

Sovereignty, Nationalism, and Human Rights

THE ENDURING STRENGTH OF NATIONAL IDENTITY

There is to be sure a substantial minority within Western electorates deaf to moral arguments supporting even a qualified right to cross borders in search of safety or opportunity. Its members are deaf because all such arguments presume at least a latent sense of obligation to all people with endangered or stunted life chances. At the very least they presume some feeling of a common humanity. But this sense is missing from right-wing nationalists, for they subscribe to the set of convictions that ferociously expressed themselves in the bloody Balkan war of the 1990s. In that conflict, Croats and Serbs, though intermarried in large numbers and essentially indistinguishable to outsiders in looks and language,¹ slaughtered each other. The impetus for their animosity was national identities that had been constructed by political adventurers and rabid intellectuals out of carefully selected or willfully reshaped fragments of a largely common history.²

Although liberating in its initial formulation, the idea that the world was organized into “peoples,” each with a fixed and unique identity³ that was expressed in their respective beliefs and practices, deteriorated in the course of the nineteenth century into claims of a Darwinian struggle for group survival. Blood-and-soil nationalism reached its nadir in the twentieth century with fascist regimes like Mussolini’s in Italy, which purported to reclaim the grandeur of ancient Rome as it dropped mustard gas on the defenders of Ethiopian space.⁴ In the twisted mind of fascism’s most barbarous figure, Adolf Hitler, the insidious idea that needed to be extinguished was the idea of a common humanity and that a state could be held to external legal standards expressing humanity’s common interests. This, according to Hitler, was an illusion purveyed by Jews as part of a conspiracy to weaken and ultimately dominate the strong.⁵

Attacks on mosques, refugee centers, and refugees in Western Europe and the United States remind us that a feral nationalism is not restricted to the Balkans.

Its embers still smolder around the edges of the populist parties fueled in part by Europe's economic stagnation, ostentatious growth in inequality, and the deteriorating conditions in provincial cities and towns, but driven in equal or larger measure by the rising tide of immigration from the Global South.⁶ The parties themselves are not uniform. Some reveal their connection to their fascist predecessors in their deep visceral hostility not only to immigration but to tolerance and the cosmopolitan spirit in all its quotidian expressions.⁷ Some right-wing activists, however, position themselves as the true defenders of liberal values, particularly freedom of speech, undermined by craven cosmopolitan elites indulging in the name of multiculturalism the practices of migrants from the Global South.⁸

All of them, however, decry the recession of a cozy familial nation. The Swedish Democrats are typical. In a conversation with James Taub, the thoroughly liberal investigative journalist and columnist, Paula Bieler, a Swedish Democrat activist, described herself as a "nationalist" who fears that an increasingly multicultural Sweden is in danger of losing its identity, which she defined as "the feeling that you live in a society that is also your home." Bieler, Traub writes, "objects not to immigrants themselves, but to the official state ideology of integration, which asks Swedes as well as newcomers to integrate into a world that celebrates diversity, and thus casts Sweden as a gorgeous mosaic." Apparently reflecting her views, Traub then asks: "Are native Swedes to think of their own extraordinarily stable thousand-year-old culture as simply one among many national identities?"⁹

This concern is not limited to people with a naturally conservative bent. In an interview following the New Year's Eve sexual assaults in Cologne by young men identified as being for the most part immigrants from North Africa, Alice Schwarzer, a leading German feminist, said:

In recent decades, millions of people have come to us from cultural groups within which women have no rights. They do not have a voice of their own and they are totally dependent on their fathers, brothers or husbands. That applies to North Africa and that applies to large parts of the Middle East. It isn't always linked to Islam. But since the end of the 1970s, at the beginning of the revolution in Iran under Khomeini, we have experienced a politicization of Islam. From the beginning it had a primary adversary: The emancipation of women. With more men now coming to us from this cultural sphere . . . this is a problem. We cannot simply ignore it.^{10*}

However uneasy they may be about immigration from Islamic or, more generally, patriarchal societies, the majority of Europeans, at least West Europeans, arguably like the great majority of Americans,¹¹ are not blood-and-soil nationalists. They imagine themselves as defenders of what they take to be core Western values and

* She does not speculate whether a large group of young male migrants from Christian-majority countries might have behaved much the same in the darkened precincts of a lightly policed perhaps bibulous throng.

are, therefore, implicitly committed to a discourse of universal rights. In that discourse rights restrain absolutist conceptions of sovereignty.

Thus everyone who believes however casually that all people are entitled to the means for creating a dignified life should be open to arguments supporting at least a conditional opportunity to enter for persons fleeing persecution or war or a dead-end existence.¹² One of the issues I will ultimately address is the character of those conditions. More particularly I want to examine the claim that the defense of liberal values requires limiting entry to those who already respect those values and concede the authority of the admitting state to inculcate those values in their children. Should liberal governments feel correspondingly free to reject prospective migrants who, for example, believe homosexual relations should be criminalized or that marital rape is an oxymoron?

The terms and conditions for initial entry constitute only one of the divisive issues raised by global migration. A second is whether a person entering as either an economic migrant or a refugee should immediately become entitled to the full measure of social protection and the economic opportunities available to long-settled residents. A third is whether granting entry to one person entails an obligation subsequently to admit members of his or her family and to a prospective spouse and grandparents, what migration skeptics often refer to as “chain migration.” There is, in addition, the question of whether the receiving state should use its power and resources to incentivize integration of the migrants and their families, and, if so, to what extent.

For instance, a government might require that, in order to move from the status of provisionally admitted to that of permanently settled, migrants would have to demonstrate fluency in the native language. It could condition citizenship on evidence of participation in civic life: joining parent–teacher associations, book clubs, conversation groups, volunteer firefighters, and so on. It could establish compulsory early-childhood programs in which children of migrant background would be mixed with those of indigenous families. Or, conversely, should the state accommodate a migrant’s inherited culture through exceptions to laws of general application and assist migrant communities in maintaining their culture? Should a Sikh motorcyclist, for instance, be compelled to wear a helmet, a requirement at odds with the religious requirement to wear a turban? Finally, shadowing all of these questions is the issue of what measures states should take to reduce the risk of mass-casualty terrorism, a problem made increasingly urgent by the growing incidence of barbaric violence in the name of one or another jihadi party.

