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### Mass Migration, Cultural Conflict, and the Fear of Terrorism: Dilemmas of the Democratic West

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**MYRES S. MCDOUGAL DISTINGUISHED LECTURE 2016**  
**MASS MIGRATION, CULTURAL CONFLICT, AND THE FEAR OF**  
**TERRORISM:**  
**DILEMMAS OF THE DEMOCRATIC WEST**

\*PRESENTED BY PROFESSOR TOM FARER AT THE UNIVERSITY OF DENVER COLLEGE  
OF LAW ON THE OCCASION OF THE ANNUAL SUTTON COLLOQUIUM

I. INTRODUCTION: THE DEMOGRAPHICS OF MASS MIGRATION

There is no reason to believe that 2015 was the high-water mark of migration, documented and undocumented, from the lands of mass poverty to the wealthy and comparatively well-ordered countries of the West. In the next thirty-five years, tens of millions more people are likely to begin the trek to the West driven by the economic, social and political pathologies of the lands of their birth and pulled by visions of affluence and security. Some will seek entry invoking the right to be protected from persecution.<sup>1</sup> Others implicitly will invoke a moral right to build a better life for themselves and their families.<sup>2</sup> The world's population is headed

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1. U.N. High Comm'r for Refugees, Introductory Note to Convention and Protocol Relating to the Status of Refugees 3 (2010), <http://www.unhcr.org/3b66c2aa10.pdf> (An "Asylum seeker" is a person who has arrived at the border of a state or gained entry by whatever means and has applied for asylum under the 1951 Refugee Convention on the ground that he or she has a well-founded fear of persecution on account of race, religion, nationality, political belief or membership in a social group if they return to their country of origin. Technically a refugee is a person whose application for asylum has been successful, but in lay discourse the term is often applied to anyone who appears to have fled their country of origin either because of the stipulated fear of persecution or to avoid being caught in the cross fire of an armed conflict. The term is often applied as well to persons uprooted by a natural disaster which has put their lives at risk. Some national courts have stretched the concept still wider to embrace individuals fleeing fearsomely abusive spouses or families. Once a person has come within the jurisdiction of a state, the principle of "non-refoulement" precludes a state from expelling the person to a country, whether or not the country of origin, where he or she is at risk of torture or execution. While this principle is embodied in the 1951 Refugee Convention and its 1967 Protocol, it has evolved into a principle of customary law and so is binding on all countries.)

2. Compare CHRISTOPHER HEATH WELLMAN & PHILLIP COLE, DEBATING THE ETHICS OF IMMIGRATION: IS THERE A RIGHT TO EXCLUDE? 8-9 (Sept. 30, 2011). (The author's justification for debating the ethics of immigration largely in terms of theory rather than more instrumental considerations like economic impact: "It is the role of theory... to challenge 'common sense,'. And we can at least shift it out of the consciousness of those who engage in this debate at the theoretical level.... Theory is the use

toward 11 billion or more by the end of the century<sup>3</sup> in the absence of nuclear war or collision with a large asteroid or the discovery by nihilists of how to combine the lethality of Ebola with the contagiousness of the common cold. Less than twenty years ago, the conventional wisdom among demographers was that the world's population would peak in 2050 at 9 billion.<sup>4</sup> Now, according to United Nations (UN) reports, it is expected to hit almost 10 billion by mid-century and surpass 11 billion by 2100.<sup>5</sup>

The largest bulk of that growth will occur in Africa. Experts estimate that a population that has already grown 50 percent in the last fifteen years will by 2050 double from the present 1.25 billion to approximately 2.5 billion and continue to surge toward 4 billion by the century's end.<sup>6</sup> To convey a sense of what that means for individual countries, Nigeria's population alone is projected to leap from today's roughly 180 million to 500 million by mid-century<sup>7</sup> and the population in the risibly misnamed Democratic Republic of the Congo should expand from the current 75 million (an increase of 55 million since 1970) to 194 million.<sup>8</sup> Meanwhile, most of the rich countries will shrink absent large-scale immigration. Japan, to take an extreme case, with its 1.1 birthrate is projected to diminish from 120 million to less than 100 million by the middle of the century.<sup>9</sup> Italy, Spain, and Germany tag closely behind.<sup>10</sup>

In Asia, Pakistan's increasingly violent and dysfunctional society will likely add 50 million people just in the next fifteen years. Swelling numbers are also predicted for Afghanistan, from today's roughly 25 million to 55 million in 2050.<sup>11</sup>

Demographic pressure in the Middle East and North Africa present a

of the imagination to construct possibilities, and we can only critically examine our beliefs if we are prepared to imagine other possibilities.”), with CHANDRAN KUKATHAS, *THE LIBERAL ARCHIPELAGO: A THEORY OF DIVERSITY AND FREEDOM* (2003) (After conceding that a campaign for open borders is politically untenable, he goes on to encourage theorizing about and coming to recognize the case for it).

3. U.N. Dep't. of Social and Economic Affairs, *World Population Projected to Reach 9.7 billion by 2050* (Jul. 29, 2015), <http://www.un.org/en/development/desa/news/population/2015-report.html> (last visited Apr. 23, 2017); see also Rod Nordland, *A Migration Crisis, and It May Yet Get Worse*, N.Y. TIMES (Dec. 31, 2015), [https://www.nytimes.com/2015/11/01/world/europe/a-mass-migration-crisis-and-it-may-yet-get-worse.html?\\_r=0](https://www.nytimes.com/2015/11/01/world/europe/a-mass-migration-crisis-and-it-may-yet-get-worse.html?_r=0) (last visited Apr. 23, 2017).

