Limiting Deterrence: Judicial Resistance to Detention of Asylum-Seekers in Israel and the United States

Michael Kagan

University of Nevada, Las Vegas – William S. Boyd School of Law

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Limiting Deterrence: Judicial Resistance to Detention of Asylum-Seekers in Israel and the United States

MICHAEL KAGAN*

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ABSTRACT

Governments have advanced the argument that asylum-seekers may be detained in order to deter other would-be asylum-seekers from coming. But in recent litigation in the United States and Israel, this justification for mass detention has been met with significant resistance from courts. This Article looks at the way American and Israeli courts have dealt with the proposed deterrence rationale for asylum-seeker detention. It suggests that general deterrence raises three sequential questions:

* Michael Kagan (B.A. Northwestern, J.D. Michigan) is Professor at the University of Nevada, Las Vegas, William S. Boyd School of Law. The research underlying this Article was closed in June 2015.
1. Is deterrence ever legitimate as a stand-alone justification for depriving people of liberty?

2. If deterrence is sometimes legitimate, is it valid as a general matter in migration control, or is it limited to certain exceptional circumstances?

3. If deterrence is a legitimate goal, is there any effective proportionality limit on the measures a government may take against asylum-seekers?

The American and Israeli courts did not answer these questions in the same way, and they did not foreclose all potential future uses of deterrence by their respective governments. But they signaled considerable judicial resistance, which may make it more difficult for governments to justify mass detention in the future.

**INTRODUCTION**

International refugee law is built on a paradox. The premise of refugee law is that people fleeing persecution should be protected. But refugee law might not be necessary if sovereign States did not insist on tightly regulating migration. The very idea that people fleeing persecution deserve asylum exists in perpetual tension with the prevailing inclination to exclude foreigners. That is, if governments did not control entry—and thus exclude or deport those who enter without permission—there would be little need to formally define refugees as a class of people for whom an exception should be made. As Professor James C. Hathaway wrote, the principle that refugees should be protected even if they enter without authorization may be the "most important innovation" of modern refugee law. The clash between these impulses fuels many of the great controversies in international refugee law.

Often, this clash is expressed through a struggle to maintain the distinction between refugees and other would-be immigrants. But in other contexts, this clash is expressed more bluntly, and paradoxically, through a government stating openly that it does not want refugees and asylum-seekers to come, even as it grudgingly concedes that genuine refugees who arrive should not be deported. This Article examines the efforts of two governments—those of the United States and Israel—that have recently adopted this position in response to an influx of unwanted asylum-seekers. Both governments adopted a policy of mass detention of people with strong asylum claims, explicitly for the purpose of deterring other asylum-seekers from coming. In both countries, the governments have attempted to strengthen their deterrence arguments by linking the influx of asylum-seekers to grave concerns for national security.

My focus here will be on how the judiciaries have responded to these arguments. Israel and the United States are quite differently situated in some respects with regard to asylum-seekers. Although the numbers of arrivals have been comparable in gross


2. See JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 386 (2005) (calling this principle the most important innovation of the 1951 Refugee Convention).

scale, Israel is a considerably smaller country, which may enhance a sense of being overrun or besieged by migrants. Perhaps more importantly, the United States has one of the best-established asylum systems in the world. Israel, by contrast, has resisted efforts to grant durable rights to non-Jewish refugees and has not set up a reliable administrative apparatus to fairly process their claims. But in both countries, the arrival of large numbers of asylum-seekers triggered an alarmist response from leading politicians, who established draconian policies to detain many of them. And in both countries the judiciaries resisted mass-detention policies and treated the governments' deterrence justification with considerable skepticism.

I begin in Part I, by outlining the importance of detention and deterrence in global refugee policy. Part II sets out in brief terms why deterrence poses a conceptual challenge to migrant rights. Part III discusses the way American courts have dealt with the government's recent invocation of deterrence to justify asylum-seeker detention. Part IV discusses two high profile Israeli High Court cases that have grappled with the analogous problem. I conclude by pointing to potential legal questions that may emerge after these cases. Readers should note that the discussion reflects case law at time of writing, in June 2015. My primary goal is to identify the fundamental legal dilemmas inherent in deterrent policies, rather than to provide an up-to-date synopsis of the state of the law.

I. DETENTION AND DETERRENCE OF ASYLUM-SEEKERS

Detention of migrants is a widespread challenge to human rights law because it is widely used by States and poses a conflict between the individual right to liberty and the sovereign right to control borders. In some cases, the concern is simply about the conditions of detention. For example, a recent report found that in North African countries asylum-seekers are detained in conditions that are "often horrific and inhumane." But there is also concern that governments are turning increasingly to incarceration to enforce migration law, and are criminalizing the act of migration in the process.


6. See Cathryn Costello, Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law, 19 IND. J. GLOBAL LEGAL STUD. 257, 258-59 (2012) ("The state's migration control powers seem to be given greater sway than others, reflecting an uneasy tension between the universal right to liberty and the state's border control prerogatives.").


Beyond these general concerns, there is something especially challenging about the basic concept of detention of asylum-seekers, overt and above the concerns that may be raised in reference to detention of any migrant. As other writers have noted, there is something contradictory at the heart of any policy calling for the detention of asylum-seekers, since it means that people seeking refuge from persecution are welcomed first by being locked up. Nevertheless, many governments have long-established policies for detaining asylum-seekers who arrive uninvited. Australia, for instance, began a system of mandatory detention for asylum-seekers who arrive spontaneously in 1989.

Mandatory detention of asylum-seekers caught at the border can be mitigated at least somewhat by the opportunity for an individual review. For example, in the United States, the normal system is for asylum-seekers to be detained when they arrive without travel documents, but to then be released if they establish a “credible fear” of persecution. In the United States, the credible fear interview is an interim procedure designed to weed out baseless and clearly fraudulent claims, and is used with reference to migrants who otherwise would be subject to expedited removal. Such procedures are ostensibly targeted against abuse of the asylum system, not against asylum-seekers with valid refugee claims, and thus raise deterrence in a somewhat different context.