The most formidable obstacle that advocates of a generous opportunity to enter must overcome is what I take to be the average legacy Westerner’s self-conscious identity as the citizen of a particular state. As Paul Collier notes in his book *Exodus*,

While nationalism does not necessarily imply restrictions on immigration, it is clearly the case that without a sense of nationalism there would be no basis for

restrictions. If the people living in a territory do not share any greater sense of common identity with each other than with foreigners, then it would be bizarre collectively to agree to limit the entry of foreigners: There would be no “us” and “them.” So without nationalism it is difficult to make an ethical case for immigration restrictions.¹³

In Western Europe, unlike the United States, traditional displays of nationalist ardor are rare. People of different nationalities no longer seem able to imagine each other as prospective enemies, and by the millions they work and retire in each other’s countries as casually as if they were simply moving from the north to the south in their own. And yet, when the debt crisis bloomed, those same Germans who throng the beaches of Greece, basking in its sun and chatting amiably with its bilingual waiters, discovered a host of non-Germanic vices in their erstwhile hosts and said “no” to bailouts, however much misery that might entail for the average Greek.

The Germans had as much fellow feeling for the Greeks in their moment of need as the French seemed to have for Germans, their co-authors of the European Union project, when they began struggling to cope with a wave of impoverished asylum claimants. By contrast, New Yorkers and Californians, sharing as they do a single national identity, do not clamor against the transfer through federal taxation of a portion of their income to states like Mississippi, whose politics they despise, a sentiment amply reciprocated.[†] Globalization has not entirely hollowed out the citizen’s identity with fellow citizens of a given nation-state.

That identity is the product of a shared political history, a self-congratulatory narrative of heroism and sacrifice inculcated through all of the society’s means of cultural reproduction. Nationalist narratives don’t require recognized borders; the Kurds, for instance, have the narrative without the concomitant borders, but their struggle to acquire them underscores the felt anomaly of a people without an independent homeland.

Nationalism is based on more than just feel-good, ego-swelling tales of martial sacrifice and triumph. It is also the personal security of Copenhagen’s well-policed streets and Denmark’s cushioning welfare state or the US passport which enables Americans to travel without fear, knowing that if a Cairene pickpocket takes our wallet in a crowded bazaar or if we are arrested for a punch-up in a Liverpool pub, there will always be a consular official to call. And finally, and I think perhaps most importantly, there is the belief – and to some slight extent the reality – that as a citizen one is contributing to the community’s continuous history.

For persons in Europe and North America with a commitment to liberal values of individual freedom and formal equality, that history is a narrative of struggle, against defenders of racial and class privilege, patriarchy, and intolerance of all deviations

[†] Admittedly, the phenomenon may be attributable more to widespread ignorance about the allocation of federal funds than to fellow feeling.

from traditional views of sexuality and gender. To anyone who watched in 2016 the US Republican Party's primary election debates, Donald Trump's rallies, or experienced the aftermath of his victory and the renewal of right-wing populism in Europe, it is evident that the struggle continues.

Liberal values require constant protection. So, defenders of those values have reason to reject the claim of a right to cross borders, particularly if that right allows newcomers to participate in political processes and institutions. Because 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. Hence the irony of Western conservatives hostile to liberal values opposing immigration from countries where social values similar to their own predominate. Liberals, by contrast, are at worst ambivalent.

A further irony, at least from a liberal cosmopolitan perspective, is the role of the UN Charter, an iconic document among liberal cosmopolitans, in consolidating or at least in reflecting the strict division of the world into sovereign states. Nationalism alone could ignore or threaten borders because the "nation" as defined by the histories constructed by intellectuals and their political partners could and often did spread across frontiers. Hence it could spur wars to change borders in order to unite the ethnic nation, as Hitler claimed to be doing in his assaults on Czechoslovakia and Poland.¹⁴ In light of that experience, the Charter drafters outlawed the use of force for any purpose, implicitly including wars of "national unification."¹⁵ The Charter is first and foremost a defender of existing states from any threat to their "territorial integrity and political independence."¹⁶

IS THERE A MORAL CASE FOR OPEN BORDERS?

As opponents of any right to migration have argued, what meaning can the political independence and territorial integrity of states have if citizens of other countries can wander across their borders and settle on their territory? The International Covenant on Civil and Political Rights,¹⁷ the widely ratified statement of core human rights, omits a right to enter, reinforcing the Charter's guarantee of state sovereignty.¹⁸ Nevertheless, in the view of a number of thoughtful liberal political theorists, such a right should be seen to exist if not strictly speaking as a matter of law then at least as an emanation of the totality of liberal values reflected in the various human rights treaties including the Covenant.¹⁹

FROM WHAT SPECIFIC RIGHTS MIGHT THIS EMANATION FLOW?

How about the freedom of association? What could be more basic than my right to invite someone to share dinner in my home or to share my home permanently with an invalid parent or my sister and her family or the woman I want to marry or a new

friend I met on the internet? In 1948, when the UN General Assembly adopted the Universal Declaration on Human rights, and even in 1967 when the International Covenant on Civil and Political Rights was adopted, friends and family and prospective partners of persons in the member states would rarely have lived in another state. In the globally connected world of 2019, 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 (except to the extent it has explicitly waived that right in an international agreement) 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.

Individuals are not islands. Most people hunger for some measure of companionship and feel profound ties to their families. So where a state limits the entry of loved ones currently residing in other countries, it coincidentally limits the freedom of the concerned citizens.[‡]

A right to enter can in certain circumstances be associated with the right to life. As persuasively interpreted by the Supreme Court of India, this right has application far beyond protection from summary execution by tyrants. In a case brought on behalf of impoverished street-dwellers roused out of their shanties by a municipal government bent on some urban renewal project, the Court held that the demolition of their meager habitat and consequent separation from the place where they had eked out a living threatened their lives. So, it required the government to provide alternate shelter for long-term inhabitants of the redevelopment area, shelter so located as to allow them some hope of continuing the activities which supported their subsistence.²⁰

It is true that migrants from the Global South rarely come from the ranks of the destitute. Movement requires funds to pay smugglers and to purchase the bare necessities of life on the long trek north. Not only do they lack any financial margin; in addition, the truly destitute often are too weak and sick to move and too close to the edge to risk any deviation from their life-supporting regime even if it is no more than scavenging on the mountains of urban garbage. Moreover, they lack access to the sources of information and the wider human networks which persons above the poverty line, even if just above, are these days likely to possess. While stunning numbers of poorer people in Africa now possess cell phones,²¹ the poorest in their tens of millions possess little more than the rags on their backs.