4. U.N. Dep't. of Social and Economic Affairs Population Div., *The World at Six Billion*, Introduction U.N. Doc. ESA/P/WP.154 (Oct. 12, 1999), <http://www.un.org/esa/population/publications/sixbillion/sixbilpart1.pdf>.

5. U.N. Dep't. of Social and Economic Affairs, *supra* note 3.

6. Ivana Kottasova, *Biggest populations in 2050: Move over Russia and Mexico. Here comes Africa*, CNN MONEY (Aug. 18, 2015), <http://money.cnn.com/2015/08/18/news/countries-with-biggest-populations/>.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Fertility Statistics*, Eurostat (Dec. 22, 2016), <http://ec.europa.eu/eurostat/statistics-explained/pdfscache/1273.pdf>.

11. U.N. Dep't of Econ. and Soc. Affairs, Population Div., *World Population Prospects: The 2015 Revision, Key Findings and Advance Tables*, ESA/P/WP.241 18 (2015), [https://esa.un.org/unpd/wpp/Publications/Files/Key\\_Findings\\_WPP\\_2015.pdf](https://esa.un.org/unpd/wpp/Publications/Files/Key_Findings_WPP_2015.pdf).

particularly daunting picture for European political leaders concerned about managing immigration. In the second half of the twentieth Century, the population of the Middle East and North Africa increased fourfold, from about 93 to 347 million people.<sup>12</sup> Furthermore, that number is projected to double in the next thirty-five years, becoming roughly 680 million tightly packed persons by 2050.<sup>13</sup>

Powerful push factors beyond sheer numbers are at work in parts of the Global South. Anarchic violence, civil war, and persecution have already driven more than 60 million people from their traditional homes.<sup>14</sup> Some are displaced within national territories; others have fled across borders.<sup>15</sup>

Potentially dwarfing the numbers fleeing violence and persecution are the tens of millions of young people arriving at the door of the labor markets of developing countries, which seem incapable of bringing them into stable employment much less opportunities to prosper. In the Middle East and North Africa, 60 percent of the population is now under the age of twenty-five.<sup>16</sup> Less than 50 percent of people aged sixteen to thirty have regular employment and prospects for improvement in that figure are dim.<sup>17</sup> For many young job searchers, formal educational qualifications appear irrelevant: According to the World Bank, 30 percent of the unemployed in the Middle East and North Africa are university graduates, the victims of low quality education and a lack of relevant job skills, as well as insufficient private sector capital investment and persistent misgovernment.<sup>18</sup> Conditions in Sub-Saharan Africa, where many governments are hardly more than vertically integrated criminal conspiracies for the extraction of wealth from tortured societies, are just as grim or grimmer.<sup>19</sup>

The swelling migrant tide has fueled a political reaction which is proving much more toxic in Europe than in the United States. In this country, a coalition of liberals, big business, agricultural interests and members of earlier diaspora battle on the whole effectively in favor of continuing immigration on a scale calculated to bring the US population of almost 500 million by the middle of the century.<sup>20</sup> The issue of migration is more toxic in European politics in part because it has become entangled

12. Patrick Clawson, *Demography in the Middle East*, THE WASHINGTON INSTITUTE (Dec. 2009), <http://www.washingtoninstitute.org/policy-analysis/view/demography-in-the-middle-east-population-growth-slowing-womens-situation-un>.

13. *Id.*

14. Sam Jones, *One in every 113 people forced to flee, says UN refugee agency*, THE GUARDIAN (June 20, 2016), <https://www.theguardian.com/global-development/2016/jun/20/one-in-every-113-people-uprooted-war-persecution-says-un-refugee-agency>.

15. *Id.*

16. Middle East and North Africa: Youth Facts, YOUTH POLICY, <http://www.youthpolicy.org/mappings/regionallyouthscenes/mena/facts/> (last visited Feb. 28 2017).

17. Lili Mottaghi, *The Problem of Unemployment in the Middle East and North Africa Explained in Three Charts*, THE WORLD BANK (Aug. 25, 2015), <http://blogs.worldbank.org/arabvoices/problem-unemployment-middle-east-and-north-africa-explained-three-charts>.

18. *Id.*

19. See generally SARAH CHAYES, *THIEVES OF STATE: WHY CORRUPTION THREATENS GLOBAL SECURITY* (2015).

20. UN Dep't. of Social and Economic Affairs, *supra* note 3.

in the politics of cultural conflict, inequality and economic stagnation.

