

# Washington University Global Studies Law Review

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Volume 17 | Issue 3

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2018

## Higher Education is a Human Right

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### Recommended Citation

Heidi R. Gilchrist, *Higher Education is a Human Right*, 17 WASH. U. GLOBAL STUD. L. REV. 645 (2018), [https://openscholarship.wustl.edu/law\\_globalstudies/vol17/iss3/9](https://openscholarship.wustl.edu/law_globalstudies/vol17/iss3/9)

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# HIGHER EDUCATION IS A HUMAN RIGHT

HEIDI R. GILCHRIST\*

*Education is the most powerful weapon  
which you can use to change the world.  
--Nelson Mandela*

## ABSTRACT

*Higher education is a human right. In the United States, we have become complacent about the skyrocketing costs of higher education where yearly expenses at many highly selective universities well exceed the median income of United States workers. We need to change the dialogue about higher education so that it does not become a luxury only the wealthy can afford. This article examines the right to higher education under international law and argues that it is already an established right and not a luxury item. Additionally, not only is a higher education a human right, but it has an important national security value. Using the Syrian refugee crisis as an example, the world cannot risk a 'lost generation' of students who do not get the education they need to rebuild and lead their country and counter terrorist messages that breed in failed states. We need diversity in education and people with capacity from all backgrounds should be able to exercise their human right to education, at all levels.*

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## INTRODUCTION

Although the right to primary education enjoys broad recognition in human rights law, the human right to higher education is not as fully developed. However, the right to higher education is incredibly important and is an integral part of the right to education. Although the right to higher education may sound lofty or like a luxury at first glance, it is not. To deny someone with capacity access to higher education is to deny them their full dignity and potential as a human being. By understanding higher education as a human right, we can change the dialogue about higher education. No longer should highly selective colleges be considered only accessible to the wealthy but should be accessible to those with the capacity and ability. And everyone who has the capacity to succeed in college should be able to attend college. But that is not currently the case in the United States. Instead, in the United States, we have reached a point of crisis. Costs at many highly selective institutions are estimated to be between \$60,000 to almost \$70,000 per year<sup>2</sup> and yet the median household income in the United States in 2015 was only \$53,718.<sup>3</sup>

On a global level, recognizing the human right to education, and higher education, has counter-terrorism benefits. We need diverse, educated, innovative thinking to combat terrorism. And, in war-torn countries such as Syria we cannot risk a ‘lost generation’ who lack the necessary education to rebuild Syria or the ability to integrate into the host countries in which they are living. We do not want a fertile ground for more terrorist groups to grow in. But, at the most basic level, a human right to higher education is simply correct.

This article closes a gap in the literature by looking critically at the human right to higher education. Section I looks at the right to higher education under international law, law in the European Union and the United States. I examine cases in the United States regarding education, and cases that have been brought in the European Union looking specifically at the right to higher education. I argue that the right to higher education is already established under international law, and that the United States needs to recognize the right to education generally and

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<sup>2</sup> For example, the cost to attend New York University, including tuition, mandatory fees and room and board, for the academic year of 2018-2019 were estimated by that university to be \$69,984. See COST OF ATTENDANCE 2018-2019, <https://www.nyu.edu/admissions/financial-aid-and-scholarships/tuitiongeneral.html> (last visited Apr. 8, 2018).

<sup>3</sup> BERNADETTE D. PROCTOR ET AL., INCOME AND POVERTY IN THE UNITED STATES: 2015, U.S. CENSUS BUREAU 5 (Sept. 2016), <https://www.census.gov/library/publications/2016/demo/p60-256.html>.

specifically the right to higher education. The dialogue in the United States needs to begin regarding the scope of the right. And the United States, at a minimum, needs a plan on how to address how to best facilitate the right as high costs have made higher education a luxury item and it is not.

Section II addresses the impact of recognizing a human right to higher education on the Syrian refugee crisis. As the war in Syria drags on, there is a real danger of a ‘lost generation.’ Syrians who were already in university, or now should be, are not getting the education they will need to rebuild and lead their country. Terrorists are using this vacuum to propagate their own distorted education and this is not merely a problem for Syria, but also for Europe, where many of the refugees flee. This is a problem that needs to be addressed on a moral level and also strategically as a national security issue.

Finally, Section III looks specifically at the impact of a human right to higher education from a national security perspective. In order to counter the terrorist message and the new lone wolf and low-level attacks, we need new ways to counter terrorism. Bombs and war will not work. We need individuals from all backgrounds to examine the terrorist appeal and come up with ways to counter it. People from different backgrounds need to work in the intelligence field to come up with new and innovative solutions. There needs to be education that promotes inclusion and respect for human rights and different opinions and viewpoints. Once again, this is a problem that needs a solution at a global level. In sum, higher education is a human right and needs to be recognized as such. Recognizing the right to higher education will not only benefit the individuals with capacity and desire who will be able to attend institutes of higher learning, but it will also have benefits on a global level.

## I. Higher Education as a Human Right

### A. *Right to Higher Education under International Law*

There is both broad language in international law recognizing the right to education and specific language regarding the right to higher education. Article 26 of the Universal Declaration of Human Rights recognizes the right to education, stating “[e]veryone has the right to education” and “higher education shall be equally accessible to all on the basis of merit.”<sup>4</sup> Although the Declaration is not binding, it has strong moral authority as it

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<sup>4</sup> G.A. Res 217 (III) A, Universal Declaration of Human Rights, art. 26 (Dec. 10, 1948) [hereinafter UDHR].

is generally agreed to be the foundation of international human rights law<sup>5</sup> and much of it has acquired the status of customary international law.<sup>6</sup>

The United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 declares in Article 13, “[t]he States Parties to the present Covenant recognize the right of everyone to education” and that “[h]igher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.”<sup>7</sup> The ICESCR is incredibly important for discussing the right to higher education as it is a legally binding document on state parties and is widely recognized with 167 state parties and four signatories.<sup>8</sup> The language shifted from “merit” to “capacity” to include those who come from disadvantaged backgrounds.<sup>9</sup> Capacity must be looked at broadly to include those who may not have benefited from a strong primary and secondary education, but nonetheless have the capacity for further study. The scope of the right is not clearly defined as the cost of education is very high so states are only required to have higher education that is “equally accessible” and free higher education is a goal.<sup>10</sup> However, although the exact contours of the right are not fully defined that does not detract from

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5 *The Foundation of International Human Rights Law*, UNITED NATIONS, <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/> (last visited Jan. 31, 2018).

6 See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 353-54 (1995/1996). “Although the impact of customary law in national legal systems varies, on the international plane it is by definition binding on all states. Given the central importance of the Universal Declaration in the international human rights firmament, it is the first instrument that should be consulted when attempting to identify the contemporary content of international human rights law.”

7 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx> [hereinafter ICESCR].

8 There are 26 countries that have not taken action on the ICESCR. The United States is one of the four signatories. See *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUMAN RIGHTS, <http://indicators.ohchr.org/> (last visited Mar. 14, 2018) (choose “International Covenant on Economic, Social and Cultural Rights” from the drop-down list available under “Select a Treaty”). The ICESCR clearly differentiates between the different levels of education, stating in Article 13(2) “The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.” See ICESCR, *supra* note 6 at art. 13.

9 K. D. BEITER, *THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW* 97 (2006).

10 ICESCR, *supra* note 6, art. 13(2)(c).

it being a human right.

The Convention on the Rights of the Child is the most widely ratified treaty pertaining to the right to education with 196 states parties and one signatory – the United States.<sup>11</sup> Therefore, it is an important source of the human right to higher education. Article 28 of the Convention on the Rights of the Child states that signatories should “[m]ake higher education accessible to all on the basis of capacity by every appropriate means” and should “[m]ake primary education compulsory and available free to all.”<sup>12</sup> The treaty differentiates between primary education and higher education, but higher education is still recognized as a human right.

The right to education is also enshrined in other conventions against discrimination. The International Convention on the Elimination of All Forms of Discrimination against Women states, “The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training.”<sup>13</sup> The International Convention on the Elimination of All Forms of Racial Discrimination recognizes “[t]he right to education and training.”<sup>14</sup> The Convention on the Rights of Persons with Disabilities requires state parties to ensure that persons with disabilities are “able to access general tertiary education” without discrimination and ensure that “reasonable accommodation is provided to persons with disabilities.”<sup>15</sup> The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families also provides that migrant workers shall have equality of treatment with nationals of the State of employment in relation to access to educational institutions.<sup>16</sup>

The United Nations formed the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) recognizing the importance of education not only because of its human value but its value at a national

11 See *Status of Ratification Interactive Dashboard*, *supra* note 7 (choose “Convention on the Rights of the Child” from the drop-down list available under “Select a Treaty”).