[‡] Since the associational and equal-treatment rights belong to a national, derivative benefits flow only to those migrants who have some sentimental or vocational link to a resident of the country they wish to enter.

In general, then, migrants aspiring to enter the Global North other than those fleeing persecution or civil war cannot normally invoke the right to life. But there are exceptions, exceptions certain to increase. Traditional sources of income like fishing, small-scale cultivation, or herding can suddenly disappear as a result of dramatic climatic shifts or natural disasters like earthquakes and typhoons. Therefore, people may flee north when destitution is only approaching. As the seas and the thermometer rise and pollution and overfishing increase along with the intensity and frequency of killer storms, so will the number of migrants able to invoke the right to life.

THE DEEP NORMATIVE PREMISES BEHIND SPECIFIC RIGHTS

A right to enter need not rest only on specific rights. It may rest, perhaps even more securely, on the principles that inform the various legal enumerations. One of these principles, arguably, is that the state cannot legitimately use violence against individuals whose actions do not threaten the rights of others. A person approaching a border who wants to find work or rejoin his family does not meet that test. If he is determined, only violence will stop him: clubs, water cannon, stun guns, anti-personnel mines, tear gas, rubber bullets, real bullets.

A norm immunizing the individual from violence for crossing a border without malicious intent is not spun out of the sentimental imaginings of scholars and divines. Its emotional force is implied by the relative restraint most Western governments have used in dealing with migrants. Consider the protests that erupted in Spain several years ago over reports that border guards in the North African enclave of Ceuta had fired rubber bullets at Africans struggling to swim around the barriers erected to keep them out.²² More than a dozen drowned in the attempt.

Equally suggestive is Spain's erratic use of razor wire on top of the fences around its Moroccan enclaves. Having employed it in 2005, a socialist government removed the wire two years later in response to reports that the wire had inflicted gory wounds on a number of wall crossers. In 2013 a conservative party government put the wire back up despite Spanish Catholic bishops calling the wire inhumane. The present socialist government's interior minister has promised, albeit somewhat ambiguously,⁵ to take it down again.²³

It is telling that despite their determination to halt the flow of migrants through their territories, most governments in Central and Eastern Europe have not used live ammunition to control migrant surges. The French authorities, not widely known for their pacifism, hesitated for years to clear through main force the encampments around Calais of the migrants seeking to access the United Kingdom through the

⁵ Implementing a pledge made during the last general election campaign, he has tasked a commission with finding the "least bloody possible means" of preserving border security. BBC World News (online), June 14, 2018.

Channel Tunnel. In September 2014, ordinary citizens of Rome were “shocked” when police in riot gear used water cannon to disperse migrants who were camping out in front of a building from which they had just been evicted.²⁴

Also telling in this regard has been the reluctance of European governments to deport by main force persons whose asylum claims have been rejected. Rather than shackling obdurate lingerers and hauling them by plane or boat to whatever country would accept them, at least one European government has tried to induce compliance with orders to leave by offering not only free passage home but also a modest emolument.²⁵ An effort by the UK government to encourage self-deportation by cutting off support payments was stymied by a judicial decision finding the termination of support an unacceptable employment of destitution as an instrument for enforcing immigration law.²⁶

It seems reasonable to assume that authorities in democratic states hesitate to use violence against participants in large-scale and blatant violations of the law (which do not threaten public security) in part because they fear triggering popular hostility to their actions. When a series of migrant drownings occurred in the wake of an EU decision to reduce naval search-and-rescue patrols in the Mediterranean, there was editorial outrage in the respectable organs of opinion.²⁷ If evidence of mere indifference to the possible deaths of migrants can generate outrage, active employment of the violence needed to drive away migrants would seem to be an *a fortiori* case – for now and not for the United States under the administration of Donald Trump.

Of course, opposition to the use of violence to deter and prevent undocumented migration is not universal, in France or anywhere else. Germany has seen repeated attacks on persons believed to be migrants, as well as the torching and vandalizing of migrant residences.²⁸ This shows that a violent subculture can thrive even in a country where human rights norms are embedded in the national constitution²⁹ and supported by government practices and the great body of public opinion.³⁰ The possible shifting of opinion throughout Europe, the discernible growth of right populism and even in some cases an apparent renewal of fascist movements is a subject requiring more discussion. My only point here is that, in spite of these worrying trends, there remains a deep-seated unease about the use of violence against non-threatening border crossers.

Libertarian purists ought to make a similar argument but in more straightforward terms. For them the use of force is not the issue. Even if governments defended their borders by filling the air around them with a repellant smell or a substance inducing extreme lethargy, they would still be violating human rights because, in the libertarian view, every human has the right to do anything which does not threaten anyone else’s identical right. From the libertarian perspective, harm occurring incidentally from large numbers of persons exercising their rights simultaneously – harm, for instance, in the form of sudden elevation in the cost of housing or a wage-deflating oversupply of unskilled labor – is irrelevant. The state has no right to make

distributional decisions. Only free markets should make them.³¹ The premise is that individuals will act rationally to optimize their conditions. If mass migration makes a place less attractive, people will adjust by moving elsewhere and new migrants will adjust their choice of destination. To be sure, this is not an argument with broad appeal.