## II. MIGRATION AND CULTURAL CONFLICT

Cultural conflict in the United States is conducted largely among the long-settled inhabitants, most sharply between devout evangelicals and conservative Catholics, on the one hand, and social liberals and libertarians, on the other, between addicts of Fox News and consumers of the New York Times. Although traditionalists have not disappeared from West European countries,<sup>21</sup> for the past several decades social liberals have occupied the commanding heights of politics and culture. Nominally the faith of the great majority of West Europeans, Christian piety is more a background to contemporary society than an active presence. It does not aggressively combat the sunny hedonism of day-to-day life among the middle classes. To paraphrase Ronald Dworkin, Western Europe is a secular space where religion is more wallpaper than immediate presence.<sup>22</sup> The US is a religious country in which religious indifference is tolerated.<sup>23</sup>

Since World War II, a steady stream of Muslim immigrants has entered Continental Europe from Turkey, North, and to a lesser degree, West Africa. In the United Kingdom, the stream's headwaters are primarily in South Asia. Despite a very long history of Moslem-Christian conflict, the first wave of migrants from predominantly Muslim countries did not generate anxiety, in part because the migrants were needed to fill gaps in the labor force opened by the Post World War II economic boom, and in part because particularly in the continental countries governments assumed that the migrants were in essence guest workers who would return to their countries of origin when they were no longer needed.<sup>24</sup> This expectation proved false. Most migrants stayed, their families joined them, and, as usually occurs, the existence of diaspora communities encouraged and facilitated new waves of migration even after the post-war European economies lost their exuberance. Meanwhile, opportunities for the less skilled members of the indigenous population and a fortiori for the second and third generations of immigrant families have been eroding in the face of the economic transformations and disruptions resulting from globalization and technological change.

Three other developments have turned the growing presence of migrants, but particularly migrants who identify as Muslim, into a ferocious political issue. One is simply numbers: A growing Muslim presence has become increasingly manifest at the grassroots level of society as Muslims have sought space for public worship and burial according to Muslim traditions and legal authority to slaughter animals in accordance with Halal law.<sup>25</sup> A second development has been the perceptible

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21. Adam Nossiter, *François Fillon Wins Center-Right Nomination for French Presidency*, N.Y. TIMES (Nov. 26, 2016), <https://www.nytimes.com/2016/11/27/world/europe/francois-fillon-wins-center-right-nomination-for-french-presidency.html>.

22. See generally Ronald Dworkin, RELIGION WITHOUT GOD (2013).

23. *Id.*

24. *Muslim Migration to Europe*, UNIVERSITY OF MINNESOTA (July 17, 2015), <https://cla.umn.edu/ihr/news-events/other/muslim-migration-europe>.

25. James Meikle, *What exactly does the halal methods of animal slaughter involve?*, THE

alienation of many of the children and grandchildren of the first immigrant wave and their disproportionate presence in the prison population. The recent phenomenon of a limited number of young men and women, not all from poor families,<sup>26</sup> departing Europe to join ISIS has sharpened the perception of alienation.

Developments within the Muslim World have been a third factor generating Islamophobia in European politics. An aggressive, intolerant piety, hostile to the liberal norms which in Europe have displaced those of Christian traditionalism, has gained increasing traction among Muslim populations worldwide, but particularly in the Arab-speaking sub-world. Its affective power there is in part the result of the political and military failure of Arab nationalism, a secular ideology of integration and modernization which briefly captured the imagination of educated Arabs in the decades before and just after the Second World War. The deflation of Arab nationalism left a vacuum into which a species of Islamic thought analogous to Christian fundamentalism rushed in. But it has also gained powerful traction in non-Arab countries like Pakistan.<sup>27</sup>

Funded principally by Saudi oil wealth,<sup>28</sup> the spread of fundamentalist theology within Islam coincided with the demographic explosion I have already mentioned.<sup>29</sup> It coincided as well with a vast movement of people from the countryside into the region's cities<sup>30</sup> bringing with them patriarchal traditions to which fundamentalist Islam gave a theological legitimacy which could be wielded against the condescension of sophisticated urban elites.

The spread of fundamentalist piety also coincided, of course, with armed militancy spurred initially by the successful call for jihad against the Soviet occupiers of Afghanistan and then reinforced by the difficulties Arab and West Asian Governments have had in coping with the twin stresses of mushrooming population growth and rocketing urbanization. Also fueling militancy, has been the increasing militarized presence of the West in the Middle East and West Asia and its association with repressive governments unable to help their swollen populations enter the precincts of that lavish consumerism which the popular majority witness in the media and in the lives of a small upper class. It is not, therefore, surprising that the call for jihad against the "far enemy", as Osama Bin Laden described the

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GUARDIAN (May 8, 2014), <https://www.theguardian.com/lifeandstyle/2014/may/08/what-does-halal-method-animal-slaughter-involve>.

26. Heather Long, *Who's joining ISIS? It might surprise you...*, CNN MONEY (Dec. 15, 2015), <http://money.cnn.com/2015/12/15/news/economy/isis-recruit-characteristics/>.

27. Directorate-General for External Policies, *The Involvement of Salafism/Wahhabism in the Support and Supply of Arms to Rebel Groups Around the World*, at 5, AFET (June 2013), [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/457137/EXPO-AFET\\_ET\(2013\)457137\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/457137/EXPO-AFET_ET(2013)457137_EN.pdf).

28. *Id.* at 19; see also John Kemp, *Saudi Arabia's oil reserves: how big are they really?*, REUTERS (July 11, 2016), <http://www.reuters.com/article/us-saudi-oil-kemp-idUSKCN0ZL1X6>.

29. Muslim Migration to Europe, *supra* note 24.

30. Martin Hvidt, *Economic diversification in GCC countries: Past record and future trends*, LONDON SCH. OF ECON. AND POLITICAL SCI. (Jan. 2013), <http://www.lse.ac.uk/middleEastCentre/kuwait/documents/Economic-diversification-in-the-GCC-countries.pdf>.

West, found a sufficient number of receptive ears to bring mass casualty terrorism into the cities of Europe as well as the United States.

