it also entails a
recognition that I myself, am one among others. Indeed, justice only emerges
when I am an ‘other’ among others. As Levinas says:

If he were my only interlocutor, I would have had nothing but obligations!
But I don’t live in a world in which there is but one single ‘first comer’;
there is always a third party in the world; he or she is also my other, my
fellow.”

The presence of the third introduces justice, comparison and politics because of
the complication that it delivers to the encounter between the self and the other:

We do not live in a world constituted solely by the relation between the
self and the other; rather, “there is always a third party in the world.”

Significantly, while this form of justice introduces limits to the exercise of an
infinite responsibility to the other, it does not enable us to forget our
responsibility. With the arrival of the third, we are confronted with the need
to balance competing demands for responsibility; one must decide how to
respond to an other among others, to undertake the ‘reckoning of possibles’ and
make a comparison among the incomparable. This heralds the beginning of the
world of judgement, calculation and the measurement of the immeasurable;
the unique and singular other. The arrival of the third complicates the
relationship I have with the other. As Levinas writes, the third:

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815 Levinas, “Philosophy”, 105.
816 Ibid., 104.
introduces a contradiction … It is of itself the limit of responsibility and the birth of the question: what do I have to do with justice? A question of consciousness. Justice is necessary, that is, comparison, coexistence, contemporaneousness, assembling, order, thematization, the visibility of faces and thus intentionality and the intellect, the intelligibility of a system and thence a co-presence on an equal footing as before a court of justice.817

While this is a ‘betrayal’ of the incommensurability of the relation with the other, it does not signal the retreat of the ethical relation. Rather, competing demands in social life make the question of how to respond an ethically important one.818 It also reveals that it ‘is only thanks to God that, as a subject incomparable with the other, I am approached as an other by the others, that is, “for myself”. “Thanks to God” I am another for the others’.819 There is justice for me, as well as for the other, even though the others ‘concern me from the first’.820 Without justice, then, ‘there would be no limit to my responsibility’.821

The full impact of this can be discerned in the experience of suffering not just among those who are detained, but those doing the detaining, as I outlined in chapter four. This is important because, on an individual level, the responsibility which Levinas urges and which is central to his ethics is so consuming that it risks being persecutory, swallowing up the self in unremitting obligations even while the self is constituted through responsibility. Justice as a limit to responsibility is also significant for politics because this demanding ethics cannot easily – if ever – be realised in the modern nation-state. Law and politics manage this unmanageable obligation, even while risking the loss of the singular ethical response. At the same time, law and politics preserve the ethical relation in another form.

This understanding of the third has drawn on Pugliese’s compelling argument

817 Levinas, Otherwise, 157
818 Ibid., 161.
819 Ibid., 158.
820 Ibid., 159
821 Levinas, “Philosophy”, 105.
that the first nations peoples in Australia occupy the site of the third – as the origin of justice – to determine who comes to this country and on what terms. Insofar as the third is necessary for justice, I propose however that we can locate the third in the occupation of office. Determining how ethical conduct can be attained in institutional life demands careful attention, requiring that we ‘manage’ this un-mediable obligation to the singular, and unique other, since the presence of the third is precisely the moment of justice. Levinas writes:

There must be a justice among incomparable ones...A third party is also approached; and the relationship between the neighbour and the third party cannot be indifferent to me when I approach.

In acknowledging the presence of the third in society and the need for a ‘reckoning of the possible’, Levinas nowhere suggests that we must always, or indeed can dispense with the processes of government which require us to make judgements and to administer law. This is so even for the migration officer who fails to see the ‘tears of the other’. Here, I take the controversial step of arguing against his claim that the bureaucrat cannot encounter the other on these terms. While the civil servant does not always see the ‘secret tears’ of those in immigration detention, this does not preclude her from reflecting on what it is like to shed those tears, or indeed imagining the effects of her actions which might produce them. While our responsibility to the singular, unique other is always going to be difficult because of the third, this does not preclude the possibility of a ‘good violence’ in which we can imagine or reflect upon our own actions, can care for others and judge well, even if we are unable to appreciate fully the radical difference of the other.

This reminds us that demand to respond to the other and the need for justice to emanate from love, even if it is not the same as love, are required to ensure that

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822 Pugliese, “Reckoning.”
823 Levinas, Otherwise, 16.
824 See Alford, “Levinas”, 146, where Alford refers to the tears of the other as those ‘which even the just regime cannot see.’ Stress added.
justice does not ignore those who are ‘the closest’. As noted above, Levinas’s ethic is not limited to the immediacy of the face to face encounter but extends beyond this. The entry of the third person introduces the need to respond to others as inherently deserving of human dignity even while it might involve calculation. Accordingly, the cultivation of office personae and institutions help us to manage competing demands and obligations in social and political life. The arrival of the third interrupts the self-other relation and constitutes the beginning of society.

JUSTICE WHICH COMES FROM LOVE

Levinas says that a loving relationship of intimacy has no need for justice, as all acts spring from care for the other without a need for compromise, which the third person requires. Levinas writes:

“To love is to exist as if the lover and the loved one were alone in the world. The intersubjective relation of love is not the beginning of society but its negation... The society of love is a society of two... resisting universality.

In the immediacy of the intimate relation, there is no need for justice. The need for justice and calculation arises when the third person arrives.

When we enter society, we must then make this ‘difficult turn’ towards the third person, who is outside love. How then, can love inform justice, when love does not require or involve justice? I propose that this is best understood by conceptualising justice as imbued with the qualities which attach to love, without being love, marked by the care and respect that love inspires. We can also appreciate this as an orientation or service to the other. If love does

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825 Levinas, Otherwise, 159.
826 Levinas, Totality and Infinity, 213.
828 Levinas, “The I and the Totality”, 35.
not involve justice, but justice must emerge from love, then what is asserted as justice must be founded on qualities of love. We can detect the persistent quality and presence of love in moments of mercy, and the expectation of goodness and of little kindnesses. In this way, justice ‘comes from the outside’, from difference and the awareness of other others in the world. As Levinas remarks:

The Bible requires justice and deliberation! From the heart of love, from the heart of mercy.

For Levinas, justice is ethical when it has love as its source, even if it cannot be the same as love. The idea that all humans are precious is what conditions justice, since without this condition, justice can be instrumentalised. In other words, for justice to be pure and to come from love, it must always avoid treating humans as if they were a thing, and must instead attend to the absolute value of the person.

Justice which comes from love appears as the resolution of the apparent contradiction between the ethical relation of the self and other, and the entry into society heralded by the third person, which undermines this relation. Love encourages justice to be done in a way that has regard to the other in an impersonal way, in Simone Weil’s sense of the word. It inflects justice with care, respect and a heed for the cry of the other.

In Weil’s terms, this encompasses love and respect. In the world of office, this can be understood as entailing respect and care. Following philosopher Raymond Gaita, this comprises an imperative that we are addressed as humans,

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830 Levinas “The Bible”, 135.
832 Levinas, “The Bible”, 134.
833 Simone Weil understands the impersonal as that state where respect for us emerges from our humanness as something which is precious on its own terms, and not because of any specific characteristics which marks us out as distinct from each other. See 13 – 14 for an elaboration on this point in “Human Personality,” in Selected Essays 1934-1943, translated by Richard Rees (Oxford, New York: Oxford University Press, 1962).
rather than as persons. For Gaita, how we construct the meaning of human life is through lives lived as human. As Gaita argues, as human beings we share a ‘characteristic embodiment – that we have faces, for example’. Leaving aside Gaita’s preference for thinking this through as a singular rather than an institutional relation, and shifting this understanding of human to the official, this nonetheless points to the qualities underpinning justice. As he observes of Simone Weil, we all have an expectation that we will be treated with respect, not contempt. This expectation – even in the midst of terrible suffering – is a testament to existence of a moral quality and humanity which goes beyond mere expediency or reason. It is the recognition of the ‘sacredness’ of the human, as well as a recognition of a sacredness in humans. That is to say, that we are all, as Levinas reminds us, others to an other.

While the intersubjective relation of love and intimacy are impossible in public life, there remains an expectation that we are treated with respect, and that our dignity is preserved. We can see this in the observations made in numerous reports by the AHRC and the Commonwealth and Immigration Ombudsman, that providing care to refugees in immigration detention centres is both profoundly important and difficult. If we are unable to think of the other as sacred, then we are able to justify all manner of violence against him or her, and to justify whatever laws are necessary to this end. The idea that all humans are precious is what conditions justice – this is what Levinas means by justice having love as its source – since without this condition justice can be instrumentalised.

By conceptualising the third as being occupied by office, we can appreciate how office conduct—and qualities which conform to principles of just and fair

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838 As cited by Gaita in *Breach of Trust*, 51.
treatment – can likewise be drawn from the virtues and attributes articulated as foundational to early modern office. These qualities were regarded as ethically important, constituting a form of vigilance against the possibility of tyranny. Returning to Taylor’s reflections in chapter two, ethics requires that we watch over the line dividing good and evil. For philosopher Marguerite La Caze:

> ethics [must] be thought with the possibility of providing ethics with a deeper basis . . . [W]hat is needed is a conception of the political life that enables life to be ethical. Thus, ethical considerations need to be incorporated in politics at the most fundamental level in the case of wonder, generosity or respect and love.

Approaching politics from the position of the ethical relation as articulated by La Caze, is illustrative of how an exercise in respect and love can be a way to respond to those at the ‘margins’, whether outside political representation (that is, outside the state) or at the margins within political community. In states’ obligation to care for those in need, the role of the state acquires an ethical significance. The state is, therefore a necessary violence for the care of the other. Love contributes to the resolution of the apparent contradiction between ethics and law, and political life. This resolution is possible for love allows justice to be done in a way that has regard to the other in an impersonal way in Weil’s sense of the word, while being underscored by the interpersonal. I now turn to the attributes or qualities of office which I propose, attach to an ethics of office in the institutional life of migration processes.

AN ETHICS OF OFFICE: CARE, REFLECTION AND DISINTERESTEDNESS

To be an office-holder in the ethical sense that I argue for, requires particular qualities or attributes: justice which comes from love, respect, care, imagination

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839 Taylor, “The Line.”
841 Herzog, “Is Liberalism.”
842 Ibid.
and reflection. Such qualities are crucial to the capacity to fulfil the purpose of office. As Condren observes, and as noted in chapter two, office pivots on an expectation that we conduct ourselves in ways that are appropriate to the ‘requirements’ of ‘respective offices’. This requires the cultivation of those qualities or attributes which together comprise the persona of office. Stepping into office, with all the obligations that this entails, amounts to taking up the persona of that office. Office transforms us then, from a private individual to a person who is expected to display certain qualities.

This account of the ethical potential for office is supplemented by an affirmation of the need for jobs to be ‘done well’. That is, it is not sufficient for office to be ethically responsive in the terms I have outlined throughout this thesis. Rather, office must also have capacity to do so. A more complicated understanding of office shows that the potential for evil is magnified when the role is poorly crafted without a view as to how it might facilitate, rather than undermine, ethical conduct. To avoid violence, the role in office must be sourced in the ethical relation. I propose that the exercise of care, disinterestedness and reflection are central to the persona of office in the institutional setting of migration.