Many questions about detention relate to migrants who are found to have invalid asylum claims or who may not even be asylum-seekers. There is considerable international case law holding that a State cannot detain migrants in absence of deportation proceedings. In Zadvydas v. Davis, the U.S. Supreme Court found that indefinite detention would pose a constitutional problem, even for deportable non-citizens with serious criminal records. By contrast, in what may be an outlying decision, a divided Australia High Court affirmed indefinite detention in Al-Kateb v.


10. See, e.g., Krakauer, supra note 4, at 275 (illustrating Israeli detention of unwanted asylum-seekers); Sayed, supra note 5, at 1836 (detailing U.S. detention of unwanted asylum-seekers).


12. See Johnson, supra note 9, at 590-91 (describing the deportation process in the United States for “defensive” asylum-seekers).


Godwin, though the majority based its reasoning in large part on the limited powers of the judiciary in Australia in order to distinguish the contrary case law from other jurisdictions. Moreover, a more recent Australia Federal Court decision has appeared to limit the impact of Al-Kateb by holding that the Minister must consider the impact of indefinite detention on a migrant before deciding to deny a visa to that individual.

It is not my purpose in this Article to re-examine the implications of detaining a migrant who under applicable law would be deported and has no right to remain. My interest here is in the detention of asylum-seekers who have a presumptive right to remain because they have a right to pursue refugee protection. A government may seek to deter the filing of false asylum claims, in which case it makes sense to screen out (or screen in) those with non-abusive claims and to release them from detention. But such a focused procedure would not satisfy a government that wants to discourage the arrival of asylum-seekers, even if their claims are valid. Such detention challenges the general rule that detention of asylum-seekers should be tied to the individual person's characteristics and situation. Instead, such policies focus on deterring people who are not even parties to the proceedings.

II. THE CONCEPTUAL CHALLENGE OF DETERRENCE

Deterrence, when used in isolation, is an extreme utilitarian justification for the use of State power to deprive individuals of liberty. This justification proposes that one person should suffer a hardship in order to change the behavior of others. Like any extreme utilitarian policy, deterrence is subject to the critique that it ignores the rights of individuals in the pursuit of a supposed greater good. As a threshold matter, deterrence as a rationale for confinement is most commonly associated with imprisonment as a criminal punishment. Murderers may be sent to prison in part to deter would-be murderers, but they are also personally deserving of punishment for an immoral act. Thus, the impact on third parties (deterrence) is consistent with the

17. Id. paras. 49–55.
19. See Pistone, supra note 13, at 237 (arguing that deterrence should be limited to unmeritorious claimants).
20. See, e.g., Michael D. Yanovsky Sukenik, Marginal Refuge: The Ramifications of Terrorism for an Unsustainable United States Asylum Policy, 65 U. MIAMI L. REV. 79, 86 (2010) (arguing that there is a tension between the humanitarian interest in supporting grants of meritorious asylum claims and the reality that—given the spread of global terrorism—there will soon be too many meritorious claims for the United States to practically accept).
moral culpability of the person. By contrast, when governments detain asylum-seekers, the element of moral culpability may be missing. Refugee status determination, and even detention of asylum-seekers, is usually understood as a civil or administrative matter. This categorization is generally beneficial to governments because it normally justifies fewer procedural safeguards than would be required in criminal cases. In the context of American immigration law, César Cuauhtémoc García Hernández has recently explained why governments’ insistence on the deterrence rationale strengthens the argument that immigration detention is really a form of punishment, not mere administrative processing. If refugee detention is analogous to criminal punishment, then governments might need to revamp their refugee procedures to meet the requirements of a fair criminal trial.

If governments insist on maintaining the non-criminal nature of immigration enforcement, standard rationales for criminal incarceration are thus of limited persuasive value to justify detaining asylum-seekers.

When asylum-seekers are detained, the question of whether an individual may be made to suffer in pursuit of a broader goal is brought front and center. Asylum-seekers are normally not prosecuted for any criminal act related to their entry. In fact, since international law recognizes the right to seek asylum and the obligation of States to not forcibly return genuine refugees, it is not at all clear that they have done anything wrong. This is the paradox of refugee law that I noted in the introduction—asylum-seekers and refugees may have done nothing wrong, and yet States believe it is reasonable to try to dissuade others from following in their footsteps. Utilitarianism in its extreme forms is willing to sacrifice individual liberty for the greater good. But in this case it is not even completely clear that deterring asylum-seekers from seeking asylum is a good at all.

It is important to note that even without a deterrence rationale, detention of asylum-seekers may be justified in a number of different ways. The Refugee Convention itself allows countries to deport a refugee—even to a country where she would be persecuted—if she should pose a security threat. The Convention also allows a refugee to be punished for illegal entry, at least in certain narrow circumstances. But these justifications for detention are rooted in the characteristics or actions of an individual. A person may be punished for illegal entry as a routine

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23. See id. at 805 (stating that “there are intuitive sensibilities about punishments” that lead to “different levels of punishment”).


26. See id. at 1392–93 (stating that “recogniz[ing] immigration detention as punishment . . . would necessarily require changing how immigration law is enforced”).

27. Chelgren, supra note 8, at 1495


29. Id. art. 33(2).

30. Id. art. 31(1).

31. See Krakauer, supra note 4, at 304 (“[D]etention can only be applied for a legitimate purpose in the individual case.”).
criminal manner, if such action was not necessary to flee from a grave threat, or may be detained if he would personally pose a security threat.

Detention that is based solely on individual characteristics is inherently limited and offers the detained person an opportunity to challenge the detention. A person can contest whether she poses an actual national security threat, for example. In the case of punishment for illegal entry, the Refugee Convention establishes a defense against prosecution, providing that States “shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . . enter or are present in their territory without authorization.” Although under this provision States could punish illegal entrants, including refugees, who choose to come solely for reasons of personal convenience, the refugee condition is defined by fleeing from threats to life or freedom. Thus, many or most refugees are likely to be able to invoke this defense. In the United States, there is a general rule shielding asylum-seekers from having their manner of entry held against them. Thus, if a State wishes to deter asylum-seekers from coming, the mechanisms permitted by the Refugee Convention are unlikely to be satisfactory.