These developments have produced in European electorates a mental association of migration and militant anti-liberalism, an image fueling, paradoxically, the rise of right-wing nationalist parties, illiberal themselves, and driving the leaders of main-stream parties to repudiate what they call multi-culturalism.<sup>31</sup> That repudiation implies either a cultural test for prospective migrants or government-driven efforts at cultural assimilation of multi-generational migrant families or both.

Obviously, the association of Islam with anti-liberalism in Europe finds an echo in the United States, principally albeit not exclusively on the political right, even though the Muslim community in the United States is small,<sup>32</sup> for the most part prosperous,<sup>33</sup> and with few exceptions integrated, by any definition of the word, into economy and society.<sup>34</sup>

What makes European political developments exquisitely important to anyone anywhere committed, however casually, to the defense of human rights is the issues they raise first about the appropriate limits of liberal tolerance and majority power and, conversely, the rights of religious and ethnic minorities. Those are the issues I want to address all too briefly in this lecture and then discuss with you in the time your patience and Ved's authority will allow.

Before going any further, however, I need to define exactly what I mean by the words "Liberalism" and "fundamentalism" or "Traditionalism." First, "Liberalism." I use the term not narrowly as a reference to some fraction of the American electorate but rather in its larger philosophical meaning as a political and social order dedicated to enabling individuals to shape continuously a personal identity and life plan in light of their understanding of the meaning and value and possibilities of human existence, in other words a political and social order in which human beings are the architects of themselves. The Universal Declaration of Human Rights<sup>35</sup> and the International Covenant on Civil and Political Rights<sup>36</sup> are legal expressions of my conception of Liberalism.

A corollary of respect for human agency is toleration of different choices

31. Clifford D. May, *The Trouble with Multiculturalism*, NAT'L REVIEW (June 21, 2012), <http://www.nationalreview.com/article/303529/trouble-multiculturalism-clifford-d-may>.

32. Besheer Mohamen, *A new estimate of the U.S. Muslim population*, PEW RESEARCH CENTER (Jan. 6, 2016), <http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population/>.

33. *Muslim Americans: Middle Class and Mostly Mainstream*, PEW RESEARCH CENTER (May 22, 2007), <http://www.pewresearch.org/2007/05/22/muslim-americans-middle-class-and-mostly-mainstream/>.

34. *Id.*

35. Universal Declaration of Human Rights, art. 25, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), [http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf).

36. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf> [hereinafter *ICCPR*].

people make, choices which may be implicit in their practices. But suppose their practices include active membership in communities which reject the premises of Liberalism and also include propagation of the traditionalist community's il-Liberal protocols through indoctrination of their children? Should those choices be tolerated by Liberals? Perhaps the answer to that question depends on whether one advocates Liberalism as a formula for the peaceful coexistence of people with different systems of belief. Liberalism does have that instrumental value. But Liberalism itself is a belief system, at least a conviction about the character of a good society and the nature of an admirable life. Therefore, Liberalism, like Fundamentalism, can be messianic particularly when it coincides with the conviction that the propagation of Liberal values will serve the interests of the United States.

Even more than Liberalism, Fundamentalism can be widely referential, its meaning varying with context. But I use it as a reference to cultures which idealize the organization of family life along patriarchal lines with women in a subordinate position insofar as legal rights, sexual freedom, family decisional power, and relations with the larger society are concerned. Arguably, typifying this mindset was the Egyptian Muslim Brotherhood's criticism of a proposed United Nations Commission on the Status of Women declaration condemning violence against women,<sup>37</sup> which included a statement of women's rights to choose their marriage partners, to work, to travel, and to use contraception without their husband's permission, and to take their husbands to court for marital rape.<sup>38</sup> In a memorandum commenting on the document, the Brotherhood stated: "This declaration, if ratified, would lead to the complete disintegration of society".<sup>39</sup> In response, a spokesperson for Egypt's National Council for Women condemned the Brotherhood's condemnation.<sup>40</sup>

The Traditionalist culture also incorporates the premise that identity is inherited and fixed rather than individually constructed, that virtue consists in adherence to inherited traditions, that internal challenges to received beliefs is heresy, abandonment of the faith is punishable apostasy akin to treason in secular societies, and external criticism or satire of its central figures or core beliefs is blasphemy and

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37. See *Muslim Brotherhood Statement Denouncing UN Women Declaration for Violating sharia Principles*, IKHWANWEB (Mar. 14, 2013), <http://www.ikhwanweb.com/article.php?id=30731>; see also *The National Council for Women's Response to the Muslim Brotherhood's Statement on the Proposed Agreed Conclusions by the 57<sup>th</sup> Session of the Commission on the Status of Women on Violence Against Women*, THE NATIONAL COUNCIL FOR WOMEN (Mar. 15, 2013), <http://www.ncwegypt.com/index.php/en/media-centre/ncw-news/147-ncw-s-stand-with-regards-to-the-current-events-and-issues/748-the-national-council-for-women-s-response-to-the-moslem-brotherhood-statement-on-the-proposed-agreed-conclusions-by-the-57th-session-of-the-commission-on-the-status-of-women-on-violence-against-women>.

38. A/RES/48/104, Declaration on the Elimination of Violence against Women (Dec. 20, 1993), <http://www.un.org/documents/ga/res/48/a48r104.htm>.