Office negotiates justice in ways that demonstrates disinterestedness (or impartiality) or, in Weil’s terms, the impersonal concern for the other, while maintaining an openness or attentiveness to the other. When I speak of disinterestedness in relation to office, I refer to the cultivation of impartiality as an absence of self-interest, and consequently as an openness to the other, even while it might be on terms that constitute a form of violence to the singularity of the other on the radical terms discussed above. Bringing this together with a Levinasian understanding of disinterest, also reveals its ethical content; as noted by Sean Gaston: ‘[d]is-interest interrupts the great project of self-consciousness
as the colonisation of the other.\textsuperscript{843} The forgetting of self is the absence of agenda, impartiality or what Levinas terms disinterestedness. For Levinas:

\begin{quote}
The equality of all is borne by my inequality, the surplus of my duties over my rights. The forgetting of self moves justice.\textsuperscript{844}
\end{quote}

In preserving the possibility of a ‘good violence’, this understanding of disinterestedness delivers a different account of office to that provided by Douzinas and Warrington in which they regard the exercise of ‘objectivity’ as an ethical gap. And it questions the unreflective application of Arendt’s theory of evil. For these scholars, disinterest is posed in terms of detachment rather than as a form of ethical commitment to the other. Understanding it as ethical detachment underpins the claim that a violence takes place between the ‘objective’ language of the law and the subjective testimony of the asylum seeker.\textsuperscript{845} While this risk of violence is always present, I offer a reading of disinterestedness that neither entails a ‘bad’ violence nor precludes ethical possibilities.

Disinterestedness marks out the justice of the third as an impartial, impersonal concern for the other, even while it requires calculation. It signals the retreat of the self and the absence of personal agenda and is not to be confused with the absence of interest in, or care for the other. As Pugliese reflects:

\begin{quote}
in articulating the necessity of the state and the institution of law as fundamental to the realisation of justice within a society, Levinas immediately introduces a critical qualification: ‘But justice only has meaning if it retains the spirit of disinterestedness which animates the idea of responsibility.’\textsuperscript{846}
\end{quote}

Justice as disinterestedness provides an openness to the other and to difference which invigorates the exercise of judgement. Here I bring together the absence

\textsuperscript{844} Levinas, Otherwise, 159.
\textsuperscript{845} Douzinas and Warrington, “A Well-Founded Fear”, 126.
\textsuperscript{846} Pugliese, “The Reckoning”, 356.
of agenda as a key element of office with the absence of self-interest as an ethical responsibility to the other. Animated by attentiveness to the consequences of our actions, exercising disinterestedness is, therefore, critical to good judgement. It might also be understood as form of heteronomous justice. As a rejection of the ego and an openness to the particularities of the other, to difference, it is ethically productive. At the same time, disinterestedness embodies a faithful service; it entails a commitment to role in office which can enable respect rather than diminish it, as Arendt otherwise suggests.

In contrast, the singularity of the other is invoked whenever we speak of human dignity, preciousness and respect: respect for what is uniquely other. This is the foundation of care for the other: reading this through Gaita’s discussion of love provides us with a way of thinking about love through the quality of the human. Gaita calls this the mystery of humanity. Levinas calls it the infinite, the unknowable, the beyond. Thinking of love as a recognition of this mystery, or preciousness, reveals love as the refusal to treat others as if they were a thing, in Gaita’s terms. Love inflects justice with care, respect and heed for the cry of the other. In hearing the other’s cry, we are awakened to a ‘spirit of love’. This cry comes from the position of being hurt, from vulnerability, revealing the transformative potential of love and an accompanying responsibility of care that love invokes.

As I will argue in chapter six, the decisions of Justice Michael Kirby, former High Court judge, are an illustration of care and of judgement enriched by a capacity for reflection, or what others such as legal ethicist David Luban, have described as a capacity for imagination. Such an orientation helps to alert us to the sorts of decision which inflict suffering. This encompasses more careful

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847 Gaita, *Breach of Trust*, 5, 17 - 19. Gaita here describes the love of a nun for patients who are afflicted, as a demonstration of her unstudied respect for their singular humanity.

848 Ibid., 59 – 60.


850 Ibid., 25 – 27.
attention to the practices we engage in, to the effects of our actions upon others, and to the risk that always accompanies a concern with ‘efficient’ governance to the detriment of ethics. In attentiveness to the trace of our intentions, or reflection upon the consequences of our actions, we become more acutely aware of the unintended consequences which follow our decisions and actions.

This brings me back to my earlier observation that the ethical encounter is not dependent upon a literal concept of the face to face relation. It is enabled whenever we reflect on the suffering of others, whenever we demonstrate our capacity to ethically imagine the suffering of the other. As I will show in chapter six, this is critical to good office conduct: the capacity for reflection was crucially absent in the case of Eichmann and in the Milgram experiments. Obedience to role here eclipsed attentiveness to the suffering which eventuated from ‘doing one’s job well’. The result might have differed if doing a job well required, or was founded upon reflection, disinterestedness and care. Roles are ethically enriched when they are constituted through responsibility, and founded on justice which comes from love.

**RESPONSIBILITY AS CONSTITUTIVE OF OFFICE**

The office of migration is one which is charged with responsibility to refugees, along with other forms of migration. However, the instrumental construction and unmindful application of categories, and the infliction of suffering through law and policy discredit office. How we see office and how we understand responsibility are constitutive of office itself. As Gaita has remarked, contemporary approaches to professional life seem to be marked by is a ‘steadily diminishing understanding that standards may be partly constitutive rather than merely regulative of an activity.’\(^{851}\) Against this, following Gaita, we

\(^{851}\) Gaita, *Breach of Trust*, 16.
have to see ethics ‘as what makes us, not what regulates us’. Accordingly, an ethically diminished understanding of office inhibits us from realising office as the site for justice which has love as its source.

As Gaita goes on to argue, ethical conduct in office entails a convergence between what we do and who we are and as such it cannot be reduced to a handbook or procedural manual; this is read then, as a call to responsibility, in which the self is at the service of the other. On this reading, office is an orientation, a way of conducting ourselves which is directed outwards to a justice which comes from love. Crucially for this thesis, the historical origin of office illustrates its emergence from an ethical tradition often neglected in contemporary accounts of office as outlined in chapter two. Historical accounts identify office as characterised by the careful cultivation of impartiality and proper conduct. Office bearers in early modernity were expected to be aware of ‘the burdens of their sphere’ but also to appreciate ‘the consequences of neglect or excess’. Taking up a conceptual persona enables us to meet the obligations of office in a manner which conforms to the expectations of office. We transform ourselves in subtle and not so subtle ways every time we step into the space of office. Accordingly, I argue that justice which comes from love offers a transformative potential for the persona of office.

It is through the exercise of our responsibility as response to the other that we are constituted as selves in the world; we are who we are because of the other. We might think of this in everyday terms as the way in which our humanity emerges in our sociality: our engagement with others is what makes us. Levinas takes this a step further. If our subjectivity emerges because of and through our relations and response to the other, the other was already and always there

852 Ibid., 16–17.
853 Ibid.
854 Condren, Argument and Office, 44.
before me.\textsuperscript{855} It is through the call of the other that I am constituted in the world.\textsuperscript{856} The other defines me; I ‘become who I am’ because of her.\textsuperscript{857} This is the constitutive effect of responsibility. In office, we are defined by how we serve others.

**CONCLUSION**

Reflecting back on early modern conceptions of office, I argue that this orientation is characterised by care, reflection and disinterestedness. An ethics of conduct is enabled by institutional settings and practices where these attributes can flourish. However, meeting the obligations of office is also a matter of competency, skill and the capacity to do one’s job well. Importantly for this thesis, there is an interplay between technical and moral responsibility; the two are not necessarily divided. Competency of office, and the appropriate allocation of obligations which can be achieved skilfully and well, are also critical. The ethical exercise of office is nurtured when there is a convergence between what it does (its specific purpose, limits and technical capacity) and the foundations on which it rests (its general purpose of service to the other and respect for human dignity).

Levinas’s philosophy is commonly regarded as too transcendent and radical to be concretely applied to law, politics and justice. By attending to the aspects of Levinas’ philosophy outlined above, I am able to develop a way of thinking about the violence of the modern state which can yet preserve the ethical relation in institutional life. This is a distinct reading of Levinas in institutional life. While the weight of the literature on Levinas addresses the radical demands of his ethic, I am instead concerned with how we can think through what it means to occupy office in the concrete world of the third. In this chapter I have argued that we can turn to Levinas to challenge contemporary practices in

\textsuperscript{855} Levinas, “Signature”, 294.
\textsuperscript{856} Levinas, “Is Ontology”, 10, 34.
\textsuperscript{857} Douzinas, *The End of Human Rights*, 351.
office, identifying conceptual ‘tools’ for thinking otherwise with office. By extending his conception of responsibility and the ethical relation, it is possible to think of office ethically, as a form of service in which agenda and self-interest are absent from the relation. While office cannot be the site of love, office conduct can yet amount to a justice which comes from love. Accordingly, I propose that Levinas’s ethic is not just a story of the radical encounter with the singular other. It is also a story about how we conduct ourselves in political, legal and public life.

As I have asserted from the start, this thesis is driven by a concern about what it means to exercise responsibility in the institutional life of migration. In this chapter, I have used Levinas to set up a conceptual framework for thinking ‘otherwise’ with office, which reveals its ethical possibilities through responsibility as a constitutive exercise. By taking up the notion that justice must always come from love, and harnessing this to other historical accounts of office, we can also construct another way of thinking about office which identifies ethical potential, rather than presume that role division facilitates evil through ethical detachment. I pose this office as service to the other, entailing a heteronomous obligation. In chapter six, I examine practices and forms of conduct which concretely illustrate office as a site of ethical possibility on the terms I have described here.
CHAPTER SIX: ETHICAL CONDUCT – PRACTISING OFFICE OTHERWISE

Introduction

In chapter five, I presented a conceptual account of office holding characterised by the Levinasian third and by justice which comes from love. Chapter six provides a concrete illustration of this ‘rethinking’ of office and, while addressing some similar themes from my discussion in chapter four, it has an important, alternative purpose. I have already showed the ways that staff working in immigration detention have been affected by the distortion of office. However, the accounts I identify in this chapter reveal that office can also push back against its ethical degradation. Here I draw out the ways in which office has been characterised both by an acknowledgement of the significance of care, reflection and disinterestedness in office conduct, and by examples where we can see this being practised.

My aim is to show how these attributes, as part of the persona of office, have been emphasised, acknowledged or fulfilled in relation to Australia’s Immigration Detention Network and its obligation to refugees. There are three central observations I glean from this: that those in office are often acutely aware of the importance of ethical conduct; that many attempt to practice this; and that historical evidence points to the possibility of alternative policy approaches which are driven by responsibility as an ethical undertaking. My discussion begins by exploring a contemporary example of office which affirms an ethical responsibility. I then turn to an historically illustrative account of alternative responses, by describing how obligations under the Refugee Convention were avowed during the arrival of Vietnamese ‘boat people’ in the mid-1970s in Australia. These examples reveal the pertinence of good judgement and
leadership in preserving ethical conduct and show that developing the ethical foundations of office is critical in grounding what might otherwise remain an abstract responsibility.\textsuperscript{858} The examples I point to also show that there exist forms of orientation and practice which can (and have been) drawn upon to push against this policy, and to affirm other ways of responding to those seeking protection at the border.

