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Catherine Dauvergne
Allard School of Law at the University of British Columbia, dauvergne@allard.ubc.ca

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AMORALITY AND HUMANITARIANISM IN IMMIGRATION LAW©

BY CATHERINE DAUVERGNE*

The author argues that liberalism does not provide a meaningful standard for assessing whether immigration laws are just. In the absence of a justice standard, immigration laws occupy an amoral realm. Varying strands of liberal theory about membership in society do converge around the humanitarian ideal that some people are so needy that they must be admitted on a moral basis. The humanitarian consensus, however, is unhelpful for most of the broad societal debates about immigration, and is a front for discursive cohesion without any underlying agreement. Humanitarianism is a pragmatic tool for shifting law and policy, but must be used with caution because of its foundation in inequality.

L'auteur argumente que le libéralisme ne pourvoie pas de critère significatif pour juger si les lois de l'immigration sont justes. Dans l'absence d'un critère de justice, les lois de l'immigration occupent un domaine amoral. Des positions variables de la théorie libérale sur l'appartenance à la société convergent autour de l'idéal humanitaire, considérant certains gens tellement nécessiteux qu'ils doivent être admis sur une base morale. Le consensus humanitaire est, pourtant, inutile pour la plupart du débat sociétal sur l'immigration, et constitue une façade pour la cohésion discursive sans aucun accord sous-jacent. L'humanitarisme est un outil pragmatique pour changer la loi et la politique, mais il doit être utilisé avec précaution parce qu'il se base sur l'inégalité.

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I. INTRODUCTION

Immigration is a contentious political topic in prosperous Western nations at the close of the twentieth century. As barriers to trade and financial movements are being challenged and dismantled, and technologies of communication and transportation are shrinking the globe, barriers to the movement of people have remained rigid. Outside the globe-trotting business class and the few citizens-of-the-world who hold multiple passports, permanent movement between nations remains relatively difficult. Birth in a prosperous Western nation is, in Joseph Carens's phrase, the contemporary equivalent of feudal privilege.[1] The immigration debate in popular discourse takes many forms. Debates about the status of guest workers in Europe,[2] about the implications of British nationality law,[3] or the burgeoning "illegal" population in the United States[4] all draw out different perspectives on questions of membership and belonging and the appropriateness of various immigration law provisions. The seven years of almost unabated public consultation on immigration law that Canadians have experienced,[5] and

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1 See J.H. Carens, "Aliens and Citizens: The Case for Open Borders" (1987) 49 Rev. Pol. 251 at 252 [hereinafter "Aliens and Citizens"].

2 See W.R. Brubaker, ed., *Immigration and the Politics of Citizenship in Europe and North America* (Lanham, Md.: University Press of America, 1989).

3 See A. Dummett & A. Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (London: Weidenfeld and Nicolson, 1990); and A. Paliwala, "Law and the Constitution of the 'Immigrant' in Europe: A UK Policy Perspective" in P. Fitzpatrick, ed., *Nationalism, Racism and the Rule of Law* (Aldershot, U.K.: Dartmouth Press, 1995) 77.

4 See D.M. Grable, "Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996" (1998) 83 Cornell L. Rev. 820.

5 In January 1999, the Canadian minister of citizenship and immigration released proposals for new directions in Canadian immigration and citizenship laws for public consideration: see Citizenship and Immigration Canada, News Release 99/01, "Minister Lucienne Robillard Announces New Directions for Immigration and Refugee Protection Legislation and Policy" (6 January 1999), online: Citizenship and Immigration Canada <http://www.cic.gc.ca/english/press/99/9901-pre.html> (date accessed: 20 November 1999). This move followed public consultations in 1998 in response to the December 1997 report, which aimed to restructure Canadian immigration legislation: see Citizenship and Immigration Canada, *Not Just Numbers: A Canadian Framework for Future Immigration* (Ottawa: Minister of Public Works and Government Services, 1997), online: Citizenship and Immigration Canada <http://www.cic.gc.ca/english/about/policy/lrag/emain.html> (date accessed: 20 November 1999). This report itself marked the culmination of a year-long consultative process.

Australia's recurring Asian immigration controversies,[6] are symptoms of similar tensions concerning the place of immigration in these societies.