12 G.A. Res. 44/25, annex, Convention on the Rights of the Child (Sept. 2, 1990).

13 Convention on the Elimination of all Forms of Discrimination Against Women, art. 10, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

14 International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD].

15 G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006) [hereinafter CRPD].

16 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 43-1, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003).

security level. UNESCO is a specialized agency of the United Nations system created with the mission of contributing to peace and security in the world by “promoting collaboration among nations through education, science, culture and communication in order to further universal respect for justice and the rule of law and for the human rights and fundamental freedoms . . . without distinction of race, sex, language or religion.”<sup>17</sup> The UNESCO Convention against Discrimination in Education in Article 4 states that parties must, “make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all on the basis of individual capacity; assure compliance by all with the obligation to attend school prescribed by law.”<sup>18</sup>

In contrast to the rights afforded to other groups mentioned above, a refugees’ recognized right to higher education is extremely limited. The Convention Relating to the Status of Refugees, states in Article 22(2), “The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.”<sup>19</sup>

Under current law, state parties to the ICESCR have to “take steps” towards making higher education equally accessible to all and must ensure that it is provided without discrimination “fully and immediately.”<sup>20</sup> Under international law, there is already a right to education generally and higher education specifically. Education needs to be available, accessible to all without discrimination, acceptable, and adaptable.<sup>21</sup> Looking at widespread treaty ratifications as a basis for finding a universal human

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17 *What is UNESCO?*, UNESCO.ORG, <http://www.unesco.org/education/asp/pdf/wunesco.pdf> (last visited July 16, 2017).

18 UNESCO Convention against Discrimination in Education, art. 4, Dec. 14, 1960, 429 U.N.T.S. 93.

19 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150. In 1968, the United States ratified the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, obligating it to comply with the substantive provisions of the Convention Relating to the Status of Refugees.

20 Jane Kotzmann, *Lifting the Cloak of Conceptual Confusion: Exploring the Meaning of the Human Right to Higher Education*, AUSTRALIAN J. OF HUM. RTS., 2015, at 85-86.

21 Comm. on Econ., Soc. and Cultural Rights, General Comment No. 13: The Right to Education, ¶ 1, U.N. Doc. E/C.12/1999/10 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6, ¶¶ 28-30, 48, 50, 59 (2003) [hereinafter General Comment 13].



right to education under customary international law,<sup>22</sup> there is a strong argument that education is indeed a human right under customary international law.<sup>23</sup> A country with the resources, such as the United States, needs to recognize that higher education is a human right and look closely at barriers to accessibility for the those from disadvantaged or lower socio-economic groups. It is not enough to say there are financial aid, scholarships, and loans; there needs to be an understanding of higher education as a human right and ways to ensure that all those with capacity are actually able to take advantage of these opportunities.<sup>24</sup> Indeed, with tuition costs skyrocketing, rather than advancing towards the goal of higher education as a human right, the United States is in danger of making higher education inaccessible to many of those from disadvantaged or even middle class backgrounds. The United States needs a concrete plan on how to make sure that it is not violating its obligation to make higher education for those with capacity equally accessible to all, even vulnerable groups.

### *B. Right to Education Under United States Law*

The right to education is not recognized in the United States Constitution, although it is included in many state constitutions.<sup>25</sup> Bizarrely, the right to even primary education is not considered a fundamental right in the United States. In *San Antonio Independent School District v. Rodriguez*, the Supreme Court in 1973 declared, “Education, of

<sup>22</sup> José E. Alvarez, *The Fifth Annual Louis Henkin Lecture: The Human Right to Property* (June 20, 2017) (unpublished manuscript), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2989942](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2989942).

<sup>23</sup> See Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, 11 HARV. BLACKLETTER L.J. 37, (1994) (“While international standards, using principles of statutory construction, can be used to buttress all those theories, it should not be forgotten that adequate grounds exist to urge courts that the right to equal opportunity to education has risen to the level of a customary international right that must be followed in this country.”).

<sup>24</sup> There are some programs already in place but more needs to be done. See Frank Bruni, *Lifting Kids to College*, N. Y. TIMES (Apr. 26, 2017), <https://www.nytimes.com/2017/04/26/opinion/usc-neighborhood-academic-initiative-lifting-kids-to-college.html>. (“Many kids in her low income neighborhood here don’t get to or through the 12th grade. Her single mother isn’t college educated. Neither are Sierra’s two brothers, one of whom is in prison. Her sister has only a two year associate degree. But when Sierra was in the sixth grade, teachers spotted her potential and enrolled her in the Neighborhood Academic Initiative, or N.A.I., a program through which U.S.C. prepares underprivileged kids who live relatively near its South Los Angeles campus for higher education. She repeatedly visited U.S.C., so she could envision herself in such an environment and reach for it. She took advanced classes. Her mother, like the parents or guardians of all students in the N.A.I., got counseling on turning college into a reality for her child.”).

<sup>25</sup> See Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 917 (2016).

course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”<sup>26</sup> In *Rodriguez*, a class action was brought in Texas on behalf of children of poor or minority families residing in areas with a low property tax base attacking the Texas system of financing public education in part through local property taxation.<sup>27</sup> The amount spent per pupil in the poorer district was 40 percent less than that spent in the more affluent area.<sup>28</sup> The Court said it carefully considered all of the arguments in favor of finding that education is a fundamental right and found those arguments unpersuasive.<sup>29</sup> However, as the dissent pointed out,<sup>30</sup> the Court discussed arguments in favor of finding a fundamental right to education that are extremely convincing:

It is appellees’ contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The ‘marketplace of ideas’ is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.<sup>31</sup>

The majority here was working very hard to convince itself that education is not a fundamental right because there are so many strong arguments in favor of it being a fundamental right. They themselves point to the very convincing argument that education is essential to exercise other

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<sup>26</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

<sup>27</sup> *Id.* at 4-6.

<sup>28</sup> *Id.* at 12-13.

<sup>29</sup> *Id.* at 37.

<sup>30</sup> *Id.* at 99 (“I therefore cannot accept the majority’s labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself.”).

<sup>31</sup> *Id.* at 23.

Constitutional rights, such as the First Amendment and the right to vote.

In fact, the Supreme Court has long recognized the importance of education and that it is essential to the enjoyment of other rights, stating in *Brown v. Board of Education*:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. **In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.** Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>32</sup> (emphasis added).

In *Brown v. Board of Education*, the Court noted how incredibly important education is in itself, and as an empowerment right to enable an individual to exercise all other rights and to enjoy life in general. As *Brown* was decided before *Rodriguez*, many scholars have noted<sup>33</sup> that the Court took a step backwards in recognizing the fundamental right to education through their decision in *Rodriguez*.

Although the Court in *Plyler v. Doe* still did not recognize a fundamental right to education, the Court in 1982 made a significant step forward in recognizing the right to education by finding that states could not constitutionally deny illegal aliens access to public education:

We are reluctant to impute to Congress the intention to withhold from these children, for so long as they are present in this country through no fault of their own, access to a **basic education . . .** If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made

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<sup>32</sup> *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) (emphasis added).

<sup>33</sup> See Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL'Y 45, 68 (2011).

here.<sup>34</sup> (emphasis added).

Although the court specifically says basic education and many have argued that the court decided the case because of sympathetic children plaintiffs<sup>35</sup>, the ruling in *Plyler* indicates that the Court does recognize how important education really is even if the Court is hesitant to declare that a fundamental right to education exists. The court also stated in its decision that “[i]n sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”<sup>36</sup> By giving children illegally living in the United States access to free education, the Court is indicating how vital education truly is. And in today’s global and increasingly high-tech economy, yesterday’s basic education is for many – with capacity and desire – today’s higher education.

Courts in the United States have noted the obligation of the United States under international law to provide equal access to higher education, generally framed as non-discrimination. There are many cases in the United States about desegregating institutions of higher education.<sup>37</sup> In *Tayyari v. New Mexico State University*, the court declared unconstitutional and invalidated a motion passed by the regents of the University of New Mexico to deny enrollment at the University to any student whose home government holds or permits the holding of United States hostages.<sup>38</sup> The case took place during the Iran hostage crisis and the University tried to bar Iranian nationals from attending their University in retaliation for their government’s actions.<sup>39</sup> The court discussed United States policy against nondiscrimination on the basis of nationality against aliens lawfully in the country in the area of public education.<sup>40</sup> The Court specifically pointed to the UDHR and ICESCR and the United States commitment to international law that provides for equal access for all to higher education, on the basis of capacity, without discrimination on the basis of national origin or other status.<sup>41</sup>

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34 *Plyler v. Doe*, 457 U.S. 202, 226, 230 (1982) (emphasis added).

35 See Geoffrey Heeren, *Persons Who are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 383 (2013).

36 *Plyler*, 457 U.S. at 221.

37 See, e.g., *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979) and *Knight v. Alabama*, 14 F.3d 1534 (11th Cir. 1994).

38 *Tayyari v. New Mexico State University*, 495 F. Supp. 1365, 1380-81 (D.N.M. 1980).

39 *Id.*

40 *Id.* at 1379.