**ETHICAL DISCOMFORT**

The story of former migration officer and bureaucrat Tom Davis under a policy of immigration detention, discloses the ethical discomfort he experienced as an effect of decision making processes in which care and reflection were absent. As a new employee in the office of the Refugee Review Tribunal (RRT), he saw himself as part of a team of ‘good decision-makers’.\textsuperscript{859} But the spectre of fallibility always ‘lurked’, he said, in the background. There was always a degree of uncertainty in making these decisions: how could he be sure? What experience did others bring to the process? As he moved to other positions in the department he recalled his increasing reluctance to simply tick the boxes. At the same time a shift in organisational direction from 1996 under the Howard Liberal Government signalled an increasing pressure to do so. Prior to the leadership of Prime Minister Howard and Minister Ruddock, while there were ‘clear procedures to narrowly defined categories such as business migration, family reunions’, ‘the interpretation of refugee status was much more complex, requiring skill and expertise in judgement and decision-making which depended on detailed knowledge and understanding of this law.\textsuperscript{860} Commenting on the role of migration officers in making such judgements, Davis noted that there were no:

- easy-to-tick boxes. It was all too judicial. They were trained to manage in

\textsuperscript{858} Without this, it risks being subjected to similar criticisms which I have levelled at a human rights-based approach.

\textsuperscript{859} Davis, “Why I quit the department.”

\textsuperscript{860} Ibid.
a command-control manner, yet were placed in charge of a group who were largely autonomous and judge-like in their decision making.\textsuperscript{861}

Ministerial direction stressed that too much time was spent processing claims, and too much time was spent engaging with individual cases; the preference was for decision making based on ‘paperwork alone’. Under such conditions the capacity for careful decision making and reflection was being subtly but progressively eroded. A silent unease set in:

Within the department, previously unspoken debates began to be aired, blown along by exchanges with Minister Ruddock’s office and internal reports such as that of October 1996 criticising the cost of the refugee determination system. How many refugees should be let in? Were we spending too much to process them? Why did we have to interview every applicant, couldn’t some simply be decided "on the papers"? What sort of message was the detention system sending to potential asylum seekers who had yet to leave their countries?. . . As 1996 progressed, I also began to change, began to question what I was doing in such a place. I started to add up all the decisions I had made. It must have been about a hundred – more if the RRT\textsuperscript{862} decisions I drafted were counted. I began to think: including family members, how many people’s lives had been affected by my decisions? Two hundred? Three? Multiply that by the number of decision-makers working in the Immigration Department. Multiply that figure again by the number of years the system had been in operation. I started to get a sense of the social and psychological enormity of asylum seeking in Australia. The way the Immigration Department went about its business had implications that were far broader than I had been prepared to recognise. My work had implications. I realised, for the first time, surprisingly, that my job was truly serious. And it was becoming increasingly apparent that the minister’s office and the department cared less and less.\textsuperscript{863}

Shortly after this shift in 1996, Davis ‘quit’ the department.\textsuperscript{864} Davis was uncomfortable with executive directions that migration officers dispense with

\begin{itemize}
\item \textsuperscript{861} Ibid.
\item \textsuperscript{862} Refugee Review Tribunal.
\item \textsuperscript{863} Davis, “Why I quit the department.”
\item \textsuperscript{864} I use this term based on Davis’s choice of words in the title of his article. Davis resigned.
\end{itemize}
even the most fundamental and usual investigations to verify identity since it minimised the possibility that their evaluation was correct. Until then, he reflects, ‘we saw ourselves as the ‘good’ decision makers’ trying to do a job well.865 His reflections about the effects of his actions show how pivotal discretion is to this reflective capacity and testify to the potential for reflection and ethical engagement despite role division.

THE ATTRIBUTES OF OFFICE: CARE, REFLECTION AND DISINTERESTEDNESS

There are a number of ways in which the attributes of care, reflection and disinterestedness have been affirmed, asserted or recognised in the institutional life of migration as being ethically important. I begin by noting that these attributes are not practised in equal measure in all offices. For example, the persona of the judge or the migration officer is more centred on judgement than that of the guard or the health worker, whose work entails physical care. Nonetheless, the exercise of care and reflection is also important in those making judgement. I do not wish to dwell on this point too much, except to emphasise that these attributes, while partially offered as different strands of the persona of office, also intersect with each other. This point is implicit in Joyce Chia’s suggestion that judicial cases (and indeed, policies and laws) affecting refugees require ‘heightened judicial solicitude’866 because of the profound consequences which can follow from decisions wrongly made. In other words, the situation in which refugees commonly find themselves, that is, without protection and access to legal advice and support, necessitates particular attention to the individual and watchfulness or vigilance in the exercise of judicial obligations: care, disinterestedness and reflection here coalesce.

Together, these attributes are critical to the fulfillment of the obligations which

865 Ibid.
866 Chia, “Back to the Constitution”, 667.
flow from Australia’s responsibility under the Refugee Convention. The examples below are testament to the numerous acknowledgements that a duty of care, reflection and disinterestedness exists, while also bringing to light the persistent attempts by some of those working under a policy of mandatory immigration detention to demonstrate these attributes.

**Care**

The responsibility of the department extends to an obligation to care for people in detention. This is expressed in the Migration Act and associated Regulations which give effect to the terms of the Refugee Convention, and it is explicitly conveyed in administrative instructions to officers of the department:

> Officers have a duty of care with respect to detainees. This means that officers are obliged to take all reasonable action to ensure that detainees do not suffer any physical harm or undue emotional distress while detained. Officers should be aware of the potential for serious consequences for the detainee, the department and themselves if they fail to fulfil their duty of care.  

In the 2012 report of the Commonwealth and Immigration Ombudsman emphasised that this extends to ‘a positive duty to prevent harm from occurring’ as a duty of care under tort law. Justice Gleeson likewise noted, in *Behrooz*, that even though conditions are irrelevant to establishing whether detention is lawful or not, this does not remove detainees from the ordinary protections of law:

> An alien does not stand outside the protection of civil and criminal law. If an officer in a detention centre assaults a detainee, the officer will be liable to prosecution or damages. If those who manage a detention centre fail to comply with their duty of care they may be liable in tort.

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867 HREOC asserts that a duty of care was explicitly conveyed within Migration Series Instruction 92, General Detention Procedures, Section 8, *For those who’ve come*, 62.

868 Neave, *Suicide and Self Harm*, 10, 27.

Such care is required irrespective of a person’s ‘lawful’ status and despite the majority decision in *Behrooz* determining that the conditions of detention did not constitute punishment. While an obligation of care stands alone, the proven nexus between prolonged detention and mental illness also delivers an additional, unique obligation upon the department to ensure that harm is minimised. The exercise of control intensifies prior vulnerabilities and increases the need for care, as I showed in chapter four and as the Commonwealth and Immigration Ombudsman noted:

The nature and extent of a person’s duty of care is affected by the very high level of control over detainees in closed detention facilities. It uses its coercive powers to hold those detainees against their will, determines the conditions and length of time of their detention, and is responsible for providing all of their needs.870

Because the level of control is so high, the duty of care is correspondingly high. The Commonwealth and Immigration Ombudsman’s Office thus counsels the need for those working within the institutions of migration to exercise particular care in their duties.871 Those working in detention centres have often been acutely aware and intent upon providing such care both because it is within the persona of their office to do so and because the detention setting warrants and demands it. In chapter four, I have already pointed to the stories of many staff ‘who were trying to do their job well under difficult circumstances.’872 Concerns about the impact of this upon staff have been so significant as to prompt an investigation into this by the Commonwealth body responsible for workplace health and safety, Comcare. Specifically, the report was concerned about ‘work pressure and the risk of harm and mental stress’ as consequences of working in this environment.873

870 Neave, *Suicide and Self Harm*, 27.
871 Ibid., 29.
A 2003 television documentary on the Woomera detention centre – the site of the most violent unrest of the centres – showed a former migration officer recalling that many staff had ‘developed good relationships with the detainees.’

For some, working under such difficult conditions was unsustainable. Mandatory immigration detention adversely affects those working throughout the network, whether as the guards, health care professionals or migration officers, or those in senior management and advisory roles. Yet there are different pressures and expectations applying to medical officers compared to migration officers, for example. Those providing medical support to those in detention must navigate their obligations to the Department with those they have towards their own profession under their code of ethics. This introduces complex challenges for medical professionals. As Briskman and Zion have shown, it creates a uniquely different set of challenges to those experienced by migration officers. This is not to say that migration officers are not unsettled by their role.

Evidence of staff who struggled with what they had to witness, as well of examples of good relations between staff and detainees, has been extensively corroborated by the accounts of ‘whistleblowers’ who have resigned from their positions in immigration detention centres. The point I wish to emphasise here is that the sustained attempts to provide care – even when the setting continues to mitigate against this – constitute a form of resistance to the ethical (and technical) degradation of office. This is especially profound for those office holders working as health professionals, both because of the duty of care this entails, and the obligation to a professional code of ethics, something which distinguishes these offices from that of the migration officer, with higher

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874 Whitmont, “About Woomera.”


876 The stories of whistleblowers have been extensively reported in the investigative journalism undertaken by the ABC television program Four Corners, as I have shown in chapter four and in this chapter. Notably, this has included those in a range of offices, from those of medical staff, to guards and migration officers. See also Briskman, Zion and Loff, “Care and Collusion” and “Challenge and Collusion.”
standards of ethical conduct.\textsuperscript{877} As Louise Newman, former chair of the Detention Expert Health Advisory Group, and researcher and practitioner in the area of mental health and psychiatry has remarked, psychiatrists working with the immigration detention setting are faced with a ‘deep conflict between clinical duty and responsibility, duty of care and the needs of the immigration system and current immigration policy.’\textsuperscript{878}

Care is not limited to actions which ensure physical and mental well-being however. I propose that, under an ethics of office, there is also an expectation that the work of office is discharged with care and with what I have described as attentiveness, or reflection upon the consequences of one’s actions and decisions. This comprises a capacity to consider the other as a form of orientation, or service. Thus, care is an attribute which is demonstrable both as care of the other as human, together with care in the exercise of office as noted above in the Palmer Report. Dispensing obligations with care requires reflection on the ‘individual circumstances’ of those subject to detention and on the impact of one’s decisions and actions. It also requires skill and competency. Both ethical and technical capacity are crucial to office.

**Reflection**

Reflection is especially significant for refugees: a wrong decision made without careful reflection can have serious consequences.\textsuperscript{879} As I explained in chapter five, when I speak of attentiveness or reflection, I deploy this in the Levinasian sense of exercising vigilance over the consequences of our actions and our decisions. For Manderson, reflection entails an openness to others which

\textsuperscript{877} The distinction between these two forms of office warrants closer examination, especially in settings where there is a conflict between professional codes and obligations to the Department as employer. This becomes more complex when services are outsourced to private contractors.