At the heart of these debates, in each of their manifestations, is the question of just immigration. How many people must we as Germans, Americans, Australians, or Canadians admit to our community? What is the fair number? Whom should we choose and how should we choose them? The intransigence of this debate is explained in part by the fact that liberal theory, the common denominator in public and political thought in these prosperous nations, does not provide an answer. This article explores how liberalism's failure to answer the question "how many is just" moves the question outside liberal morality into an amoral arena. I describe this realm as amoral because the absence of a liberal standard means shifts in immigration laws and policies cannot be critiqued by comparison to an accepted notion of the good. The realm is not *immoral*, but is outside the reach of agreed versions of liberal morality, justice, and equality.

Part II of this article surveys liberal theory and demonstrates the limitations of liberal morality. Part III considers the tension between individualism and impartiality at the heart of liberal theory, which makes it impossible to extrapolate liberal postulates as a whole into this amoral realm. Parts IV through VI explore the consequences of these characteristics of liberal theory for immigration law: narrow justice standards are developed; discourses about refugees and other immigrants are fractured and overlapping; and immigration law debates are overshadowed by an illusory humanitarian consensus. This humanitarianism occupies the amoral realm because it is grounded in inequality and partiality and it provides agreement with no underlying standard. Liberal discourses of justice and humanitarianism are both inadequate for providing guidance in analyzing and reforming immigration laws.

II. THE LIBERAL POSITION

Classical liberal theory does not provide a standard for assessing whether particular immigration laws are just because to do so requires an understanding of justice that can span national boundaries. A just standard in immigration law must take account of the needs and claims

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[6] See M.C. Ricklefs, "The Asian Immigration Controversies of 1984-85, 1988-89 and 1996-97: A Historical Review" in G. Grey & C. Winter, eds., *The Resurgence of Racism: Howard, Hanson and the Race Debate* (Clayton, Vic.: Monash University Publications, 1997) 39.

of those outside the border as well as those inside. Classical liberal conceptions of justice cannot do this because these theories assume a political and legal community and proceed to consider questions of justice as issues arising within the community.[7] John Rawls and Ronald Dworkin provide contemporary examples of this characteristic of liberalism. In introducing his theory of justice, Rawls describes society as "a closed system isolated from other societies."[8] Justice applies within that closed system. The closed border is an assumption upon which the theory is built, not something subject to examination within the theory.

For Dworkin, the just practice of law is a condition that arises only in true associative communities—communities of principle. Accordingly, he is more specific than Rawls about the character of the community within which his theory applies. We can therefore infer that closed borders are not merely assumed, but are assumed to be a virtue. He explicitly denigrates a universal view of justice:

> People might regard their political community as merely de facto [rather than truly associative], not because they are selfish but because they are driven by a passion for justice in the world as a whole and see no distinction between their community and others. A political official who takes that view will think of his constituents as people he is in a position to help because he has special means—those of his office—for helping them that are not, regrettably, available for helping others. He will think his responsibilities to his own community special in no other way, and therefore not greater in principle. So when he can improve justice overall by subordinating the interests of his own constituents, he will think it right to do so.[9]

In Dworkin's view, to think of justice in universal terms is to misunderstand the importance of one's own community. While he writes of the possibility of considering questions of justice as reaching beyond borders, this is not his principal concern, nor should it be the concern of members of a true associative community. He submits that "we treat community as prior to justice and fairness in the sense that questions of justice and fairness are regarded as questions of what would be just or

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[7] See D. Galloway, "Liberalism, Globalism, and Immigration" (1993) 18 Queen's L.J. 266 at 269 [hereinafter "Liberalism, Globalism, and Immigration"], which discusses the extent to which this assumption is typical of liberalism.

[8] J. Rawls, *A Theory of Justice*(Cambridge, Mass.: Harvard University Press, 1971) at 8. Defending his theory of justice in "Justice as Fairness: Political Not Metaphysical" (1985) 14 Phil. & Pub. Aff. 223, Rawls elaborates, at 233, that "society is viewed as a more or less complete and self-sufficient scheme of cooperation, making room within itself for all the necessities and activities of life, from birth until death. … [C]itizens do not join society voluntarily but are born into it, where, for our aims here, we assume they are to lead their lives."

