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Al Hashmi, R. ORCID: <https://orcid.org/0000-0002-5499-9206>
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Lotteries and Immigration

RUFAIDA AL HASHMI 

ABSTRACT *States sometimes select immigrants by lottery. In this article, I argue that lottery-based programs that select immigrants are not ideal for neither an unbiased decision-making process, fairness, nor diversity. I consider each argument in turn. First, I examine the argument that lotteries should be implemented because they 'sanitise' the immigration selection procedure of bad reasons and biases. Second, I consider the fairness-based justification of lotteries, which claims that lotteries are a fair way of selecting would-be immigrants because it gives them all an equal chance to enter. Third, I consider the argument that an immigration lottery should be adopted as a way of increasing diversity in the immigrant population. I show that none of these arguments succeeds in its own terms. However, I argue that lotteries that are part of a wider immigration regime can sometimes be justified as a second-best policy device. I illustrate my argument by focusing on the case of the Green Card Lottery.*

1. Introduction

States sometimes select immigrants by lottery. For example, the United States selects immigrants by lottery for the H-1B visa for skilled workers. In 2019, more than 200,000 people applied for the H-1B visa, and only 85,000 were accepted via the lottery. The United States also runs the Diversity Visa Program, otherwise known as the Green Card Lottery, which allocates 50,000 green cards by lottery. Each year, over 20 million people apply for the lottery. Canada, too, has used a lottery to allocate 10,000 family reunification places to Canadians wishing to bring in parents or grandparents. New Zealand also has a migration scheme called the Pacific Access Category, which grants residency each year via lottery to migrants from Fiji, Kiribati, Tonga, and Tuvalu. Are states justified in selecting immigrants by lottery? Lotteries have, after all, long been used as a policy device for taking decisions that – like immigrant selection – have life-changing consequences. They have been used to fill law-court juries, place children in school, draft men into armies, and so forth.

This question has largely been ignored by philosophers in the normative literature on migration.¹ I address it here within three parameters. First, I will assume for the sake of argument that a state has a legal right to exclude. My exploration of the ethics of lottery-based programs that select immigrants would still be of interest to proponents of open borders as it is relevant to them how a right to exclude is not just in theory but also in practice morally objectionable. Second, I consider only the case of voluntary rather than forced or family-reunification immigration. The latter categories are importantly different from the former because even proponents of closed borders think immigrants in the latter categories have a human-rights-based claim to immigrate, which complicates the issue of lotteries. Third, I consider both permanent and temporary migrants and set aside the

question of whether a lottery might raise different issues for each of the two categories. Lotteries have in fact been used to admit both temporary and permanent migrants.

In this article, I will argue that lottery-based programs that select immigrants are not ideal for neither an unbiased decision-making process, fairness, nor diversity. I draw on three justifications that have been used to defend lotteries in general, which I then apply to the specific case of immigration. These are arguments that I take to be among the strongest for lottery-based programs that select immigrants. In Section 1, I examine the argument that lotteries should be implemented because they ‘sanitise’ the immigration selection procedure of bad reasons and biases. In Section 2, I consider the fairness-based justification of lotteries, which claims that lotteries are a fair way of selecting would-be immigrants because it gives them all an equal chance to enter. In Section 3, I consider the argument that an immigration lottery should be adopted as a way of increasing diversity in the immigrant population. I show that none of these arguments succeeds in its own terms. However, in Section 4, I suggest that lotteries that are part of a wider immigration regime can sometimes be justified as a second-best policy device. I illustrate my argument by focusing on the case of the Green Card Lottery. It will generally be easier to defend existing lotteries on this basis than to argue for introducing new ones.

Lotteries can be set up in different ways. They can be open to everyone or restricted to those who fulfil prior conditions; they can also be weighted or unweighted. For ease of discussion, my analysis of immigration lotteries will focus on open, unweighted lotteries that can be entered on multiple occasions. But I will occasionally discuss lotteries with qualifying conditions for entry, since real-world immigration lotteries often take this form.

2. Section 1: The Sanitising Justification of Lotteries

In this section, I will consider the argument that states should implement a lottery to select immigrants in order to sanitise the decision-making process of bad reasons that may lead selectors to favour a particular person or group or unconscious biases that have a similar effect. Here I follow Peter Stone’s justification of lotteries.² On his account, we should use lotteries only when we are liable to be influenced by bad reasons or by unconscious biases, while there are no good reasons for selecting between people. To clarify, we can distinguish the two claims here. First, lotteries obviously stop us from consciously using any reasons to select a particular person or group and prevent us from being influenced by unconscious bias. Thus, lotteries are morally attractive, according to Stone, when there are bad reasons to favour a particular person or group – ‘the kinds of reasons that people would (or at least should) be actively ashamed to allow into their decisions’³ – or unconscious bias that we have reason to think might in fact distort the decision-making process. The second part of Stone’s account is that if there are good reasons for selecting between people then it does not make sense to use a lottery. We should obviously just choose the person using the good reason we have rather than use a lottery, which excludes all reasons from the decision-making process.