41 *Id.* at 1379-80 (quoting affidavit by David D. Newsom, Undersecretary for Political Affairs,

The Supreme Court in *Grutter v. Bollinger* recognized the real importance of diversity in higher education. Petitioner, a white student, alleged that she was rejected from Michigan Law School because race was used as a “predominant” factor and she alleged that minority applicants had a significantly greater chance of admission than those with similar credentials who were white.<sup>42</sup> The Court found that the Equal Protection Clause did not prohibit the law school’s narrowly tailored use of race in its admission decision to “further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”<sup>43</sup> The court noted that access to the legal profession and legal education “must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.”<sup>44</sup>

The Court stressed the importance of ensuring that public institutions are open to all segments of American society and “[n]owhere is the importance of such openness more acute than in the context of higher education.”<sup>45</sup>

Whether using Equal Protection, human dignity,<sup>46</sup> human rights law, or international law, the United States needs to recognize education as a fundamental right as it is a human right. And education does not only mean basic or primary education, it includes higher education to those with capacity. Therefore, it is not premature to speak of a human right to higher education, as education does not have a cut-off point, especially in today’s global economy.

### C. *Right to Higher Education Under European Union Law*

Courts in the European Union have gone much further than United States courts, recognizing not only a human right to education but also a human right to higher education. However, many cases have restricted the

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United States Department of State; “This policy is reflected in the United States’ strong support for developing international human rights standards, as expressed, for example, in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, both of which provide for equal access for all to higher education, on the basis of capacity, without discrimination on the basis of national origin or other status. The introduction of such discrimination by law within a jurisdiction of the United States would be damaging to United States efforts to promote the widest realization internationally of human rights goals and standards.”)

42 *Grutter v. Bollinger*, 539 U.S. 306, 317 (2003).

43 *Id.* at 343.

44 *Id.* at 333.

45 *Id.* at 331-32 (citing Brief for United States as *Amicus Curiae*, at 13).

46 Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 IND. L. REV. 467 (2014) (arguing for enforcement of the right to education using a dignity-based due process clause analysis).

right or have given wide latitude to the states in deciding what the right involves.

*R (Douglas) v. North Tyneside MBC*, decided in 2004 by the United Kingdom's Court of Appeal,<sup>47</sup> was the first case in the UK to recognize that higher education is a human right as it falls within the scope of Article 2 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The court concluded, "[t]here was no reason in principle for concluding that the Art.2 right should cease at any particular stage in the educational process."<sup>48</sup> The court stressed the fact that primary, secondary, and tertiary education were not even divisible into self-contained compartments across the contracting states and "it would be artificial to cut away the third stage of education from that which had gone before."<sup>49</sup> The claimant was denied a loan for a one-year course to obtain a Higher National Diploma<sup>50</sup> because he was over the age of fifty-five and argued that denial violated his right to education.<sup>51</sup> However, the court found that although the lack of availability of loans might make it more difficult for a student to exercise his Article 2 rights, they "were not so closely related as to prevent him from doing so."<sup>52</sup>

Although Article 2 does not oblige states to provide higher education institutions, if they have them, then states must provide "an effective right of access to them."<sup>53</sup> In *Sahin v. Turkey*, the European Court of Human Rights also concluded that as "Article 2 of Protocol No. 1 provides that no one shall be denied the right to education," there was no reason that such mandate should not include higher education<sup>54</sup> although the decision recognized that the right could be restricted if there were legitimate aims.<sup>55</sup>

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47 The Court of Appeal is the highest court within the Senior Courts of England and Wales. See *The Court of Appeal*, COURTS AND TRIBUNALS JUDICIARY (April 9, 2018), <https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/court-of-appeal-home/>. The UK's Supreme Court is, however, the final court of appeal for all United Kingdom civil cases and criminal cases from England, Wales and Northern Ireland. The Supreme Court takes appeals from the criminal and civil divisions of the Court of Appeal. See *Role of The Supreme Court*, SUPREME COURT, <https://www.supremecourt.uk/about/role-of-the-supreme-court.html> (last visited Apr. 9, 2018).

48 R. (on the application of Douglas) v. North Tyneside MBC, [2004] A.C.D. 25 (2003), at 92.

49 *Id.*

50 Higher National Diplomas (HNDs) are work-related, or vocational, higher education qualifications. See Higher National Certificates and Higher National Diplomas, <https://www.nidirect.gov.uk/articles/higher-national-certificates-and-higher-national-diplomas> (last visited Mar. 14, 2018).

51 North Tyneside, *supra* note 47 at 91.

52 *Id.* at 93.

53 Leyla Sahin v. Turkey (Sahin I), No. 44774/98, para. 137 (Eur. Ct. H.R. June 29, 2004), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search by Application Number).

54 *Id.* at para. 134.

55 *Id.* at para. 158.

The Court found that the ban on wearing an Islamic headscarf in an institution of higher education pursued the “legitimate aims of protecting the rights and freedoms of others and maintaining public order. The obvious purpose of the restriction was to preserve the secular character of education institutions.”<sup>56</sup> Although the court advanced the right to higher education as a concept, it severely restricted the right in practice.

In *Hurley v. Moore*, two students who wished to go to University challenged regulations in the United Kingdom that allowed institutes of higher education to increase fees from the then current amount of £3,290 to £9000 per year.<sup>57</sup> One of their arguments was that the fee increase was contrary to the right to education conferred by Article 2 or Protocol 1 of the European Convention on Human Rights because the new rules will have a “chilling effect on the ability of those from disadvantaged social backgrounds to take up university places.”<sup>58</sup> The court did not quash the regulations though, reasoning that the Secretary of State, prior to introducing the regulations, considered equality objectives, loans are widely available to those that need them, and the decision to fix fees at the new level were the subject of appropriate analysis.<sup>59</sup>

The claimant in *Hurley v. Moore* argued that with the almost threefold increase in fees, the right to higher education would be “rendered theoretical and illusory” for many poorer students.<sup>60</sup> The claimant referred to a 2007 study that showed that “students from lower socio-economic classes are more debt averse than the more privileged students and therefore will be more likely to be deterred from going to University if this involves taking out loans.”<sup>61</sup> The claimant also reinforced her submission by relying on Article 13(2)(c) of the ICESCR which the United Kingdom and all EU member states had ratified and which stipulated that “[h]igher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.”<sup>62</sup> The Committee on Economic, Social and Cultural Rights, which enforces obligations under the Covenant, emphasized that the obligations under the ICESCR are not merely aspirational, noted with concern that the higher tuition fees and loans in the UK appears inconsistent with the obligations under Article 13 and

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<sup>56</sup> *Id.* at para. 158.

<sup>57</sup> R. (on the application of Hurley & Moore) v. Secretary of State for Business, Innovation & Skills, [2012] EWHC (Admin) [2011] para. 1-3 (Eng.).

<sup>58</sup> *Id.* at para. 4(1).

<sup>59</sup> *Id.* at para. 94, 97, 99 and 102.

<sup>60</sup> *Id.* at para. 33, 35.

<sup>61</sup> *Id.* at para. 35.

<sup>62</sup> *Id.* at para. 36, 37.

“ha[ve] tended to worsen the position of students from more disadvantaged backgrounds.”

The Court admitted that there was evidence that some students would “be discouraged from applying to institutions of higher education because of the fee increases” even though loans and grants were available.<sup>63</sup> However, it concluded that “[t]he fact that someone may be temperamentally or psychologically disinclined to accept a student loan and enter into debt does not justify the conclusion that the right to higher education of such a person has been effectively denied or unjustifiably restricted.”<sup>64</sup> As for the ICESCR, the Court concluded that “the progressive introduction of free education is not an absolute obligation” and “it must depend on the resources available” and must be based on a determination of how large the tertiary sector should be.<sup>65</sup> Once again, although the Court recognized the human right to higher education in theory, they took a serious step backward in reality by allowing a three-fold increase in fees in the United Kingdom.

Although higher education is considered a human right, courts interpreting a state’s obligation under Article 2 of Protocol 1 (“A2P1”) have stressed that fees are permissible for higher education:

In the Court’s view, the State’s margin of appreciation in this domain increases with the level of education, in inverse proportion to the importance of that education for those concerned and for society at large. Thus, at the university level, which to this day remains optional for many people, higher fees for aliens – and indeed fees in general – seem to be commonplace and can, in the present circumstances, be considered fully justified.<sup>66</sup>

The European Court of Human Rights in *Ponomaryovi. v. Bulgaria* held that Article 14 read together with A2P1 had been infringed when Bulgaria required Russian nationals to pay for secondary education but not others.<sup>67</sup> However, the court recognized the incredible and increasing importance of education beyond basic education in present society stating:

The Court is mindful of the fact that with more and more countries now moving towards what has been described as a ‘knowledge-based’ society, secondary education plays an ever-increasing role in

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<sup>63</sup> *Id.* at para. 39.

<sup>64</sup> *Id.* at para. 42.

<sup>65</sup> *Id.* at para. 44.

<sup>66</sup> *Ponomaryovi v. Bulgaria*, No. 5335/05, para. 56 (Eur. Ct. H.R. 2011).