[9] R. Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986) at 209.

fair within a particular political group."[10] His argument stops short of advocating closed borders because he does not address the immigration context. However, when the determination of justice starts *after* the community is constituted, it cannot also be used to determine the membership of the community. Neither Rawls nor Dworkin articulate a measure of justice that can cross borders.

Liberal theorists concerned about fairness in immigration laws of course have sought to extend liberal conceptions of justice to the immigration context. That is, they have attempted to extrapolate ideas of justice developed on the basis of an assumed community to the question of the constitution of the community itself. The result has been a debate between those arguing that liberalism requires closed borders and those arguing that liberalism requires open borders. That both positions can be coherently articulated by thinking people concerned about justice points to one of liberalism's central tensions and underlines the tenacity of the conflict.

Against the backdrop of assumed communities, closed border theorists have an easier case to make: in order for a border to be assumed, it must be assumed to be closed. Michael Walzer's seminal work on liberal justice theory conducts a detailed examination of the assumed border of the community.[11] He argues not only that closed borders are just, but that closed borders are a necessary condition for justice. For Walzer, the question of community membership precedes the elaboration of his distributive justice concept. That is, his understanding of justice takes the same starting point as Rawls and Dworkin, but he undertakes a more detailed inquiry of this precondition of justice. He asserts both that membership is not subject to justice standards and that closure of communities is necessary to foster their distinct cultures and characters. He writes that

> [t]he distribution of membership is not pervasively subject to the constraints of justice. Across a considerable range of decisions that are made, states are simply free to take in strangers (or not) … . Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be *communities of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.[12]

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[10] *Ibid.* at 208.

[11] See M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) c. 2.

[12] *Ibid.* at 61-62 [emphasis in original].

Walzer builds his argument by drawing analogies between the nation and what he calls "similar" associations: neighbourhoods, clubs, and families.[13] He claims that neighbourhoods in liberal societies can be open to newcomers only because closure is provided for at the national level. Like a club, admission to national membership should be controlled, but departure must remain an open option. Drawing on the family analogy, he notes that liberal immigration policies often make membership more easily available to "ethnic relatives," members of a type of extended family.

Along with this staunch defence of the closed national community, Walzer recognizes that the mutual-aid principle creates particular duties to admit some outsiders whose need is for membership itself, and cannot therefore be met by ceding territory to them or exporting wealth. In an assertion that is perhaps paradoxical, Walzer argues that a valid claim of asylum can never morally be denied, but a sufficiently large number of refugee claimants will annul the duty of mutual aid.[14] In other words, even in the case of strictly humanitarian claims for admission, not everyone should be allowed in. When a state is faced with choosing among refugees, those who most resemble community members should be admitted. Walzer links the limits of mutual aid to community definition, stating that communities "depend with regard to population on a sense of relatedness and mutuality. Refugees must appeal to that sense. One wishes them success; but in particular cases, with reference to a particular state, they may well have no right to be successful."[15] While it is unclear how far Walzer believes the principle of mutual aid obligates liberals to accommodate refugees, or indeed asylum claimants,[16] it is evident in his analysis that this duty

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[13] *Ibid.* at 36-43.

[14] In Walzer's analysis, an asylum claim is made by those fleeing political persecution who are already within the nation's borders; refugee claimants are still outside. See also L.M. Seidman, "Fear and Loathing at the Border" in W.F. Schwartz, ed., *Justice in Immigration* (New York: Cambridge University Press, 1995) 136.

[15] Walzer, *supra* note 11 at 50.

[16] Walzer makes a distinction between these two groups that reflects, primarily, the distinction enshrined in international refugee law between those seeking admission who are already in your country (Walzer's asylees) and those who are elsewhere, seeking admission to your country on humanitarian grounds (Walzer's refugees). This terminology is current in Europe and the United States. In Canada and Australia, both groups are referred to in popular public discourse as refugees. The international law definition of refugee, followed by most prosperous Western nations, is narrow and idiosyncratic. The *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 28 July 1951, 189 U.N.T.S. 137 at 152 (entered into force 22 April 1954) [hereinafter *Convention*] defines a refugee, in Article I(A)(2), as any person who,