39. *Id.*

40. Michelle Nichols, *Egypt's Islamists warn giving women some rights could destroy society*, REUTERS (Mar. 14, 2013), <http://www.reuters.com/article/us-women-un-rights-idUSBRE92E03D20130315>; see also *The National Council for Women*, *supra* note 37.



should be punishable.<sup>41</sup>

Liberal minorities present public policy challenges to a secular Liberal state in a host of areas: free speech, sexual and reproductive freedom, educational standards including educational content and length, the regulation of marriage, gender equality with respect to divorce and control of family property, and the treatment of children, including protection of children from arranged marriages.<sup>42</sup>

### III. MIGRATION AND THE RIGHT TO CULTURAL PRESERVATION

I want you to consider three questions: The first is whether international human rights law prevents Western Governments from denying entry to migrants who profess fundamentalist values. The second is whether human rights law requires Western Governments to respect the practices of fundamentalist minorities already settled in their countries. The third is whether, even if traditionalist minorities are not legally protected, people who think they are supporters of human rights should at least tolerate the efforts of fundamentalists to live and perpetuate culturally distinctive lives.

The first question, that is whether governments can impose cultural tests on persons wishing to enter and settle, assumes that governments have a broad discretion to exclude those wishing to enter, indeed could if they wished (and if they withdrew from the Refugee Convention), ban migration altogether. The legal case for governmental power in this regard is powerful. The UN Charter is first and foremost a defender of existing states from any threat to their "territorial integrity and political independence."<sup>43</sup> As opponents of any right to migration have argued, what meaning can the political independence and territorial integrity of states have if people can wander across their borders at will and settle on their territory?<sup>44</sup> A heavily populated but militarily weak state could engulf its well-armed neighbor simply by lifting border controls.

The omission in the International Covenant on Civil and Political Rights of a right to enter<sup>45</sup> corresponding to the specifically enumerated right to leave<sup>46</sup> can therefore be seen as a corollary of the UN Charter's guarantee of state sovereignty.<sup>47</sup> State practice reinforces the argument grounded in authoritative texts.

The moral as distinguished from the legal case for a right to exclude is much

41. Kareem Elbayar, *Reclaiming Tradition: Islamic Law in a Modern World*, GEORGE WASHINGTON UNIV., <http://www.iar-gwu.org/node/23>.

42. Ben Hubbard, *A Saudi Morals Enforcer Called for a More Liberal Islam. Then the Death Threats Began.*, N.Y. TIMES (July 10, 2016), <https://www.nytimes.com/2016/07/11/world/middleeast/saudi-arabia-islam-wahhabism-religious-police.html>.

43. U.N. Charter, art. 2, ¶ 4.

44. Catherine Dauvergne, *Challenges to sovereignty: migration laws for the 21<sup>st</sup> century*, (UNHCR Working Paper No. 92, 2003), <http://www.unhcr.org/3f2f69e74.pdf>.

45. ICCPR, *supra* note 36.

46. *Id.*

47. *See generally* U.N. Charter.

less clear.<sup>48</sup> A moral right to enter could be seen as an emanation from the totality of Liberal values reflected in the various human rights treaties. Consider the Freedom of Association and Assembly.<sup>49</sup> What could be more basic than my right to share my home permanently with a person I met on my travels abroad or on the Internet? In the globally connected world of 2016, and with the already enormous migration of people from the lands of their birth, many citizens of every state are likely to have human connections, both intimate and professional, that cross national boundaries. So to say that the state has a largely unconstrained right to close its borders is to concede to the state the authority sharply to diminish my associational rights and, incidentally, to create great disparities among citizens in the enjoyment of that right: those citizens whose intimate connections are entirely local will enjoy the right fully while those whose connections are transnational will be vulnerable to whatever limits the state chooses to impose.

A moral right to enter need not rest only on emanations from specific rights. It may rest, perhaps even more securely, on the principles or deep normative premises seen to lie behind the various legal enumerations. Arguably, one such moral premise is that the state should not use violence against individuals whose actions do not threaten the rights of others. Many aspiring migrants to Europe have repeatedly demonstrated that only physical violence will stop them. Africans, for instance, have climbed high barbed wire fences and faced hails of rubber bullets trying to enter the Spanish enclave of Ceuta in North Africa.<sup>50</sup>

A second principle or normative premise which could support a right to enter is that no one should be denied the opportunity to lead a life with some opportunity for improvement and some measure of choice. When a person struggling from day-to-day in some Southern country's informal economy, a person like Mohamed Bouzazi, the Tunisian street vendor whose self-immolation ignited the Arab Spring, moves from his or her country of birth into a comparatively well-governed, capital-rich country in Europe or North America, he or she enters a new universe of opportunity and quotidian security. Where grotesque inequality in life chances stemming from the accident of birth in a poor country can be radically mitigated by no more than acquiescence in entry, can persons who believe in the moral equality of all people bar the gates? Barring entry of non-threatening migrants is an affirmative action denying people the chance to escape the prison of poverty and powerlessness where the accident of birth deposited them. It is a means of enforcing what Josef Carens calls a geographical caste system, "the modern equivalent to feudal privilege which was an inherited status that greatly enhanced one's life

48. WELLMAN, *supra* note 2.

49. The Rights to Freedom of Peaceful Assembly and Association and the Internet, ASS'N FOR PROGRESSIVE COMMUNICATIONS, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/166/98/PDF/G1016698.pdf?OpenElement>; see generally *Special Rapporteur on the rights to freedom of peaceful assembly and of association*, UNHCR, <http://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/SRFreedomAssemblyAssociationIndex.aspx> (last visited Mar. 1, 2017).