\textsuperscript{878} Louise Newman, ‘Asylum Seekers and Refugees – how should psychiatry respond?’ Australasian Psychiatry, 24, 1 (2016): 5 – 6. As Michael Dudley comments elsewhere in this special issue, immigration detention compromises the capacity for health professionals to uphold their commitment to their ethical codes of practice. See Dudley’s discussion in “Helping professionals and Border Force secrecy: effective asylum-seeker health care requires independence from callous policies” Australasian Psychiatry 24, 1 (2016) : 15 – 18.

\textsuperscript{879} Even those made with reflection can have a serious impact. This is a key concern which has been emphasised by those occupying judicial office, such as Justice Michael Kirby and Justice Brennan, as well as in refugee law jurisprudence.
imparts meaning to our actions and our laws. Importantly, he emphasises that simple obedience, without reflection is not responsibility, or is at least an ethically impoverished version of it. Similarly, Luban argues for a capacity for reflection when he refers to the ethical significance of exercising imagination in judgement.

When former High Court Judge Michael Kirby emphasised that context is critical to the definition of persecution applied under the Refugee Convention, he also implicitly endorsed the view expressed by Luban: we cannot consider what persecution means unless we consider it within the context of the person suffering it. This requires an imaginative capacity, even while a decision is grounded in law. This is not to suggest that this capacity is not exercised within the limits and expertise of office: indeed limits and expertise can help to nourish this capacity.

The poor application of categories is of particular importance in the area of refugee claims, given that the consequences of a wrong decision are profound. As legislation becomes more ‘tightly drafted [it] can have an unforeseen and harsh consequence for an individual.’ Importantly, the Ombudsman’s report noted in 2009 that the effect and intention of greater legislative complexity has been to progressively limit the capacity for imagination, for migration officers to depart from legislative criteria, a trend which can produce ‘unexpected consequences, anomalous outcomes and unfairness.’ While a lack of documentation regarding personal identity makes verification of claims for refugee status time consuming, it places a particular onus on the department to get this right. Poor conditions for sound and careful decision making

880 Manderson, “From Hunger to love.”
881 Ibid. Specifically on obedience, also see David Luban, “The Ethics of Wrongful Obedience” 237 – 266, in Legal Ethics.
883 MacMillan, Mistakes and Unintended Consequences, 1.
884 Ibid, ii.
885 Ibid., 7.
produce delays in processing, longer periods in detention or even deportation, as I highlighted in chapter three.

The ethical significance of reflection is also brought to light in this statement by Justice Kirby, where he warns that the assessment of the ‘credibility’ of the applicant:

affords no foundation for the Tribunal to proceed to a premature evaluation of the “plausibility” of his story. On the contrary, that may be a path fraught with dangers. Claims of extreme persecution may often at first seem to a person far removed from the context in which the events are said to have taken place, to be far-fetched.886

Reflecting the need to imagine the complex and varied experiences of persecution and the difficulty in establishing what form persecution might take, Justice McHugh similarly commented in *Anor v Minister for Immigration and Ethnic Affairs 1997* that:

Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society.887

As noted, the forms of persecution may be ‘infinite’. Despite a number of limits to protection in the Convention and criticisms that the definition of persecution and the refugee are too narrow the effect is arguably to ensure a wide, rather than narrow definition of persecution: it may be systemic, or consist of no more than a ‘single act of oppression.’888 We are alerted in this statement to the dangers of presuming the other’s story, of failing to imagine the extremity of persecution: in short, of failing to appreciate that others may live a life which is unrecognisable to us.889 This is a warning to law to be present to the

887 Justice McHugh, *Chan v MIEA 169 CLR 225*, at 429-430.
889 This is despite the fact that such cases in the High Court, for example, are detached from the particular circumstances of the individual, and unlikely to encounter him or her in their uniqueness. See discussion by John, McMillan, “Judicial Restraint and Activism in Federal Law,” *Federal Law Review* (2002): 346.
possibility of what we cannot understand, to what is other to law. Importantly it
also underpins the spirit of the Refugee Convention, with authors of the Refugee
Handbook noting that ‘[w]here the result of a flawed decision may imperil life
or liberty a special responsibility lies on the court in the examination of the
decision-making process.’ But reflection also relies upon access to procedural
fairness which might facilitate this openness. Judgement is a critical component
of this.

Implying the importance of judicial review to ensure attentiveness to context
and adequate protections, Justice Gleeson asserted in *S157/2002 v Commonwealth
of Australia* that those whose ‘rights are at stake are ordinarily entitled to expect
more than good faith. They are ordinarily entitled to expect fairness’, which
access to judicial review helps to protect. Terms such as ‘ordinarily entitled’
and ‘rights at stake’ are important here. Being threatened with the infringment
of one’s rights is a serious matter, and it requires that access to the law be regarded
as applying ‘ordinarily’ without conditions.

Limiting the ordinary entitlement of fairness is a refutation of the rule of law.
Protections must, therefore, exist in law, which ensure the capacity for reflection
in the exercise of judgement. The limited scope for judicial review of
administrative decision making in relation to refugee cases specifically, places a
greater burden on the judgements made by administrative office. At the same
time, the pressure to process refugee claims quickly has undermined the capacity
for sound, administrative judgement.

For Luban and Manderson, responsibility which is accompanied by discretion
and reflection signals the exercise of an imaginative capacity which is critical
both to law and to our interactions with others, whether in the singular, face to

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under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Part Two: Procedures for the
Well-Founded Fear", 133, footnote 19. Stress is in the original.
face relation, or in office, whether one occupies administrative or judicial office. Accordingly, against the claim made by Douzinas and Warrington that judgement inevitably risks the loss of attentiveness to the uniqueness of the other, the examples pointed to above tell us a different story: they uncover an acute awareness of the gravity of attentiveness to the consequences of their decision on singular others. Indeed access to fair treatment under law seems to be predicated on such attentiveness: the ‘careful weighing up of claims’ and making judgements, as Levinas would describe it. It is not that the risk of violence in judgement is absent: Douzinas and Warrington provide an important criticism of the risk of errors of judgement and the loss of the singularity of the other in the act of judgement. However I want to push forward the notion that those exercising judgement achieve this through the development of a persona of office which can be ethically alive and committed to the idea of office as *service*. As I have argued in chapter five, I describe this in Levinasian terms as disinterestedness.

**Disinterestedness**

It is incumbent upon office to ensure that decisions as to what constitutes persecution are made with care and with disinterestedness, which entails an openness to the possibility of persecution. To this extent, the absence of judgement creates other risks, as many have argued in the wake of restrictions imposed on judicial review under a policy of mandatory immigration detention.\(^{892}\) It is always possible that judgement can be poor but judgements exercised with care, also create a condition for the possibility of the ethical. For Manderson, the possibility of a meaningful relation with others, through law, requires that we are always mindful of the purpose of law, and reflect on its effects.\(^{893}\) Careful attention to the consequences of our decisions and the laws we make are better facilitated rather than undermined, through judgement

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\(^{893}\) Manderson, “From Hunger to Love”, 133 – 135.
as a form of disinterestedness. I want to stress that this is the case whether we are talking about a court of law or about administrative tribunals. Even though I have focused largely on the capacity for judicial review in this thesis, it is clear that those making administrative decisions are also expected to make judgements well and with care, as Tom Davis asserts. Yet, this is not the same as simply exercising vigilance over the line dividing good and evil, as Taylor proposes. Rather, it requires that we are attentive to the consequences of our actions upon others, even, and especially, to those who are radically different.

Douzinas and Warrington apply Levinas’s ethic to criticise the limited capacity for courts to engage with the uniqueness and singularity of those applying for refugee status. In their view, this accentuates the underlying violence of law. However, this does not differentiate between the need to follow a rule as a specific source of violence against the other and the capacity for judgement to nonetheless address the face of the other, through the position of the third, in the adjudication of competing obligations. The absence of careful judgement and ethical concern is not inevitable; their presence preserves a good violence in a world where judgement is necessary. Against their view that the impartiality of the judge divests judicial office of ethical capacity in responding to the uniqueness of the other, I argue that when understood as disinterestedness, this attribute instead encompasses an openness to the other through the conduct and orientation of office, one which is without personal agenda and political interest, and is hence ethically potent. Justice Kirby’s support for careful interpretation of claims of persecution under the Refugee Convention noted above, illustrates this point.

Achieving a wide definition requires an openness to the case at hand, not pre-judging or pre-judicial. The High Court decision on the Australian Government’s plans to send irregular maritime arrivals to Malaysia as a part of a ‘swap deal’

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894 See Douzinas and Warrington “A Well-Founded Fear”; Parker, “Spirited Away” and Parsley, “Performing the Border.”
with those waiting in refugee queues off shore illustrates this point. In rejecting the plan, Justice French of the High Court expressed concern that the Australian Government had failed to address the potential human rights implications for detainees deported to Malaysia. In short, an expectation of human rights protections was insufficient:

The declaration must be a declaration about continuing circumstances in the specified country. It cannot therefore be a declaration based upon, and therefore a declaration of, a hope or belief or expectation that the specified country will meet the criteria at some time in the future even if that time be imminent. It is a misconstruction of the criteria to make a declaration of their subsistence based upon an understanding that the executive government of the specified country is “keen to improve its treatment of refugees and asylum seekers”.

The High Court rejected the submissions of the Minister that:

such a declaration [could] rest upon a belief that the government of the specified country has ‘made a significant conceptual shift in its thinking about how it wanted to treat refugees and asylum seekers’ or that it had ‘begun the process of improving the protection offered to such persons’. Yet the Minister’s affidavit suggested that, at least in part, this is how he approached the questions he had to ask himself before making the declaration.

This decision signalled a refusal to presume the circumstances of refugees and indeed of the protections available under law. In more specific, individual cases, this care is also crucial. The presumption that one is guilty, without a process of judgement, discloses a form of interestedness as agenda, and pre-judgement. The Palmer Report has likewise noted that:

The forming of a “reasonable suspicion” is an exercise of personal

895 Plaintiff M70/2011 v Minister for Immigration and Citizenship & Anor and Plaintiff M106 by his Litigation Guardian (2011) 244 CLR 144 (High Court of Australia, 2011) at 62.
896 Plaintiff M70/2011 v Minister for Immigration and Citizenship & Anor and Plaintiff M106 by his Litigation Guardian (2011) 244 CLR 144 (High Court of Australia, 2011) at 29.
judgement. Exercise of this power places an obligation on officers who detain a person under the provisions of s. 189 (1) to justify the reasonableness of their suspicion before they make the decision to detain. Indeed, a properly based exercise of discretion in the determination of a “reasonable suspicion” provides, for a person facing possible immigration detention, the only protection against indefinite arbitrary detention.898

Similarly, the report noted that the judgement in Goldie v Commonwealth (hereafter referred to as Goldie) ‘made it clear that this exercise of a ‘reasonable suspicion’ detention ‘must be justifiable upon objective examination of relevant material’ and that the detaining officer must not simply rely on information immediately to hand but must make ‘efforts of search and inquiry that are reasonable in the circumstances’.899 Several years later, the inquiry into the wrongful detention of Cornelia Rau found that such care in the assessment of the material had been absent. This has been identified as peculiarly specific in cases regarding women. As Spijkerboer has found, women are treated differently to men by those conducting refugee assessments, reviews and appeals: assumptions are made about their credibility which are directly linked to gender stereotypes and this is even more pronounced in cases of ethnic difference.900 As he notes, this is not simply due to technical incompetence,901 important though this is. And yet the consequences of sloppiness in the process are profound.