A second moral conviction which animates and shapes the concrete legal articulations of human rights, particularly the Covenant on Economic, Social and Cultural rights, is that no one should be denied the opportunity to lead a dignified life for reasons beyond their control or through the application of irrelevant criteria. By “dignified” I mean a life with some opportunity for improvement and a measure of choice. Consider a person struggling from day to day in some southern country’s informal economy, a person like Mohamed Bouazizi, the street vendor whose self-immolation in 2011, in front of the governor’s office in the Tunisian city of Ben Arous, ignited the Arab Spring. When that person 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. Where inequality springs from differences in how hard one works, most liberals will see it as justified. Where, by contrast, it is the result of sheer chance – being born in Louisville, for instance, rather than Lagos – justification is rather more difficult.³²

If one of the defining features of a liberal world view is some sense of an individual and collective obligation to help people escape extreme poverty and powerlessness, then actions affirmatively restricting the capacity of people to escape poverty and predatory governments would seem morally dubious. Barring entry of non-threatening migrants is precisely such an affirmative action. It is a means of enforcing what the political scientist Joseph Carens calls a geographical caste system, which he defines as “the modern equivalent to feudal privilege which was an inherited status that greatly enhanced one’s life chances.”³³ Similarly, in her brilliant exploration of the conceptual analogy between birthright citizenship and inherited property, the scholar Ayalet Sachar writes:

[Birthright citizenship] provides a state-sponsored apparatus for handing down from generation to generation the invaluable security and opportunity that attach to membership in a stable, affluent, and rule-of-law society. It also allows members of well-off polities an enclave in which to preserve their accumulated wealth and power through time.... For those granted a head start simply because they were born into a flourishing political community, it may be difficult to appreciate the extent to which others are disadvantaged due to the lottery of birthright.... Citizenship laws assigning political membership by birthright play a crucial role in the distribution of basic social conditions and life opportunities on a global scale.³⁴

That is one way of perceiving the great disparities between rich and poor nations. But it is not the only one. Even a person who feels some degree of sympathy for the

stunted life chances of a majority of people living in poor countries may question whether the naked fact of disparity implies a moral obligation of rich countries to open their doors. The countries of the Global North are rich, she might say, because successive generations built governments which facilitated and protected private initiative, built infrastructure, established great systems of education, and enforced the rule of law. If other peoples build the right sort of governments, they would have better life chances.

But suppose conditions in poor countries do not stem solely from failures attributable to their inhabitants? Suppose they are at least in part the result of the actions of today's rich countries. The slave trade decimated parts of Africa. European armies crushed long-established political orders. By various means, European officials in Africa and Asia turned millions of small farmers into landless laborers.³⁵ Rather than being able to develop organically, many of today's poor countries are the creations of Western states which drew borders serving their own administrative and political interests irrespective of the ways those boundaries compromised the evolution of political orders reflecting cultural affinities and constituting geographically rational units of administrative control.

Imperialism is just a word until you look behind it to find the stuff of real life. When you do, the picture is not pretty. Take one case, India, still home despite recent economic growth to hundreds of millions of immensely poor people. Compare it with Germany or the United States in terms of industrial development. To protect their nascent industries in the nineteenth century, both of the latter two erected high tariffs. For centuries before the industrial revolution, India was a leading producer and exporter of cotton goods woven by hand.³⁶ Had it been an independent state, then following the mechanization of textile production beginning in Great Britain, it would have erected its own barriers to allow Indian businessmen time to manage the transition from hand weaving to factory production. But being a colony, it was unable to prevent British-made goods from flooding its huge internal market and thereby preempting textile-led development. Incidentally, the flood drowned tens of thousands of suddenly penniless weavers. They starved to death.

If, as I think it is reasonable to conclude, more than a few of today's rich states contributed to what one writer called the "development of underdevelopment"³⁷ in many of today's relatively poor ones, then a generous welcome to migrants could seem justified morally by the broad principle of restorative justice, the principle which underlies contract and tort law. An essential feature of a capitalist economy, it should appeal to conservatives no less than liberals.

The principle does not dictate that the door be wide open to immigration. It would not prevent states from vetting for threats to public health and safety or from limiting entry to numbers which could be digested without threatening the very qualities of government, economy, and society which attract migrants. What it does weigh against, however, is a door open barely a crack and the mean treatment of

those few allowed to squeeze through. So, for instance, the case can be made that the United States, having contributed over the years to the awful poverty and insecurity of Honduras, El Salvador, and Guatemala by providing political and military aid to governments, military establishments, and oligarchs ruthless in their defense of the grotesquely unequal distribution of wealth and power in those states, has a special obligation to families currently fleeing the social violence which engulfs them today.

In making the case for a right to exclude, Christopher Heath Wellman concedes a transnational obligation to help all people toward an existence with some measure of freedom to shape and actualize a life plan. But, he argues, open borders are not required to satisfy it.³⁸ It could be done, he proposes, through dramatic increases in foreign assistance programs of one kind or another. What he does not go on to explain is how increased levels of assistance, however large, could escape the predations of the many deeply corrupt governments of the Global South, which routinely steal from their citizens, investing what they do not consume back into northern safe havens like the London property market.

THE MORAL CASE AGAINST A PRESUMPTIVE RIGHT TO ENTER

I have described the moral case for a presumptive right to enter. What is the moral argument against? Why shouldn't we begin with the presumption that, rather than being constrained by deep moral values, sovereign states should and indeed do have a broad right to defend their borders, if necessary with proportional force, against private individuals seeking without prior authorization to cross those borders or to remain after short-term permission has lapsed?

For starters, one can argue that in light of the political and ideological climate in which the seminal human rights texts were adopted, as well as the absence from those texts of an explicit right to enter a country other than one's own, any fair-minded interpretation of those texts must conclude that the absence was a deliberate omission. The very fact that the Covenant includes the right of a person to enter *her own country*³⁹ excludes any claim that the failure to include a general right of entry was inadvertent.

Given the tenor of the times, its inclusion at that point would have been inconceivable. After all, the World War II, among the great slaughters in recorded history, had been fought by the victors in defense of the sanctity of borders. Against any claim of their inviolate character Hitler had invoked the rights of cultural nations divided by historical contingencies to unite. (That, of course, was the least fanciful and toxic of his visions.)