Governments also justify, or at least attempt to justify, detention of asylum-seekers by failing to distinguish their situation from other unauthorized migrants. Since individualized characteristics do not justify detention on the scale that governments may want, this strategy seeks to erect procedural obstacles for even having individual characteristics correctly evaluated. One can see this strategy in the Israeli asylum system, which has delayed or refused to conduct individual asylum examinations of Eritrean and Sudanese migrants while simultaneously insisting that they are economic migrants. But, as we will see, this procedural strategy did not fool the High Court, which used the flaws in the government’s asylum adjudication system.
to cast doubt on the government's arguments. This procedural strategy does not contest the basic principle that refugees have rights, but seeks to erect procedural obstacles to prevent them from actually accessing their rights.

But deterrence is a wholly different kind of rationale. As a matter of substantive law, it attempts to thwart claims that refugees and asylum-seekers have rights because of their individual circumstances by suggesting that they can be detained anyway, so as to send a message to others. When a government argues that an asylum-seeker should be detained in order to deter other asylum-seekers, the detention becomes divorced from the conduct and characteristics of the person who is actually detained. The government may concede, explicitly or implicitly, that the detained person poses no threat to anyone. The government may even concede that she is likely to eventually be granted refugee status. The purpose of deterrence is not tied to the person detained, but rather to send a message to other people who are not even present. The more that government is able to claim that the arrival of asylum-seekers is a bad thing, the stronger its case will be for deterrence. But by the same token, deterrence-based measures do not have a built-in limit. In fact, the theory of deterrence is that the more severe the measure, the better. Thus, it can be difficult to strike a balance that achieves proportionality. In short, how far can a government go to infringe the rights of person A in order to send a message to person B?

In sum, when the government imposes harsh measures based solely on a deterrence rationale, three sequential questions are presented as a matter of law:

- Is deterrence ever legitimate as a stand-alone justification for infringing the rights of asylum-seekers?
- If deterrence is sometimes legitimate, is it valid as a general matter in migration control, or is it limited to certain exceptional circumstances, such as migration of a certain scale or situations where there is a **bona fide** national security threat as well?
- When (if ever) deterrence is a legitimate goal, how far may governments go? Is there any effective proportionality limit?

As we will see, these questions have been answered in different ways by administrative and judicial bodies in the U.S. and Israel.

### III. THE UNITED STATES: MATTER OF D-J- AND R.I.L-R V. JOHNSON

Detention of asylum-seekers who enter without authorization is a long-standing problem in the United States. Under the normal procedure, asylum-seekers who enter the country without permission or without valid documents are initially subject to

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44. Kevin C. Kennedy, A Critical Appraisal of Criminal Deterrence Theory, 88 DICK. L. REV. 1, 5 (1983) (describing researcher opinion that "no punishment can deter unless the punishment is perceived as being severe").
mandatory detention, but may be released on parole or with bond if they pass a "credible fear" interview, an initial step in the asylum process.\textsuperscript{45} American immigration law has well-established factors governing release on bond, principally risk of flight and danger to the community.\textsuperscript{46} Although an alien in removal proceedings has no constitutional right to release on bond, denial of bail to an alien is only within the Attorney General's lawful discretion where that denial has a "reasonable foundation."\textsuperscript{47} Where no reasonable foundation for denial of bond exists, the Immigration Judge should release the alien from custody if she does not pose a danger to other persons or to property in the United States and she "is likely to appear for any scheduled proceeding or interview."\textsuperscript{48} The U.S. Supreme Court has explicitly drawn a link between criminal pre-trial detention and immigration detention, since in neither case has the detained person been found guilty of a crime.\textsuperscript{49} As a result, the detention cannot be justified as a form of punishment.\textsuperscript{50} Importantly, risk of flight and danger to public safety share a focus on the conduct and characteristics of the detained person. They thus differ from general deterrence as a rationale for detention because that rationale ignores individual factors.

Just over a year after the September 11 attacks, the Attorney General introduced a new rationale for detaining asylum-seekers.\textsuperscript{51} On October 29, 2002, the Coast Guard intercepted a boat carrying 216 would-be migrants from Haiti.\textsuperscript{52} Mr. D-J- attempted to flee, but was caught.\textsuperscript{53} In his removal proceedings, he asked for asylum, and also asked for release on bond while his case was pending.\textsuperscript{54} The Immigration Judge set a relatively low bond—$2500—based on the assessment that he was not a flight risk or a danger to the community.\textsuperscript{55} The Immigration and Naturalization Service (INS) (predecessor to the Department of Homeland Security (DHS)) objected that the judge should have also considered the possibility that releasing D-J- would "stimulate further surges of such illegal migration by sea and threaten important national security interests."\textsuperscript{56} Overruling the Immigration Judge and the Board of Immigration Appeals, Attorney General John Ashcroft sided with the INS:

\begin{itemize}
\item \textsuperscript{45} Pistone, supra note 13, at 234.
\item \textsuperscript{46} Immigration and Nationality Act § 236(a)-(c), 8 U.S.C. §1226 (2012); 8 C.F.R. § 1003.19(h)(3) (2015); see Patel, 15 I.&N. Dec. 666, 666-67 (B.I.A. 1976) (refusing to uphold even minimal bond of immigrant who overstayed a student visa, as there was no risk that he would fail to appear at deportation proceedings).
\item \textsuperscript{47} Carlson v. Landon, 342 U.S. 524, 540-41 (1952) (referencing United States ex rel. Potash v. District Director, 169 F.2d 747, 751 (2d Cir. 1948)); see also United States ex rel. Barbour v. District Director of INS, 491 F.2d 573, 577 (5th Cir. 1974) (applying the "reasonable foundation" standard to find that denial of bond was warranted where the alien was a threat to national security).
\item \textsuperscript{48} 8 C.F.R. § 1003.19(h)(3).
\item \textsuperscript{49} See Zadvydas v. Davis, 533 U.S. 678, 690-91 (2001) (stating that civil detention, much like criminal pretrial detention, requires adequate procedural protections and should be used in nonpunitive circumstances).
\item \textsuperscript{50} See id. (finding that civil detention should be "nonpunitive in purpose and effect").
\item \textsuperscript{51} HUMAN RIGHTS FIRST, THE DETENTION OF ASYLUM SEEKERS IN THE UNITED STATES: ARBITRARY UNDER THE ICCPR 9-10 (2007).
\item \textsuperscript{52} D-J-, 23 I.&N. Dec. 572, 572 (A.G. 2003).
\item \textsuperscript{53} Id. at 572-73.
\item \textsuperscript{54} Id. at 573.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Id.
I conclude that releasing respondent... on bond would give rise to adverse consequences for national security and sound immigration policy. ... Encouraging such unlawful mass migrations is inconsistent with sound immigration policy and important national security interests. 57