<sup>67</sup> *Id.* at para. 9, 32, 63.



successful personal development and in the social and professional integration of the individuals concerned. Indeed, in a modern society, having no more than basic knowledge and skills constitutes a barrier to successful personal and professional development. It prevents the persons concerned from adjusting to their environment and entails far-reaching consequences for their social and economic well-being.<sup>68</sup>

In *Tarantino v. Italy*, applicants complained that Italian legislation imposing quotas on the number of successful applicants to medical and dentistry schools violated students' rights under Article 2 Protocol 1.<sup>69</sup> The European Court of Human Rights concluded that the restrictions were "foreseeable" and in pursuit of the legitimate aim of ensuring a minimum and adequate education level in universities running in appropriate conditions, which is in the general interest.<sup>70</sup>

The European Court of Justice granted Germany the right to refuse a student visa to an Iranian national on national security grounds.<sup>71</sup> The student was studying "security of mobile systems, esp. intrusion detection on smartphones to security protocols."<sup>72</sup> Even though there was no indication the student herself was a threat, the situation in Iran "gives reason to fear that the knowledge Ms. Fahimian would acquire during her stay for study purposes would later be misused in her country of origin."<sup>73</sup> The court reasoned that national authorities had wide discretion in deciding who represents a threat to public security.<sup>74</sup>

Education cases in European Union go further than the United States in recognizing not only a human right to education, but also recognizing the human right to higher education. However, many of the cases chip away at this invaluable right. In the United Kingdom, as discussed in *Hurley v. Moore*, they have taken a step backwards by allowing an increase in fees at institutes of higher learning to almost three times the previous amount.

#### *D. Higher Education is a Right, Not a Luxury*

The right to education and the right to higher education are not luxuries. We need to recognize and understand the right to higher

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<sup>68</sup> *Id.* at para. 57.

<sup>69</sup> *Tarantino v. Italy*, No. 25851/09, para. 35 (Eur. Ct. of H.R. 2013).

<sup>70</sup> *Id.* at para. 47-48.

<sup>71</sup> Case C-544/15, *Fahimian v. Bundesrepublik Deutschland*, EURO-LEX (Dec. 21, 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CN0544>.

<sup>72</sup> *Id.* at para. 19.

<sup>73</sup> *Id.* at para. 23.

<sup>74</sup> *Id.* at para. 29.

education as a human right – for those with capacity -- or it has the very real potential of becoming a luxury that only the wealthy can afford. Education is a human right in itself and is needed to enjoy other rights. In the words of the Committee on Economic, Social and Cultural Rights, the Committee responsible for monitoring implementation of the ICESCR by state parties:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities . . . But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.<sup>75</sup>

Katerina Tomasevski, the first United Nations Special Rapporteur on the right to education of the United Nations Commission on Human Rights, explained that education “functions as a multiplier, enhancing all rights and freedoms when it is guaranteed while jeopardizing them all when it is violated.”<sup>76</sup>

Understanding higher education as a human right is important especially today when in the United States people have become complacent about the skyrocketing costs of higher education and consider many universities out of reach because of the incredible cost of attending them. Instead of working towards the ‘progressive introduction of free education’ we are going backwards with tuition and fees at many private institutions in the \$50,000-70,000 range. By first recognizing that higher education is a human right, there will be a new sense of urgency to make college accessible to those with capacity and desire and we can also begin a much-needed discussion about how to bring down ballooning costs of higher education.

What is a human right and why does it matter? As human rights scholar Philip Alston has said, “At the very least, the notion of human rights connotes the equal dignity and autonomy of human beings in their pursuit of their conception of a good life, a life worth living. At a foundational level, to speak of something as a human right is to not just make a legal

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<sup>75</sup> General Comment 13, *supra* note 20.

<sup>76</sup> KATERINA TOMASEVSKI, HUMAN RIGHTS OBLIGATIONS IN EDUCATION: THE 4-A SCHEME 7 (2006).

claim to resources or for protection against an abuse of power, but it is also to insist that without those resources or that protection, one's equal dignity, autonomy and participatory parity are fundamentally impaired."<sup>77</sup> Rights can also be a means of inclusion as Kenji Yoshino has pointed out,

“As the polity becomes more diverse, such “rights talk” can be a ground on which to create coalitions that embody broader, more inclusive forms of “we.” For instance, movements for a “right to education,” a “right to health care,” a “right to welfare,” or a “right to vote” that cut across traditional identity politics groups might helpfully erode the traditional group-based distinctions among them.”<sup>78</sup>

Human rights discussions can have an invaluable effect on those deprived of them. John McCain, a prisoner of war in Vietnam, wrote about how incredibly important statements from the United States government about remembering POWs and their humane treatment was to him and fellow prisoners while they were in captivity.<sup>79</sup> “[H]ope is a powerful defense against oppression.”<sup>80</sup> For higher education, those who think that they cannot go to college or graduate school because of a lack of money, should understand that they too have the right to their dreams of becoming a doctor or engineer. Money should not be the reason to give up those dreams. Those with capacity and desire should know that they have a human right to access institutions of higher learning and those persons should be able to use that right to fight for access to those institutions of higher learning.

There are obvious economic benefits to recipients of higher education, and education also has benefits both on the individual level and society at large. “From an individual standpoint, higher education does much more than contribute to income; it is linked to an important array of benefits that are not always easily measured: better personal, spousal, and child health outcomes; children's educational gains; greater longevity, and even happiness.”<sup>81</sup> UNESCO has stated that one of the purposes of education is

<sup>77</sup> Phillip Alston and Nehal Bhuta, *Human Rights and Public Goods: Education as a Fundamental Right in India* (NYU Law School, Public Law Research Paper No. 05-18 and NYU Law School, Center for Human Rights and Global Justice Working Paper No. 6), *final version printed in HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT* (P. Alston, M. Robinson, eds., Oxford, Oxford Univ. Press 2005).

<sup>78</sup> Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 794 (2011).

<sup>79</sup> John McCain, Opinion, *Why We Must Support Human Rights*, N.Y. Times (May 8, 2017), <https://www.nytimes.com/2017/05/08/opinion/john-mccain-rex-tillerson-human-rights.html>.

<sup>80</sup> *Id.*

<sup>81</sup> Omari Scott Simmons, *Class Dismissed: Rethinking Socio-Economic Status and Higher Education Attainment*, 46 ARIZ. ST. L.J. 231, 260 (2014).

“readiness on the part of the individual to participate in solving the problems of his community, his country and the world at large.”<sup>82</sup> We cannot risk a society where only those from wealthy backgrounds are able to access higher education and the many opportunities and benefits that arise from that education.

More fundamentally, as Louis Henkin has pointed out, human rights, such as the human right to higher education, are moral entitlements owed to all of us as human beings.<sup>83</sup> “Lou would remind us that the case for human rights is made most effectively by moral appeals.”<sup>84</sup> We do not want a situation that only those from privileged backgrounds can go to universities or highly selective universities; we want those with capacity and ability to also gain the education they desire.

The right to education needs to include the right to higher education. And, in many instances, college level education is not enough. As the Supreme Court has pointed out, “Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders. Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives.”<sup>85</sup> Further, education at highly selective institutions in the United States can also be incredibly important. “The pattern is even more striking when it comes to highly selective law schools. A handful of these schools account for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.”<sup>86</sup> These statistics show that to deny those from disadvantaged backgrounds their right to higher education has an incredible detrimental impact. We want our government and all aspects of our society to truly represent the people - people from all backgrounds.

In the United States, we have become accustomed to the idea of higher education coming at a phenomenal cost – something you either save a lifetime for as the middle class or consider certain expensive institutions out of reach, ‘for the elite.’ Yes, there are scholarships and financial aid,

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82 General Conference of the United Nations Educ., Scientific and Cultural Org., *Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education Relating to Human Rights and Fundamental Freedoms*, at art. 4(g) (Nov. 19, 1974).

83 Louis Henkin, *The Universality of the Concept of Human Rights*, 506 ANNALS AM. ACAD. POL. & SOC. SCI., 10, 11 (1989).

84 José E. Alvarez, José E., *The Fifth Annual Louis Henkin Lecture: The Human Right to Property* (June 20, 2017), <https://ssrn.com/abstract=2989942>.

85 *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (citations omitted).

86 *Id.*

but we need to change the dialogue about higher education more generally. Higher education needs to be viewed as a human right. When viewed as a human right, it cannot be something only for the elite but must be available to those with capacity. And, by available, it cannot be at a prohibitively high cost. We need to change the way we view higher education. Although some argue that a proliferation of human rights can have a detrimental effect on human rights law as we should focus on the most basic of human rights and needs, education is a basic need in today's society and for those with capacity and desire so is higher education.

#### *E. Scope of the Right to Higher Education*

Even if we can all agree that access to higher education is a human right, defining the scope of the obligation can differ greatly. The right to primary education is absolute under human rights law and there is broad agreement that it should be compulsory and free.<sup>87</sup> However, the right to higher education is tied to capacity or merit, as it should be, and the scope of the right is highly contested. Even though higher education is a human right, not every individual should attend an institution of higher learning, only those with capacity, desire, and ability. Denying access to those with capacity and ability is a human right's violation as education is so important for human dignity. Cases in the European Union have already defined the right to education to include higher education and several countries already have free or almost free university systems already in place.<sup>88</sup> The United States should follow suit and recognize higher education as a human right.

In the United States, we have a problem and are in violation of the human right to higher education. A study has shown that 38 colleges in the United States, including five Ivy League universities – Dartmouth, Princeton, Yale, Penn and Brown – have more students from the top 1 percent of the income scale than from the entire bottom 60 percent.<sup>89</sup> Furthermore, "[e]ven though lower-income students face

<sup>87</sup> Katarina Tomasevski, *Globalizing What: Education As A Human Right Or As A Traded Service?*, 12 IND. J. GLOBAL LEGAL STUD. 1, 1-3 (2005).

<sup>88</sup> Rick Noack, *7 Countries Where Americans Can Study at Universities in English for Free (or Almost Free)*, WASH. POST (Oct. 29, 2014), [https://www.washingtonpost.com/news/worldviews/wp/2014/10/29/7-countries-where-americans-can-study-at-universities-in-english-for-free-or-almost-free/?utm\\_term=.fb5238756c6f](https://www.washingtonpost.com/news/worldviews/wp/2014/10/29/7-countries-where-americans-can-study-at-universities-in-english-for-free-or-almost-free/?utm_term=.fb5238756c6f) (listing Germany, Finland, France, Sweden, Norway, Slovenia, and Brazil as nations where Americans can attend universities offering classes in English for no tuition).

<sup>89</sup> Gregor Aisch, Larry Buchanan, Amanda Cox & Kevin Quealy, *Some Colleges Have More Students from the Top 1 Percent than the Bottom 60 percent*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the->

challenges that other students do not, they end up earning almost as much on average as affluent students who attend the same college,<sup>90</sup> which shows that those lower-income students can be just as capable as their more affluent peers when given similar opportunities. Promise2Kids, a San Diego County based organization that provides services to foster children, has listed on its website that “[o]nly 55% of former foster youth will attend college and of that, only 8% will graduate.”<sup>91</sup> Additionally, a study of former foster children that had aged out of foster programs in Illinois, Iowa, and Wisconsin conducted by the University of Chicago and the University of Washington found that out of their sampled population only about 25% had attended college and only 2.5% had actually graduated from a four-year university.<sup>92</sup> Money, not capacity, is likely the impediment for many of them.<sup>93</sup>

Many human rights scholars agree that charging for higher education is acceptable as long as the fees are not so high or burdensome to become an impediment to access.<sup>94</sup> Some law school estimates for the cost of one year of attending law school have reached \$92,906.<sup>95</sup> Meanwhile, the U.S. Census Bureau reported the median household income in the United States in 2015 was \$53,718.<sup>96</sup> This is a problem. Although there is financial aid, that is not a real solution for many. “The news is constantly buzzing about the disappearing middle class, and nothing illustrates this better than the college financing problem – Too poor for college, too rich for financial

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top-1-percent-than-the-bottom-60.html?\_r=0.

<sup>90</sup> *Id.*

<sup>91</sup> *Foster Care Facts*, PROMISES2KIDS, <http://promises2kids.org/facts-figures/> (last visited Apr. 15, 2018).

<sup>92</sup> MARK E. COURTNEY, AMY DWORSKY, ADAM BROWN, COLLEEN CARY, KARA LOVE & VANESSA VORHIES, *MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26*, CHAPIN HALL AT THE UNIV. OF CHICAGO 23 (2011).

<sup>93</sup> See Noel Anaya, Opinion, *Life in College After a Life in Foster Care*, N.Y. TIMES (Apr. 25, 2017), <https://www.nytimes.com/2017/04/25/opinion/after-foster-care-college-california.html>

(“Another program for former foster kids set me up with college counselors who helped me plan out my education and get an additional stipend. This money — about \$850 per month — makes a huge difference. Without family support, many former foster youth work full time to attend college part time. As a result, it can take them years to complete college, putting their financial aid at risk because eligibility for federal Pell Grants is limited to 12 semesters. I work about 20 hours a week, which still allows me to focus on my education.”).

<sup>94</sup> Tristan McCowan, *Is There a Universal Right to Higher Education?*, 60 BRITISH BRIT. J. EDUC. STUD. 111-128, 117, (2012) (“[S]ome fees might be charged even if higher education is considered a right — as long as they did not represent an impediment to access.”).

<sup>95</sup> *Student Expense Budget*, NYU. LAW, <http://www.law.nyu.edu/financialaid/budgetandbudgeting/studentexpensebudget> (last visited. May 7, 2018).

<sup>96</sup> Proctor et al., *supra* note 2.

aid. It's a problem plaguing millions of families across the country."<sup>97</sup> Stories across the United States highlight anecdotes of students working hard to get into the college of their dreams, getting in but, ultimately, not being able to afford to go.<sup>98</sup>

Loans may be another solution but, with tuitions rising to alarming levels, loans are often not enough. If private tuition/living expenses at many universities has grown to approximately \$60,000 or more a year, that would result in a total cost in excess of \$240,000 by graduation. And that only covers the cost of an undergraduate degree. Even if economists tell you the investment is still worth it because the degree you earn will allow you to make more money in the long run, that is a daunting figure for anyone but the extremely wealthy and is an especially daunting amount for anyone from a disadvantaged background. As intuition would dictate, a study jointly produced by the Centre for Research on Learning and Life Chances (LLAKES) and the University College of London's (UCL) Institute of Education have shown that poorer students are more debt averse than their upper-class peers<sup>99</sup> and consequently those students are more likely to be deterred than their upper-class peers from applying to premier universities due to their fears of incurring significant student loan debt.

Presidential candidate Bernie Sanders mobilized millions of young voters in the 2016 presidential election in part with his campaign for tuition-free public universities and colleges. In fact, more young voters voted for Bernie Sanders than Donald Trump or Hillary Clinton combined, by a wide margin.<sup>100</sup> Bernie Sanders argued, "[i]t is time to build on the progressive movement of the past and make public colleges and universities tuition-free in the United States — a development that will be

<sup>97</sup> Robert Farrington, *Too Poor for College, Too Rich for Financial Aid*, FORBES (June 17, 2014, 9:12 AM), <https://www.forbes.com/sites/robertfarrington/2014/06/17/too-poor-for-college-too-rich-for-financial-aid/#72c63cef6922>.

<sup>98</sup> Emily Jane Fox, *I Got Into my Dream School, But Can't Afford to Go*, CNN MONEY (May 11, 2015, 7:12 AM), <http://money.cnn.com/2015/05/11/pf/college/college-financial-aid/index.html> [<https://perma.cc/9NC9-UUBH>] and Tracy Mayor, *He's Accepted to College, But We Can't Afford It*, WASH. POST (Apr. 13, 2016), [https://www.washingtonpost.com/news/parenting/wp/2016/04/13/playing-financial-merit-aid-roulette-with-my-college-bound-son/?utm\\_term=.2ec585ab4e24](https://www.washingtonpost.com/news/parenting/wp/2016/04/13/playing-financial-merit-aid-roulette-with-my-college-bound-son/?utm_term=.2ec585ab4e24).

<sup>99</sup> Claire Callender & Geoff Mason, *Does Student Loan Debt Deter Higher Education Participation? New Evidence from England 20* (LLAKES Research Paper No. 58 2017), <http://www.llakes.ac.uk/sites/default/files/58.%20Callender%20and%20Mason.pdf>.

<sup>100</sup> Aaron Blake, *More Young People Voted for Bernie Sanders than Trump and Clinton Combined - By a Lot*, WASH. POST (June 20, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/06/20/more-young-people-voted-for-bernie-sanders-than-trump-and-clinton-combined-by-a-lot/?utm\\_term=.50cd28a7dee0](https://www.washingtonpost.com/news/the-fix/wp/2016/06/20/more-young-people-voted-for-bernie-sanders-than-trump-and-clinton-combined-by-a-lot/?utm_term=.50cd28a7dee0).

the driver of a new era of American prosperity.”<sup>101</sup> Skyrocketing student loan debt is a real problem facing young people today and so his message really resonated with millennials.<sup>102</sup>

Some strides are being made towards equalizing access to higher education, but much more still needs to be done. In New York, students who have resided in New York for one year and whose families make less than \$125,000 can attend, tuition-free, any school in the State University of New York or City University of New York systems.<sup>103</sup> Although criticized because there is a requirement that students stay in the state following graduation for the length of time they participated in the program and because the free tuition does not cover room and board, New York’s tuition program represents an incredible step forward to opening up access to institutions of higher education. Tennessee has a program called the Tennessee Promise that provides two years tuition-free at a community or technological college in Tennessee and also gives participants mentoring for when they apply to college.<sup>104</sup> Oregon has also started a program that makes community college free and one quarter of the attending students questioned said they would not have gone to college if not for the aid of the program.<sup>105</sup> San Francisco announced in February 2017 that community college would be free for all residents.<sup>106</sup> After an initial proposal to make the last two years at the University of Rhode Island or Rhode Island College be tuition-free, Rhode Island is now struggling to pass a cheaper version that would make community college tuition-free for two years.<sup>107</sup>

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101 Bernie Sanders, Opinion, *Make College Free for All*, WASH. POST (Oct. 22, 2015), [https://www.washingtonpost.com/opinions/bernie-sanders-america-needs-free-college-now/2015/10/22/a3d05512-7685-11e5-bc80-9091021aeb69\\_story.html?utm\\_term=.4693acecaf6a](https://www.washingtonpost.com/opinions/bernie-sanders-america-needs-free-college-now/2015/10/22/a3d05512-7685-11e5-bc80-9091021aeb69_story.html?utm_term=.4693acecaf6a).