To illustrate Stone’s view, suppose that a mother is trying to choose which one of her children should receive a family heirloom. Each child wants the heirloom, but none of them wants it more than the others do. Further suppose that the mother knows that she has a tendency to prefer her sons over her daughters because of a bias that she finds it hard to control. In this case, Stone’s account tells us that the mother should use a lottery to

allocate the family heirloom because there are clearly no good reasons to appeal to – we assumed none of them wants it more than the other – and there is unconscious bias that the mother might be influenced by.

Returning to the immigration context, the question is now whether we think there are bad reasons a state may use to favour certain immigrants, or unconscious biases it might be influenced by, *and* no good reasons for selecting between would-be immigrants. If that is true, then it follows from Stone's account that we should use a lottery to select immigrants. There is strong support for the claim that immigration-selection procedures tend to be influenced by unconscious biases against certain immigrant groups. Fatma Marouf highlights the ways in which this happens in the case of immigration judges and notes that 'studies using the [implicit bias Implicit Association Test] have replicated the existence of implicit attitudes towards many marginalised groups, including, but not limited to, racial and ethnic minorities, Muslims, women, and homosexuals. Since such marginalised groups routinely appear before immigration judges, especially in asylum cases, it is surprising that the role of implicit bias in immigration courts has not yet been scrutinised.'⁴ There is also strong support for the claim that immigration selection procedures tend to use bad reasons to select one immigrant over another. Not only do states sometimes use obviously bad reasons to select immigrants – such as the recent US Muslim Ban – but also ostensibly unproblematic selection policies such as skill-based selection policy have been accused of being discriminatory against, for example, women.⁵ Thus, if a state is concerned that its policymakers might use bad reasons to select one category of immigrants in preference to another, and/or that its border officials are liable to be influenced by unconscious biases against certain immigrants, then it would follow from Stone's account that such a state should use a lottery to select immigrants as a way of sanitising the selection procedure of these bad reasons and unconscious biases.

However, we must also consider Stone's second requirement for using a lottery, namely that there should be no *good* reasons for choosing particular candidates in preference to others. It seems that in the immigration case there are likely to be such reasons, whether on the side of the receiving state or on the side of the immigrants themselves. We can express this by saying that some immigrants will have stronger claims to enter than others. In that case, despite their desirable sanitising properties, the use of lotteries appears not to be justified.

Especially because I will also rely on this point in the later section, it is here worth pausing to examine what we mean by immigrants having claims to enter. Since we are assuming for the sake of argument that states have the right to exclude, having a *claim* to enter cannot mean having a *right* to enter.⁶ I propose that a person has a claim to some good when there is some morally relevant reason why she should have that good. This is something less than a right because often there will be several people with competing claims to the same good. In some cases, the good should be given to the person with the strongest claim, who will then have a right to it; in other cases, where the good is divisible, it should be divided up in proportion to the strength of different claims. Claims can be supported by reasons of different kinds, but note that merely *wanting* to have the good will not in normal circumstances be sufficient to generate a claim, whereas, for example, deserving it or needing it may well do.

Applying this to the case of would-be immigrants, although all by definition must want to enter, only some will have reasons to enter of the kind that can support claims, and these typically will vary in strength. It is not necessary for present purposes to specify what can

count as a relevant reason in this context, but by way of illustration, some will have claims based on the contribution that they can make to the economy of the receiving state, while others perhaps have claims based on the opportunity that entry will give them to acquire special skills that they can only acquire by studying in that country, and so forth. These claims do not translate directly into a right to enter because there may be more claimants than there are entry places that the state is willing to offer. So, Stone's justification of lotteries implies that the would-be immigrant with the strongest claim should be admitted – a lottery should therefore not be used – but *not* that any would-be immigrant with a claim to entry should be admitted.

Finally, I assume for the sake of argument that these claims do have sufficient force to undermine the case for using a lottery to select immigrants according to Stone's justification for lotteries.⁷ Recall that for Stone, a lottery is justifiable as a selection device only when (a) using it will sanitise the system against bad reasons and unconscious biases, and (b) there are no good reasons for selecting some rather than others. Where immigrants have claims to enter of varying strengths, the second condition will not, in general, be met. This still leaves open the possibility that a lottery is the preferred way of selecting for entry within groups all of whose members have equally strong claims. We might think of the following two examples as realistic instances in which the group of would-be immigrants all have an equal claim to enter a particular society. The first example is a group of would-be immigrants who have all been accepted to study for undergraduate degrees at various universities and are now applying for student visas to take up their offers. We might think that all have an equal claim to entry because they all need the undergraduate degree from the receiving state in order to pursue their choice of careers. The second example is a group of would-be immigrants all applying for a work visa. We might think that this is also a case in which all have an equal claim to enter because all equally need the job in the receiving state, again to pursue their choice of careers.