The United Nations Charter adopted in the war's immediate aftermath did not merely deny the primacy of communal reintegration at the expense of recognized states. It resolved the ambivalence which had threatened the peaceful intercourse of sovereigns ever since the seventeenth-century treaties ending the European

continent's sanguinary religious wars established the authority of sovereigns to govern matters of religious faith within their domains. Equality of right to govern matters of faith developed into equality of right to govern all internal matters. Each sovereign could govern at will without legitimate remonstrance from any other sovereign unless the latter's material interests, such as the protection of its nationals when passing through or residing in another sovereign's territory, were prejudiced.

This equal right would endure, however, only as long as the sovereign did. Respect for internal self-governance did not include a prohibition against one sovereign deciding to extinguish another. Therefore, sovereignty was conditional until the Charter prohibited threats or acts against the political independence and territorial integrity of another state.⁴⁰ The Charter thus appeared to make sovereignty the basis of a peaceful international order. To claim after its adoption that a state did not enjoy a largely unfettered right to deny entry would have been very odd. Imagine a powerful and populous state we will call A sharing a long border with a weak, thinly populated, and culturally distinct one we will call B. The Charter prohibits the former from occupying the latter through main force. But insofar as political independence is concerned, if citizens of A can at will cross the border into B and settle there and if, in fact, a sizable number do so while sustaining subjective ties of loyalty to A, the Charter's promise to B of political independence and territorial integrity would seem to be hollow.

Beginning in the 1960s, however, the decolonization movement – an amalgam of a new collective self-consciousness uniting hitherto fragmented subaltern populations and a new not unrelated change in metropole perceptions of the cost–benefit ratios of colonial rule – demanded a one-time exception to the territorial-integrity principle. It did not attack the principle as such. Instead, it insisted that the principle be construed not to include territories of culturally distinct populations acquired by force during Europe's imperial expansion. But by insisting on the right to self-determination within the colonial boundaries and denying it to ethnic minorities within those boundaries, decolonization's champions reinforced the sanctification of borders and the concomitant vision of a global political order in which each state is a high-walled castle whose masters legitimately control its gate.

Still, the impact of decolonization campaigns on perceptions of sovereignty is not unambiguous. After all, in their bid for independence, the champions of decolonization drew on the emergent canons of human rights law, including the right to participate in self-governance; they drew, in other words, on a vision of human equality which made each state's treatment of the people under its authority a matter of legitimate concern to other states.⁴¹

As I will discuss later, however, the ideology of human rights has more than one sharp edge. Because it rests on the idea of the moral equality of all human beings and imputes non-negotiable rights to every human being by virtue of being born, it undermines grandiose notions of sovereignty. But at the same time,

in its legal formulations it expresses duties owed *by states* to persons within their jurisdiction. In other words, the process of normalization and institutionalization of human rights implicitly recognizes the individual state as the principal actor in world affairs albeit one with strict duties along with a wide ambit of discretion in fulfilling them.

Recent developments in the area of human rights, in particular the Responsibility to Protect (R2P) doctrine,⁴² have not necessarily undermined the perceived importance of the state understood as a particular people living within a determinate territory and enjoying international legal protection from actions threatening its territorial integrity or political independence. After all, R2P looks to the individual state as the main vehicle for preventing the commission of grave crimes against its inhabitants and recognizes a power in the Security Council to authorize third parties to intervene only where all else fails. As Christopher Wellman argues in his contribution to *Debating the Ethics of Integration*, “a state has an obligation to protect the human rights of its inhabitants. If it performs this obligation in a satisfactory way, it has a right not to be interfered with, i.e. it enjoys moral dominion over its internal affairs.”⁴³

Interpretations of law shift as political interests and societal values change in response to a multitude of factors including new technologies like those which over the past three decades have radically reduced the material barriers to the global movement of goods, services, capital, and people. Without the revolution in the ease and cost of movement and of communication, the gathering migration tsunami would, I think, more closely resemble a strong but plainly manageable current. Without the revolution and the resulting denationalization of manufacturing and transnationalization of the service and financial sectors, the capitalist elements of the migration-supporting coalition would be weaker.

Another result of the revolution is exposure of Western populations to real-time images of slaughter and misery in the poorer and less well-governed parts of the world. This intimate revelation of the terrible lives other people endure by virtue of being born within the wrong borders strengthened advocates of a Good Samaritan exception to the rule of non-intervention in the affairs of sovereign states. At a minimum, it strengthened the sentiment “to do something.” Given the dubious results of sporadic interventions from Somalia through Libya to Iraq and Afghanistan, *the only “something” pretty much guaranteed to improve the life chances of determinate human beings living in bad places is to allow them to move to good ones.*

Do the changes I have described enable an argument that a presumptive right to enter is emerging in customary international law? Most international lawyers and governments would say “no.” State practice, a principal evidence of customary law,⁴⁴ is not encouraging. The leading African states seem to tolerate mass movement across their borders without inquiring very closely or at least systematically into whether people are fleeing persecution, civil conflicts, generalized violence, great

poverty, or tyranny.⁴⁵ In the face of the Syrian bloodbath, Jordan, Lebanon, and Turkey initially opened the gates to fleeing Syrians as if virtually all satisfied the legal criterion for refugee status.

Their relaxed views on that status⁴⁶ mirrored until very recently those of the most accommodating European states like Germany and Sweden, which in 2015 decided to assume that all Syrian nationals were refugees⁴⁷ and thus expanded the definition of refugee from someone with a well-founded fear of persecution to anyone reasonably presumed to fear becoming collateral damage in a country's civil wars.^{**} Meanwhile other countries notoriously deny an obligation to accept any migrants, whether or not they have plausible claims to asylum, and assert a right to discriminate among asylum claimants on the basis of their religious identity.⁴⁸

Certainly nothing in recent US practice under a liberal president, much less political discourse during and since the 2016 presidential electoral season, evidences implicit acceptance of an emergent right to enter. The multiplying ranks and increasingly high-tech gear of the border patrol, the deployment of troops along the southern border, and the employment of a chemical weapon to drive back asylum-seekers hardly attest to relaxed views about unauthorized entry. While the Obama administration conceded that the breakdown of social order in the northern triangle countries of Central America was responsible for the human tide moving through Mexico toward the Rio Grande,⁴⁹ the close detention of migrants and the stated intent to deport large numbers of them back to Honduras, El Salvador, and Guatemala demonstrated continued rejection of a right to enter.⁵⁰

Actually, you do not need the aid of international law to defend a broad right to exclude migrants. You can find solid ground for it, paradoxically, in the very liberal values invoked by advocates of open borders.