102 Nikhil Goyal, *The Real Reason Millennials Love Bernie Sanders*, TIME (Apr. 19, 2016), <http://time.com/4299321/millennials-bernie-sanders>.

103 *Tuition-Free Degree Program: The Excelsior Scholarship*, N.Y. STATE, <https://www.ny.gov/programs/tuition-free-degree-program-excelsior-scholarship> (last visited July 25, 2017).

104 See TENNESSEE PROMISE, <http://tnpromise.gov/about.shtml> (last visited July 25, 2017) and David W. Chen, *Free Tuition? Tennessee Could Tutor New York*, N.Y. TIMES (May 14, 2017), <https://www.nytimes.com/2017/05/14/nyregion/for-cuomos-free-tuition-plan-lessons-from-tennessee.html>.

105 Katie Lobosco, *Most of Oregon’s Free-Tuition Dollars Aren’t Going to Poor Students*, CNN MONEY (Mar. 6, 2017, 10:24 AM), <http://money.cnn.com/2017/03/06/pf/college/oregon-free-tuition/index.html>.

106 Josh Hafner, *San Francisco Announces Free Community College for All Residents*, USA TODAY (Feb. 7, 2017, 11:58 AM), <https://www.usatoday.com/story/news/nation-now/2017/02/07/san-francisco-announces-free-community-college-all-residents/97591606/>.

107 Katherine Gregg, *Raimondo’s Pledge to Finance Free-Tuition Proposal Raises a Legal Question*, PROVIDENCE J. (July 6, 2017, 6:29 PM),



Once again, the dialogue about affordable public higher education is just beginning, and we need to think creatively about opening up access to higher education more broadly. Free or very inexpensive public education is a great start as we have seen in a few states. However, in the United States, education at selective and often private institutions can also make a difference so the situation is somewhat different than in much of Europe. But, the important step for now is to begin the dialogue and start making changes, striving towards a more equal access to higher education. Matters cannot stay as they are now with yearly tuitions at many private higher education institutions far exceeding the average yearly income in the United States. The United States is in violation of the right to education<sup>108</sup> and we need to correct this violation as it is so important for the future of our country.

## II. IMPACT ON THE REFUGEE CRISIS – THE SYRIAN EXAMPLE

The situation in Syria is dire for many reasons, so the importance of higher education for Syrians may not be at the forefront of most peoples' minds. However, "[i]n times of peace, these students become their societies' future leaders, but in times of war, they may become a lost generation."<sup>109</sup> According to a UNHCR report, only one percent of the twenty-one million refugees are enrolled in tertiary education.<sup>110</sup> From Syria alone, the Institute for International Education ("IIE") estimates that more than 100,000 refugees are university-qualified students.<sup>111</sup> For many students, the dilemma is to pay a smuggler to become a refugee in Europe or seek a scholarship and go to a university, and generally the possibility of success is higher with the first than with the second.<sup>112</sup> And with the

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<http://www.providencejournal.com/news/20170706/raimondos-pledge-to-finance-free-tuition-proposal-raises-legal-question>.

108 See Emma Melton, Note, *An Analysis of the Right to Education in Hurley and Moore v. Secretary of State for Business, Innovation & Skills and Its Application in the United States*, 13 WASH. U. GLOBAL STUD. L. REV. 393 (2014) (arguing the United States is in violation of the International Covenant on Economic, Social, and Cultural Rights because due to of the higher tuition than the UK and less availability of loans).

109 Allan E. Goodman, *Foreword*, in INST. OF INT'L EDUC., SUPPORTING DISPLACED AND REFUGEE STUDENTS IN HIGHER EDUCATION, PRINCIPLES AND BEST PRACTICES (2016), <https://www.iie.org/Research-and-Insights/Publications/Supporting-Displaced-and-Refugee-Students-in-Higher-Education>.

110 Compared to an access level of 34% globally among youth. UNHCR, REPORT REFUGEE AGENCY, MISSING OUT: REFUGEE EDUCATION IN CRISIS (2016), <http://www.unhcr.org/57beb5144>.

111 *The "Delivering Higher Education to Syrian Refugees" Workshop: A Rare Moment of Guarded Optimism*, IIE: POWER INT'L EDUC., <https://www.iie.org/en/Learn/Blog/2016-January-The-Delivering-Higher-Education-To-Syrian-Refugees-Workshop> (last visited Feb. 2, 2018).

112 Riham Kusa, *A Syrian Student's Dilemma: Pay a Smuggler or Seek a Scholarship?*, CHRON. HIGHER EDUC. (Sept. 17, 2015), <http://www.chronicle.com/article/A-Syrian-Students-Dilemma->

civil war in Syria dragging on, the possibility of a lost generation is real. Ensuring these students are connected to higher education opportunities is not only correct on a moral level, but it also makes sense from an economic and national security standpoint.

Some of the challenges faced by Syrian students include: understanding the language of instruction; documentation – as most people fleeing their country do not bring their documents with them; funding – not just for tuition, but for living expenses as well; accessing information in general and specifically accessing academic opportunities; and discrimination.<sup>113</sup> Opportunities provided from access to higher education include social inclusion in their host country and the ability to return to Syria and rebuild when the war is over.

When many refugees face severe hardships – lack of food, housing, and basic education, discussing higher education may seem trivial. But, in addition to being a human right, providing access to higher education for refugees makes economic sense. In 2016, Columbia University implemented a program to provide free tuition and room and board to several students “displaced by the conflict in Syria and currently living in Lebanon, Jordan, or Turkey.”<sup>114</sup> In an article considering Columbia’s experience with the program and also considering the American history of providing opportunities to access higher education to refugees, the authors of the article argued that providing for the “[h]igher education of displaced students, not just from Syria but from many other nations, makes economic sense for those individuals with the academic potential to study at leading US universities.<sup>115</sup> Through calculating the median starting salaries of Columbia graduate, the authors found that “by focusing on degrees with high earnings potential – business, engineering, and other STEM fields – a university graduate can cover the cost of higher education in as little as four years of employment post-graduation.”<sup>116</sup> Therefore, the costs of educating these vulnerable populations, while steep initially, can make economic sense in the long run.<sup>117</sup>

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/233199 and Hans DeWitt & Philip G. Altbach, *The Syrian Refugee Crisis and Higher Education*, 84 INT’L HIGHER EDUC. 9 (2016), <https://ejournals.bc.edu/ojs/index.php/ihe/article/viewFile/9109/8209>.

113 Adrienne Fricke, *Regional Opportunities and Challenges for Syria Students*, in INST. OF INT’L EDUC., SUPPORTING DISPLACED AND REFUGEE STUDENTS IN HIGHER EDUCATION: PRINCIPLES AND BEST PRACTICES 10-13 (2016), <https://www.iie.org/Research-and-Insights/Publications/Supporting-Displaced-and-Refugee-Students-in-Higher-Education>.

114 Kim Gittleson & Bruce Usher, *Higher Education for Refugees*, STANFORD SOCIAL INNOVATION REV. (Apr. 18, 2017), [https://ssir.org/articles/entry/higher\\_education\\_for\\_refugees](https://ssir.org/articles/entry/higher_education_for_refugees).

115 *Id.*

116 *Id.*

117 *Id.*

There are already some programs to provide access to higher education to refugees in place under governments<sup>118</sup> and international organizations and universities<sup>119</sup> and we can learn from the experiences of those program when implementing future programs. Small liberal arts colleges and some major universities in the United States have taken students from Syria and they have had many success stories.<sup>120</sup> Social media is often in the news for its relationship to terrorism and how terrorist organizations such as ISIS use it to recruit lone wolves from around the globe. However, social media is playing a vital role in linking refugees to crucial resources and scholarships.<sup>121</sup>

Another product of the modern internet, massive open online courses (“MOOCs”), may also play a role in helping refugees gain access to higher education. Language can be a large hurdle and MOOCs could facilitate language acquisition even before students set foot in host countries.<sup>122</sup> Creating easily accessible online courses and platforms so that students can continue their studies when they have been interrupted is another possible solution.<sup>123</sup>

Europe is facing a refugee crisis, with 95,000 people having arrived by boat in Southern Italy as of July 2017.<sup>124</sup> However, the refugee crisis

118 For an example of a nation that has implemented a program to provide free education to refugees see *Fields of Study*, STUDY IN GERMANY, <https://www.study-in.de/en/plan-your-studies/fields-of-study/> (last visited May 7, 2018).

119 See *IIE Syria Consortium for Higher Education in Crisis*, IIE: POWER INT’L EDUC., <https://www.iie.org/Programs/Syria-Scholarships> (last visited Feb. 2, 2018) (international organization providing a program for Syrian students) and *Scholarship Opportunities*, IIE: POWER INT’L EDUC., <https://www.iie.org/Programs/Syria-Scholarships/Find-Scholarships/Scholarship-Opportunities> (last visited Feb. 2, 2018) (listing actual opportunities at universities).