However, even if lotteries are justifiable when there are equal claims, claims to entry are rarely, if ever, equal. Consider the group of would-be immigrants all applying for a study visa for their undergraduate degrees. Even within such a group, some arguably have a stronger claim to entry than others. For example, does a student come from a state where there are few educational opportunities? Or is the degree they hope to study for only available in the state they are trying to enter? Or does the student have reduced opportunities to travel to other states for her education? Consider also the case of a group of would-be immigrants all applying for a work visa. Here, also, some arguably have a stronger claim to entry than others. For example, has someone lived or studied in the receiving state before applying for the work visa and so has an established life there? Does a would-be immigrant have no options other than this job to pursue their career ambitions? So, even within well-defined subgroups of immigrants, it seems likely that there will often if not always be some who have stronger claims to enter than others. And this defeats the sanitising argument for lotteries in the form presented by Stone, which requires that there are no such unequal claims.

3. Section 2: The Fairness Justification of Lotteries

I will now examine the fairness-based argument for implementing a lottery. This is an intuitive and common rationale for lottery-based programmes for selecting immigrants.

For instance, Brian Donnelly, the congressman who sponsored the first Green Card Lottery, explained that the programme was ‘just a matter of fairness. No one area of the world should have access to the American dream at the expense of others ... A lottery would be the fairest way, no favouritism. We literally couldn’t think of a fairer way to do it.’⁸ Should lotteries be implemented because they are a fair way of selecting immigrants?

What exactly do we mean when we say a lottery is a *fair* way of selecting immigrants? We generally have the intuition that it is fair because it gives all immigrants an equal *chance* to be selected. I will here distinguish between the weak fairness view and the strong fairness view and consider each in turn.⁹ The weak view claims that we have this intuition only when claims to enter are equal. To motivate this view, notice that we do not think we should use a lottery to, say, allocate a pill to one person in a group if only one of them will die without it. But we do think that we should use a lottery to allocate the pill if everyone in the group will die without it. Thus, the weak view states that it is fair to select immigrants by lottery only when claims to the good – in our case, the claim to enter – are equal. The problem with this, as mentioned above, is that claims to entry are rarely equal. Recall, even in the case of a group of students applying for a study visa, some have a greater claim to entry than others. For example, some might not be able to study their subject of choice except in the receiving state. The weak view is therefore not very persuasive in our case because there will often if not always be no realistic case of a group of immigrants with equal claims on all relevant dimensions.

Now, consider the strong view that holds that *even* when some have a stronger claim, a lottery is still a fair way to select immigrants because it gives each an equal chance. While in the previous case we considered a lottery that selects only among those with equal claims to the good, now we are considering a lottery that selects even among those with varying claims to the good. There are two ways of fleshing out the strong fairness view. First, we might think that a lottery offers ‘surrogate satisfaction’ for those who do not win. A prominent statement of this comes from John Broome. In cases such as the immigration one where some have a stronger claim to an indivisible good, Broome suggests the following:

A lottery at equal odds may be fairer than giving the good directly to the candidates with the strongest claims. This depends on a complicated judgment. The result of the lottery will generally be that the good goes to the candidates who do not have the strongest claims. This is less fair than the result of giving it directly to those who do. The likelihood of this less fair result will have to be weighed against the contribution to fairness of the lottery itself.¹⁰

What is the ‘contribution to fairness of the lottery itself’? Broome takes this to be the surrogate satisfaction offered by a lottery. He writes, ‘a lottery provides at least a surrogate satisfaction: a chance’.¹¹ The satisfaction here, according to Broome, is that ‘if you have a chance of getting the good you may actually get it.’¹² However, his version of the strong view does not justify selecting immigrants by lottery. His account, as we have seen, tells us that we should use a lottery only when the unfairness of not giving the strongest claimants a right to the good in question is outweighed by the fairness of providing this surrogate satisfaction to all. In the immigration context, it is hard to see how the unfairness of giving the right to entry to people other than the strongest claimants can be outweighed by the fairness of this surrogate satisfaction. For example, in the study-visa case, it would mean that the unfairness of giving a right to entry to a student who has plenty of resources and

opportunities to study elsewhere over a student who has no opportunities to study elsewhere, e.g. because of a travel ban, is somehow outweighed by the fairness of giving equal chances to both applicants. Or in the work-visa case, it would mean that the unfairness of giving a work visa to a person who never lived in the receiving state before over someone who has lived there for a long period and has an established life there is somehow outweighed by the fairness of giving an equal chance to both applicants. This seems to be an implausible claim.

However, one might argue that I do not seriously consider how the fairness of the surrogate satisfaction of giving each one an equal chance could outweigh the unfairness of giving the good to anyone other than the strongest claimants. I want to show that this is generally only plausible in cases where not giving the good to the strongest claimants is not very high stakes. To illustrate, compare the two following examples. First, suppose we again have the mother trying to choose who among her children to give the family heirloom to. Now suppose that all of them have a strong claim to the heirloom – some want it as a decorative piece for their homes and others want it in memory of their grandmother – but the daughter has the strongest claim because she grew up playing with the heirloom and so has the strongest emotional connection to it. In this case, it seems at least plausible that the unfairness of giving it to someone other than the daughter could be outweighed by the fairness of giving all of them an equal chance. In the second case, suppose that the mother is trying to choose which of her children will receive a certain pill. We can assume that all have a strong claim to it, e.g. they all need it to cure the discomfort they are suffering from, but that the daughter has the strongest claim because she will suffer discomfort *and* will be left paralysed without the pill. In this case, we do not think that the unfairness of giving it to someone other than the daughter could be outweighed by the fairness of giving an equal chance to all. The reason for this is that, unlike the case of the family heirloom, not giving the daughter the good in the second example is high stakes because it will leave her paralysed. The immigration case is similar to the second one because not giving the right to entry to the strongest claimants is typically very high stakes. It can mean losing out on the only education opportunity the migrant has, missing out on the job that the migrant needs for their career ambitions, and so on. The migrant case is much closer to the pill example than to the heirloom example. Thus, the immigration case does not seem to be of the kind in which the unfairness of giving the good to anyone other than the strongest claimant is outweighed by the surrogate satisfaction of giving an equal chance to all.

However, here one might point to two disanalogies. The first is that only one child suffers the serious cost in the pill case, but more migrants than a state will plausibly admit will suffer a serious cost if a state excludes them. But this does not seem to change the conclusion. Let us instead suppose that in the pill example the others do suffer a serious and permanent discomfort that makes many everyday activities difficult, and that the daughter will in addition to this be left paralysed without the pill. It seems that again because not giving the strongest claimant, the daughter, the pill is very high stakes, the fairness of the surrogate satisfaction of giving equal chances to all intuitively does *not* outweigh the unfairness of not giving her the pill. Second, one might point to the following version of the pill example: the parent has two pills, and one child will be paralysed without the pill, whereas the others will all experience identical but less weighty symptoms. The parent, we might think, is surely not wrong to use a lottery to allocate the second pill after giving the first to the endangered child. Similarly, we might have one group of migrants living in poverty in their country of origin and another group of affluent students seeking to pursue

tertiary education in a high-income country. Could we here not also use a lottery on the grounds of fairness within these categories?¹³ However, while we can imagine that one group of people could have identical symptoms without the pill, my point is that in the immigration case there will be people with stronger claims to immigrate, something that is very high stakes, *even* within such categories. This is why, as I argued, the Broome-type fairness argument does not apply.

There is, however, another way of supporting the strong fairness view. In this version of the argument, we should use a lottery, even if some have a stronger claim to the good than others, because it is a way of respecting people and their claims. That is, we should ignore that certain people have stronger claims to enter by using a lottery to select immigrants. But why should treating people with respect mean ignoring relevant differences? One potential explanation for this invokes Ian Carter's notion of opacity respect.¹⁴ In this view, 'we take the subject as given and ask no questions about his or her capacity to pursue the good or to understand the nature of the moral or aesthetic good life or to understand his or her place in the world.'¹⁵ To illustrate this in the case of immigration, suppose we have the case of Sara, who is applying for a visa to study a subject she cannot study elsewhere, and Ali, who is applying for a visa to study a subject he can study in many other states. A lottery would be fair, in this line of thought, because it would be disrespectful for a state to say to Ali that Sara will be chosen over him because of the subject he chose to study. The state would be evaluating the immigrant's life plans, something that is none of its business. Thus, in the second version of the strong view, a state should use a lottery because it shows respect for the would-be immigrants' claim to enter by refraining from evaluating their life plans.

However, this example misunderstands what counts as a violation of opacity respect. It is violated when one is assessing the capabilities of the migrants and not merely their life plans. For example, in the domestic case, it would be disrespectful for a state, in this view, to make a right to vote conditional on passing a public exam that includes an intelligence test. This is because the state would be evaluating its citizens' intellectual capacities. By contrast, we do not think it is disrespectful, in this view, for a state to give a student loan to someone with a plan to pursue a university education and not to give an equivalent loan to someone without that life plan. This is because, in this case, the state is not evaluating their capacities. It *would* be disrespectful if the state does not give student loans to certain people on the grounds that their intellectual or reasoning capabilities are inadequate. Thus, opacity respect tells us that it is the assessment not of life plans but of capabilities that is disrespectful. In the example above of Ali and Sara, the state is not evaluating their intellectual capabilities by, for example, assessing their test scores to determine who is more worthy of a right to enter. They are simply taking Sara and Ali as givens, one with a plan to study a subject not available anywhere else and one with a plan to study a subject available elsewhere. Thus, neither of the two versions of the strong fairness view nor the weak fairness view justifies implementing a lottery to select immigrants.

4. Section 3: A Diversity-Based Justification of Lotteries

In this section, I will consider the argument that states should implement a lottery to select immigrants because it brings about diversity in the immigrant population. More generally, diversity is often the motivation for implementing lotteries for other policy areas. For

example, an intuitive and prominent argument for implementing a lottery to select political officials is that it would represent the diversity of a multicultural society and incorporate a wide range of viewpoints. A similar diversity-based justification also underpins the Green Card Lottery.¹⁶ For example, some argue that ‘the diversity visa program presents an opportunity to reduce some of the effects of the past exclusion of Africans and to increase their representation in the U.S. immigration population.’¹⁷ Should we implement a lottery because it promises to increase diversity in the immigrant population?¹⁸

The problem with this diversity-based argument for selecting immigrants by lottery is that there are other more direct ways of achieving a diverse immigrant population than lotteries. For example, immigration officers can instead admit more immigrants who belong to nationalities that are underrepresented in the state’s immigrant population. In this way, a state can directly achieve diversity in its immigrant population rather than attempt to achieve diversity indirectly by using a lottery. However, I might be accused of putting this unfairly. That is, one might argue that an indirect way should be used *because* there’s something objectionable about using the direct way. And there may be many reasons why the direct way is objectionable. To illustrate, consider how a company wanting to employ a more diverse workforce will typically behave. The direct way to achieve this goal is obviously just to hire people that belong to minority groups. But in practice the company is much more likely to opt for more indirect methods such as running outreach activities and events to encourage more applicants from minority groups to apply. With a more varied pool of applicants, the company can then hire on the basis of merit while still achieving its diversity goal. There are many reasons why a company would adopt this indirect method of diversifying its new hires. One powerful argument is that people might have low self-esteem if they suspect they were accepted only because of affirmative action.¹⁹ There is strong empirical support for this worry.²⁰ For example, one study finds that women managers who believed that they were promoted to their position mainly because they are women, felt dissatisfied with work and had less commitment to the organisation.²¹

One might wonder if the same problem will arise in the immigration case. However, it seems clear that, in most cases, admitting immigrants of underrepresented nationalities will not result in low self-esteem among the beneficiaries. This is because, unlike the university or company case, people are not always admitted on the basis of merit in most immigration-selection procedures in the first place. People are admitted for all sorts of reasons that do not have to do with merit, such as family ties, medical purposes, and so on. So, if some are admitted on the basis of their nationality, there is no obvious reason they will feel low self-esteem because other immigrants are also admitted on grounds other than merit. By contrast, beneficiaries of affirmative action in the company or university case may feel low self-esteem at least partly because everyone around them at university or the company is accepted on the basis of merit.²²

However, one might think that this self-esteem issue nonetheless poses a problem in cases of immigration policy where people *are* admitted on the basis of merit. We might think we can find such cases in skill-selective immigration policy. To illustrate, suppose a state awards 100,000 work visas each year. Further suppose that they normally pick the best 100,000 people to receive these visas. Now suppose the state decides to reserve a quota of 20,000 to award to the top applicants who belong to underrepresented nationalities. The remaining 80,000 spots will be awarded to people regardless of their nationality. The question is now whether the immigrants selected via the quota will feel

low self-esteem in a similar way to, say, a minority university student who suspects they were admitted because of affirmative action. The answer is that they probably will not, and this is because there are often two separate admission processes in the immigration context: the company hiring decision and the immigration decision. In general, a company will hire someone and then that person will apply for a visa. Assuming that the company hiring process was merit based, we do not have reason to think that someone will have low self-esteem if they suspect they were given a visa only because of their nationality. This is because they were assessed and hired on the same basis as everyone else in the company. That is, even if they do strongly suspect that they got the *visa* because of their nationality, they would still know that they are as good as everyone else who was hired by their company. And that is what ultimately matters because it is their colleagues to whom the immigrants will be compared.

What if we know that in practice, companies will begin to offer jobs in part based on diversity considerations? Companies might be more likely to do so given that they desire that their employees receive a visa, and they know that ‘diverse’ candidates are more likely to succeed. If so, it seems that the self-esteem worries will reappear since diversity considerations will have been used in both of two stages. However, even if employers are incentivised to sponsor minority candidates, there is no reason to assume that this will become apparent to the successful candidate. In fact, we would think that they have every reason to conceal this because otherwise the state selectors for visas would likely demote their candidates. Therefore, the reasons that discourage us from directly selecting people who belong to minority groups in the small group cases, such as a university or a company, do not apply in the immigration context. Thus, the diversity-based justification of selecting immigrants by lottery is not successful because states can directly achieve greater diversity rather than use an indirect method such as a lottery.

5. Section 4: A Second-Best Policy Solution

So far, we have seen that a lottery would not be the best policy for fairness, diversity, or a sound decision-making process. However, in this section, I will suggest that these principles can still support lotteries, when they are part of a wider immigration regime, as a second-best policy device.²³ To be clear, we can here distinguish between two views on discretionary admission: one that claims that certain policies can be *unjust* – for example, if they exclude on the basis of reasons that the excluded cannot accept – and another that claims that the rights of a state to set their own admissions policy is robust, with no, or almost no, admissions policies being *unjust*.²⁴ On the latter view, the question is not ‘which policy must they use or not use’ but ‘which policy, from among those available to them, would be morally optimal?’ I will show that *even* on the latter view, lotteries can be justified as a second-best policy in the sense that they are both less morally optimal than the ideal policy, as we have seen in previous sections, but more optimal than other likely policies. I do this to show that even those that believe that states have strong rights to set their own admission policy will still be onboard with my argument. I will explore how lotteries can be morally optimal in terms of the three principles I considered. I believe arguments for lotteries as a second-best policy device will be strongest when they are framed in terms of these three principles because I took these principles to be the among the strongest potential arguments for lottery-based programs that select immigrants.

To illustrate, I will focus on the Green Card Lottery, which selects applicants from countries with low rates of migration to the United States and awards only 5% of the overall number of green cards the US issues every year. After examining the fairness argument, I concluded there that it is unclear why selecting immigrants by lottery is a fair selection procedure. Now consider the ways in which US immigration policy unfairly prioritises the exceptionally talented and the very wealthy in programs such as the EB-5 program which offers permanent residency in return for a \$1 million investment.²⁵ While it is true that the Green Card Lottery has some prerequisites – for example, migrants have to come from countries with low rates of migration to the United States – its selection process, by contrast, does not prioritise the very wealthy or exceptionally talented neither in who can apply nor in who is selected. The Green Card Lottery then can be said to offset some of this unfairness present in the rest of immigration policy.²⁶ As one put it, '[the green card lottery] is the only instance where an average Joe, housewife or a mechanic, just an ordinary person – not a PhD holder, not a Harvard professor, not an engineer – could apply. And that continues to be the beauty of it.'²⁷

With respect to the sanitising argument for lotteries, I concluded that states are not justified in selecting immigrants by lottery because while bad reasons and unconscious bias might influence the selection procedure, there are good reasons for favouring particular immigrants, which is that some can be said to have stronger claims to entry. However, note that even when there are differences in the strengths of the claims made by would-be migrants, these differences could be opaque for at least two reasons. The first is that it is unclear that officials can straightforwardly determine which of several claims is strongest. Officials might not be well trained to make such moral calculations, and cases are often muddier than our thought experiments, with multiple competing types of claims of varying strengths. Second, even if they were able to make such distinctions, it will likely lead to invasive screening procedures. In other words, it is not clear that immigration officials can or should try to make such fine-grained distinctions between applicants. So, we have reason to think that the sanitising effect of lotteries is still important given that the alternatives that the sanitising account puts forward will in reality likely come with significant drawbacks.

Finally, on the diversity-based argument for lotteries, we can grant my claim that diversity can be achieved by directly selecting immigrants of underrepresented nationalities. However, there is resistance to selecting people purely on the basis that they belong to minority groups, and selecting would-be immigrants from underrepresented nationalities might raise similar concerns.²⁸ So, the Green Card Lottery might not be an ideal way to achieve diversity, but it is nevertheless more socially acceptable than other methods of achieving that goal. The common thread running through these three arguments is that the Green Card Lottery can be justified as a second-best policy device because it is morally optimal to have such lottery, according to the three principles I explored, than to not have one.

What does this tell us about *other* lottery-based programs that select immigrants? Since it is another lottery-based program in the United States, the H-1B visa lottery system, which allocates by lottery tens of thousands of work visas to the United States every year, could also be justified for similar reasons. But I also mentioned that there are lottery-based programs that select immigrants in Canada and New Zealand. Many of the problems that I have argued the Green Card Lottery can help to offset have also been noted to arise in other countries' immigration policy. For example, it has been argued that several

countries including Canada and New Zealand unfairly prioritise very wealthy would-be immigrants through policies such as immigrant investor programs.²⁹ This might give us reason to think that, for example, New Zealand's lottery-based program for allocating residence permits to people from Fiji, Kiribati, Tuvalu, and Tonga could also be a second-best policy on a similar line of reasoning. However, a closer inspection of these policies is beyond the scope of this article.

I have here illustrated the second-best argument using an example of an existing lottery-based program, but one might wonder if this argument would only justify keeping lotteries that already exist, as opposed to introducing lotteries where none currently exist. Is there a risk that by introducing new lotteries the public will be blinded, so to speak, to other problems in immigration policy, as lotteries will be viewed as exhaustive of immigration reform? However, this merely suggests that the bar for justification is very high in implementing a lottery where one does not already exist. This is because it is not clear that implementing a lottery – or a second-best policy more generally – to deal with some problems would have the effect of blinding us to further problems. Suppose that we audition musicians behind a screen in order to eliminate bias on the grounds of physical appearance. It seems implausible for someone to object to this on the grounds that it would blind us to the more general problem of sexism in the music business. Similarly, just because we introduce a lottery to deal with certain undesirable features in the immigration regime, it does not mean that it will necessarily blind us to further problems. So although there may be concerns about the possible effects of introducing lotteries in countries that have not so far used them, those concerns are not decisive. Thus, a second-best argument can also justify implementing lotteries where none currently exist, but it will be harder to argue for this than to defend existing lotteries such as the Green Card Lottery.

6. Conclusion

Lotteries that are used in political decision-making often face much resistance, and lottery-based programs that select immigrants are no exception. As Jon Elster notes, 'people want to have reasons for what they do.'³⁰ In the political sphere, 'if one person receives a good and another does not, people want there to be reasons for that difference.'³¹ Lottery-based programs are often greeted with rhetoric of the same kind: how could such a life-changing decision as admitting someone to a new society be determined by a lottery? When Canada, for example, introduced a lottery-based program to select immigrants for family reunification, it was quickly branded as a 'cruel' and 'heartless' policy.³²

At the heart of the distrust of lotteries in general is what Elster calls 'hyperrationality' – to ignore the limits of reason. That is, we often think that we *must* rely on reasons in all selection procedures even when it is not helpful. For example, in the case of higher education policies, Stone argues that 'designers of admission processes go to great lengths to pretend that nobody gets admitted or denied without good reason' and that this 'may involve expending massive resources for marginal-to-insignificant measurement gains.'³³ In one way our hyperrational reaction to lottery-based programs that select immigrants is apt, but in another way it is not. As we have seen, it is true that a lottery is not the best policy for achieving fairness, diversity, or a sound decision-making process. However, hyperrationality may prevent us from acknowledging cases in which lotteries that are part of a wider immigration regime can be justified as a second-best policy device: it can

sometimes be more morally optimal to have such lotteries than to not have them. I illustrated this by considering the case of the Green Card Lottery. The many lotteries used in the political sphere have long been ‘perceived largely as a curiosity,’³⁴ but this view, as we have seen, is not *always* well-founded.

Rufaida Al Hashmi, University of Oxford, Nuffield College, University of Oxford, Oxford OX1 1NF, UK, Oxford, UK. rufaida.alhashmi@nuffield.ox.ac.uk

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NOTES

- 1 There are two exceptions to this. First, Michael Blake briefly considers this but focuses on randomisation that results from idiosyncratic desires. By contrast, I consider potential justifications for selecting immigrants by lottery more broadly. See Michael Blake, *Justice, Migration, and Mercy* (Oxford: Oxford University Press, 2020), pp. 124–127. Second, Ayevee Bhattacharya examines whether various defences of open borders could justify selecting immigrants by lottery. By contrast, I am interested in whether defences of lotteries in general could apply in the case of immigration. See Ayevee Bhattacharya, ‘Does justice require a migration lottery?’, *Global Justice: Theory Practice Rhetoric* 5 (2012): 4–15.
- 2 Peter Stone, *The Luck of the Draw: The Role of Lotteries in Decision Making* (Oxford: Oxford University Press, 2011). I follow philosophers such as Jon Elster in distinguishing between the argument for lotteries based on the sanitising effect and the argument for lotteries based on fairness. However, it is worth pointing out that Stone argues that the argument from fairness is essentially just a special case of the sanitising effect: Peter Stone, ‘Three argument for lotteries’, *Social Science Information* 49,2 (2010): 147–163.
- 3 Stone 2011 op. cit., p. 36.
- 4 Fatma Marouf, ‘Implicit bias and immigration courts’, *New England Law Review* 417 (2011): 417–448, at p. 427–428.
- 5 For example, see Desiree Lim, ‘Selecting immigrants by skill: A case of wrongful discrimination?’, *Social Theory and Practice* 43,2 (2017): 369–396.
- 6 For much more on the many differences between claims and rights, see Alan White, ‘Rights and claims’, *Law and Philosophy* 1,2 (1982): 315–336.
- 7 It is plausible to assume that states have duties of justice to select in certain ways, even if we assume they do not have duties to admit would-be immigrants. This is similar to how a company, for example, would be free to decide whether to hire employees or not, but if they decide to do so, they must select employees on defensible grounds.
- 8 Amber Jamieson, ‘A one in a million chance at a better life: Will the US green card lottery survive?’ (2 May 2017). Online at: <https://www.theguardian.com/us-news/2017/may/02/green-card-lottery-us-immigration-trump-agenda> 21 September 2021
- 9 I follow Jon Elster in making this distinction: Jon Elster, ‘Taming chance’ in *Solomonic Judgements: Studies in the Limitations of Rationality* (New York: Cambridge University Press, 1989), pp. 36–122, at p. 113.
- 10 John Broome, ‘Fairness’, *Proceeding of the Aristotelian Society* 91 (1990): 87–102, at pp. 98–99.
- 11 Broome op. cit., p. 100.