50. *Spain: 400 migrants storm North African border fence*, FOX NEWS (Dec. 9, 2016), <http://www.foxnews.com/world/2016/12/09/spain-400-migrants-storm-north-african-border-fence.html>.

chances.”<sup>51</sup>

Despite its considerable power, the moral argument for open borders is not decisive. There is a possible response also grounded in the Liberal values which inform the human rights texts, in particular the linked rights of self-determination, self-government, and, paradoxically, the Freedom of Association and Assembly.<sup>52</sup> In long-established states like those of North America and Western Europe, which have evolved organically and where a certain unifying national spirit prevails, people imagine themselves as forming an enduring political association with boundaries within which members share a history, a sense of comradeship, and sets of quotidian practices and understandings. From that association they derive an identity. Not their only identity but one of such power that, when necessary, they risk their lives for it.

Article 25 of the International Covenant on Civil and Political Rights declares the right of citizens “to take part in the conduct of public affairs, directly or through freely chosen representatives.”<sup>53</sup> Taking part in public affairs through freely chosen representatives would be gaseous rhetoric if it were not construed to mean that majorities can decide issues of great moment.<sup>54</sup> Who can enter the country and on what conditions has long been such an issue.

That is one string to this argument’s bow. Its second string is the plausible claim that the coherent management of public affairs is impossible without a fairly stable body politic. Issues need to be defined, proposals for their resolution tested, potential representatives identified and assessed. How can this be accomplished if millions of people unfamiliar with the society’s problems and personalities, its resources and institutions and historical experiences, persons who may not even be able to read or speak its principal language, can pour into the body politic in an unending stream?

The political philosopher Michael Walzer has put the point in a slightly different way. The political order, he has argued, is the outcome of negotiation and struggle over time and in a determinate place, a struggle towards what he calls a “common standpoint of morality,” a moral settlement.<sup>55</sup> Where the moral settlement not only sustains civic peace but is as well the source of individual freedom and the relatively equal application of the law, it can be defended in the name of Liberalism. So, if migration of a certain size or composition is reasonably calculated to undermine the settlement, then on this view the Liberal democratic society is entitled to restrain or condition it. Whether migration does or could have that effect is, of course, a judgment about which people continue to disagree furiously.

The triumph of Liberal values in each Western country is not decisive.<sup>56</sup> So,

51. Compare CHANDRAN KUKATHAS, *THE LIBERAL ARCHIPELAGO: A THEORY OF DIVERSITY AND FREEDOM* 153–54 (2003), with JOSPEH H. CARENS, *IMMIGRATION & CITIZENSHIP* 131–35 (2002).

52. *Special Rapporteur on the rights to freedom of peaceful assembly and of association*, *supra* note 49.

53. ICCPR, *supra* note 36, art. 25(a).

54. *Id.*

55. Michael Walzer, *Response to Kukathas*, in IAN SHAPIRO AND WILL KYMLICKA, *EDS., ETHNICITY AND GROUP RIGHTS* (1997).

56. See generally James Taub, *FOREIGN POLICY*, <https://foreignpolicy.com/author/james-traub/>.

one could argue, defenders of those values have reason to resist an unqualified right to cross borders. If there is a largely unqualified right to enter, persons coming from societies where Liberal values have not prevailed might bring with them the dominant values of those societies and thus serve as reinforcements for Liberalism's enemies.

But do international human rights norms allow for discrimination among prospective migrants on the basis of a person's cultural values? Certainly, a case can be made that they bar discrimination on the basis of religion. But would a test intending to bar entry for persons who believe that women must be governed by men or express homophobic views constitute discrimination on the basis of religion? A government like that of the Netherlands which has introduced something like a cultural test<sup>57</sup> would argue that such views are not integral to any of the great faiths but can be found among certain believers in all of them. For instance, a virulent strain of homophobia exists in Christian majority countries like Uganda where radical American evangelists have encouraged the passage of vicious anti-gay laws.<sup>58</sup> In any event, people are denied entry not because of their religious identity but rather because certain of their practices or convictions threaten the rights of others.

But, even if we assume that states have a moral as well as legal right to limit entry, there remains the question of the legal and moral rights of traditionalist minorities who have already entered and settled. What legal protection do international human rights norms offer to minority communities in general and to illiberal minorities in particular? Article 18 of the International Covenant on Civil and Political Rights (Covenant) requires states "to have respect for the liberty of parents...to ensure the religious and moral education of their children in conformity with their own convictions."<sup>59</sup> However, it makes that liberty subject to "such limitations...as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."<sup>60</sup> That limitation can cover a lot of ground. It could, for instance, be construed to give governments discretion to require private schools established by Islamic fundamentalists to teach: (1) the necessity of respect for members of other faiths and for agnostics and atheists, (2) the equality of men and women and their equal right to shape their individual lives and the life of their family, (3) the value of free speech including speech critical of religious beliefs, and (4) the right of every person to change his or her religious identity: In short, to teach things at odds with traditionalist culture.

Article 23 of the Covenant declares the family to be "the natural and fundamental group unit of society and entitled to protection by society and the state."<sup>61</sup> An emphasis on the family unit rather than the individual is promising from

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57. *Dutch set immigrants culture test*, BBC (Dec. 22, 2005), <http://news.bbc.co.uk/2/hi/europe/4551292.stm>.