120 See *Supporting Displaced and Refugee Students in Higher Education: Principles and Best Practices*, IIE (Aug. 2016), <https://www.iie.org/Research-and-Insights/Publications/Supporting-Displaced-and-Refugee-Students-in-Higher-Education>.

121 *Id.* at 48 (“Khadr Eskandar ’17 (biochemistry and physics double-major; SigEp; undergraduate research; soccer; 3-3 biomedical engineering program): [“]I found out about Jusoor and the IIE Consortium colleges through a family member. I found the process of applying to college not difficult because the consortium members were accessible on an IIE website that was easy to find through Google. All the requirements for the different colleges were clearly noted. The most helpful process was direct communication with Dr. Bren through email. I was able to ask questions, get a feeling of what the college was like, and how friendly the college community is – and get direct encouragement and support, as well. She followed my application process piece by piece and helped me find solutions to problems. From what I remember, even though the time different was an issue in getting a quick response, she was always on top of her email and I had direct and fast feedback. The Facebook page for incoming students helped me meet new classmates and gave me insight into the diversity that I was about to experience and the different items I needed as a first-year in college.[”]).

122 John Law, *Can Higher Education Fix Refugee Crisis?*, BRITISH COUNCIL (April 22, 2016, 1:32 PM), <https://www.britishcouncil.org/voices-magazine/can-higher-education-fix-refugee-crisis>.

123 *Id.*

124 Simon Tisdall, *Divided Europe Seeks a Long-Term Answer to a Refugee Crisis that Needs a Solution Now*, GUARDIAN (July 22, 2017), <https://www.theguardian.com/world/2017/jul/22/divided-europe-refugee-crisis-italy-serbia-greece>.

should not be looked at solely as a European problem, and it should definitely not fall only on Italy because of its geography. Instead, the refugee crisis should be addressed at the international level, with all countries sharing in the responsibility and burden of the flows of refugees from war torn countries and those refugees otherwise facing persecution and poverty. Rather than merely closing borders or developing an anti-immigration policy, two short-term solutions that will not end the migration, countries need to work together towards an effective, permanent solution.<sup>125</sup>

Although higher education is expensive, the cost of not educating an entire generation of refugees will be more expensive in the long run. Governments should share in the cost as it will ultimately benefit the greater good, but universities are also uniquely positioned to help as, “they have the ability to bypass bureaucratic inefficiencies, prioritize Syria applications and provide facilities for students and their families.”<sup>126</sup> Further, the relationship is symbiotic because the universities will benefit from having students with diverse viewpoints in their classrooms, whose contributions can enrich discussions for everyone. As stated in an amicus brief written by universities in Massachusetts opposing President Trump’s travel ban:

The importance of maintaining international inclusion on our campuses cannot be overstated. Regular interactions with students and professors who come from different cultures and who have had vastly different life experiences promote both a richer understanding and a deeper appreciation of the pluralistic world in which we live. Equally important, international diversity challenges all of the members of an academic community to reevaluate their assumptions and to reconsider their beliefs and biases.<sup>127</sup>

The brief even cited an example from Syria: “the five Syrian students enrolled at MIT this past semester undoubtedly were able to contribute to their peers’ understanding of the wide-ranging consequences of the war in

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<sup>125</sup> See Mario Savino, *The Refugee Crisis as a Challenge for Public Law: The Italian Case*, 17 GERMAN L.J. 981, 1003-04 (2016).

<sup>126</sup> Jessica Magaziner, *The Importance of Higher Education for Syrian Refugees* (Dec. 7, 2015), <http://wenr.wes.org/2015/12/the-importance-of-higher-education-for-syrian-refugees>.

<sup>127</sup> Brief of Amici Curiae Massachusetts Universities in Support of Plaintiffs’ Complaint for Declaratory and Injunctive Relief at 5-6, *Louhghalam v. Trump*, 230 F.Supp.3d 26 (D. Mass. 2017) (No. 1:17-cv-10154-NMG), <https://www.bu.edu/today/files/2017/02/Brief-of-Amici-Curiae-in-Support-of-Complaint.pdf>.

Syria in a way no textbook or lecture ever could.”<sup>128</sup> One refugee, Mohammad Al-Haj Ali, a civil engineering student studying at the University of West London who died in the Grenfell Tower fire in London after fleeing the civil war in Syria, spoke about his desire to return and rebuild Syria prior to his death: “I want to [be] a civil engineer so when the war is over I can go back to Syria and I can rebuild Syria with the people.”<sup>129</sup>

Higher education also impacts the inclusion of refugee and other immigrant groups in their host countries. Higher education as a means of social inclusion sounds very nice in theory, but it can be much harder as a reality. Universities are places where ideas are debated but they are also supposed to be safe spaces. And often, through the relationships that are formed, real social inclusion does take place. After sitting next to the refugee from Syria all year in class you know that there is nothing scary about her. But, with inclusion, comes the worry that by inclusion we mean uniformity. Are we saying, “look like us, talk like us, and you’ll be one of us.” But if you wear that headscarf or look different you will remain scary and “the other.” What is so scary about a burkini that laws were enacted in France, since declared illegal,<sup>130</sup> to ban them?

The Dutch Prime Minister wrote an open letter to immigrants in his country when he faced an election against a populist far-right party warning them to “act normal or leave”.<sup>131</sup> Why do we care if someone looks different or wears a headscarf? We need to debate these issues. Is telling someone not to wear their headscarf to a job interview good advice or a violation of their rights? In *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, the E.E.O.C. sued Abercrombie & Fitch on behalf of a Muslim woman who wore a headscarf and was not hired because it violated the store’s “Look Policy” that prohibits “caps.”<sup>132</sup> Although the store did not have “actual knowledge” of the applicant’s need for an accommodation, the Court stated “an employer who acts with the motive of avoiding

128 *Id.* at 6.

129 ‘It’s Just Too Much’: Syrian Refugee Escaped Civil War Only to Die in London Highrise Fire, CBC RADIO (June 15, 2017), <http://www.cbc.ca/radio/asithappens/as-it-happens-thursday-edition-1.4161990/it-s-just-too-much-syrian-refugee-escaped-civil-war-only-to-die-in-london-highrise-fire-1.4161995>.

130 Lizzie Dearden, *Burkini Ban Suspended: French Court Declares Law Forbidding Swimwear Worn by Muslim Women ‘Clearly Illegal,’* INDEPENDENT (Aug. 26, 2016), <http://www.independent.co.uk/news/world/europe/burkini-ban-french-france-court-suspends-rule-law-forbidding-swimwear-worn-muslim-women-seriously-a7211396.html>.

131 *Act Normal or Get Out: The Netherlands’ Election is this Year’s First Test for Europe’s Populists*, ECONOMIST (Feb. 11, 2017), <http://www.economist.com/news/europe/21716643-geert-wilders-dragging-all-dutch-politics-nationalist-direction-netherlands>.

132 *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2031 (2015).

accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.”<sup>133</sup> Meanwhile, in France, headscarves have been banned in public schools since 2004.<sup>134</sup>

The importance of inclusion has real consequences. Although Europe has attracted a large number of Muslim political and economic refugees in the past few decades, many of these immigrants and their children do not fully integrate into European societies.<sup>135</sup> “Instead they experience identity crises and build resentment toward their new countries. Terrorist and extremist groups are able to exploit this resentment.”<sup>136</sup> As we integrate refugees into higher education, there also needs to be a focus on inclusion and what that really means.

### III. HIGHER EDUCATION AS A COUNTERTERRORISM MEASURE

Education itself is key in fighting terrorism. However, the importance of education in fighting terrorism has not been given a great amount of attention beyond the academic literature.<sup>137</sup> As the 9/11 Commission concluded, “[e]ducation that teaches tolerance, the dignity and value of each individual, and respect for different beliefs is a key element in any global strategy to eliminate Islamist terrorism.”<sup>138</sup> Universities are places where ideas are exchanged and different viewpoints should be expressed, listened to, and evaluated. ICESCR itself states in Article 13, the purpose of education:

Education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious

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<sup>133</sup> *Id.* at 2033.

<sup>134</sup> Law No. 2004-228 of Mar. 15, 2004, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190 (the French law banning conspicuous religious symbols in French public schools).

<sup>135</sup> J. Scott Carpenter, Matthew Levitt & Michael Jacobson, *Confronting the Ideology of Radical Extremism*, 3 J. NAT’L SECURITY L. & POL’Y 301, 302 (2009).

<sup>136</sup> *Id.*

<sup>137</sup> See Diane Webber, *Education as a Counterterrorism Tool and the Curious Case of the Texas School Book Resolution*, 11 U. MD. L. J. RACE, RELIG., GENDER & CLASS 271, 275 (2011).