- 12 Broome op. cit., p. 98.
- 13 This is setting aside whether a state should have this two-part immigration policy.
- 14 Ian Carter, 'Respect and the basis of equality', *Ethics* 121,3 (2011): 538–571.
- 15 Carter op. cit., pp. 551–552.
- 16 Peter H. Schuck, *Diversity in America: Keeping Government at a Safe Distance* (Cambridge: Harvard University Press, 2003), pp. 75–133.
- 17 Ahdowah A. Newton, 'Injecting diversity into U.S. immigration policy: The diversity visa program and the missing discourse on its impact on African immigration to the United States', *Cornell International Law Journal* 38,3 (2005): 1049–1082, at p. 1051.
- 18 I here set aside the question of whether this would be a lottery for those with roughly equal claims to enter or a lottery for even those with varying claims to enter.
- 19 Thomas Nagel, 'A defense of affirmative action', *Philosophy and Public Policy Quarterly* 1,4 (1981): 6–9, at p. 7.
- 20 See Rupert Barnes Nacoste, 'Sources of stigma: Analysing the psychology of affirmative action', *Law & Policy* 12,2 (1990): 175–195.
- 21 Thomas Chacko, 'Women and equal employment opportunity: Some unintended effects', *Journal of Applied Psychology* 67,1 (1982): 119–123. See also Madeline Heilman, Michael Simon, & David Repper, 'Intentionally favored, unintentionally harmed? Impact of sex-based preferential selection on self-perceptions and self-evaluations', *Journal of Applied Psychology* 72,1 (1987): 62–68.
- 22 For example, there is evidence that shows that non-beneficiaries of affirmative action question the abilities of beneficiaries. See Madeline E. Heilman, Caryn J. Block, & Jonathan A. Lucas, 'Presumed incompetent? Stigmatization and affirmative action efforts', *Journal of Applied Psychology* 77,4 (1992): 536–544.
- 23 This touches on the problem of second best. See Robert E. Goodin, 'Political ideals and political practice', *British Journal of Political Science* 25,1 (1995): 37–56; Adam Swift, 'The value of philosophy in nonideal circumstances', *Social Theory and Practice* 34,3 (2008): 363–387.
- 24 For an example of the former approach, see Joseph Carens, 'Who should get in? The ethics of immigration admissions', *Ethics & International Affairs* 17,1 (2003): 95–110.
- 25 See Ayelet Shachar, 'Picking winners: Olympic citizenship and the global race for talent', *Immigration and Nationality Law Review* 32 (2011): 523–574.
- 26 David Miller briefly notes that this how the Green Card Lottery is often defended. See David Miller, 'Selecting refugees' in David Miller & Christine Straehle (eds) *The Political Philosophy of Refuge* (Cambridge: Cambridge University Press, 2020), pp. 97–113, at p. 101.
- 27 Online at: <https://www.theguardian.com/us-news/2017/may/02/green-card-lottery-us-immigration-trump-agenda>
- 28 It is important to note that this depends on the framing of the affirmative action program. See Donald Kinder & Lynn Sanders, 'Mimicking political debate with survey questions: The case of white opinion on affirmative action for blacks', *Social Cognition* 8,1 (1990): 73–103.
- 29 See Lea Ypi, 'Borders of class: Migration and citizenship in the capitalist state', *Ethics & International Affairs* 32,2 (2018): 141–152.
- 30 Elster op. cit., p. 116.
- 31 Peter Stone, 'Access to higher education by the luck of the draw', *Comparative Education Review* 57,3 (2013): 577–599.
- 32 Online at: <https://www.scmp.com/news/world/united-states-canada/article/2160581/canada-scraps-cruel-family-reunification-lottery>
- 33 Stone 2013 op. cit., p. 592.
- 34 Elster op. cit., p. 36.