> [a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of

operates only at the margins of an otherwise justifiably closed community. He states that "[t]he principle of mutual aid can only modify and not transform admissions policies rooted in a particular community's understanding of itself."[17]

Several aspects of Walzer's defence of closed borders are open to criticism.[18] There are flaws in his analogies between liberal states and neighbourhoods, clubs, or families. Unlike a neighbourhood, the state must be involved in governance; unlike a family, all existing liberal states are democratic. While a club provides a perhaps more compelling analogy, individuals do not depend on club membership for basic conditions of life. Thus, "clublessness" provides no parallel with statelessness. Although Walzer relies only partially on each analogy, inviting inconsistencies, the need to constantly shift analogies weakens the argument. Neighbourhoods, clubs, and families do not hold monopolies on coercive force, and cannot deploy armies to police their boundaries. Walzer's assertion that closure is necessary for communities of character and for stability is not fully defended. His discussion of mutual aid for asylees is an important qualifier to his theory, and an expression of the liberal humanitarian consensus that I consider in detail below.

What interests me about Walzer's argument at this juncture is the place of individuals as equal moral actors. To articulate a defence of closed borders, Walzer has necessarily departed from liberalism's primary focus on the individual and its central concern with equality between individuals. This point is not, of course, an attack on the internal consistency of Walzer's position. As a communitarian liberal,

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> being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The 1967 Protocol on the Convention Definition removed the link between the refugee definition and events prior to 1951: see Article I(2) of the *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267 at 268 (entered into force 4 October 1967).

[17] Walzer, *supra* note 11 at 51. While Walzer does not discuss it, his theory does leave room for an open-bordered community, if this openness was part of the community's self-understanding. Such a community would, nonetheless, presumably be impoverished by its lack of closure and hence, in Walzer's view, by its lack of character and stability.

[18] Several analysts have criticized Walzer's closed border argument in much more detail than I do here: see, for example, J.A. Scanlan & O.T. Kent, "The Force of Moral Arguments for a Just Immigration Policy in a Hobbesian Universe: The Contemporary American Example" in M. Gibney, ed., *Open Borders? Closed Societies? The Ethical and Political Issues* (New York: Greenwood Press, 1988) 61; P. Singer & R. Singer, "The Ethics of Refugee Policy" in *ibid.*, 111; and J.H. Carens, "Refugees and the Limits of Obligation" (1992) 6 Pub. Aff. Q. 31 [hereinafter "Refugees and the Limits of Obligation"].

Walzer necessarily privileges community as a value in and of itself and membership in a community as a value for individuals.[19] Indeed, he opens his discussion of membership by stating that "[t]he primary good that we distribute to one another is membership in some human community."[20] Walzer's argument shows that communitarianism, within which a defence of closed borders can be coherently elaborated, modifies the liberal commitment to the moral worth of the individual. Necessarily, Walzer's equality and justice are measured between members of the community. Those outside the community are fundamentally unequal. He would agree that his distributive justice concept cannot be applied between members of a community and outsiders.

The relationship between closed borders and equality is seen more starkly in Donald Galloway's work, as his defence of closed borders for liberal communities includes a claim to adhere to Rawlsian equality.[21] While Galloway's work has been less influential than Walzer's, his argument provides a more direct challenge to my project as he does not assert a communitarian position, but claims instead that "closed borders are consistent with 'pure' liberalism."[22] Galloway argues that if the Rawlsian original position were adapted to an international viewpoint, that is, if originalists were to choose whether and how to organize human life into a state system, the state would be characterized as a "self-help device for moral individuals,"[23] a device to assist moral individuals in meeting their independently determined goals and duties. Despite his ambivalence towards communitarians, he relies on analogies that resemble Walzer's: "The liberal state takes on an appearance similar to that of the familiar, voluntary association, promoting the multifarious purposes of its members, and balancing these against its

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[19] For a differing view, see F.G. Whelan, "Citizenship and Freedom of Movement: An Open Admission Policy?" in Gibney, ed., *supra* note 18, 3. Whelan argues that liberalism requires that communities have open borders, but when combined with communitarianism, statism, or democracy, closed borders are morally justified. The problem with Whelan's approach is that it divorces liberalism from political context, while it is only in political context that questions of immigration can arise.

[20] