

## ESCAPING THE SUNKEN PLACE: INDEFINITE DETENTION, ASYLUM SEEKERS AND RESISTANCE IN YARL'S WOOD IRC

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### INTRODUCTION

In 2018, the Law Society of England and Wales raised concerns about the United Kingdom's migration system, stating that 'failures in UK immigration and asylum undermine the rule of law'.<sup>1</sup> Nowhere are those problems more apparent than in the United Kingdom's handling of migrants and asylum seekers in detention centres. A particular recurring issue that speaks to the Law Society's concern is the absence of a defined time limit for immigration detention. The possibility of indefinite detention has been a source of tension both within British politics and within UK immigration detention centres. An example of this can be understood with reference to the Yarl's Wood Immigration Removal Centre (IRC) in Bedfordshire, known for its controversial and rebellious past.<sup>2</sup> In 2015 Nick Hardwick, a former chief prisoner inspector, labelled the Centre a place of 'national concern', after examining the mistreatment of vulnerable detainees.<sup>3</sup> Yarl's Wood's problematic history seems to have continued into the present, following a detainee-led hunger strike that resulted in 'renewed concerns' over health care in detention

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<sup>1</sup> The Law Society, 'Failures in UK Immigration and Asylum Undermine the Rule of Law' (*The Law Society*, 12 April 2018) <<https://www.lawsociety.org.uk/news/press-releases/failures-in-uk-immigration-and-asylum-undermine-the-rule-of-law/>> accessed 14 April 2018.

<sup>2</sup> Paul Hamilos, 'Asylum Centre Wrecked by Fire' (*The Guardian*, 15 February 2002) <<https://www.theguardian.com/uk/2002/feb/15/immigration.immigrationandpublicservices4>> accessed 30 April 2018; Simon Cox, 'Whistleblower's Concerns over Safety at Yarl's Wood' (*BBC News*, 24 June 2014) <<https://www.bbc.com/news/uk-27906730>> accessed 30 April 2018; Danny Shaw, 'Yarl's Wood: Years of Misery and Controversy' (*BBC News*, 10 June 2015) <<https://www.bbc.com/news/uk-33043395>> accessed 30 April 2018.

<sup>3</sup> BBC News, 'Yarl's Wood Removal Centre of 'National Concern'' (*BBC News*, 12 August 2015) <<https://www.bbc.com/news/uk-33871283>> accessed 8 April 2018.

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centres.<sup>4</sup> In addition to protesting the standard of medical treatment received by detainees, the strikers' underlying focus was on indefinite detention.<sup>5</sup> The Home Office's response to these strikes was unsympathetic. In reaction to the strikes, the Home Office sent detainees letters suggesting that their continued participation in the strike may in fact result in their removal being accelerated.<sup>6</sup> Although the hunger strike ended in March 2018, the Home Office's response to the strike raised some interesting legal and philosophical questions about human rights and resistance in detention centres. In order to grapple with some of these issues, this article is in two parts. Part One seeks to contextualise the existing immigration regime and explore how legal disputes might fit within the broader scheme of opposing indefinite detention. It will also briefly examine the legal challenges that may arise from the use of threats of accelerated deportations.

Part Two explores the lack of power and agency that detainees experience in immigration detention centres, due to a deprivation of control or ability to determine their own circumstance. It is argued that such a state of powerlessness can be likened to the fictional *Sunken Place* popularised by Jordan Peele's film 'Get Out'. In the film, the Sunken Place serves as an allegory for a state of incarceration and helplessness as the 'victim' loses the ability to interact with the physical world.<sup>7</sup> In order to make the comparison more appropriate the article analyses blog posts written by detainees in Yarl's Wood IRC. In addition, by using the words of detainees themselves, the article seeks to ensure that their perspective of detention is given due regard. The article then investigates the role that political resistance can play in detention centres as a means of escaping the Sunken Place, and relies on the work of Hannah Arendt, as well as other commentators, to justify such a position.

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<sup>4</sup> Dexter Erin and Cornelius Katona, 'Hunger Strike Renews Concerns over Health in UK Detention Centres' (*British Medical Journal*, 29 March 2018) <<https://www.bmj.com/content/360/bmj.k1446.full>> accessed 8 April 2018.

<sup>5</sup> Detained Voices, '22 Feb 2018 – The Protest Is about Their System of Indefinite Detention' (*Detained Voices*, 22 February 2018) <<https://detainedvoices.com/2018/02/22/the-protest-is-about-their-system-of-indefinite-detention/>> accessed 8 April 2018.

<sup>6</sup> Busby Eleanor, 'Home News Home Office Tells Women They Will Be Deported More Quickly for Hunger Striking' (*The Independent*, 4 March 2018) <<https://www.independent.co.uk/news/uk/home-news/yarls-wood-home-office-women-deported-more-quickly-hunger-strike-a8239611.html>> accessed 8 April 2018.

<sup>7</sup> Alex Rayner, 'Trapped in the Sunken Place: How Get Out's Purgatory Engulfed Pop Culture' (*The Guardian*, 17 March 2018) <<https://www.theguardian.com/film/2018/mar/17/trapped-in-the-sunken-place-how-get-outs-purgatory-engulfed-pop-culture>> accessed 30 April 2018.

## PART ONE: OVERVIEW OF LAW AND HISTORY OF IMMIGRATION DETENTION CENTRES

This section provides both a brief overview of immigration detention in Britain, as well as a short history of Yarl's Wood. The section will then discuss potential legal challenges to the current immigration detention system.

### Yarl's Wood in Context

Yarl's Wood is a 'purpose built' IRC that predominantly holds female detainees and operates under the Detention Centre Rules 2001 (discussed below). It opened in 2001 and is capable of housing approximately 400 detainees.<sup>8</sup> The Centre appears to hold a combination of asylum seekers and other migrants and, according to statistics from 2016, 46% of people in detention were asylum seekers.<sup>9</sup> Yarl's Wood has been the subject of various reports which revealed a high level of mental health problems among detainees, as well as issues of self-harm and repeated allegations of incidents of sexual harassment and abuse by the Centre's staff.<sup>10</sup> Recent reports into health care at Yarl's Wood have also begun to raise fears about damage to the mental health of vulnerable detainees. Certainly, in connection with the hunger strike that took place at Yarl's Wood, indefinite detention and mental health were major issues raised by strikers.<sup>11</sup> On 22 February 2018 the Yarl's Wood hunger strikers began their protest and put forth 15 demands that included an end to indefinite detention;<sup>12</sup> access to proper health care; and an end to the systematic torture that was taking place in detention centres.<sup>13</sup> The response from the Home Office came in a letter addressed to the hunger strikers stating that the fact that detainees were refusing food and liquid may cause their cases to be accelerated, thereby expediting their

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<sup>8</sup> Independent Monitoring Board, *Annual Report of the Independent Monitoring Board at Yarl's Wood Immigration Removal Centre: Annual Report 2016* (26 June 2017) 3. The Independent Monitoring Board is a statutory-based organisation which monitors the day-to-day life in local prisons or removal centres and ensures that proper standards of care and decency are maintained.

<sup>9</sup> Erin and Katona (n 5).

<sup>10</sup> Marchu Girma and others, *I Am Human: Refugee Women's Experiences of Detention in the UK* (Women for Refugee Women 2015) 2.

<sup>11</sup> Detained Voices, '22 Feb 2018 – The Hunger Strikers' Demands' (*Detained Voices*, 22 February 2018) <<https://detainedvoices.com/tag/yarls-wood/>> accessed 8 April 2018.

<sup>12</sup> Detained Voices, '22 Feb 2018 – The Protest Is about Their System of Indefinite Detention' (n 6).

<sup>13</sup> *Ibid.*

removal from the United Kingdom.<sup>14</sup> Before examining the significance of resistance by detainees, it is important to explore the existing regime of immigration detention and analyse any potential legal challenges.

### **Detention and Immigration Law**

It is crucial to note that immigration law is a combination of statutory instruments, Home Office policy, royal prerogative and rules that have a quasi-legal status.<sup>15</sup> The power to detain for 'administrative purposes' was introduced into British immigration law by the Immigration Act 1971 (IA).<sup>16</sup> Since its introduction, it has been relied upon by the state and appears to have become a routine measure in immigration control.<sup>17</sup> The powers to detain are predominately contained in Sections 3, 4 and 5, and Schedules 2 and 3 of the Act; however, they have been subject to regular updates.<sup>18</sup> One such reform was the Nationality, Immigration and Asylum Act 2002 (NIAA). Its main policy objective was aimed at normalising detention by instituting reception, accommodation and removal centres as an ordinary part of the immigration examination process.<sup>19</sup> Another role that detention appears to play is in the 'criminalisation of mobility'.<sup>20</sup> For example, detention is used to hold convicted foreign-nationals after they have served their prison sentences while they are being considered for removal or deportation; and used to hold people found guilty of 'immigration offences' such as overstaying and illegal entry, while they are considered for removal.<sup>21</sup> Some commentators suggest that the United Kingdom's current use of detention is contrary to international law, since detention should only be used as a last resort. This is considered in more detail later on. It is important to

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<sup>14</sup> Eleanor (n 7).

<sup>15</sup> Ian Macdonald and Ronan Toal, *Macdonald's Immigration Law & Practice Volume 1* (9th edn, Lexis Nexis 2014) 31.

<sup>16</sup> *Ibid.*

<sup>17</sup> Amnesty International, *A Matter of Routine: The Use of Immigration Detention in the UK* (Amnesty International United Kingdom Section 2017) 5.

<sup>18</sup> In relation to reforms of detention powers, these are Immigration and Asylum Act 1999; Nationality, Immigration and Asylum Act 2002; UK Borders Act 2007; Immigration Act 2014; and Immigration Act 2001.

<sup>19</sup> Macdonald and Toal (n 16).

<sup>20</sup> Alessandro De Giorgi, 'Immigration Control, Post-Fordism, and Less Eligibility: A Materialist Critique of the Criminalization of Immigration Across Europe' (2010) 12(2) *Punishment & Society* 147–167.

<sup>21</sup> Mary Bosworth, 'Subjectivity and Identity in Detention: Punishment and Society in a Global Age' (2012) 16(2) *Theoretical Criminology* 124, 140; see also Immigration Act 1971, s 24.

recognise that detention itself is not a punitive measure, otherwise it could be found to be in conflict with Article 31 of the Refugee Convention, which prohibits penalisation for illegal entry or presence of those persons who are seeking protection or are recognised as asylum seekers.<sup>22</sup> Detention is currently allowed for three statutory purposes.<sup>23</sup> Firstly, to examine a person's immigration status.<sup>24</sup> Secondly in order to implement a person's administrative removal from the United Kingdom,<sup>25</sup> and thirdly in order to implement a person's deportation from the United Kingdom.<sup>26</sup> There is an important difference between administrative removal and deportation. Removal occurs where one's claim for a right to abode or leave to remain is unsuccessful, whereas deportation occurs where it is 'conducive to the public good'.<sup>27</sup> Although the use of detention is restricted by availability of space, as well as the need for a rational justification, and human rights compliance,<sup>28</sup> it is not restricted by a time limit.<sup>29</sup> The possibility of indefinite detention in the United Kingdom separates it from most of its European Union counterparts due to the fact that the United Kingdom chose to opt out of the EU Returns Directive, which places a time restraint on detention.<sup>30</sup> Arguably, it is this nonexistence of a defined time limit that is the subject of greatest controversy.<sup>31</sup>

### Legal Challenges to Indefinite Detention

In confronting the risk of indefinite detention, it is possible to seek judicial review of the policy on the basis that it is 'unreasonable' or that it is in contravention of the Human Rights Act 1998. A human rights review of indefinite detention would

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<sup>22</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

<sup>23</sup> Amnesty International (n 18) 9.

<sup>24</sup> Immigration Act 1971, s 4; sch 2 paras 2 and 3.

<sup>25</sup> Immigration Act 1971, s 4 and sch 2 paras 8, 9, 10, 12, 13, 14 and 16.

<sup>26</sup> Immigration Act 1971, s 3, s 5 and sch 3 para 2.

<sup>27</sup> Ibid.

<sup>28</sup> Human Rights Act 1998, s 6(1): 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.'

<sup>29</sup> Except in cases involving children or pregnant women. See Immigration Act 2014, s 6(2), in relation to unaccompanied minors, and Immigration Act 2016 s 60(4), in relation to pregnant women.

<sup>30</sup> Erin and Katona (n 5).

<sup>31</sup> Rob Merrick, 'Theresa May Faces Tory Revolt over the Indefinite Detention of Immigrants' (*The Independent*, 27 January 2018) <<https://www.independent.co.uk/news/uk/politics/theresa-may-immigration-detention-home-office-tory-revolt-amendment-time-limit-a8179846.html>> accessed 8 April 2018.

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likely be argued on the grounds of a breach of Article 3 or 5 of the European Convention of Human Rights (ECHR). Article 3 contains an absolute right not to be subject to 'torture or to inhuman or degrading treatment or punishment' while Article 5 provides for a qualified right to 'liberty'. Both pathways face a different and difficult struggle against the status quo.

### *Article 5 Challenge*

The right to liberty is only infringed where a deprivation of liberty has occurred in an unlawful or arbitrary manner.<sup>32</sup> Moreover, it must be remembered that Article 5(1)(f) allows for detention as a form of 'immigration control':

The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Under Article 5 there are two potential arguments that could be pursued. The first is that detention without any safeguards is unlawful, and the second is that the lack of a time limit makes any detention arbitrary.

With regard to the first argument, all detention in the United Kingdom is primarily justified on the basis that there is a 'presumption of liberty' that the government must rebut.<sup>33</sup> The fact that detention must be justified reduces the chance that it could be opposed as unlawful or arbitrary. The use of detention is also limited by the restrictive opportunities for bail review,<sup>34</sup> and the *Hardial Singh* principles, which state that:

- a. the Secretary of State must intend to deport the person and can only use the power to detain for that purpose; b) the deportee may only be detained for a period that is reasonable in all the circumstances; c) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect the deportation within that reasonable period, he should not seek to exercise the power of detention; and d) the Secretary of State should act with the reasonable diligence and expedition to effect removal.<sup>35</sup>

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<sup>32</sup> *Chahal v United Kingdom* [1997] 23 EHRR 413 [118].

<sup>33</sup> *Khawaja v Secretary of State for the Home Department* [1983] UKHL 8 [62]. Lord Scarman quoting Lord Atkin 'that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act'.

<sup>34</sup> Macdonald and Toal (n 16) 1629 para 18.8.

<sup>35</sup> *R v Governor of Durham Prisons, ex p Hardial Singh* [1984] 1 WLR 704 (QBD); see

The ‘reasonableness’ requirements in the *Hardial* principles may be considered as a guard against lawful detention becoming arbitrary over time. As a result, requiring that a person is only detained for a ‘reasonable period’ appears to suggest there is formal but unclear limit on detention, and that detention in the United Kingdom is not *prima facie* indefinite. However, the interpretation of ‘reasonable time’ has been very broad in domestic courts and the European Court of Human Rights (ECtHR).<sup>36</sup> In *Chahal*, the ECtHR established the absolute principle of non-refoulement in Article 3 cases concerning deportation to a country where the applicant faces a risk of torture. However, *Chahal* also found that a five-year period of detention was not a breach of Article 5 where the Secretary of State acted with due diligence.<sup>37</sup> It appears that where a State acts reasonably, and with due diligence the length of detention is inconsequential. This finding has led to the criticism that persons in immigration detention experience a ‘second class right to liberty’.<sup>38</sup>

The UN High Commissioner for Refugees (UNCHR) Guidelines support the argument that indefinite detention for immigration purposes is arbitrary as a matter of international human rights law.<sup>39</sup> The UNCHR’s justification for its position is based on two cases, *A. v Australia* and *Mukong*. In the first case, the UN Human Rights Committee (HRC) considered that the length of time in detention, coupled with the inability to review, could give rise to arbitrariness.<sup>40</sup> This case does not appear to suggest condemnation of an indeterminate time period for detention, but rather a confirmation that absence of review procedures can result in detention being arbitrary. The second case of *Mukong* appears to carry more weight as a rationalisation as it emphasised factors such as unpredictability and inappropriateness as elements of arbitrary detention.<sup>41</sup> Nevertheless, these arguments are not concrete precedents since both the UK Supreme Court and the ECtHR have found that time limits on detention are not

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also *Lumba (WL) v Secretary of State for the Home Department* [2011] UKSC 12 (23 March 2011) [22].

<sup>36</sup> *Chahal* (n 33).

<sup>37</sup> *Ibid.*, 123.

<sup>38</sup> Chloe Marong, ‘Protecting the Public? Challenging the Indefinite Preventive Detention of Non-Citizens’ (2014) 3(1) UCL Journal of Law and Jurisprudence’ 115, 123.

<sup>39</sup> UNHCR Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012).

<sup>40</sup> UN Human Rights Committee, *A. v Australia* CCPR/C/59/D/560/1993 (3 April 1997) <<http://www.refworld.org/cases,HRC,3ae6b71a0.html>> accessed 10 April 2018, [9.2].

<sup>41</sup> UN Human Rights Committee, *Mukong v Cameroon* Communication No. 458/1991 (21 July 1994) <<http://www.refworld.org/cases,HRC,4ae9acc1d.html>> accessed 10 April 2018, [9.8].

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required for compatibility with the right to liberty.<sup>42</sup> Current case law appears to suggest that an Article 5 challenge to indefinite detention would not succeed solely on the basis that the lack of a time limit is unlawful, so long as the appropriate opportunities for review exist.<sup>43</sup>

### *Article 3 Challenge*

A successful Article 3 challenge must demonstrate that holding individuals in detention without a defined time limit amounts to either 'torture or to inhuman or degrading treatment or punishment'. This section begins by examining the difference between torture and inhumane and degrading treatment, before analysing the kind of conduct that may amount to a breach of Article 3. It then explores whether there is any evidence to support the argument that indefinite detention in the United Kingdom may violate protections provided by Article 3. As a result of reviewing case law and reports by NGOs it is argued that indefinite detention poses a serious threat to detainees' mental health, which may amount to degrading treatment.

#### *'The distinction between torture, inhuman and degrading treatment'*

Indefinite detention is more likely to amount to inhuman or degrading treatment rather than torture. This is because torture requires actual or intense mental harm.<sup>44</sup> The ECtHR states that treatment which humiliates, debases or shows a want of respect for, or diminishes human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance can be characterised as degrading.<sup>45</sup> Similarly, Lord Bingham in the House of Lords stated that '[t]reatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being'.<sup>46</sup>

Furthermore, it is important to recognise that inhumane or degrading treatment considers personal characteristics and that the ECtHR has recognised that asylum

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<sup>42</sup> *R (on the application of Nouazli) (Appellant) v Secretary of State for the Home Department (Respondent)* [2016] UKSC 16; *J.N. v the United Kingdom* App no 37289/12 (ECtHR, 19 May 2016).

<sup>43</sup> *Ibid.*; see also *Machnikowski v Secretary of State for the Home Department* [2015] EWHC 54 (Admin) [80–104].

<sup>44</sup> *Pretty v UK* [2002] 35 EHRR 1.

<sup>45</sup> *Ibid.*, 52.

<sup>46</sup> *R (Adam and Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66 [7].



seekers are particularly vulnerable.<sup>47</sup> On the question of whether the treatment is inhuman, degrading or both, it is potentially easier to prove that indefinite detention amounts to degrading treatment. This is in part due to the fact that degrading treatment appears to have a lower threshold of harm,<sup>48</sup> and because the treatment need only be seen as degrading in the eyes of the victim.<sup>49</sup> Additionally, there is no need for the State to have a positive intention to humiliate or debase the complainant.<sup>50</sup> However, although there is evidence suggesting that indefinite detention can lead to mental harm serious enough to be considered inhumane, it is more difficult to prove that that is the case collectively, since not every detainee will experience the same levels of mental stress. Thus, the stronger argument appears to lie in claiming that the treatment is degrading. As regards proving violations of Article 3 in the context of mental health, the ECtHR has been more inclined to find that a breach has occurred where there is evidence that detention caused an applicant's mental health to deteriorate. In order to demonstrate that detention has caused harm to their mental health, successful applicants have provided evidence that detention caused a deterioration of their mental health and well-being;<sup>51</sup> that the mental care facilities in detention were inadequate;<sup>52</sup> that detention was unsuitable for an already vulnerable individual;<sup>53</sup> or that detention exacerbated an existing mental health condition.<sup>54</sup>

### *Reports and Evidence for an Article 3-based Challenge*

Before examining the evidence in detail, it is necessary to consider the distinction between harm caused by *detention* in general, and harm caused by *indefinite detention*. Although many of the reports described herein provide a scathing indictment against the current detention system, the subsisting argument relevant to indefinite detention is that the longer detention lasts, the more likely serious mental harm will occur and that the stress of not knowing when detention will end creates or exacerbates mental disorders such as depression or anxiety. As a result the evidence considered in this article focuses on how a deficiency in providing defined time limits for detention affects detainees' mental health.

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<sup>47</sup> *MSS v Belgium and Greece* [2011] 53 EHRR 28.

<sup>48</sup> *Bouyid v Belgium* App no 22380/09 (ECtHR, 28 September 2015) [112].

<sup>49</sup> *Ibid.*

<sup>50</sup> *Romanov v Russia* App no 63993/00 (ECtHR, 20 October 2005).

<sup>51</sup> *Ibid.*

<sup>52</sup> *Slawomir Musiał v Poland* App no 28300/06 (ECtHR, 20 January 2009).

<sup>53</sup> *ZH v Hungary* App no 28973/11 (ECtHR, 8 November 2012).

<sup>54</sup> *Bamouhammad v Belgium* App no 47687/13 (ECtHR, 17 November 2015).

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The British Medical Association (BMA) has recognised that a major issue for detainee health is the fact that ‘a large number of individuals score at “clinically significant” levels for depression and anxiety’.<sup>55</sup> Even where detainees did not reach a clinical threshold it was noted that, ‘every person in detention faces some challenge to their mental health or wellbeing and experiences psychological and emotional distress’.<sup>56</sup> In relation to Yarl’s Wood, a Home Office-commissioned review, led by Stephen Shaw, found that around 90% of detainees’ accessed health care every day, and ‘very many women’ were taking antidepressants.<sup>57</sup> He also highlighted a number of issues, stating that the mental health care was not fit for purpose, during detention detainees felt afraid to complain, and if they did they were not taken seriously, and that detention had psychological effects even after it ended.<sup>58</sup> Shaw recommended that the use of detention be decreased, and that there should be more reform in order to protect vulnerable detainees.<sup>59</sup>

In addition to Shaw’s findings, there are also findings from a review of Article 3 breaches by Jeremy Johnson QC, and Mary Bosworth’s literature review on the impact of immigration detention on mental health. In his review, Johnson found that there was a particular need to focus on the provision of health care and the detention review process.<sup>60</sup> Furthermore, the five breaches Johnson reviewed seemed to all follow a trend, where detention was found to exacerbate existing mental health conditions up to the point that would constitute inhuman or degrading treatment to keep the persons in detention.<sup>61</sup> Bosworth’s literature review established that across all the different bodies of work and jurisdictions, detention (i) has a negative impact on mental health and that this increases the longer detention persists; (ii) that asylum seekers are particularly vulnerable; and (iii) that there are three predominant forms of mental disorder related to immigration detention: depression, anxiety and post-traumatic stress disorder (PTSD).<sup>62</sup> Bosworth’s review also suggested that the effects of detention continue

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<sup>55</sup> British Medical Association Medical Ethics Committee, *Locked Up, Locked Out: Health and Human Rights in Immigration Detention* (British Medical Association 2017) 19.

<sup>56</sup> *Ibid.*

<sup>57</sup> Stephen Shaw, *Review into the Welfare in Detention of Vulnerable Persons* (Cm 9186, 2016), para 3.133.

<sup>58</sup> *Ibid.*, para 3.140.

<sup>59</sup> *Ibid.*, 193–198.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*, 291–293.

<sup>62</sup> *Ibid.*; see also Erin and Kotona (n 5).

even after detention has ended.<sup>63</sup> The conclusion to be drawn from these reports, as well as from reports by Amnesty International, Detention Action<sup>64</sup> and the UN Committee against Torture,<sup>65</sup> is that the practice of indefinite detention poses a serious problem for United Kingdom's obligation to refrain from breaching Article 3 rights as the practice appears to consistently be accused of being psychologically harmful to detainees who are already uniquely vulnerable. Although there is consistent opinion that the use of detention causes harm, which is then exacerbated by its indefiniteness, it is still not clear whether that maltreatment might translate into 'degrading treatment'.

### *Deportation Row*

As stated above, in order for treatment to be degrading it must diminish human dignity, arouse feelings of fear or anguish, and can be degrading from the perspective of the complainant, which is a subjective standard. In relation to indefinite detention it is important to consider the factors as cumulative in order to make it degrading. Features include the uncertainty of when detention will end; the vulnerability of asylum seekers; the indications that that the majority of detainees are not removed; the evidence of the effect detention has on well-being; and length of time spent in detention that can range from a month to more than two years.<sup>66</sup> It is also valuable to consider how those in detention describe their experience of being 'helpless institutionalised victim[s]',<sup>67</sup> 'constantly on edge'<sup>68</sup>, as well as the anxiety placed on both their own lives and the lives of their family members.<sup>69</sup> Indefinite detention can be found to be degrading treatment in the same way as the 'death row phenomenon' was found to be inhumane.<sup>70</sup> The phrase 'death row phenomenon' is usually used without precision, but it typically alludes to the

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<sup>63</sup> *Ibid.*, 305.

<sup>64</sup> Jerome Phelps and others, *The State of Detention: Immigration Detention in the UK in 2014* (Detention Action, 2014).

<sup>65</sup> UN Committee Against Torture, 'Concluding Observations on the Fifth Periodic Report of the United Kingdom, Adopted by the Committee at Its Fiftieth Session' (6–31 May 2013) CAT/C/GBR/5 para 30.

<sup>66</sup> Amnesty International (n 18) 36.

<sup>67</sup> Detained Voices, '22 Feb 2018 – So to Give You an Update on the Events Regarding Our Strike' (*Detained Voices*, 22 February 2018) <<https://detainedvoices.com/tag/yarlswood/>> accessed 8 April 2018.

<sup>68</sup> Detained Voices, '22 Feb 2018 – The Hunger Strikers' Demands' (n 12).

<sup>69</sup> Amnesty International (n 18) 43.

<sup>70</sup> *Soering v United Kingdom* [1989] 11 EHRR 439.

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unique stress experienced by prisoners on death row.<sup>71</sup> A satisfactory definition will usually account for delay, uncertainty and conditions of imprisonment.<sup>72</sup> In *Soering*, the ECtHR did not find that the death penalty in itself was an act that violated Article 3 but rather it was the risk of exposure to the death row phenomenon.<sup>73</sup> Similarly, in the case of indefinite detention it is neither the act of detention, nor administrative removal or deportation that is unlawful, but rather the circumstances in which a particularly vulnerable person is forced to suffer the debasing agony of insecurity, fear and mental distress. Admittedly there are some flaws in this argument. Firstly, detention centres in the United Kingdom and prisons in the United States may not be suitable comparators. Secondly, the length of delays and level of acceptable of injury caused by awaiting execution are already accepted as grave by international law,<sup>74</sup> whereas the harm caused by indefinite detention has not been as frequently acknowledged in the international discourse. However, making the argument that indefinite detention is closer to being degrading rather than inhuman treatment allows for some manoeuvrability in terms of the gravity of the ill-treatment required. Consequently, the risk of exposure to mental suffering in the case of immigration detention may be enough to demonstrate that confinement without time limits is degrading. Yet, this is a far from definitive conclusion.

### *Solutions and Alternatives*

Although the 'deportation row' argument may not be enough to demonstrate a breach of Article 3, it appears that ending the practice of indefinite detention is in the interest of the UK Government. The Home Office has 'Rule 35 reviews' which are intended to guard against detaining people who suffered torture or people 'whose health is likely to be injuriously affected by continued detention or any conditions of detention'.<sup>75</sup> However, the Shaw review found that these reviews are not fit for purpose.<sup>76</sup> Although his follow-up report suggests improvements are occurring in connection to mental health treatment, he remained concerned that

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<sup>71</sup> Patrick Hudson, 'Does the Death Row Phenomenon Violate a Prisoner's Human Rights under Intentional Law?' (2002) 11(4) *European Journal of International Law* 833–856.

<sup>72</sup> *Ibid.*; see also Reprieve, 'Death Row Phenomenon: The Psychological Impact of Living in the Shadow of Execution' (*Reprieve*) <<https://reprieve.org.uk/death-row-phenomenon-psychological-impact-shadow-execution/>> accessed 11 April 2018.

<sup>73</sup> *Soering* (n 71).

<sup>74</sup> Hudson (n 72).

<sup>75</sup> Detention Centre Rules 2001.