<sup>138</sup> THOMAS H. KEAN & LEE H. HAMILTON, NAT’L COMM. ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 378 (2004).

groups, and further the activities of the United Nations for the maintenance of peace.<sup>139</sup>

A sound education can promote tolerance and understanding. Recognizing the human right to higher education will promote our national security objectives.

All aspects of terrorism can best be fought with education. Education is crucial in countries that are a breeding ground for terrorism. With weapons, we can kill terrorists, but we need education to fight the ideology of terrorism.<sup>140</sup> Without education, the terrorists can, and do, prey on the minds of the young in those countries.<sup>141</sup> The President of the American University of Cairo said that higher education should play a major role in fighting terrorism and guiding young people in the right direction through communication, cooperation and problem solving.<sup>142</sup> We need education to help prevent attacks, “[i]nformation gathering is the most powerful weapon in the struggle to dismantle terrorist networks and prevent attacks.”<sup>143</sup> We need tech savvy people who can come up with new ways to monitor terror networks. We also need education to counter the terrorist ideologies on-line and on social media and we need to come up with creative and innovative solutions. Academic freedom is necessary so people can study all different aspects of the problem.

Perhaps higher education will save a few individuals who may have turned to violence or extremism,<sup>144</sup> but more likely higher education will be key for those that will find new and innovative ways to combat terrorism. We need individuals from all backgrounds, not just the elite whose lives may be incredibly similar to one another’s to look at the

139 International Covenant on Economic, Social and Cultural Rights, *supra* note 2.

140 Rhiannon Mills, *Malala: Education Key in Fight Against Terror*, SKY NEWS (Mar. 30, 2016), <http://news.sky.com/story/malala-education-key-in-fight-against-terror-10223391>.

141 See Hosam Al-Jablawi, *A Closer Look at the Educational System of ISIS*, ATLANTIC COUNCIL (Apr. 26, 2016), <http://www.atlanticcouncil.org/blogs/syriasource/a-closer-look-at-isis-s-educational-system> (describing how ISIS provides its own education to young persons as a means of recruiting members to its terrorist organization).

142 Abdul Hadid Habtoor, *Education is Key to Combat Terrorism, Says AUC’s President*, ASHARQ AL-AWSAT (May 9, 2017), <https://english.aawsat.com/abdul-hadi-habtoor/lifestyle-culture/education-key-combatting-terrorism-says-aucs-president>.

143 Sara A. Daly, *Fight Terrorism With Intelligence, Not Might*, CHRISTIAN SCIENCE MONITOR (Dec. 26, 2003), <https://www.csmonitor.com/2003/1226/p13s01-coop.html>.

144 Mohammad AlAhmad, *The Crisis of Higher Education for Syrian Refugees*, BROOKINGS (June 17, 2016), <https://www.brookings.edu/blog/education-plus-development/2016/06/17/the-crisis-of-higher-education-for-syrian-refugees> (“[S]tatements about the likelihood of young Syrians joining extremist groups if they go without education are exaggerated, racist, and sometimes Islamophobic generalizations. These beliefs emanate from the waves of migration to Europe, recent terrorist attacks, and accusations against Syrians which are often baseless. Indeed, what is said about the nature of Syrian civilization is wrong—it is moderate and tolerant. However, it is possible that some Syrians may turn to violence because of the obstacles they face, and their feelings of frustration and despair”).

problem and figure out solutions. We need people combatting terrorism who may have themselves been hungry, seen jihadi propaganda, have a family member who was swayed by it. People who understand the language and subtle references and nuance.<sup>145</sup> These are the people most likely to come up with counterterrorism solutions. Not just the wealthy who may be very smart but cannot see the problem in the same way. Refugees often come from the war-torn countries that are breeding grounds of terrorism.<sup>146</sup> They can provide useful insight into the problems and possible solutions with first-hand understanding and experience. The same holds true with the white supremacists or the lone wolves looking for a cause to cling on to. We need lots of different people, from different backgrounds, working together to solve these problems.

Many of those closest to terrorist attacks understand the importance of education rather than bombs. After the bombing in Manchester, Richard Barrett, former director of global counterterrorism operation at MI6 urged authorities to engage the Muslim communities of Britain rather than bombing the Middle East or putting up barriers and said, “[i]t’s about engaging the community and letting the community inform us about how to avoid attacks.”<sup>147</sup>

We also need voices in the Middle East to counter the radical extremists.<sup>148</sup> Education is a global human right and a global good. For example, in the case of Syria, by educating refugee Syrians to be doctors, lawyers and engineers, those educated Syrians will then have the skills and knowledge to go back to Syria and rebuild their home state so that Syria will not be a fertile breeding ground for terrorism as is the case in too

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145 Dan Eggen, *FBI Agents Still Lacking Arabic Skills*, WASH. POST (Oct. 11 2006), [www.washingtonpost.com/wp-dyn/content/article/2006/10/10/AR2006101001388\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/10/10/AR2006101001388_pf.html).

146 Leading human rights defender Radhya Almutawakel, the Chairperson of the Yemeni NGO, Mwatana Organization for Human Rights, briefed the UN Security Council on the war in Yemen saying “[w]ar is providing an ideal environment for extremist groups to take hold and flourish. These groups have been working tirelessly amid the war to strengthen their power at the local level. They are virtual landmines in Yemen’s future and they cannot be weakened unless a state of law and order exists.” Sarah Knuckey, *Yemeni Human Rights Activist Radhya Al-Mutawakel’s Speech to the UN Security Council*, JUST SECURITY (May 31, 2017), <https://www.justsecurity.org/41570/yemeni-human-rights-activist-radhya-al-mutawakels-speech-security-council/>.

147 Katrin Bennhold, Steven Erlanger, & Ceylan Yegnisu, *Terror Alert in Britain Is Raised to Maximum as ISIS Claims Manchester Attack*, N.Y. TIMES (May 23, 2017), <https://www.nytimes.com/2017/05/23/world/europe/manchester-arena-attack-ariana-grande.html>.

148 See Carpenter at al., *supra* note 134 at 321 (“United States public diplomacy efforts must be mainly about empowering mainstream Muslims to compete with radical extremists, not about employing U.S. researchers, pollsters, and marketers to improve the American brand. The United States must more effectively identify Muslim activists, entrepreneurs, writers, business people, media personalities, students, and others who lead opinion abroad and within their domestic communities, particularly at the local level.”).



many other failed states. And, “[a]s home to the strategically vital 18-25 age group, higher education can help shelter and protect an important subset of young men and women during crisis situations, maintaining their hope in the future and preventing them from being driven into the hands of violent groups.”<sup>149</sup> Finally, let’s be clear – it is not just about ISIS or Islamic terror – white supremacists or mass murderers are terrorists just the same and many of the so-called Islamic terrorists who pledge allegiance with ISIS have no real connection to Islam or ISIS.<sup>150</sup> With education, we can fight all different forms of terrorism at the most basic level. The terrorists have figured out how important education is, now we need to do the same.

### CONCLUSION

Higher education is a human right. To say that primary education is a human right, without including secondary and higher education for those with capacity is to not understand the world we live in. In the United States, we have become complacent, accepting that university costs are so high that they are out of reach for many. This needs to change. By changing the dialogue and by recognizing higher education as a human right, we will be able to start to solve the problem by opening the debate on the scope of the right to education in the United States. Much has been written about the tension between civil rights and national security<sup>151</sup>, but here is an example of a time when respecting a human right to education, and specifically higher education, will actually increase global security. Nelson Mandela said, “*Education is the most powerful weapon which you can use to change the world.*”<sup>152</sup> *Without education we are only left with real weapons, which is not the way we should want to change our world. And, in the modern fight against terrorism, largely fought on the internet and on social media, education is a more effective weapon than bombs.*

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<sup>149</sup> SULTAN BARAKAT & SANSOM MILTON, HOUSES OF WISDOM MATTER: THE RESPONSIBILITY TO PROTECT AND REBUILD HIGHER EDUCATION IN THE ARAB WORLD, BROOKINGS DOHA CENTER (2015).

<sup>150</sup> See Jen Easterly & Joshua Geltzer, *The Islamic State and the End of Lone Wolf Terrorism*, FOREIGN POLICY (May 23, 2017, 12:56 PM), <http://foreignpolicy.com/2017/05/23/the-islamic-state-and-the-end-of-lone-wolf-terrorism/> (“The Islamic State thus offers a chance to those who feel alone — those who may lack opportunities or who may simply disagree with the politics or mores of the society around them — not to be lone actors.”).

<sup>151</sup> For an excellent discussion of the tension between civil rights and national security, see SUSAN N. HERMAN, TAKING LIBERTIES: THE WAR ON TERROR AND THE EROSION OF AMERICAN DEMOCRACY (2011).

<sup>152</sup> Valerie Strauss, *Nelson Mandela on the Power of Education*, WASH. POST (Dec. 5, 2013), [https://www.washingtonpost.com/news/answer-sheet/wp/2013/12/05/nelson-mandelas-famous-quote-on-education/?utm\\_term=.ca135d6da905](https://www.washingtonpost.com/news/answer-sheet/wp/2013/12/05/nelson-mandelas-famous-quote-on-education/?utm_term=.ca135d6da905).