One of those values is freedom of association, if not standing alone then in conjunction with the right to self-determination and the right to participate in government. The founding of a sovereign state⁵¹ can be seen both as an exercise in self-determination and as an expression of the shared desire of persons settled within a determinate territory to associate for mutual security and the generation of other public goods essential to individual autonomy and dignity. Arguably the corollary of associational freedom is the freedom *not* to associate.

According to the two human rights covenants, self-determination is a right belonging to "peoples," a term neither defines. "Peoples" is essentially a synonym for what nineteenth- and early twentieth-century enthusiasts for self-determination called "nations." So, what is a nation? Ernest Gellner, a brilliant analyst of the nationalist phenomenon, proposed two possibilities:

^{**} The more elastic the criteria for refugee status, the more difficult it is to distinguish fairly among migrants from ungoverned, misgoverned, violent, and miserably poor states.

1. "Two men are of the same nation if and only if they share the same culture, where culture in turn means a system of ideas and signs and associations and ways of behaving and communicating."
2. "Two men are of the same nation if and only if they recognize each other as belonging to the same nation... A mere category of person (say, occupants of a given territory, or speakers of a given language, for example) becomes a nation if and when the members of the category firmly recognize certain mutual rights and duties to each other in virtue of their shared membership of it."⁵²

The nation, the political scientist and historian Benedict Anderson has written, "is imagined as *limited because* even the largest of them ... has finite, if elastic, boundaries, beyond which lie other nations."⁵³ An earlier writer, the Frenchman Ernest Renan, spoke of nations as people sharing memories of "endeavors, sacrifice, and devotion." More importantly for present purposes he wrote that the members of the nation reinforce themselves in a "daily plebiscite" of a common will to live together.⁵⁴

However imagined – Renan wrote sardonically that the members of the nation believe that they have many things in common although they cannot remember what they are – the participants in Renan's metaphorical plebiscite believe themselves members of a community: "regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship" which aspires to freedom and the "gage and emblem of this freedom is the sovereign state."⁵⁵

From these several efforts to capture the essence of nationalism one can see the elements of the moral argument for a right to limit entry. For better or worse people imagine themselves as forming an enduring political association with boundaries within which members share a history, a sense of comradeship in a historical voyage, and a host of everyday 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. In states that have a long history of cultural homogeneity and, until recently, little immigration, the association is more than metaphorically familial in its affect. That imagined blood connection is not possible in states formed by successive waves of immigration. Their nationalism is civic in character; the comradeship is one of belonging to a historically defined association, and new arrivals are entitled and, in a view at least once widely held, are obligated to share vicariously in that history recalled as a successful struggle for independence.

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." 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. Who can enter the country and on what conditions has long been such an issue.

To be sure, majorities cannot override any of the other rights enumerated in the Covenant, but as I noted earlier, there is no explicit right to enter. In addition to invoking the absence of a legal right to enter and insisting that the right to participate in government implies electoral control of migration, advocates of a largely unfettered state discretion to decide who and how many may enter could argue 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?

An answer is the explicit restriction of the right to vote, unlike most others in the Covenant, to "citizens." Indeed, with the exception of local elections no Western society extends the vote to persons very shortly after they enter. They require a period of settlement and in many cases a demonstration by applicants for citizenship that they have some knowledge at least of the country's constitutional arrangements.⁵⁶

While a period of settlement is an uncontroversial condition for admission to the electorate, the length of that period and the level of knowledge the extant majority can reasonably require of candidates for admission is not clear. Lengthy delay and a standard of political sophistication higher than that demanded traditionally of voters in a particular country would certainly violate the spirit of the Covenant, because the power to participate in the electoral process is one of the most important means for persons to defend their rights, particularly persons constituting an identifiable minority. Hence it could be argued that the pressure to grant political rights to persons not long after their admission to a country for settlement prejudices the linked rights of association, self-determination, and participation in self-government.

Even if admission to the electorate is delayed, new arrivals bearing different values than the legacy electorate can impede the implementation of long-term social projects by quietly refusing to comply with authoritative norms. Suppose, for example, that after a long period of contestation and discourse, there had emerged within a democratic electorate agreement in principle to eliminate racial, ethnic, religious, and gender barriers to real equality of opportunity. As a result, anti-discrimination laws had been adopted, bureaucracies established to enforce them, and, coincidentally, the ethos of informal discrimination had begun to dissolve. Then there arrived in the country masses of people from a culture in which favoring your extended family, your clan, and your co-religionists is the predominant norm. Not only might they passively resist enforcement of the equal-opportunity norms,

they might reinforce the dwindling minority of legacy inhabitants unreconciled to the new normative dispensation.

Thus, recognizing a broad discretion in a liberal government to limit the pace and number of persons entering enables it to honor associational freedom. For that freedom includes associating with the end of formulating and progressively implementing complicated social projects. It is allied to the freedom of individuals to develop and implement and continuously revise personal life plans, a freedom stemming from the totality of enumerated individual rights.

The issue of entry weighs with particular severity on persons drawn to the more libertarian side of liberalism, which emphasizes the freedom of individuals to do anything which does not intrude (other than incidentally) on the exercise of like freedoms by others. For libertarians, there is an unassuageable tension between an assumed freedom of movement and the linked rights just discussed. That tension eases for communitarians, persons like the theorist Michael Walzer, who argues in effect that individual rights have to be understood and enforced in ways compatible with the survival of enduring political and cultural communities.⁵⁷

Communitarians do not visualize any long-settled and stable political order as analogous to a contract permanently open to participation by any number of additional signatories. Instead, they see the political order as the outcome of negotiation and struggle over time and in a particular place toward a “common standpoint of morality,” a moral settlement.⁵⁸ Individuals have rights, but they also have duties to reconcile their private interests with the collective interest in preserving the essential rules and practices, the institutions of the settlement. And each settlement is the product of a unique set of collective experiences, a unique history.