Ashcroft based his decision on a particularly insidious logic that associates asylum-seekers like D-J- with terrorists, even though the government did not allege (much less present evidence) that D-J- personally had anything to do with terrorists. 58 Although D-J- was himself apparently harmless, Ashcroft relied on the premise that arrival of people like him drains resources that could be used to fight terrorism. 59 Moreover, the State Department alleged that "aliens from countries such as Pakistan" were trying to enter the United States from Haiti. 60 At the same time, the government's strained resources in the "declared National Emergency" after 9/11 allegedly made individual screening impractical. 61

Matter of D-J- is based in part on the questionable premise that non-citizens facing deportation do not have a right to release on bond. 62 It is true that in 1952 the Supreme Court did observe in passing that the American immigration statute makes release on bond a matter of discretion, 63 but the court barely discussed the issue in that case. 64 More to the point, in the much more recent case of Zadvydas v. Davis, the Court found that even deportable immigrants with serious criminal records have a "liberty interest [that] is, at the least, strong enough to raise a serious question as to whether... the Constitution permits detention that is indefinite and potentially permanent." 65 The Court of Appeals for the Ninth Circuit has extended Zadvydas to establish a right to a bond hearing for lengthy pre-hearing detention of people facing removal, even when the Immigration and Nationality Act imposes mandatory detention. 66 The Attorney General appears to have severely undervalued the constitutional importance of a non-citizen's liberty, which thus allowed a skewed analysis in which detaining such people as a deterrence to others might more easily appear proportional. The Attorney General also did not consider U.S. obligations under the Refugee Convention, especially the Convention's Article 31, which limits punishment for illegal entry and restrictions on refugees' free movement. 67 In theory,

57. Id. at 579.
58. See D-J-, 23 I.&N. Dec. at 579-80 (discussing pro-terrorism effects of allowing alien asylum-seekers to be released on bond).
59. Id. at 580.
60. Id.
61. Id.
62. See id. at 575 (citing Carlson v. Landon, 342 U.S. 524, 534 (1952), for the proposition that the statute gives the Attorney General discretion to grant bond rather than a right to be released).
63. Carlson, 342 U.S. at 534.
64. See id. (noting in passing that the statute "does not grant bail as a matter of right").
treaty obligations should impact the interpretation of any ambiguities in American immigration statutes.\textsuperscript{68}

There was no direct appeal of the Attorney General’s decision, leaving it as binding administrative precedent for Immigration Judges and the Board of Immigration Appeals.\textsuperscript{69} But there is little indication that the Department of Homeland Security invoked \textit{Matter of D-J-} again until 2014 when the United States experienced a surge of migration from El Salvador, Honduras, and Guatemala.\textsuperscript{70} Most of these migrants were unaccompanied children or children traveling with their mothers who were trying to escape rampant gang violence.\textsuperscript{71} The unaccompanied children were typically released if a relative or custodian could be located in the United States.\textsuperscript{72} But DHS detained the mothers and children, even after many of them passed a credible fear interview, indicating that they had plausible asylum claims.\textsuperscript{73} The detainees then asked immigration judges to release them on bond.\textsuperscript{74}

Asylum-seekers with no criminal records who pass a credible fear interview normally make strong candidates for release on bond.\textsuperscript{75} DHS’s own standards favor release of asylum-seekers who can establish their identity, so long as an individualized determination does not reveal a flight risk or danger to the community.\textsuperscript{76} In fact, in 2009 DHS issued policy guidance declares that “continued detention” after a favorable credible fear determination is not “in the public interest.”\textsuperscript{77} Nevertheless, DHS relied on \textit{Matter of D-J-} to argue against the release of the Central American women and children in what became known as the “no bond, high bond” policy.\textsuperscript{78}

In Immigration Court, DHS submitted an affidavit from an ICE official bolstering the claim that the women and children should be detained in order to deter others from coming:

68. See Curtis A. Bradley, \textit{The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law}, 86 GEO. L.J. 479, 483 (1998) (arguing that when “congressional intent is ambiguous or absent,’ applying the \textit{Charming Betsy} canon ‘is the same as creating a rule that the government regulatory scheme cannot violate international law’”) (quoting Phillip R. Trimble, \textit{A Revisionist View of Customary International Law}, 33 UCLA L. REV. 665, 675 (1986)).


70. \textit{Id.} at 175–76; see Kristina M. Campbell, \textit{A Dry Hate: White Supremacy and Anti-Immigrant Rhetoric in the Humanitarian Crisis on the U.S.-Mexico Border}, 117 W. VA. L. REV. 1081, 1114 (2015) (explaining that the Obama administration opened a “deportation center” to quickly deport the mass influx of immigrants from Central America using \textit{Matter of D-J-} to remedy Fifth Amendment issues regarding the “no-release-detention policy”).


72. \textit{Id.}


74. \textit{AILA's Take on Bond for Detained Families}, supra note 73.


76. U.S. IMMIGRATION AND CUSTOMS ENF'T, DIRECTIVE NO. 11002.1, PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE para. 6.2 (2009)

77. \textit{Id.}

78. Dean, supra note 75.
Allowing detainees to bond out would have indirect yet significant adverse national security consequences as it undermines the integrity of our borders.

The current detainees already are motivated . . . by the belief that they would receive release from detention. Validating this belief further encourages mass migration, which only increases the already tremendous strain on our law enforcement and national security agencies . . .

Such a diversion of resources disrupts our ability to deal with other threats to public safety, including national security threats.79

The factual basis of this assertion was hotly disputed.80 DHS relied heavily on a report written by Vanderbilt University professor Jonathan Hiskey, which DHS believed supported the theory that release on bond incentivizes irregular migration by Central Americans through Mexico to the United States.81 But Prof. Hiskey filed an affidavit contending that DHS had distorted his research.82 DHS submitted a declaration from one of its own officials expressing concern that the migrants are transported by criminal smuggling gangs who often deprive them of food, water and ventilation, steal their belongings, and threaten to kill them.83 DHS argued that this explained why it is humane to deter migrants from trying to make the journey.84 But lawyers for the migrants noted that it was implausible to suggest that rumors of low bond decisions are more powerful inducements to migrate while factual reports of armed robbery, forced starvation, and imminent death somehow have little deterrent effect.