Similarly to the judgement in Goldie, the Inquiry into the Rau case cautioned that the decision to detain a person ‘carries with it a responsibility to continue to reassess the validity of the decision in the light of further enquiries and information’ and thus to continue to assess the basis for that suspicion.40

The task of judgement and the capacity to judge well are not limited to the judge in a court of law, but are also central to the persona of office of the migration officer, from the processing of refugee claims, to the assessment of appeals at

898 Palmer, Inquiry into the Circumstances, 22.
900 Spijkerboer, ‘Stereotyping and Acceleration.’
901 Ibid., p. 88.
the RRT. I acknowledge that objectivity is notoriously problematic, so I am not casting a naïve belief in its immunity from criticism when we are called to judge. Rather, I regard the attempt to maintain disinterested, careful and reflective conduct and orientation is ethically important. This also lies at the foundation of procedural fairness, which determines that a person is innocent until proven guilty.

And yet, the field of responsibility under a policy of mandatory immigration detention has contracted to the extent that the capacity for good judgement (and indeed for care and reflection) is diminished or undermined. While this discussion is not exhaustive, it offers a way of thinking about the conduct and persona of office which can help advance a capacity to meet these obligations. If the capacity for judgement and judicial oversight is limited, so too is the meaningful exercise of the rights that might flow from them.

**Ethical and technical responsibility: office as service**

Under a policy of mandatory immigration detention, the ability to demonstrate these attributes of office has been tested, with effects on ethical and technical capacity of office. In cases where the purpose or *telos* of office is undermined or distorted, we can detect both a diminishing ability to exercise technical responsibility (ability to do one’s job) and a diminishing ethical responsibility. Discomfort on the part of those in office is one possible measure of this, as Davis has shown. The resignation of leading mental health expert, Dr Harry Minas[^902] from his position as advisor in the DeHAG in late 2012, also reflects this institutional dissonance. After ten years in the position, he resigned in despair as the Gillard Labor government moved to limit work rights to newly arrived refugees. Describing political leadership as contributing towards a widening gap between Australian policy and its international obligations, he

[^902]: Director of Centre for International Mental Health, University of Melbourne.
remarked that it was not possible for him to continue working in this setting:

If I feel that my views are so divergent from the directions that we are heading that I obviously can’t be of any real use, the only reasonable thing to do in those circumstances is to resign and say I can’t serve in that way.\(^903\)

As Briskman, Zion and Loff have found, and as I have noted in chapter four, resignation is one of several responses adopted by staff when they perceive that they can no longer fulfil the tasks which their role encompasses, either on ethical or technical terms,\(^904\) that is, when their office cannot be exercised as service.\(^905\) The key point I wish to stress in relation to the incongruity of executive powers under this policy, is that the shift or distortion in the function of office acts as a limitation on the ethical and technical responsibility exercised by administrative office. Where executive office assumes a punitive function over time and takes over the functions of administrative office, it weakens administrative capacity and the skills necessary for administrative office to do its job well. Yet, as Davis noted in his account, the department ‘was not always the hard-bitten agent of the politics of race that the Palmer Report implies.’ Rather, a gradual process of transformation took place in which the end results were the product of ‘political intent’. This suggests that the leadership we have also shapes the culture of office.\(^906\) In the next section of this chapter, I examine an alternative, historical response to refugee movement which illustrates the significance of leadership in nourishing an ethics of office.

**AN ETHICAL RESPONSE: 1976, VIETNAMESE ‘BOAT’ ARRIVALS**

In the responses to Vietnamese refugees in the 1970s, we can locate an alternative response which demonstrates an ethics of office. A 1976 report,
published by a Senate Inquiry into the arrival of Vietnamese refugees in the 1970s documents this in a number of ways. This is significant, despite the report being a product of a climate of multiculturalism and civil rights which was broadly embraced. While the inquiry began prior to the commencement of Fraser’s prime ministership, it was finalised and released under his leadership. Notwithstanding the unique circumstances in which Australia’s war with North Vietnam produced a sense of responsibility, I argue that leadership was also influential in shaping the responses in the report.

Importantly, the report proposed that mechanisms should be in place to ‘ensure that Australia is able to respond quickly and effectively to refugee situations which may arise in the future.’ As noted in chapter one, the end of the civil war in Vietnam in 1975 had prompted hundreds of thousands of South Vietnamese to flee the country in search of refuge and resettlement, with the first boat of refugees from Vietnam arriving in Australia in April 1976. Over the ensuing months, the Fraser Liberal Government quickly made plans for orderly resettlement.

The report provides a background to the movement of Vietnamese refugees, and considers the appropriateness of responses by government in evacuation, screening and settlement processes. It concludes with a series of recommendations supporting the development of a Federal Liberal Government policy on refugees, ‘together with the necessary advisory and other administrative machinery.’ The language of the report is worth repeating at length because it recognises a ‘compelling’ responsibility upon Australia to

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907 Senate Standing Committee on Foreign Affairs and Defence, Australian and The Refugee Problem” Parliamentary Paper no. 329/1976. (Canberra: Commonwealth of Australia, 1976); vi. It was commissioned by the Senate under a Federal Labor Government in 1975, to respond to matters relating to the circumstances of and assistance required by South Vietnamese refugees and to provide advice on to ‘render appropriate and effective assistance. But it was undertaken and completed by the newly elected Fraser Liberal Government.

908 Whilst the report was commissioned under a Labor government, the tone and recommendations of the report were finalised under a Fraser Liberal government. I note that I do not suggest that Malcolm Fraser’s leadership was consistently ethical in all areas of policy, but that on the needs of refugees he has maintained a consistently ethical stance.

909 SSCFAD, Australia and the Refugee Problem, vi.

910 Ibid., vi.
take in Vietnamese refugees and concretely exposes what I mean by justice which comes from love. The report stated:

It is the Committee’s opinion that Australia had some responsibility to assist with the evacuation of Vietnamese citizens from Saigon. Whether the Australian Government’s former military involvement in Vietnam was right or wrong, we believe that by being in Vietnam Australia incurred a residual responsibility, not to mention a moral responsibility, to assist in the evacuation from Vietnam of those who had assisted our forces there and whose lives were believed to be in danger because of this assistance.911

Significantly for this thesis, the report encompassed an orientation towards refugees which was both informed by the substance of refugee law and guided by leadership which recognised the obligations under this law to be ethically significant and binding. The report observed that by signing up to UN protocols and conventions:

Australia has agreed to provide legal protection to refugees. The spirit of these instruments should continue to be manifested by admitting refugees and other displaced persons for settlement in Australia’.912

This was underscored by the need for a considered response,913 upholding the surplus obligations outlined in the Refugee Convention as ‘Supplementary Rights.’914 These rights press states to ‘act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement.’915 As a legal document which establishes the contours of responsibility towards refugees, the Convention details the ways in which this extends beyond the mere granting of asylum, to ensuring fair

911 Ibid. 23, 24.
912 Ibid., 90. Stress in original.
913 Ibid., 89.
914 This includes respect for family life and the right to welfare. As such, it embraced the full scope of obligations described in the Refugee Convention.
treatment and meeting their ‘moral, legal and material’ needs.  

That is, the Convention does not delineate the end point of state obligations but provides the basic standard from which the responsibility to the refugee ‘other’ might commence.

It is an obvious point that responsibility under the Convention is best effected through the practical discharge of obligations. But this is not always upheld as a responsibility. To facilitate this, the Committee report noted the need for ‘considerable re-orientation of basic thinking’, both at ministerial and departmental levels, so that policy could be ‘formulated on the basis’ of the principles underlying the spirit of the Convention. Specifically, this would mean: a ‘positive and constructive approach’ which recognised the ‘special needs of all refugees’, including ‘the significance of their culture, their value-system and the code of ethics governing their inter-personal relationships’ and the need for ‘flexible and timely action in tailoring available resources to suit the real and specific (rather than assumed) needs’ of refugees.

The program established as a result of this report sought to ensure that such practical obligations could be met. It was not confined to the issue of visas but included support for individuals and families to live a meaningful life once resettled. It was a document of welcome. The 1976 report was characterised by an orientation of care and respect for others as an act of responsibility in which legal and ethical obligations converged and in which there was no

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916 Ibid. See Chapter III “Gainful Employment” and Chapter IV “Welfare” in the Refugee Convention, which detail specific obligations in relation to these needs.
917 See Dauvergne in Humanitarianism, 3 – 4 for a discussion of the function of humanitarianism in responses to migration. She comments that ‘[u]nderstanding the place of humanitarianism in migration laws is vital to making sense of the overall structure of migration laws, and in analysing how migration law functions as a crucial site for the construction of national identity. Far from being an exception to the notion that migration laws are tools of nation building, humanitarian admissions to the polity confirm and reify the identity of the nation as good, prosperous, and generous. These attributes affirm the essence of the nation.’ This is explicitly conveyed in SSCFAD, Australia and the Refugee Problem 89.
918 Ibid., 90–91.
919 I contrast this with the tone and orientation of reports released since a policy of immigration detention was introduced. I stress that these reports typically include dissenting views being noted by members of the relevant government committee preparing the report. There were no dissenting views expressed in the 1976 report.
distinction made on the basis of mode of arrival.

There are clear areas of commonality with programs and support offered for refugees in Australia between 1992 and 2012, so this is not to suggest that under a policy of mandatory immigration detention, support services for refugees have entirely disappeared. But they have been significantly diminished, with policy responses characterised by a progressive shift away from responsibility, and toward exclusion, control and rejection, as Weber and Pickering and many others have shown. And, they are much more selectively applied, with penalties imposed according to how a person arrives, as I have shown.

In contrast to a contemporary policy setting marked by the erasure of individual, human subjectivity, the 1976 report noted that responses should recognise the needs of refugees as particular and ‘unique’, adding that protection should be afforded ‘on the basis of humanitarian concerns for a person’s needs’, ‘irrespective of whether he is technically a refugee, a stateless person or a displaced person.’ It thus affirmed the assertion in the Convention that a person is a refugee even without being declared one. Recognising the danger of refoulement of Vietnamese refugees during the 1970s, Fraser instead observed that during the 1970s such a move:

wouldn’t have occurred to me. It would have been wrong, ethically wrong however you want to define wrong. The only right thing to do...these were people fleeing terror. And it was terror for them and people forget, it was Menzies who signed on to the Refugee Convention in 1954. And that really had very significant implications for the White Australia policy. You couldn’t honour your obligations under that treaty and the White Australia policy.