<sup>76</sup> Shaw (n 58).

some time may be necessary for meaningful change to take place.<sup>77</sup> Furthermore, reforms like the revision of Chapter 55.10 of the Enforcement Instructions and Guidance (EIG) and the ‘Adult at Risk Policy’ are still not adequately addressing the long-term mental health deterioration that occurs as a result of indefinite detention.<sup>78</sup> Even though it is possible to improve the current regime by addressing the issues surrounding cynical decision making and bureaucratic inertia,<sup>79</sup> a more cost-effective and risk-averse solution would be to place time limits on detention.<sup>80</sup> Moreover, arguments made under Article 3 may have more success as there is a range of cross-party and NGO support<sup>81</sup> for bringing an end to the practice on this basis. For example, the BMA has called for detention to be replaced with a more humane alternative and for detention to have clear time limits, in order to avoid breaching Article 3.<sup>82</sup> A Parliamentary inquiry into detention has also suggested the introduction of a time limit as well as an increase in the use of community-based solutions.<sup>83</sup> Currently immigration detention has also been labelled as ‘malfunctioning and unnecessary’, by Amnesty International. During 2016 only 21% of detainees were actually removed from the United Kingdom.<sup>84</sup> Consequently, the question must be asked that if a significant number of detainees are released, why not limit their subjection to such treatment whether it is degrading or not. With the cost of detaining people amounting to £80 per night and the price of immigration detention totalling more than £523.5 million between 2014 and 2017, it appears that the choice to detain irregular or illegal migrants is expensive and ineffective.<sup>85</sup> Detention may also come at a cost to detainees as their

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<sup>77</sup> Stephen Shaw, ‘Assessment of Government Progress in Implementing the Report on the Welfare in Detention of Vulnerable Persons: A Follow-Up Report to the Home Office by Stephen Shaw’ (Cm 9661, 2018), para 3.151–3.154.

<sup>78</sup> Amnesty International (n 18); Home Office, *Immigration Act 2016: Guidance on Adults at Risk in Immigration Detention* (Home Office, 2018).

<sup>79</sup> Shaw (n 58) 302.

<sup>80</sup> *Ibid.*, 191.

<sup>81</sup> Amelia Gentleman, ‘MPs Call for End to Indefinite Detention of Migrants’ (*The Guardian*, 3 March 2015) <<https://www.theguardian.com/uk-news/2015/mar/03/mps-call-end-indefinite-detention-migrants>> accessed 10 April 2018.

<sup>82</sup> British Medical Association (n 56) 11.

<sup>83</sup> All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, *The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom: A Joint Inquiry* (2015).

<sup>84</sup> Independent Monitoring Board (n 9).

<sup>85</sup> May Blum, ‘More Than £500m Spent on UK Immigration Detention over Four Years’ (*The Independent*, 5 February 2018) <<https://www.independent.co.uk/news/uk/home-news/uk-immigration-detention-centre-cost-taxpayer-brexit-eu-migrants-a8195251.html>>

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source of income and their family lives may be disrupted by the precariousness of being detained. As a result, it is necessary for the United Kingdom to consider alternatives to detention.

Two potential types of alternatives to detention that warrant examination are enforcement-based alternatives and engagement-based alternatives.<sup>86</sup> Enforcement-based alternatives are less coercive than detention and consist of more traditional substitutes to detention such as registration, reporting and residency conditions.<sup>87</sup> Engagement-based alternatives attempt to involve migrants in the immigration process in order to promote cooperation.<sup>88</sup> Alternatives may include placing a migrant within the community with an assigned case manager who helps provide the individual with information and updates about the migration process.<sup>89</sup> The NGOs such Detention Action and the International Detention Coalition (IDC) encourage the use of more engagement-based alternatives centred on the Community Assessment and Placement (CAP) models which places an emphasis on detention as a last resort and seeks to ensure respect for minimum standards and the right to liberty.<sup>90</sup> An existing UK project that takes advantage of improved screening and case management is the Detention Community Action Project. The project conducts a risk assessment to determine eligibility through multiple interviews.<sup>91</sup> Additionally, the project provides a project coordinator and a structured post-release case management plan that helps manage the risk of absconding and re-offending.<sup>92</sup> The project coordinator helps explain why an individual is being summoned for an interview. The purpose of the project coordinator is intended to act as a liaison which helps to improve trust and communication between the government and the migrant.<sup>93</sup> The increased use of alternatives promoted and supported by civil society may have multiple benefits to society at large. Alternatives can be more cost efficient than detention and

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accessed 20 July 2018; Stephanie J. Silverman and Melanie E. B. Griffiths, 'Immigration Detention in the UK' (Migration Observatory Briefing, COMPAS, University of Oxford, UK, May 2018).

<sup>86</sup> Eiri Ohtani and Jerome Phelps, *Without Detention: Opportunities for Alternatives* (Detention Action 2016) 19.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*, 20.

<sup>89</sup> *Ibid.*, 19.

<sup>90</sup> R Sampson and others, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (Revised)* (International Detention Coalition 2015) V.

<sup>91</sup> *Ibid.*, 51.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*, 52.

encourage the respect of human rights and minimum standards which may decrease the chance of an Article 3 or 5 challenge.<sup>94</sup> Alternatives also help to protect the migrant's mental health from unnecessary duress and allow them to feel like they have more control in the immigration process. Furthermore, where the migrant has a family it allows them to continue to receive support while their status is being decided.

### **Legal Challenges to Accelerated Removal**

Identifying a nexus between the warnings issued to detainees for their participation in a hunger strike and an Article 3 violation is difficult. A particular obstacle is that there has not been a 'test case' and it is not likely that one will be brought since the hunger strike ended as many of the original group of hunger strikers were either deported or released.<sup>95</sup> It still remains possible to argue that the threat amounted to a breach of Article 3.<sup>96</sup> However, the threshold is high as it not only that the victim must see themselves as humiliated but they must also experience mental suffering severe enough that it gives rise to ill-treatment.<sup>97</sup> Even though it may be easy to demonstrate that the detainees felt degraded by the Home Office's threat, without evidence that actual harm was experienced, it remains unlikely that such an argument will succeed.

## **PART TWO: THE THEORETICAL IMPLICATIONS**

Legal routes might not be able to provide the desired outcome of ending these practices for, as Upendra Baxi suggests, '[c]ourts are ... never a substitute for direct political action, including mass politics of direct action'.<sup>98</sup> Although, the legal pathways may be uncertain, the detainees themselves may have the power to act against their circumstances and affect their situation even if they do not

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<sup>94</sup> *Ibid.*, 6.

<sup>95</sup> Detained Voices, '21 March 2018 – Today Marks the 28th Day since We Began Our Strike Here in Yarl's Wood' (*Detained Voices*, 21 March 2018) < <https://detainedvoices.com/2018/03/21/today-marks-the-28th-day-since-we-began-our-strike-here-in-yarls-wood/> > accessed 8 April 2018.