Bond decisions were initially made by Immigration Judges, and when mothers and children secured a bond order, DHS often appealed to the Board of Immigration Appeals, arguing that low bond orders should be reviewed under the deterrence and national security framework of Matter of D-J-.85 It is important to understand that this

80. See Declaration of Jonathan Hiskey, Associate Professor of Political Science at Vanderbilt University, paras. 7–18 (Sept. 24, 2014), https://www.aclu.org/sites/default/files/assets/hiskey_affidavit_9.22.14_final.pdf (claiming that the Americas Barometer Report does not support the Department of Homeland Security’s (DHS’s) proposed detention policies) [hereinafter Hiskey Declaration].
81. See Miller Declaration, supra note 79, para. 11 (citing the Americas Barometer Report as support for Miller’s proposed detention policies).
82. Hiskey Declaration, supra note 80, paras. 7–18.
84. See Miller Declaration, supra note 79, paras. 14–16 (claiming that stricter detention policies would stymy illegal immigration and consequently defund violent human trafficking networks).
85. See Hiskey Declaration, supra note 80, paras. 16–17 (asserting that there is no empirical evidence that U.S. detention policies influence the decisions of potential migrants).
created complicated procedural constraints. The most natural argument for the migrants would be that Matter of D-J- was wrongly decided, but as an administrative tribunal, the Board of Immigration Appeals (BIA) cannot overrule a decision of the Attorney General. Instead, in an unpublished decision issued in February 2015, the BIA distinguished Matter of D-J- because of factual differences in the cases:

There are material distinctions between this matter and the facts presented in Matter of D-J-. The alien in that case arrived in the United States approximately one year after the terrorist attacks of September 11, 2001, as part of an influx of seagoing migrants. He was among a group of aliens who carried little or no identification and who attempted to evade coastal interdiction and law enforcement authorities ashore. By contrast, the respondents in these proceedings are a family unit from El Salvador who entered the United States by crossing the southern border in July 2014 . . . There is no evidence in the record that the respondents sought to flee or escape the officers who apprehended them.

The BIA thus avoided dealing directly with the deterrence and national security issues and also avoided having to confront a decision by the Attorney General.

Matter of D-J- came under a more direct challenge via a case filed in the District Court for the District of Columbia, known as R.I.L.-R v. Johnson. The Plaintiffs in that case were mothers and children from Honduras, Guatemala, and El Salvador who had been found to have a credible fear, giving rise to asylum claims, but had been denied release from detention. They sought an injunction against detaining them for the purpose of deterring future migration to the United States, a policy that they argued violated the right to due process guaranteed by the Fifth Amendment. Unlike the BIA, District Judge James Boasberg was free to review the constitutionality of the no bond, high bond policy. If anything, the Matter of D-J- decision worked to the advantage of the plaintiffs, because the existence of a binding administrative decision helped to prove the existence of a systematic policy that a federal court could enjoin.

In February 2015, around the same time as the BIA’s unpublished decisions distinguishing Matter of D-J-, Judge Boasberg issued a preliminary injunction against using deterrence as a justification for detention. His decision attacked the validity of deterrence directly, noting that the Supreme Court has only upheld justifications for immigration detention that were based on characteristics of the person being detained. But deterrence is something else:

87. See D-J-, 23 I.&N. Dec. at 573-74 (holding that the Attorney General has the authority to make controlling determinations under the Immigration and Nationality Act).
88. Kowalski, supra note 86 (citation omitted).
90. Id. at 172.
91. Id. at 172-73.
92. See id. at 176-77 (explaining that because Plaintiffs “do not seek review of DHS’s exercise of discretion,” but challenge whether DHS went beyond its constitutional discretion).
93. See id. at 185 (rejecting the government’s argument the court lacks jurisdiction because no clear policy exists).
94. Id. at 191.
95. R.I.L.-R, 80 F. Supp. 3d at 188.
The Government here advances an entirely different sort of interest. It claims that, in determining whether an individual claiming asylum should be released, ICE can consider the effect of release on others not present in the United States. Put another way, it maintains that one particular individual may be civilly detained for the sake of sending a message of deterrence to other Central American individuals who may be considering immigration.96

Judge Boasberg dismissed the claim that migrants harmed national security by diverting resources away from national defense efforts, as the Attorney General had found in Matter of D-J-.97

This succinct rejection of deterrence in immigration elegantly articulates the core problem with deterrence, which also suggests some important unanswered questions. Deterrence means imposing hardship on one person in order to influence another person. In this case, it means detaining Person A in order to dissuade Person B from trying to come to the United States. Deterrence of this kind is not unknown to the law; it is a common rationale for criminal sanctions. It is thus interesting and possibly important that Judge Boasberg specifies that the case involves people being "civilly detained."98 As I noted earlier in this Article, other commentators have noted that by attempting to use immigration detention for deterrence purposes, the government raised questions about whether immigration enforcement could be considered distinct from criminal law for due process purposes.99

Judge Boasberg noted that even when States take measures against the mentally ill or violent sex offenders, there is an underlying finding that "those being deterred are . . . wrongdoers."100 If deterrence alone could justify detention, the police could detain a child to deter behavior on the part of a parent, or detain a person simply to deter his or her spouse. In other contexts, the Supreme Court has analogized immigration detention to pre-trial criminal detention, noting that punishment (and thus, presumably, deterrence) cannot be a justification because there has been no finding of guilt.101 Thus, if deterrence can justify post-conviction criminal punishment, even in that context it is only a partial justification. There must be an individualized, underlying finding of moral culpability as well. By contrast, people fleeing from violence "may have legitimate claims to asylum in this country."102

For now, it seems that the U.S. government may be retreating in the battle over deterrence-based immigration detention. On June 24, 2015, the Secretary of Homeland Security announced that DHS would relax its aggressive detention policy for families arriving from Central America.103 Among several changes in detention