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920 Weber and Pickering, “Constructing Voluntarism.”
921 See reference to social security and welfare supports in SSCFAD, Australia and the Refugee Problem, 89, 97.
922 Ibid.,90. It continued to declare that this responsibility should extend to those who do not even necessarily meet ‘existing immigration criteria.’ Stress is added.
By comparison, the dual track system under mandatory immigration detention laws discriminates through the legal category of the ‘unlawful’. This legitimates the withholding or deferral of responsibility under the Convention, as well as subjection to harm. The significance of this report lies in its overall orientation. While it acknowledged limits on protection, the report also conveyed a substantive appreciation of responsibility to refugees, in which the scope of the obligations of office was affirmed through the lawful relations which Australia has agreed to, both in its accession to the Convention and to other international treaties.

MALCOLM FRASER: LEADERSHIP AS EXEMPLAR

The leadership of Liberal Prime Minister Malcolm Fraser in the mid 1970s to early 1980s was marked by a policy of welcome and support for refugees arriving by boat. Despite some resistance to his policy, Fraser demonstrated a leadership characterised by an ethical responsiveness to the ‘other’ and an acknowledgement of the responsibility to others that accompanies public office.923

In an interview with him which I conducted for this thesis, he affirmed responsibility as a central element in his response to the arrival of Vietnamese refugees saying ‘I thought that we had no obligation but to take them.’924 This was in part, but not solely, an obligation deriving from Australia’s involvement in the war in Vietnam. He described this as an:

additional obligation. I just thought we’ve got no option, and if people weren’t going to like it we had to persuade people that we had no option, and even if we hadn’t been involved in Vietnam I would have argued the same way.925

There was resistance however. In his memoir published in 2010, Fraser noted

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923 Fraser, Interview. The interview was conducted on October 19, 2012, in his Melbourne office. See also Fraser and Simmons, Malcolm Fraser.
924 Fraser, Interview
925 I maintain the use of the term responsibility to denote an overarching relation, which Fraser here conveys as obligation.
evidence of considerable antipathy to his approach. However, this came less from his cabinet of ministers\textsuperscript{926} and more from the department, which contained a ‘hard core that opposed a genuine compassionate and humanitarian response’.\textsuperscript{927} This is indicative of the inflexible, rule-obsessed conduct, which is typically attributed to the bureaucrat in public office. Yet such a reading only gives us part of the story. Leadership and imaginative capacity appear as crucially important in such a setting. Fraser elaborated on this during his interview with this author:

> At the time the Immigration Department kept saying we can’t do this, we mustn’t do that, these are terrible people, we’ve got to have barbed wire razor fence’ [but] on important issues, the government’s just got to make up its mind and do what’s right. And if it is right they’ve got a fair chance of persuading people that it’s fair enough . . . When the numbers started to come, we had been fighting alongside some of these people, we had given them undertakings, we had not been able to keep those undertakings [and whether or not this was] their fault and not ours . . . nevertheless they had been given undertakings and they were certainly very much at risk in the early days of the communist regime.\textsuperscript{928}

As early as during the 1970s, Fraser was confronted with a number of requests, notably by the department, to introduce ‘reception centres’, or even to send the navy to interdict the boats and turn them back. In the light of contemporary policies and laws which have pursued detention (reception) centres as a normalised element of migration policy, the reiterative power of the stance one takes is instructive. It also helps to explain how difficult it seems to have been to dislodge a policy of mandatory immigration detention once it is entrenched. Fraser was well-aware of this, noting that he rejected the idea of establishing ‘reception centres’ and ensured that no planning was undertaken, despite discussions floating around regarding possible sites and ‘modalities’ of

\textsuperscript{926} Fraser remarked in the interview conducted with me that this was with one notable exception, that of John Howard, then a junior minister who sometimes sat in on Cabinet meetings, and was later to become Prime Minister and oversee the introduction of the Pacific Solution and Offshore Processing.

\textsuperscript{927} Fraser, Interview.

\textsuperscript{928} Ibid.
processing centres. This also reveals that, even though the report I have discussed is underscored by a humanitarian response, this was a position which was not comprehensively embraced. The seeds for a more exclusionary policy clearly existed. However, by rejecting these proposals he was preventing the idea from finding fertile ground: ‘if you do the planning, you have opened the door to the idea.’\textsuperscript{929} This illustrates alternative possibilities and ways of thinking about leadership, office and institutional responsibility. It also discloses the consequences of the path we take: the patterns we set in place become available for future appropriation and once established, are more difficult to dislodge.

In his interview with me, Fraser reflected on the contemporary context of a policy of mandatory immigration detention, lamenting the loss of leadership exercised as responsibility. He observed that under this policy the ‘idea of duties and obligations is gone completely, because no one is held responsible when things go wrong’.\textsuperscript{930} For Fraser, the difference between this period, and the policy responses marking the late 1980s and beyond, was a difference of leadership, and of the choices that were made and how they were communicated. Attention to the language used by office and the conduct of leadership was critical. Fraser noted that ‘we never spoke about fear. We always spoke of tolerance, diversity, and we planned carefully.’\textsuperscript{931} Government policies at this time reveal other ways of ‘doing office’, in which Australia’s responsibility under the Refugee Convention was exercised in ‘good faith’\textsuperscript{932} and where the ethical exercise of institutional responsibility towards those seeking asylum at the border was affirmed.

\textsuperscript{929} Fraser and Simons, \textit{Malcolm Fraser}, 420.
\textsuperscript{930} Fraser, Interview.
\textsuperscript{931} Fraser and Simons, \textit{Malcolm Fraser}, 425.
\textsuperscript{932} See Articles 26 and 27 of the \textit{Vienna Convention on the Law of Treaties, opened for signature May 23, 1969. 1155 UNTS 331 (entered into force January 27, 1980)}. Article 26 affirms that when signatory states sign up to international treaties they have an obligation to do so in ‘good faith,’ with the preamble emphasising the significance of international treaties in maintaining peaceful relations between states.
The clarity and strength of Fraser’s leadership is here illustrative of what Gaita has referred to as ‘exemplar’ or what Weber refers to as responsible leadership, as a vocation. It is a form of role responsibility, but one in which a moral, or indeed ethical responsibility, is sourced in the role. Indeed, as I have already stressed, the danger of inhumane actions cannot be so easily attributed to role responsibility. The danger emerges in the absence of ethical foundations for the role. This furnishes an appreciation of role in office as service. Leadership carries an added weight in this respect, as Luban has argued. The key distinction between this policy and those instituted under Fraser was a respect for human dignity and the care to avoid taking administrative office into a realm of harm.

Following Gaita, Fraser’s words reveal an ethics of office, where the value attaching to doing jobs well is preserved and where the demonstration of qualities which specifically inform the occupation of a particular office can ethically invigorate the conduct of that office. Rather than revealing office as diminished, this also points to the ethical bearing that political office has on other spheres of office. As Luban notes, we are influenced by the actions and decisions of those around us. The absence of objectivity and the exercise of irresponsibility lead to the impoverishment of political office. Yet Fraser reflects on its ethical significance:

I think it’s a total failure of leadership, I really do, but it’s worse than a failure of leadership – it’s a leadership exploiting fear and prejudice.

This response suggests that responsible leadership is characterised by choices carefully made, guided by reflection and disinterestedness. Following David

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933 Gaita Breach of Trust, 18.
934 Ibid. 18 – 20.
935 Luban, Legal Ethics, 266.
936 See Fraser, Interview, Fraser and Simons Malcolm Fraser, 417. There was considerable resistance from Fraser’s own party members – as well as from the Labor party and beyond – to the intake of Vietnamese refugees. However, departmental resistance appears to have been most profound, especially at the highest level. I note the comments regarding the need for a re-orientation of thinking in the department made in SSCFAD, Australia and the Refugee Problem, 86.
Luban’s analysis, this reveals the opening that always exists for choices which resist evil. Leadership in institutional life and a setting which fosters respect, provide a foundation for the exercise of responsibility as an ethical undertaking. As Luban has observed, we tend to follow the practices and behaviour of others to the extent that ‘our moral compass seems tremendously susceptible to the responses of the people around us.’

Resisting ‘wrongful obedience’ is more possible under leadership which provides the conditions for an ethical response, and this is what makes leadership so crucial. Liberal Prime Minister Fraser’s leadership during his prime ministership displayed such ethical foundations. It was characterised by the acknowledgement of institutional obligations, firstly in relation to international law, as noted above and secondly, in relation to domestic political obligations.

**OBEDIENCE IS NOT RESPONSIBILITY: THE ETHICAL SIGNIFICANCE OF JUDGEMENT**

In his analysis of the findings of the Milgram experiments, Luban emphasises the capacity for judgement in any position of office, even while leadership remains profoundly important. In these experiments, the ways in which participants justified the infliction of harm on another human being led Milgram to conclude that even the most ordinary of us have the potential to inflict suffering under the ‘right’ conditions. A majority of those participating were willing to go beyond the bounds of what they would otherwise have regarded as humane. My argument, following Luban, is that such inhumanity is not always the effect of role obedience. It is enabled through a corruption of judgement and the erosion of the ethical foundations of a role, rather than simple role division. This corruption develops through the ‘steady and cumulative erosion of the capacity to reflect on one’s actions in a deliberative way’.

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937 Luban, *Legal Ethics* 266.
938 In these experiments, Milgram sought to understand how humans might justify the use of violence in response to orders from those in authority.
highlighted in Minister Chris Evans’s reflections in chapter one on the excessive power being granted to executive office.

It is not that the idea of harm or suffering disappears, which is the implication of Arendt’s conclusion about Eichmann’s capacity to make decisions which lead to human suffering and death. Rather, there is a diminished capacity to recognise that what we do ‘violates’ the principle that we don’t harm another.

Once we begin down this path, it becomes increasingly difficult to turn back. While there are clear parallels here between Luban’s analysis and the view expressed by Arendt or Bauman, insofar as they all emphasise the dangers of decision making from a distance, the subtle distinctions are important. As Luban reflects:

> Good judgement lies in drawing distinctions around near-indiscernables, whereas authoritative instructions reinforce the idea that indiscernables are identical.

Without this, we are less likely to discern the nuance and complexity of the decision, opting instead for compliance with a rule. There is a close relation here between the order or decision, and ‘taking adequate time to reflect’, since capacity for reflection provides the ‘conditions for good judgement’. Rather than simply compelling surrender of our will, it whittles away the conditions for judgement.

As already noted above, in the case of wrongful detention in *Goldie*, the Full Court of the Federal Court similarly affirmed the significance of exercising judgement and discretion well in settings where procedural protections are fragile:

> By itself, the word “suspects” would be capable of being construed to

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940 Leanne Webers’ ethnographic research into detention in the UK supports this conclusion. See “Down that Wrong Road.”
942 Ibid.
include the formation of an imagined belief, having no basis at all in fact or even conjecture. Plainly, to empower an arrest on the basis of an irrational suspicion would offend the principles of the importance of individual liberty underlying the common law . . . [T]he office is not empowered to act on a suspicion reasonably formed that a person may be an unlawful non-citizen.943

This has implications for the loss of judicial scrutiny under a policy of mandatory immigration detention, as well as for the capacity of migration officers to reflect and judge with care, as we saw in the Rau and Solon cases.