58. David Smith, *Why Africa is the most homophobic continent*, THE GUARDIAN (Feb. 22, 2014), <https://www.theguardian.com/world/2014/feb/23/africa-homophobia-uganda-anti-gay-law>.

59. ICCPR, *supra* note 36, art. 18(4).

60. *Id.* art. 18(3).

61. *Id.* art. 23(1).

the fundamentalist perspective. However, it turns out that the family being protected is not necessarily the fundamentalist's idea of a proper family model, for Article 23 also provides that "States Parties...shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution." In addition, it declares that "No marriage shall be entered into without the free and full consent of the intending spouses."<sup>62</sup> So much for arranged marriages—particularly of the very young.

Fundamentalists might also invoke Article 26 which obligates State Parties to "prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on the basis of 'political or other opinion.'"<sup>63</sup> They could contend that their views on the rights of women or on intimate same-sex relations are protected "opinions." The government, conversely, could invoke Article 26 since it requires governments to prevent discrimination on the basis of sex.<sup>64</sup> Only Article 27 addresses the minorities question directly,<sup>65</sup> but it can most reasonably be construed to reinforce the previous articles and to guarantee equal opportunity and treatment for ethnic and religious minorities in competition for jobs and access to education and other societal goods.

Putting aside the question of legal protection, what is the moral argument for toleration of traditionalist practices by secular Liberal governments? On both principled and prudential grounds strong multiculturalists like Chandran Kukathas urge us to reject the "what-should-be-tolerated" framing of the policy issue.<sup>66</sup> Kukathas urges Liberals to think instead of cultures as coming together in a position of equality of right to reproduce themselves. He concedes that probably would lead to an archipelago of cultural identities and social practices within the Liberal nation-state.<sup>67</sup>

Multiculturalists differ in the lengths to which they would push the idea of communal cultural autonomy. Kukathas would deny the Liberal state the right to override community practices and beliefs which offend Liberal sensibilities such as the patriarchal organization of the family, isolation of women, arranged marriages, and gendered differences in education. What he does insist on, however, is a state-protected right of exit from the community.<sup>68</sup>

The Canadian multiculturalist Will Kymlicka's formula is cultural autonomy for migrant communities up to the point where their practices violate basic human rights.<sup>69</sup> It leaves us with a serious line-drawing problem. Which human rights are basic? Can the government in the name of equal protection punish Sunni fundamentalist owners of restaurants who refuse to admit Shia Muslims, Christians,

62. *Id.* art. 23(3).

63. *Id.* art. 26.

64. *Id.*

65. *Id.* art. 27.

66. KUKATHAS, *supra* note 2.

67. *Id.*

68. *Id.*

69. WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 1-9 (1996).

Jews, and others who do not share their beliefs? Can it enforce rape law against a fundamentalist who did not have the consent of his wife for sexual intercourse? Can it insist in the name of protecting fundamental rights that all children attend public pre-schools where they will be taught Liberal values embedded in the constitution?

Michael Walzer, whom I mentioned earlier, enters the debate from a slightly different angle. What every successful society needs, he argues, is a “common standpoint of morality” but one defined in primarily political not cultural terms.<sup>70</sup> The common standpoint is a consensus about a just organization of society which means it defines the terms in which groups compete for social and economic goods—income, wealth, access to education, celebrity—and identifies the things they should share equally like impartial application of the law, equal access to public services, equal opportunity to work in the state bureaucracy, and protection from destitution. The consensus, in his words, “represents the gradual shaping of a common life—at least, a common political life.”<sup>71</sup> “Religious differences and cultural pluralism,” he adds, “are entirely compatible with this kind of common moral standpoint.”<sup>72</sup>

#### IV.        CULTURAL DIFFERENCE AND SUSTAINABLE DEMOCRACY

And so we arrive at the last question I want to put to you and to me as well, because I am not sure of the answer. Is a common moral standpoint necessary for a long-enduring democratic society?

Consider the United States. Can its electorate be said to enjoy a “common moral standpoint”? Where is the point of commonality between those who believe that abortion is largely a matter of choice and those who label it murder; that physically intimate same-sex relationships are sinful and those who believe that sexual relationships between consenting adults are entirely a matter of choice; that the state should protect all members of the society from destitution and those who believe that in most cases destitution is the result of personal failings and therefore its consequences should not be mitigated; between those who believe that all persons are created equal and those who believe in a racially-defined hierarchy of talent and character; between those who believe that atheists and agnostics are unfit for public office and those who believe that faith is irrelevant for assessing candidates?

Could it nevertheless be argued despite those polar differences in value there exists a “common moral standpoint” among the settled inhabitants of the United States? My reply is “maybe”. It depends what we mean by a common moral standpoint. It could mean only a consensus about the justness of a society’s constitutional arrangements, about, that is, the procedure by which it produces public policies rather than the policies themselves. And arguably there is commonality in this sense.

In order to achieve this common standpoint of morality, however, we had to fight a ferocious Civil War and as evidence recently presented to the United States

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70. WELZER, *supra* note 55.

71. *Id.*

72. *Id.*

Supreme Court in connection with litigation over the Voting Rights Act implies,<sup>73</sup> the attribution of fundamental rights much less support for equal life chances for all citizens is not universal. Opinion polling supports my intuition that a considerable majority of the American people believes or at least thinks it believes that all citizens, whatever their color, ethnic background, or creed should have equal opportunities to improve the conditions of their lives and that all of us are entitled to the equal protection of the laws, to a fair trial, to privacy in our homes, to an extensive freedom of speech and conscience and expression of religious faith and a right to participate in the political process. Those shared beliefs could be said to constitute a common moral standpoint.