96. Id. at 188–89.
97. See id. at 189 ("The simple fact that increased immigration takes up government resources cannot necessarily make its deterrence a matter of national security, with all the attendant deference such characterization entails.").
98. See id. at 189 (stating that there is no logical reason to include an immigration carve-out to the general rule that deterrence solely applies in the criminal, not civil, context).
99. See, e.g., Hernández, supra note 8, at 1353–57 (noting that the Supreme Court has classified immigration detention as a civil matter without explanation, but that this has been blurred by the use of deportation and detention).
100. R.I.R-L, 80 F. Supp. 3d at 189.
103. Press Release, Dep't of Homeland Sec., Statement by Secretary Jeh C. Johnson on Family
policy, Secretary Johnson said, "[W]e have discontinued invoking general deterrence as a factor in custody determinations in all cases involving families."104 The preliminary injunction in R.I.L.-R may become the last word from the courts on the deterrence issue, if indeed the DHS change in policy rendered it unnecessary for the court to issue a final judgment in the case. However, DHS has not entirely abandoned deterrence; Secretary Johnson’s statement applied only to family detention and was premised on the fact that the number of new arrivals declined significantly in 2015.105 Thus, by implication, deterrence might be invoked again in the case of a future migrant influx. Moreover, Matter of D-J- remains on the books, at least technically.106 But it is clear that DHS faced significant resistance in applying it from both the Board of Immigration Appeals and from at least one federal judge.107 We do not know if other federal judges would have seen the issue differently; perhaps DHS could win in a different court with different jurists. But it is also possible that Matter of D J is a kind of zombie decision—a valid administrative precedent on paper that has not been directly reversed or vacated, but is effectively without any real remaining force.108

IV. ISRAEL: ADAM AND EITAN

Deterrence-based migrant detention has not reached an appellate court in the United States, but it has been the focus of two major decisions by the Israeli High Court of Justice.109 While the American Department of Homeland Security retreated from its aggressive assertion of deterrence detention within about a year, in Israel the issue has produced a nearly unprecedented level of constitutional brinksmanship.110 Indeed, this is why there are two cases—and there could be more in the future. Despite remarkable political pressure, the Israeli High Court has twice struck down laws imposing mass detention on asylum-seekers.

By way of background, from 2008 until 2013 Israel experienced a massive surge in asylum-seekers arriving through its border with Egypt. In total, about 65,000 asylum-seekers arrived during this period, the vast majority of them from Eritrea and Sudan, two countries with well-documented and large-scale human rights problems.111 Israel’s official reaction has been something short of welcoming. Israeli Prime Minister Benyamin Netanyahu said, "[I]f we don’t stop the problem, 60,000 infiltrators are liable to become 600,000, and cause the negation of the State of Israel as a Jewish


104. Id.

105. Id.; see also R.I.L.-R, 80 F. Supp. 3d at 190 (rejecting DHS’s argument that deterrence is a justification for detention).

106. See R.I.L.-R, 80 F. Supp. 3d at 189 (distinguishing precedent established in Matter of D J); Kowalski, supra note 86 (discussing the Board of Immigration Appeals’ (BIA’s) resistance to precedent established in Matter of D-J-).

107. See R.I.L.-R, 80 F. Supp. 3d at 189 (holding that migration is not necessarily a national security concern); see also Kowalski, supra note 86 (making their decision while distinguishing Matter of D-J-).

108. See, e.g., Kowalski, supra note 107 (reporting that the judges virtually ignored Matter of D-J-).


110. Johnson Statement, supra note 103; Eitan v. Israeli Gov’t, HCJ 7385/13 at 190–91; Adam v. Knesset, HCJ 7146/12 at 3-4.

and democratic state.”¹¹² In 2012, Israel’s Interior Minister said: “We don’t need to import more problems from Africa... Most of those people arriving here are Muslims who think the country doesn’t belong to us, the white man...”¹¹³ By early 2014, Israel had granted asylum to only two Eritreans out of 36,000 in the country, while the United States has approved Eritrean asylum requests at a rate of approximately 90 percent.¹¹⁴ The legal limbo imposed on Eritrean and Sudanese asylum-seekers has been explored elsewhere.¹¹⁵ The focus here is the fact that, in an effort to deter them, Israel has made use of mass detention.¹¹⁶

For anyone committed to the cause of refugee protection, Israel’s reaction to the arrival of asylum-seekers—its reluctance to grant bona fide asylum, its systemic use of detention, and its leaders’ bombastic, racially-tinged, anti-immigrant rhetoric—has been appalling.¹¹⁷ Moreover, the numbers of Eritrean and Sudanese asylum-seekers in Israel are miniscule compared to the numbers of Syrian refugees being hosted by Israel’s neighbors.¹¹⁸ Lebanon, which has a smaller population than Israel, hosts 1.1 million Syrian refugees.¹¹⁹ But, in an effort to put matters as sympathetically to Israel as possible, Israel is a small country, about forty times smaller than the United States by population.¹²⁰ An influx of 65,000 asylum-seekers over five years would likely produce a negative reaction from many governments. We have seen already the draconian measures that the U.S. government took in response to an arrival of roughly the same number of Central Americans in 2013–2014.¹²¹ But the United States is much


¹¹⁴. See Ilan Lior, Two Eritreans Granted Refugee Status in Rare Decision, HAARETZ (Jan. 27, 2014, 1:08 AM), http://www.haaretz.com/israel-news/.premium-1.570737 (noting that only two of the 1800 asylum requests had been granted); U.N. HIGH COMM’R FOR REFUGEES, UNHCR STATISTICAL YEARBOOK 2011: TRENDS IN DISPLACEMENT, PROTECTION AND SOLUTIONS 102 (2013) (showing that almost ninety percent of requests had been granted).


¹¹⁷. See Simpson, supra note 42 ("Israel’s policies are well summed up in the words of former Israeli Interior Minister Eli Yishai who said that as long as Israel cannot deport them to their home countries, it should ‘lock them up to make their lives miserable.’").


¹¹⁹. See The World Factbook, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html (last visited Feb. 6, 2015) (showing that Lebanon has a population of about six million, while Israel has a population of eight million); Syria’s Refugee Crisis in Numbers, supra note 118 (stating that Lebanon hosts around 1.1 million refugees).