Borders set the framework within which that settlement evolved. The legacy participants in the settlement have a right, indeed, an obligation to defend it and its borders against all threats. And 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 limit and condition it.

LIMITS ON THE DISCRETION TO EXCLUDE

Suppose we conclude on the basis of the arguments discussed above that governments enjoy a broad right to exclude. Does it follow that they can exclude on the basis of whatever criteria they choose? No, it does not. To conclude otherwise would be to reject the belief in the moral equality of human beings, which supports the entire edifice of human rights and expresses the core conviction of the Christian faith.

Apportioning goods, including opportunity, on the basis of criteria which have nothing to do with the protection of national security, public order, public health, or morals or the rights of others, apportioning them on the basis of criteria which simply express visceral dislike or contempt for whole classes of people, cannot be reconciled with the belief in moral equality.

The Covenant implicitly underscores this irreconcilability. Article 4, for instance, while authorizing governments to suspend certain rights in times of public emergency, limits government policy to measures which “do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.” Beyond those negative restraints on state action, the Covenant lays out positive standards governments must satisfy when limiting personal rights. For example, in declaring liberty of movement for all persons legally residing in a sovereign state, including the right to leave the national territory, the Covenant requires states to justify any limitation on free movement as “necessary to protect national security, public order (*ordre public*), public health or morals, or the rights and freedoms of others.” Since the Covenant authorizes states to limit free movement (and other rights subject to suspension when there is a national emergency) where necessary to achieve those stated purposes, purposes which constitute the central obligations a state owes to persons settled within its borders, I think it follows that even if one came to believe in a moral right to cross borders in pursuit of a better life, that right would appear similarly limited.

The essence of the matter, it seems to me is this: when persons who imagine themselves as supporters of the idea of human rights debate public policies concerning migrants, they must conduct the debate in terms of not only the effect of those policies on persons seeking to enter, but also the effect on the rights and interests, *individual and collective*, of persons already settled within the country, the persons whose security and well-being the state is obligated to protect. Imagine a case where no single member of a prospectively huge group of migrants arriving at the border in a given year poses a threat to public health, public morality, public order, or national security. It does not follow that the group as a whole is unthreatening to those interests.

The threat in my scenario is not willful. It is, rather, implicit in the sheer size of the group where its numbers exceed the capacity of a society to absorb it without jeopardizing the very qualities which make the country appear to be a haven in a harsh world. Jeopardy may stem in part from the fears and prejudices of a large fraction of the electorate. Supporters of migration whether moved by humanitarian or instrumental concerns should work to ease the fears and shame or convert the prejudiced. Liberalism’s historic task is, in Robert Putnam’s words, “to redraw more inclusive lines of social identity.”⁵⁹ But until liberals succeed, fear and prejudice sufficient to threaten the survival of liberal democratic leadership are as much a contextual given as insufficiency of space and resources.

THE SPECIAL CASE OF REFUGEES

However strong the moral case for a wide measure of state discretion in deciding whether and on what conditions to admit the generality of migrants, the case shrinks in the face of refugees. David Collier and Alexander Betts argue in their illuminating book *Refuge*⁶⁰ that in principle and increasingly in the practice of states the category should include not only those fleeing persecution (the International Refugee Convention definition) but equally those fleeing threats to their lives stemming from internal conflicts or the predation of private groups.^{††} Their condition activates the universally felt obligation to rescue, an obligation the emotional power of which leaps over cultural rifts.

Collier and Betts invoke that hypothetical case popular among moral philosophers: the anonymous drowning child you observe while strolling home from the office. The cost to you, a strong swimmer, of saving her would be the dry cleaner's charge for your suit. The cost to her if you keep walking is her life. The person fleeing persecution or deadly violence who has arrived at the door of your nation is the child drowning in the pond. The ethic of rescue says you cannot send her home.

As the authors acknowledge, in the more precise analogy you are merely one among a number of potential rescuers. Their presence does not, however, relieve you of the obligation to rescue if no one else acts. Their delinquency will not excuse yours.

How far does the analogy extend? In terms of efficiency, the strongest swimmer or the one closest to the drowning child or best clothed for swimming should perform the rescue. Ideally, all the neighborhood adults will have met and anticipated this scenario and have agreed on who should take the lead. In any event, let's assume the child is saved, but she is shivering in the cold air and, it turns out, famished. Is the Samaritan who pulled her from the water now obliged to swathe her in his coat and bring her home for dinner? And if her parents cannot be found or are dead, does the obligation to rescue lead in this instance to an obligation to adopt?

If the child will die without further assistance, clearly you do not satisfy the duty to rescue merely by pulling her from the water. Either you or someone else must provide the food, shelter, and medical care needed to sustain her life or the initial rescue is futile. In addition, she will need protection from human traffickers and other predators that may be lurking.

For decades, the specialized agency called the UN High Commissioner for Refugees, a title that includes the person of the High Commissioner and a very large staff, has tried to be that someone else. Establishing itself with government approval often in countries adjacent to the one from which refugees have fled, it

^{††} The Trump administration in the person of former Attorney General Jeff Sessions has rejected this broad reading of national obligations under international refugee law.

finances the construction and operation of camps providing food, shelter, and medical care. Successive High Commissioners have interpreted their mandate to require keeping the refugees alive, protected from human predators, and in reasonable good health pending either repatriation, if the source of their fears disappears, or, if the conditions for repatriation do not occur, then permanent settlement either in the country where the camp is located or in a third one.

At any given time, hundreds of thousands survive in these humanitarian-relief camps, but few if any thrive. How could they? These are people ripped from their homes, ripped from the dense social networks of their previous life, from the diurnal rhythms of work and play, and cast down in desolate landscapes in haven countries, dependent on others for their daily bread, which is at best meager because the camps are grossly underfunded by the generality of UN member states with the capacity to donate.⁶¹ Humanitarian relief is nowhere near enough, Betts and Collier argue. It may suffice to satisfy the primordial duty to rescue, a duty only ethical monsters would deny. But it certainly does not satisfy either the humanitarian impulse codified in the refugee treaty regime or the national interests of the states that are most proximate to the main contemporary generators of refugees (Syria, Afghanistan, Myanmar, Eritrea, and Somalia prominent among them). Neither do the camps in their present form serve well the interests of the rich states, primarily the European ones, which in recent years have become the final destinations for refugees who find life in the proximate havens unbearable.