**OFFICE AS A ‘GOOD VIOLENCE’**

Extensive jurisprudence has emerged in recent years on the diminishing capacity of Australian courts to exercise scrutiny over administrative decision making. Some of the human rights analyses and the legal commentary have been underscored by a concern about the implications of this practice for procedural fairness and the rule of law, and by implication, for the political legitimacy of executive office in encroaching upon judicial office.944

Yet, in response to limitations on judicial review, the High Court has asserted its authority as intact. Regardless of the introduction of privative clauses discussed in chapter one, the HCA continues to assert its constitutional jurisdiction to exercise powers of review in Migration Act matters which were ‘affected by jurisdictional error.’ Affirming the rule of law as central to the Constitution, Justice Gleeson stated in the decision:

> If the law confers power or jurisdiction, prohibition may issue to restrain unlawful behaviour. Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction

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to enforce the law so enacted.945

The HCA has thus continued to push back against the deprivation of procedural fairness, in the absence of other sources of review, even whilst it continues to perpetrate the violence of immigration detention by affirming its constitutionality. This is not an apology for the High Court’s reading of the lawfulness of detention. Rather, I draw out these examples to press for an appreciation of the possibilities of office. As an example of this, in 2010, the HCA determined that the review of applications for refugee protection by detainees being held at Christmas Island detention centre had failed to afford the plaintiffs procedural fairness.946

But this did not resolve the problems raised by the diminution of judicial powers available to the Federal Court in matters concerning immigration detention. As noted by Sir Gerard Brennan, former Justice of the High Court, without a capacity for judicial review, ‘executive power may be abused with impunity.’947 The effect is that the rule of law is negated’ and replaced by arbitrary decision making.948 These incursions into judicial authority also have institutional repercussions for the meaningful exercise of the rule of law.949

In considering the question regarding the ‘appropriate role of the courts in supervising immigration detention’, Australian legal scholar Joyce Chia argues that without good judgement which oversees ‘executive detention’, immigration detention will somewhat inevitably ‘violate core legal norms’ such as individual liberty, the separation of powers, and the rule of law.950 The persistent divide between judges who see the ‘legitimacy’ of their office as deriving from

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945 Plaintiff S157/2002 v Commonwealth 211 CLR 476 (High Court of Australia 2002) at 482 - 483.
948 Ibid.
949 Ibid.
950 Chia, “Back to the Constitution”, 665.
'textual exegesis' and its interpretation and those who ‘source their legitimacy in core legal norms’ and who then see themselves as a textual interpreters of the law,\textsuperscript{951} suggests that the judicial system in Australia lacks a well developed appreciation of its role in maintaining political accountability, especially where systems are ‘systemically malfunctioning.’ This is a product of shifts which produce institutional dissonance and which take office beyond the limits of its own expertise, capacity and persona.\textsuperscript{952}

In Chia’s view, some members of the judiciary have contributed to the erosion of their office through a failure to adequately appreciate their contribution to a vital, and effective judicial sphere. In other words, there has been an erosion in the value attached to good judgement, perhaps out of a desire to avoid ‘judicial activism’ or to demonstrate a narrower interpretation of law. We might consequently argue that this has implications for how judicial office conducts itself in these cases, given the sustained way in which the High Court has affirmed the validity of legislation which is inhumane and which undermines human rights. This is despite persistent examples of judges who show us otherwise, in their affirmation of the attributes of office I have outlined. The value of judicial scrutiny is especially important in the light of expanded executive power. In retrieving the ethical value of judgement as a ‘good violence’, we would do well to reflect on Joyce Chia’s suggestion that we revert to a richer appreciation of judicial conduct as entailing more than simply the narrow interpretation of legality.

THE ETHICAL FOUNDATIONS OF OFFICE

In the light of this discussion, the attributes of careful judgement, reflection and the ‘reckoning of the possible’ highlighted by the Levinasian ‘third’ elicits a productive intersection between a Levinasian ethic and Condren’s account of

\textsuperscript{951} Ibid.
\textsuperscript{952} Ibid., 667
office holding in early modernity. Drawing these two accounts together, I conclude that the potential for careful judgement and reflection within Australia’s mandatory immigration detention ‘system’ is a critical component of an ethics of office in the institutional life of migration. Indeed, the separation of spheres of office, and the ability to hold office within its ‘proper’ sphere facilitate the convergence between technical and moral responsibility, as Weber would put it, or indeed the convergence between what we do and who we are, as Gaita suggests.

In this light, we might assert that justice is ‘not a thing but an attitude, not an answer but a way of approaching questions.’ It is an orientation and to this extent, it constitutes a form of conduct. Retrieving an ethics of office, for the judge, migration officer or political leader requires a rethinking of what the occupation of office entails. While law and judgements operate within a system of rules, these rules also cannot be entirely separated from the context from which they have emerged, nor from the context of the decision itself. To this extent, the rules of law, and the reliance of the judge upon these rules are conditioned by the ethical weight bearing upon the judge of the consequences of those decisions, as we can see in the decision above.

The loss of good judgement, then, is the loss of the capacity to imagine another point of view, to exercise reflection in the implementation of rules. Corrupted judgement is what leads to wrongful obedience. And indeed, this is precisely why we need judgement exercised with care, reflection and disinterestedness. Leadership is this context is critical given the extent to which our ‘moral compass’ is influenced by the people around us. It also requires a setting in which all officers are able to exercise judgement well, and

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953 Manderson, “Proximity”, 715.
954 Crowe, ‘What’s so bad.”
955 Luban, Legal Ethics, 265.
956 Ibid., 252.
have the expertise and knowledge to do so. Without care and expertise, we can be duped into thinking that what we do is necessary, or forgivable, or something we can attribute to someone else and not ourselves.

For Weber, an ethics of responsibility requires a person to give an account of their actions: this is answerability understood as accountability in which an ethics of responsibility is exercised by the politician and not by bureaucratic office.957 The distinction Weber makes between political and bureaucratic office points to the conditions needed for an ethics of office:

> It is immensely moving when a mature man – no matter whether old or young in years – who is aware of a responsibility for the consequences of his conduct and really feels such responsibility with heart and soul, and who is following an ethic of responsibility, somewhere reaches the point where he says: “Here I stand; I can do no other”. That is something genuinely human and moving. And every one of us who is not spiritually dead must realize the possibility of finding himself at some time in that position. Insofar as this is true, an ethic of ultimate ends and an ethic of responsibility are not absolute contrasts but rather supplements, which only in unison constitute a genuine man - a man who can have the “calling for politics”958

This underscores Weber’s warning that moral and technical responsibility are not easily separable. Importantly for this thesis, he stresses that honour and integrity provide the foundation for jobs ‘done well’. My reading of this, through Levinas, is that respect and service – through a loving justice – provide the foundation for the roles we occupy in office:

> Modern bureaucracy in the interest of integrity has developed a high sense of status honor; without this sense the danger of an awful corruption and vulgar philistinism threatens fatally. And without such integrity, even the purely technical functions of the state apparatus would be
Most importantly, office holding must rest on foundations which can productively contribute to human dignity, and not to its demise. This is at the heart of my claim that if we are to preserve a ‘good violence’ it must rest on justice which comes from love, otherwise understood as respect for the dignity of others. Many of the examples addressed in this chapter raise profound questions about what it means to exercise judgement and to demonstrate care and respect. If a failure to respect others and to judge well was possible for Eichmann, then ‘it is entirely plausible to think that the same organizational and psychological forces can corrupt our judgement in lesser situations.’\textsuperscript{960} And yet, this is precisely why we need judgment and why the distortion of the purpose of office is such a dangerous thing. Bureaucrats are not killers, nor should they be. Ethically enriched practices and conduct persist and might yet be effectively nurtured in a setting and under leadership which enables this. Doing one’s job well on both ethical \textit{and} technical terms is, however, difficult under conditions marked by poor leadership and by institutional dissonance. The significance of leadership demonstrates that the ‘wrongful obedience’ exemplified by Eichmann is not just the product of role division: it is shaped, as Luban has shown, by the sort of leadership which oversees and directs others in office, by the foundations of office, its \textit{telos} and by a capacity for careful judgement. As I have implied throughout, the careful exercise of judgement is not limited to judicial office in a court of law, but is a skill exercised by migration officers, and those tasked with the administration of refugee claims. As Davis showed in the opening to this chapter, reflection and judgement are important attributes, even for the 'bureaucrat.'

\textbf{CONCLUSION}

This chapter has identified examples of persons occupying office who have

\textsuperscript{959} Ibid., 12.
\textsuperscript{960} Luban \textit{Legal Ethics}, 252.
affirmed their role and the conduct of their office as ethically significant. They provide a concrete account of the conceptual work developed in chapter five. This shows that there are other accounts of office which contest a reading of office holding as ethically bereft. Secondly and relatedly, this evidence undercuts the view that role division and office under conditions of modernity produce ethical detachment.

My aim in this chapter has been to stress that there are different ways in which office can be occupied. Occupying office in modernity is not inevitably an ethically empty exercise. On the contrary, examples I have drawn upon here have approached their office in this setting with gravitas and a keen awareness of the need for care, reflection and disinterestedness. This reminds us of the purpose of office holding as a good violence: that goodness inheres in the occupation of office which is characterised by respect for human dignity, regardless of whether there is role division or the need to follow a rule. This is what I mean by doing one’s job well and why the defence offered by Eichmann has no ethical content despite the apparent confluence between his claim of obedience to role and the one I make here. The forms of conduct and office persona we develop and practice are critical in providing a concrete foundation for the realisation of human dignity. Significantly for this thesis, the examples I have shown suggest that ethical capacity is diminished when the role rests on poor foundations, when it is distorted by veering outside its telos, and when the attributes of office are not nourished. Conversely, ethical capacity is supported when there is a capacity for reflection, for the meaningful provision of care and for good judgement free of self-interest. Attending to how we conduct ourselves in relation with others is a way of grounding responsibility through service.

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961 Luban, Legal Ethics.
CONCLUSION: THE ‘TEARS OF THE OTHER’

This thesis has argued that Australian mandatory immigration detention policy and law over the last two decades have been marked by a failure of responsibility. Central to my argument is the claim that an understanding of responsibility as founded upon relation and the conduct of office provides a foundation for rethinking our obligations in institutional life. I argue that this is best understood as service to others. The interventions this thesis makes into contemporary debates on mandatory immigration detention are both concrete and conceptual. Concretely, this thesis has shown that approaching mandatory immigration detention through the lens of office elicits an appreciation of the effects of the distortion of the purpose of office, and of the loss of judgement and ethical leadership. Conceptually, it has provided an alternative reading of office holding which brings the ethical relation and institutional life together. These interventions have emerged through adopting office as a site for research as well as a method, enabling me to isolate key concerns about the impact of harm upon those working in office, which has thus far received scant attention from the perspective of office as a site of ethical responsibility.