¹²⁰. See The World Factbook, supra note 119 (showing that Israel has a population of about 8 million, while the United States has about 321 million people).

bigger. Per capita, the arrival of 65,000 newcomers to Israel would be the equivalent of 2.6 million people coming to the United States.\footnote{122. See \textit{The World Factbook}, \textit{supra} note 119 (showing the differences in population size between the two countries).}

Israel’s most effective reaction to the influx has arguably been the construction of a barrier or wall on its southern border.\footnote{123. See HCJ 7146/12 Adam v. Knesset 1, 69 (2013) (Isr.) (tracking the decline of infiltrators as the wall was constructed).} The completion of a 245-kilometer barrier precipitated a near-total end to the large-scale influx; by 2013 fewer than a dozen migrants were arriving each month.\footnote{124. Id.} Nevertheless, the Knesset (Israeli Parliament) also enacted a measure providing for “infiltrators” to be detained at a special facility in Israel’s southern desert for three years.\footnote{125. Id. at 23.} Although Israel has not usually granted asylum to the Eritreans and Sudanese, it followed a policy of not deporting them in most cases, especially Eritreans.\footnote{126. Id. at 9.} As a result, the State could not argue that the detention was justified by a need to facilitate deportation. Instead, the State offered two purposes for the legislation.\footnote{127. \textit{See id.} at 16–17 (explaining that the right to detain is ancillary to the right to deport).}

First, to prevent the infiltrators from settling in Israel and to enable the state to address the broad ramifications of the phenomenon of infiltration. The state notes that the law seeks to prevent infiltrators who have already penetrated the borders of the State of Israel from setting down roots and settling therein, thereby positioning their illegal immigration as an accomplished fact.\footnote{128. Id. at 57–58.}

The second purpose was deterrence:

The goal is formulated by the state as blocking the phenomenon of infiltration. . . . [T]he significance of this purpose in the context of the amendment of the law is deterrence. That is, the act of placing the infiltrators in detention deters potential infiltrators from coming to Israel since they realize that they, too, will be placed in custody.\footnote{129. \textit{Adam v. Knesset}, HCJ 7146/12 at 57.}

In a unanimous decision,\footnote{130. Id. at 58–59.} the Israeli High Court expressed significant reservations about deterrence. The lead opinion by Justice Edna Arbel noted—just like Judge Boasberg in \textit{R.L.L.-R}—that deterrence means depriving one person of liberty in order to impact the behavior of another person.\footnote{131. All nine justices on the panel found that the three years of detention violated Israel’s Basic Law on Human Dignity. One justice would not have invalidated the legislation, however. \textit{Id.} at 150.} In Justice Arbel’s phrase, borrowing from Emmanuel Kant: “The person is regarded not as a goal but as a means.”\footnote{132. Id. at 59.} Quoting previous High Court jurisprudence, she wrote that human beings
have intrinsic value, and thus may not be treated as “mere means or as a negotiable commodity.”  

She noted that detention of asylum-seekers was particularly problematic because it was not punishment for a crime. The court thus appeared ready to hold that “it is doubtful whether this purpose may be considered a fit one.” But the court did not quite reach that holding. Despite a lengthy critique of deterrence in the Adam decision, the court held open the possibility that deterrence might be valid “in an extreme situation.” Justice Arbel, writing for the court, wrote: “I am willing to adopt the assumption that the law passes the fit purpose test and to examine it in accordance with the requirement of proportionality.”

Rather than rule directly on the deterrence question, the High Court rested on its conclusion that the detention was not proportional. In Adam, the Court noted that only a small minority of the asylum-seekers were actually detained, so the deprivation of liberty could not be reasonably expected to actually prevent most of them from integrating with Israeli society. As for deterrence, the success of the new barrier at the Egyptian border at reducing the flow of migrants indicated that detention was not the “least injurious means” to prevent migration.

After Adam, the Knesset re-enacted a very similar detention regime targeting Eritrean and Sudanese asylum-seekers, but with a new maximum period of one year in detention. This led to a new test in the High Court in Eitan v. Israel. This time, the government managed to attract two dissenting justices to its cause, but the result was the same in a 6-3 decision. Justice Uzi Vogelman, writing for the court, followed the analytical framework in Adam. He wrote that in the abstract, detention of asylum-seekers could be justified for a period of time necessary to verify identity and assess prospects for deportation. But, as in Adam, the court understood that the government’s policy was to not deport most of the detainees. Justice Vogelman understood that the real goal for the law was not deportation or individual case assessment: “I think that simply put the purpose is to deter.” He referenced and endorsed Justice Arbel’s critique of deterrence in Adam. But, just as the court did in the earlier case, Justice Vogelman avoided a definitive rejection of deterrence, and held instead that the detention failed on the proportionality test.

134. Adam v. Knesset, HCJ 7146/12 at 59.
135. Id. at 61.
136. Id. at 62.
137. Id. at 64-65.
138. Id.
139. Id. at 65.
140. Adam v. Knesset, HCJ 7146/12 at 75-76, 82.
141. Id. at 67-68.
142. Id. at 71-72.
143. HCJ 7385/13 Eitan – Israeli Immigration Policy Ctr. v. Israeli Gov’t 1, 5-6 (2014) (Isr.).
144. Id.
145. Id. at 215.
146. Id. at 6.
147. Id. at 36-37.
148. See id. at 38 (noting that the principal purpose seems to be deterrent, rather than the deportation of that specific individual).
149. Eitan v. Israeli Gov’t, HCJ 7385/13 at 38.
150. Id.
151. Id. (“I am willing to avoid setting rules in this matter regarding the purpose, due to the reason
It is clear from *Adam* and *Eitan* that the Israeli justices perceive deterrence to be a problematic justification for immigration detention, for reasons very similar to those articulated by Judge Boasberg in the analogous American case. But it is worth noting their evident hesitation to rest on this analysis. To do so would have imposed clearer restrictions on the State. Instead, under the proportionality test, the State is invited to try to devise a less injurious means of achieving its objective.\textsuperscript{152} This is in a sense counterintuitive; presumably, deterrence is best achieved by harsh measures, but harsh measures pose a greater problem in terms of being proportional. The court leaves intact a potentially far-reaching rationale for draconian State action, while also acting to limit the severity of any measures that might result. But this may also be explicable simply as a form of judicial restraint; the court does not completely shut the door on the legislature because it does not have to.