One thing that worries me these days is evidence of stress on that common standpoint. I am concerned particularly with the 25 percent of the population who continue to question the legitimacy of the Obama Presidency ostensibly on the grounds that he was probably born abroad.<sup>74</sup> Also concerning is recent polling data indicating that people who identify with either of the two major political parties are beginning not simply to disagree but literally to hate each other for the sheer fact of belonging to the other party as if their party affiliation were a proxy for moral degradation.<sup>75</sup> Additional grounds for concern are efforts to limit the right to vote.

Fortunately, there remains a majority of Americans committed to the idea of a common citizenship, a patriotic bond, which transcends differences about how to implement our common values.<sup>76</sup> And even more fortunately, tolerance of difference, all kinds of difference, is far greater among younger people.<sup>77</sup> And that gives us grounds for optimism, even after this terrible electoral season, that the Bill of Rights culture will endure.

What is the prospect for Liberal values in West European societies where on the whole economies are grinding more slowly and the pressure of migration from culturally more distinct countries is more intense? One source of hope is their economic need for large-scale migration in order to support the aging indigenous population. For instance, to maintain the current ratio of employed persons to retirees, Germany needs an annual intake of four-hundred-thousand working age people.<sup>78</sup> But the rise of right-wing parties and the signs of a kind of cultural panic like the local level banning from public beaches in France of women in body-covering garments<sup>79</sup> demonstrates to me that the economic argument is politically

73. *Shelby County v. Holder*, SCOTUSblog, <http://www.scotusblog.com/case-files/cases/shelby-county-v-holder/> (listing all amici curiae briefs submitted to the Court regarding this case).

74. Edward L. Hudgins, *America's Particular Patriotism*, CATO INST. (July 3, 2000), <https://www.cato.org/publications/commentary/americas-particular-patriotism>.

75. Lynn Vavreck, *Younger Americans Are Less Patriotic. At Least, in Some Ways.*, N.Y. TIMES (July 4, 2014), <https://www.nytimes.com/2014/07/05/upshot/younger-americans-are-less-patriotic-at-least-in-some-ways.html>.

76. *Partisanship and Political Animosity*, PEW RESEARCH CENTER (June 22, 2016), <http://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016/>.

77. *Id.*

78. *Germany is not Shrinking*, DW (Feb. 4, 2017), <http://www.dw.com/en/germany-is-not-shrinking/a-37415327>.

79. Ben Quinn, *French police make woman remove clothing on Nice beach following burkini ban*,

weak.

In Europe, the state must summon the human and material resources to connect new arrivals with long-established residents<sup>80</sup> and with the supportive institutions of the state, not simply its repressive ones. I do not see how this can be done without the introduction of compulsory national service where young people in small units integrated by class and ethnicity and led by carefully-trained adults serve the common good while living together and establishing thereby networks which could last a lifetime. In addition, the state must establish catchment areas in North and West Africa where prospective migrants can be taught a European language and labor force skills. To finance such an effort, Europe will, among other things, need to redeploy much of the 70 billion a year in foreign assistance it currently sends to countries in the Global South other than the funds, now inadequate, needed to assist the millions of displaced persons in the Middle East and West Asia. European states must also, I believe, require and integrate pre-school socialization. At the same time it must avoid measures which evidence contempt for traditionalist communities like the laws banning signs of piety such as headscarves and it must demonstrate positive respect by helping to finance the construction of prayer spaces and community centers and revising textbooks to reflect and celebrate the historical and contemporaneous presence and contributions of migrant communities.

Can the European state undertake the respectful integration of Muslim immigrants in the face of the continuing threat of mass-casualty terrorism? One searches with difficulty to find grounds for optimism. As Lawrence Wright, one of our most empathetic and incisive writers about jihadi terrorism, concludes in his recent book *The Terror Years*, it is “common to suggest,” he says,

that dealing with the root causes of terrorism is the best and maybe the only way to bring it to an end, but there is very little evidence to support that notion. Poverty doesn't necessarily lead to acts of terror. Nor does tyranny, nor do wars, corruption, a lack of education or opportunity. [...] Not one of these factors by itself is sufficient to say that here at last is the reason that idealistic young people line up for the opportunity to behead their opponents or blow themselves up in a fruit market. But each of those factors is a tributary in a mighty river that floods the Middle East, a river that we can call Despair.<sup>81</sup>

I ask myself: can we in the West find the will, the understanding, and the capacity to help dam that river? All I get in the form of an answer is a large question mark. This is, no doubt, how Winston Churchill felt about Britain's prospects early in World War II. All we can do is what he did, namely to struggle forward toward an uncertain end.

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THE GUARDIAN (Aug. 23, 2016), <https://www.theguardian.com/world/2016/aug/24/french-police-make-woman-remove-burkini-on-nice-beach>.

80. *Belgium to require immigrants to sign up to 'European values'*, THE GUARDIAN (Apr. 1, 2016), <https://www.theguardian.com/world/2016/apr/01/belgium-to-require-immigrants-to-sign-up-to-european-values>.

81. LAWRENCE WRIGHT, *THE TERROR YEARS: FROM AL-QAEDA TO THE ISLAMIC STATE* 342 (2016).