Contracting the field of responsibility: distorting the telos of office

I began this process in chapter one by identifying shifts in the conduct of office which accompanied a diminishing exercise of responsibility for refugee protection. In short, the Migration Act has been utilised to reshape lawful relations between Australia and ‘unauthorised’ refugees, through the progressive contraction of protection obligations applying under the Refugee Convention. While these developments have been substantially addressed in much of the literature, their implications remain unexplored from the perspective of office as a site of ethical responsibility. Although there is a growing body of work which addresses the impact of immigration detention office upon those working within the network, this work attends to office as a site of analysis rather than
a method. In chapter two, I argued that approaching mandatory immigration detention from the perspective of office generates a specific account of responsibility. This responsibility is grounded in duties and obligations which provide a foundation for the honouring of human rights. I began to address this through the lens of office in Part Two of this thesis, where I isolated practices of office which legitimise human suffering in immigration detention. The categorisation of the ‘unlawful’ and the justification of suffering comprise practices in detachment. My analysis showed that immigration detention is characterised by harms which impact much more broadly than those usually noted: the effects are experienced by office and by those 'doing' the detaining, and not just by those detained: the experience of suffering and attempts by those in office to manage it, reveal that this is beyond the capacity of office to address when the network is the source of harm. The effects are often profound, with those in office also becoming suicidal and depressed. Some leave the department in despair. Others engage in practices of collusion, involving complex techniques of denial, whilst others respond with acts of kindness. The responses are clearly varied and complex. Where the purpose of office shifts, to the extent that it produces suffering, at the same time as it limits the capacity of office to address that suffering, then office is both ethically and technically degraded. Working in these settings sees many officers simply ‘managing’ harm that this system produces.

As explained in chapter two, the purpose of office is both particular and general: general in the sense that it comes from a development in early modernity towards respect, limit and impartiality, and particular in the sense that distinct offices have distinct obligations and functions. Technical capacity is important to fulfil the distinct purpose of office, but if human dignity is to be respected, it must rest on ethical foundations which meet the general purpose of office, as a form of service to the other. The convergence of ethical and
technical responsibility is crucial to the conduct of office.

In chapter five I argued for a reading of office which points to the significance of the ethical foundations of office. Chapter six highlighted some examples where those in office have pushed back against attempts to contract the field of responsibility in Australia’s institutional setting of migration. These concrete examples show that the ethical degradation of office is not inevitable, and that there exists an alternative repertoire of conduct and practices to draw upon in rethinking our response to claims for refugee at the border.

An ethics of office

An ethics of office understood as responsibility to the other also allows us to think about the discharge of office in a way which might minimise the risk of obedience to the law which Eichmann demonstrated. It is not merely that role responsibility demands that one act in accordance with the functions and tasks of office. Suffering is also difficult to respond to when institutional settings produce suffering and affliction to such a degree that those within office are unable to do their job in a competent, and caring way, are unable, in short, to do justice which is inflected with love. The emergence of an impoverished role, divested of an office persona, nourishes poor conduct, leads to a ‘bad’ violence and erodes the human dignity of those detained as well as those occupying office. Resisting this relies on the capacity and willingness of the institutions to create an environment where ethical conduct can minimise the suffering of others.

I do not claim that the accounts of the historical emergence of office ‘thinking’ I outlined in chapter two are ethical in the sense that Levinas would demand. However, by harnessing the Levinasian third with other accounts, such as those offered by Luban, Gaita and Condren, we can develop a story about the

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962 Veitch, Law and Irresponsibility.
963 Condren, Argument and Office, 24, footnote66.
exercise of responsibility in the office of migration which has practical meaning, understood and exercised in relation, as service to the other. An ethics of office is centrally a question of conduct which is informed by a responsibility to and for the other, marked by respect and service in which the attributes of care, reflection and disinterestedness can be supported and practised. As I stressed in my introduction, office is a source of obligations and establishes the terms of our relations and the scope of responsibility. Indeed, office in this sense is a site of service to human dignity, which reflects the terms of human relations established through law.964

By posing an appreciation of office as underpinned by responsibility in relation, I contest the view that the meaning of responsibility is dominated in modernity by its attachment to role and is therefore ethically bereft. However, this is not to say that the role is irrelevant. The role of office remains ethically important, insofar as the foundations of the role and of office must be grounded in a responsibility in which obligations can be fulfilled which preserve human dignity. My approach marks a substantive divergence from Weber’s analysis of the bureaucratic sphere and from contemporary critiques of bureaucracy and institutional life more broadly, such as of those offered by Zygmunt Bauman and Hannah Arendt.965 In this vein I follow Luban who asks:

what if the moral relationship and attitudes and virtues required by the rule of law cohere better with laws enhancing human dignity than with laws assaulting it, because enacting laws that assault human dignity tends to undermine the moral relationship that sustains the rule of law?966

Law and regulations govern our relations, and so exercising them in ways that preserve the terms of the relations which we value and in which the uniquely human other is respected even while being judged, appears to me to

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964 Luban, Legal Ethics. See also Dorsett and McVeigh, Jurisdiction.
965 Bauman, Modernity and Arendt, Eichmann.
966 Luban, Legal Ethics 101.
be an ethically important obligation. These are both human and institutional questions, which require a focus on office practices and on those obligations which are both enabled and curtailed within the institutional ‘life’ of migration.

**Imagining the tears of the other**

Legal and criminological discussions of immigration detention are predominantly focused on the subjectivity of the refugee as criminalised and upon state crime and institutional violence underpinning this criminalisation. This is important work. My aim however has been to draw out the ways in which institutional life can be thought with ethically in ways that affirm responsibility and provide a critical foundation for respect for others and the protection of human dignity. As a method of inquiry, the approach I have developed can be used as a way of understanding our occupation of office beyond the realm of mandatory immigration detention, even whilst my focus has been specific in this thesis.

Underscoring my discussion throughout has been the view that the conduct of office is not just a question of acting out our roles, but centrally a matter of how we live with others in the world, of how we orient ourselves to the many other others whose claims must be adjudicated, compared and judged. This deepens and extends our understanding of what it means to conduct oneself ethically within the institutional life of migration and to respond to those who cannot fight for their own being. It shows that office is fundamentally a site of ethical and lawful relations. As a form of service to the other, it is founded upon respect for human dignity, rather than its demise, and on the capacity to *imagine* the tears of the other, even when we cannot see them.

There are also several implications which emerge from this reading of mandatory immigration detention and which can be applied more broadly. Firstly, the accounts I have provided show that role division does not inevitably produce
ethical detachment as a precursor to the justification of human suffering. That those in office\textsuperscript{967} have experienced ethical distress in this setting, even though they are unable to ‘touch’ those in detention, shows that physical distance is not a barrier to ethical imagination and love. Likewise, it is clear from the accounts I outlined in chapter four, that both love and hate emerge in intimate relations, with hate sometimes emerging most powerfully in intimate settings.\textsuperscript{968} Ethical proximity is thus not dependent upon touching or being close to others, but upon a capacity for care, reflection and disinterestedness, attributes which I argue comprise the ethical persona of office. In pushing for a more complex reading of structural forms of oppression to reveal the possibilities of a ‘good violence’, this thesis also opens up a space to bring the ethical and office together which complicates our reading of state violence.

The analysis I have provided discloses the concrete ways in which those occupying office, as well as office have been degraded or undermined by this policy. By attending to the concrete experience and execution of office under this policy and its ethical possibilities, I show that assumptions commonly made about office life under conditions of modernity are open to contestation and in doing so, bring office and ethical conduct together. Arguing that the occupation of office is substantively a question of responsibility as an ethical undertaking, my thesis has shown how a policy of mandatory immigration detention has diminished the ethical capacity of office. At the same time, it offers a distinct reading of mandatory immigration detention which draws out office as a method of inquiry and which provides new ways of thinking with the ethical relation in Levinas and with office.

The question remains one of how this might be fostered so that reflection upon the consequences of our actions can be more substantively developed. For

\textsuperscript{967} As I have illustrated in chapter four.
\textsuperscript{968} There are many examples I could point to of this, including domestic violence and the Rwandan genocide.
Luban, the capacity for judgement and reflection provides the foundations for us to make an ‘ethical’ choice and to judge well, to take a path of imagination of consequences, and not to foreclose them.\footnote{Luban, Legal Ethics, 266.} This is not an ethic which provides a code or manual for behaviour. It is a question of character, of what we do and how we conduct ourselves in our orientation towards others. This entails a convergence between what we do and who we are. Therefore, how we exercise our responsibilities is constitutive of who we are, and of the office we occupy. The importance of a shift in lens towards this responsibility, with all that this might entail, cannot be underestimated, since by attending to office in the institutional life of migration, we are also dispensing protections to the other as an ethical responsibility.

Contemporary responses to refugees reveal that what is at stake here is not only the suffering of the other, but also our own subjectivity and the integrity of office. This is important to acknowledge, because the ethical foundation of our occupation of place is inevitably conditioned by how we respond to claims at the margins of political community. If our subjectivity emerges from responsibility, then the failure to respond to the tears of the other is a negation of what it means to be in relation with others in the world.
## APPENDIX A: LIST OF DEPARTMENTAL NAMES

<table>
<thead>
<tr>
<th>NAME</th>
<th>Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Department of Immigration</td>
<td>1945-1974</td>
</tr>
<tr>
<td>Department of Labour and Immigration</td>
<td>1974-1975</td>
</tr>
<tr>
<td>Department of Immigration and Ethnic Affairs</td>
<td>1976-1987</td>
</tr>
<tr>
<td>Department of Immigration, Local Government and Ethnic Affairs</td>
<td>1987-1993</td>
</tr>
<tr>
<td>Department of Immigration and Ethnic Affairs</td>
<td>1993-1996</td>
</tr>
<tr>
<td>Department of Immigration and Multicultural Affairs</td>
<td>1996-2001</td>
</tr>
<tr>
<td>Department of Immigration and Multicultural and Indigenous Affairs</td>
<td>2001-2006</td>
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<tr>
<td>Department of Immigration and Multicultural Affairs</td>
<td>2006-2007</td>
</tr>
<tr>
<td>Department of Immigration and Citizenship</td>
<td>2007-2013</td>
</tr>
<tr>
<td>Department of Immigration and Border Protection</td>
<td>2013-current</td>
</tr>
</tbody>
</table>
APPENDIX B: IMMIGRATION DETENTION FACILITIES

Immigration Detention Centres (includes ‘closed’ detention centres such as those at Villawood, Christmas Island, Baxter and Woomera, for example). These are the central focus of this thesis because of the harm experienced after prolonged detention in these settings. They also include the centres at Manus Island and Nauru.

Alternative Places of Detention (includes Immigration Residential Housing, Immigration Transit Accommodation, Places in the community, eg. private housing, hotels, motels and hospitals).

Community Placement considered for those deemed ‘low risk.’

Regional Processing Centres includes the centres established at Manus Island and Nauru under Pacific Solution Mark 2.

Source: Department of Immigration and Border Protection
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