**CONCLUSION**

In Part II, I suggested that three sequential questions arise whenever a government justifies detention on the basis of deterrence. The first, and potentially decisive question, is whether deterrence is ever a legitimate, stand-alone justification for detention. The American district court in *R.I.L-R* answered this decisively in the negative, rendering the other follow up questions moot.\textsuperscript{153} However, this was only a district court, and only in a preliminary injunction decision at that. For the Israeli High Court, the lead opinions in *Adam* and *Eitan* strongly critiqued deterrence, suggesting an inclination similar to the court in *R.I.L-R*. But the Israeli High Court declined in both cases to hold that deterrence is illegitimate, leaving this question formally unresolved as a matter of law.\textsuperscript{154} Thus, these cases indicate judicial resistance to deterrence, but they may not be enough to prevent governments in the United States or Israel from trying again in the future.

The next question is whether deterrence is valid generally in migration control, or only in certain situations. The former seems to be the approach offered by the American Attorney General's decision in *Matter of D-J*, at least as it has been applied in unpublished decisions by the Board of Immigration Appeals.\textsuperscript{155} However, there is reason for caution and concern about this conclusion. As we saw in Part III, *Matter of D-J*- arose in the immediate aftermath of September 11 and involved a specific migration flow about which the government invoked national security concerns.\textsuperscript{156} The Attorney General did not closely scrutinize the connection between the Haitian man at issue in the case and actual security threats.\textsuperscript{157} The core of the government’s national
security argument was simply that D-J-'s arrival diverted government resources from the War on Terror. This framework could label anything that imposes costs on the government as a national security threat. It is thus interesting that the BIA has seemed eager to tighten the linkage with specific national security emergencies, emphasizing individualized factors such as whether the asylum-seeker sought to elude border police. But Matter of D-J- remains on the books, and the BIA decisions limiting its application are unpublished.

The last question is about proportionality, or how far the government can go in the name of deterrence. This is the question that the Israeli High Court answered most directly, holding first that three years of detention is disproportionate (Adam), and then that one year of detention is also too much (Eitan). While these holdings are clear, they are also inherently limited since they invite the legislature to test the court with a new policy that is in some manner less severe. Eventually, it stands to reason, the Knesset may arrive at a set of measures that are mild enough that the Court will consider them proportional. But we do not know that this is how the Court will eventually rule. If the State proceeds to test milder and milder policies, it risks falling into two additional traps. On the one hand, if the State finds a policy that passes the proportionality test, the Court could simply decide to rest its decision on the general invalidity of deterrence, on which it has already made its views known. Thus, this process of testing may in fact be a mask of judicial restraint by which the Court has based its holding on the most narrow possible analysis, but it has actually not left the State any real room to maneuver. On the other hand, once the State abandons the most severe forms of detention, it faces a question of whether other measures would actually carry any deterrence power anyway. The High Court may have placed the State into a trap. The measures most likely to deter asylum-seekers are least likely to be proportional, while measures more likely to be proportional are less likely to deter, and thus may not be justified by deterrence anyway.

My main point is that the state of the law in the United States and Israel may invite governments to try anew with deterrence, but they confront a resistant judiciary. It is thus relevant to note one other course they may take. The cases that I have examined here have all been rooted in a civil, administrative context, and the courts have noted the non-criminal nature of the adjudication. I have argued that deterrence is problematic outside the criminal context because there is no individualized finding of moral culpability. If governments are resolute in their desire to deter migration, the clearest route may be to treat asylum-seekers as criminals by prosecuting them for illegal entry. To be clear: This would likely be illegal under international law, as it would clash with the Refugee Convention’s article 31, which forbids punishment for illegal entry for refugees “coming directly from a territory where their life or freedom was threatened.” But this provision is of course potentially fraught with ambiguity. Do Eritreans face enough hardship in Egypt to be able to claim the benefit of this

159. See Kernand Pierre, 2007 WL 1724883, at *1 (stating that the respondent’s circumstances under arrival demonstrated that respondent was seeking to evade immigration inspection).
161. See Eitan v. Israeli Gov’t, HCJ 7385/13 at 215 (stating that the State requires reflections and restraint).
defense to prosecution? What about Guatemalans who cross through Mexico? Article 31 is framed as an affirmative defense in criminal law, and just like other defenses of necessity, an aggressive prosecutor could argue that it must be interpreted narrowly.

The point is that this is a long war. The governments of the United States and Israel have essentially lost some significant battles in their attempt to use deterrence to justify detention of asylum-seekers. But the war is not over.

NB: After this Article was drafted, the Israeli High Court issued a third decision on a third iteration of the Israeli legislation detaining asylum-seekers who enter over the Egyptian border. 163 I have not been able to review a complete English translation of the decision, but it appears from a detailed analysis published by Dr. Reuven Zigler that the High Court approved detention up to twelve months, but found that detention beyond that would be disproportional. 164 This holding appears to represent a retreat by the Court. It appears consistent with my observation in this Article that a proportionality-focused analysis invites the state to continue testing incrementally milder measures until it finds a formula that passes muster with the court. The Court appeared to continue its pattern of sidestepping the deterrence question, although the justices continued to express doubts about the propriety of deterrence. 165 As Zigler noted, if the Court had focused on the improper deterrent purpose rather than proportionality, most of the analysis—and perhaps the need to have three decisions—would have been avoided. 166 Moreover, in the previous two cases one could explain the Court's avoidance of deterrence as a form of judicial restraint, since the Court did not need to reach that question to justify its holding. But since in this third case the Court found the government's measures proportional to the State's asserted purposes, it was more essential for the Court to scrutinize whether the State's stated purposes were genuine and legitimate.

165. See id. ("The main opinion notes that the primary legislative goals as stipulated by the state are to enable state authorities to verify the identity of "infiltrators" and give them time to pursue avenues for voluntary departure or expulsion of "infiltrators" from Israel. The Court considered these goals proper notwithstanding the fact that the state had supplemented them with a general deterrence purpose.... In other words, according to President Naor, while deterrence would not be accepted as the primary legislative goal, it is constitutionally permissible to legislate with deterrence (also) in mind.").
166. Id. ("Notably, had the Justices accepted the petitioners' claim regarding the covert legislative goal, it would have rendered the rest of the constitutional analysis superfluous—a law enacted for an improper purpose is unconstitutional.").