<sup>96</sup> *Campbell and Cosans v United Kingdom* [1982] 4 EHRR 293 [26–30].

<sup>97</sup> *Ibid.*

<sup>98</sup> Upendra Baxi, 'The Avatars of Indian Judicial Activism: Explorations in the Geographies of Injustice' in SK Verma and Kusum Kumar (eds), *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (Indian Law Institute) 164.

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succeed in achieving their demands. Detainee strike action in Yarl's Wood may be important to help them reclaim their humanity and independence.

### The Sunken Place and Detention Centres

Indefinite detention can be compared to the Sunken Place. The Sunken Place is a plane of existence where a person's mind is separated from their body resulting in them only being able to see the world but not interact with it. On Twitter, Peele elaborated on the concept by stating that '[t]he Sunken Place means we're marginalized. No matter how hard we scream, the system silences us'.<sup>99</sup>

While Peele's comment, like his film, are more of a commentary on race relations in the United States, it can similarly be applied to those asylum seekers being held in detention centres. They are separated from society, labelled as an 'outsider group',<sup>100</sup> and have no knowledge or control over their detention or removal. They remain in an indefinite state of powerlessness and uncertainty. One detainee articulated the frustration that arises from such a state as, '[i]nside the detention centre you don't feel you have any rights. They keep telling us we need to go back to our country'.<sup>101</sup> Another detainee described detention as, '[t]hat's who you are. You're just in limbo... .' You're just in limbo now and you don't know what's going to come from day to day'.<sup>102</sup>

Although some in the social science field argue that the act of detention serves as a tool of exclusion and alienation,<sup>103</sup> it could be contended that the Home Office's policy goes beyond such segregation. The Home Office's threat of accelerated removal serves as an attempt to deprive detainees of their power to act, ensuring that they remain ostracised and silent. Evidently the Home Office has tried to ensure that detainees remain in the Sunken Place. However, just like the protagonist in Peele's film, the detainees can also escape the Sunken Place by using continued resistance. Options include using meaningful speech and

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<sup>99</sup> Ross Lincoln, 'Get Out' Director Jordan Peele Explains "The Sunken Place" (*The Wrap*, 16 March 2017) <<https://www.thewrap.com/get-out-director-jordan-peele-explains-the-sunken-place/>> accessed 10 April 2018.

<sup>100</sup> Patricia Tuitt, *Race, Law, Resistance* (1st edn, GlassHouse Press 2004) 2.

<sup>101</sup> Detained Voices, 'November 18 2017 – Inside the Detention Centre You Don't Feel You Have any Rights' (*Detained Voices*, November 18 2017), <<https://detainedvoices.com/2017/11/18/inside-the-detention-centre-you-dont-feel-you-have-any-rights/>> accessed 8 April 2018.

<sup>102</sup> Amnesty International (n 18).

<sup>103</sup> Giuseppe Campesi, 'Hindering the Deportation Machine: An Ethnography of Power and Resistance in Immigration Detention' (2015) 17 (4) *Punishment & Society* 428–453.



action so that those in detention can re-experience and restore their autonomy, and their humanity.<sup>104</sup>

### **An ‘Arendt-Based Framework’**

Arendt suggests that totalitarianism tries to abolish people’s humanity before taking away their rights and destroying their lives.<sup>105</sup> As alluded above, once detainees enter detention they feel like they do not have any rights. This feeling of rightlessness seems reminiscent of Arendt’s concept of the need ‘to have the right to have rights’. Arendt conceives of two types of rights: civic rights like those found in human rights instruments and the ‘right to have rights’.<sup>106</sup> The latter, she describes as a right to ‘a place in the world which makes opinions significant and actions effective’.<sup>107</sup> Arendt states in the context of the decline of the nation-state and the end of human rights, that ‘man, it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity. Only the loss of a polity itself expels him from humanity’.<sup>108</sup>

Thus, when a person is excluded from the right of engaging in the world they are deprived of their own humanity. The Home Office’s letter threatening accelerated removal for participation in a hunger strike has the potential of making the detainees absolutely ‘rightless’. The Home Office’s policy attempts to deprive of detainees of their voices and therefore their place in the polis and excludes them from even being able to fight for freedom. Had the detainees’ protests and the strikes ended immediately, they would have been dispossessed of their humanity, as Arendt suggests ‘a life without speech and without action ... has ceased to be a human life because it is no longer lived among men’.<sup>109</sup>

One detainee’s account captures such a state of powerlessness and disenfranchisement:

Even if we can approach people in here, no one will do anything because they are part of the home office... . Please take action to talk to the home office.

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<sup>104</sup> Lucy Fiske, ‘Human Rights and Refugee Protest against Immigration Detention: Refugees’ Struggles for Recognition as Human’ (2016) 32(1) *Refuge: Canada’s Journal On Refugees* 18–27.

<sup>105</sup> Serena Parekh, ‘A Meaningful Place in the World: Hannah Arendt on the Nature of Human Rights’ (2004) 3(1) *Journal of Human Rights* 41–53.

<sup>106</sup> Fiske (n 105) 20.

<sup>107</sup> Hannah Arendt, *The Origins of Totalitarianism* (2nd ed, Harcourt, Brace 1973), 296.

<sup>108</sup> *Ibid.*, 297.

<sup>109</sup> Hannah Arendt, *The Human Condition* (2nd ed, University of Chicago Press 1958) 176.

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Our voices aren't heard because we are in here... Help us out there, to get our voices out. It's important that people can hear our anger.<sup>110</sup>

The references to 'in here' and 'out there' seem to substantiate the idea that a life of detention is the life of being a mere object in the world. It is an existence where one is free to call out 'hear me', but without an answer. Such speech remains ineffective and leaves the detainee with no way to effectively engage in and with the world.