For both ethical and prudential reasons (prudence from the perspective of countries impacted by the refugee wave), the authors argue, the loosely related community of states should aspire to restore refugee families to a condition of normality, or as close to that as possible, a condition where parents can work, their children can go to school, and where a noise outside the window of their dwellings can be attributed to the last of the evening's revelers rather than the secret police. The present system is grotesquely inefficient while managing at the same time to be inhumane. Both qualities are captured in a few striking facts.

Syria's murderous civil wars have displaced about twelve million people. Roughly four million of the displaced sought refuge outside the country. At first, almost all fled to the neighboring states of Jordan, Lebanon, and Turkey. These states opened their borders in the face of political and economic stress, and despite the fact that none of them has ratified the Refugee Convention and therefore has no legal obligation to serve as a haven. Consistent with its long-established practice, in each country the UNHCR initiated humanitarian relief by setting up camps for the displaced. It used the resources at hand under its single-year funding cycle while urgently imploring rich states for additional funds.

These arid camps offer little more than the bare essentials of survival and were avoided by the great majority of the displaced. Instead, close to 85 percent, according to Betts and Collier,⁶² favored cities, where most sank toward destitution as they exhausted whatever capital they had brought from Syria. Largely denied the

opportunity to compete for legal employment by governments fearing backlash from their citizens, most families survived by piling into a decrepit room or two and working for pitiful wages in the informal economy. The great majority preferred this marginal existence to the camps in spite of the fact that only those in camps could receive subsistence grants from the UNHCR or be among the relative few for whom the UNHCR found places in rich countries.

As the Syrian wars raged on, a series of developments spurred hundreds of thousands of those refugees to set out for Europe. One was the fading hope of achieving stable lives either through a peace which would allow the displaced to repatriate or through real integration into the economy and society of the proximate havens. A second was an increase in refugees stemming in large measure from Russia's intervention in the war, marked by pulverizing aerial assaults on areas of the country still held by rebel forces. A third was a growing realization that Europe's external borders were virtually unguarded and that once on European territory the risk of expulsion was minimal. Finally, a large-scale organization of people-smuggling operations centered in Libya and Turkey got underway.

The terrible austerity and loss of hope together with the potential for refuge in the rich countries of Western Europe and the omnipresence of facilitators overcame the natural reluctance of people to break decisively with a familiar culture and set out for a world in which they would be a conspicuous minority. Those who had the resources to pay the people-movers began spilling in ever larger numbers over the wall of inertia onto what for Syrians in particular had become the main route north, from Turkey to the Greek islands and then on through the Greek mainland to those rich nations that had by 2014 thrown open their doors, however transiently.

The resulting mass of asylum-seekers merging with the mass of persons simply in search of a better life washed first over Greece and Italy. Leaving fragments behind in impoverished campsites or random urban spaces, the larger body flooded north primarily toward Germany and Sweden, although subsidiary streams flowed to Austria, Belgium, France, and Norway.

The 2008 financial crisis and resulting explosion of unemployment had cracked the economic pillar sustaining the West European secular-liberal political establishments consisting of the parties and officials of the center-right to left, which had governed Western Europe since World War II. After years of growing public concern about immigration particularly from the Global South and the proven emptiness of promises to limit it, the great migration wave of 2014–2015 also weakened public confidence in the political process as a vehicle for translating popular feelings into effective policies, as well as governmental competence to deliver fundamental public goods. To many, it seemed governments had lost control of their borders and their ability to preserve public order and safety.

Nightly, citizens were treated to pictures on television of tens of thousands of strangers seeming to pour over Europe's southern borders and then march north. Coinciding in 2014 with anxiety occasioned by the perceived migrant flood was the

onset of terrorist attacks after a nearly decade-long lull. The 2015 assaults on women during festive Christmas gatherings in Cologne and other German cities only aggravated the sense of governmental failure at the national level. Failure was equally evident in Brussels, home of the EU core institutions. The banal rhetoric and lame responses of EU officials confirmed for many the absence not only of competence and will to act, but even of a strategy for action to any degree commensurate with the perceived challenge to the order of things. What followed, then, was Brexit, that furious body blow to the European project, and on the Continent a giant step forward for xenophobic parties and politicians.

For me the single most arresting number in the Betts–Collier book was the \$135-to-\$1 ratio (no doubt a very rough-and-ready calculation)^{**} of daily spending on an asylum claimant who reached a rich country in Europe versus spending by the UNHCR of European relief funds on a refugee in the Middle East.⁶³ What they argue not unpersuasively is that if the billions spent to process, shelter, feed, teach, and otherwise attempt to settle asylum claimants in Germany or Sweden or other European countries had been spent to provide the semblance of a normal life for the displaced millions in Lebanon, Jordan, and Turkey, the overwhelming majority of them would have remained in place.

Exploring in all its complex political, intellectual, economic, and institutional detail the failure by national political leaders and senior EU officials to anticipate the surge, its consequences, and the strategic options available for avoiding it would require another book. What one can say with confidence is that it would not have taken prescience on the order of Nostradamus to envision the surge. Nor would it require the strategic vision of Clausewitz to imagine ways of incentivizing the displaced of Syria to remain close to the borders of their national home, where they would be in a familiar cultural setting and, incidentally, not have to risk their lives on a thousand-mile trek into the unknown. That said, the immediate question is what lessons can be learned from the intellectual, political, and strategic failure of Europe's political establishment, and how can those lessons help European and other wealthy countries manage the pressure on their borders, which for reasons I sketched in Chapter 1 are bound to grow. In the final chapter of this book I will suggest an answer.

^{**} The ratio, even if accurate, may be misleading about the real costs of converting refugee camps into the functioning communities Betts and Collier propose and I elaborate in Chapter 8.