However, the Home Office's letter and continued indefinite detention has not prevented the detainee's from revealing their humanity.<sup>111</sup> Their continued resistance has inserted them into the world.<sup>112</sup> Through strike action they demand to be judged for who they are and not what they are. As to be treated only as an 'asylum seeker' results in only ever being considered as an 'approximation of their humanity', and not as a distinct individual.<sup>113</sup> Arendt proposes that the basic conditions of effective speech and action require what appear to be two contradictory notions, equal treatment and distinction.<sup>114</sup> On the one hand, Arendt suggests that equal treatment is necessary in order for humans to be able to plan and understand each other.<sup>115</sup> On the other hand, distinction appears to be necessary condition as without it neither speech nor action would be required to communicate as all humans would be the same.<sup>116</sup> It is through the detainees' own action and view of humanity that they hold onto their autonomy and thus convince the public of their distinctness and demand to be treated as equally and not as a mere object in the world.

### The Desire to Stay Human

Through protest and hunger strikes those in detention ascend their ordinary status. Accepting that action is the political activity *par excellence*,<sup>117</sup> when combined with the 'Detained Voices' blog, it gives detainees an effective voice and impact in the world. Fiske suggests that asylum seekers are often portrayed as either villains or victims, but not as cognisant agents in mainstream discourse.<sup>118</sup> Yet migrant

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<sup>110</sup> Detained Voices, '22 Feb 2018 – The Protest Is about Their System of Indefinite Detention' (n 6).

<sup>111</sup> Arendt (n 110) 176.

<sup>112</sup> Ibid.

<sup>113</sup> Fiske (n 105) 20.

<sup>114</sup> Arendt (n 110), 175.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid., 9.

<sup>118</sup> Fiske (n 105) 19.

detainees can challenge this narrative. Through speech and action the migrant in detention articulates their claims as universal. The UK migrant desires to be recognised as human, and that longing is not contained to those detained in Yarl's Wood<sup>119</sup> but is an international experience that stretches from Italy,<sup>120</sup> to Australia,<sup>121</sup> to Israel.<sup>122</sup> It is based on a claim of universal humanity. Detainees try to appeal, to not only the government, but to the citizens of the state as well.<sup>123</sup> An example is one Yarl's Wood detainee who expressed their gratitude to protestors who visited the Centre in a message entitled 'to the wonderful people of planet earth'.<sup>124</sup> It is not only clear that detainees recognise that, as Reynold's claims, humanity is not something that can be juridically taken away,<sup>125</sup> but also that there is a power in invoking rights associated with humanity as a mode of resistance.<sup>126</sup> By pulling on the emancipatory force of progressive political rights language, asylum seekers who are excluded from society reject their abjection.<sup>127</sup> Detainees draw from the very same liberal norms upon which the community they wish to join is based, and challenge their segregation as hypocritical. Or as one detainee phrases it:

We do have hope that people are starting to wake up to what is really happening in this country that likes to present itself to the rest of the world as a leader in human rights and civil liberties.<sup>128</sup>

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<sup>119</sup> Detained Voices, 'March 1 – We Are on a Hunger Strike Because We Are Suffering Unfair Imprisonment and Racist Abuse in This Archaic Institution in Britain' (*Detained Voices*, March 1 2018). <<https://detainedvoices.com/2018/03/01/we-are-on-a-hunger-strike-because-we-are-suffering-unfair-imprisonment-and-racist-abuse-in-this-archaic-institution-in-britain/>> accessed 8 April 2018.

<sup>120</sup> Campesi (n 104).

<sup>121</sup> Fiske (n 105).

<sup>122</sup> Al Jazeera News, 'Deportation or Prison: Israel's African Asylum s Seekers' (*Aljazeera*, 3 March 2018) <<https://www.aljazeera.com/programmes/talktojazeera/inthefield/2018/03/deportation-prison-israel-african-asylum-seekers-180302143018483.html>> accessed 10 April 2018.

<sup>123</sup> Fiske (n 105) 19.

<sup>124</sup> Detained Voices, 'To Wonderful People on Planet Earth!' (*Detained Voices*, 24 March 2018) <<https://detainedvoices.com/2018/03/24/to-wonderful-people-on-planet-earth/>> accessed 8 April 2018.

<sup>125</sup> John Reynolds, *Empire, Emergency and International Law* (1st edn, Cambridge University Press 2017) 54.

<sup>126</sup> *Ibid.*, 273.

<sup>127</sup> *Ibid.*

<sup>128</sup> Detained Voices, '21 March 2018 – Today Marks the 28th Day' (n 96).

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It is through exposing liberal hypocrisy and political action that those in detention ensure their humanity even when others are not willing to act. By guaranteeing that their voices are heard, even at the risk of the destruction of their own bodies, detainees guarantee their place in the world and forcibly escape the Sunken Place.

### CONCLUSION

Resistance to indefinite detention is composed of many routes. Although challenges based on Article 5 are likely to fail, Article 3 disputes show real promise. However, the problem with an Article 3 challenge is that it is unlikely that detention *by itself* is enough to give rise to a finding of degrading or inhumane treatment. On the other hand, if the court considers the cumulative effect of detention without time limits on mental health, then it seems clear the policy may be challenged along lines of the risk of a breach to Article 3. Additionally, even if the courts do not find that Article 3 is breached by the mere fact or threat of indefinite detention, it seems the removal of such a practice benefits the United Kingdom. Moreover, it appears to be clear that without actual evidence of harm, a challenge to the threat of accelerated removal cannot be properly assessed until a test case is brought. However, from a theoretical perspective it can be established that opposition to detention within the detention centres plays an important role in giving detainees a sense of autonomy; especially in a centre like Yarl's Wood which holds the most vulnerable detainees. It is clear that indefinite detention can be brought to an end by increasing the use of detention alternatives. Alternatives such as the Detention Action Community project could address the major issues explored within this article. The increased use of alternatives that screen and place migrants within the community accompanied by the appropriate support may be useful to both prevent exposure to unnecessary mental stress and encourage respect for migrants' autonomy and humanity. The adoption of alternatives to detention may also address the problems associated with indefinite detention as issues of permission to stay and removal may be conducted without exposing potential asylum seekers to the state of limbo associated with IRC detention centres. As pressure for immigration reform, both within and outside the IRC centres, begins to amass, it is apparent that the system needs to change in order to ensure that human lives and rights are respected.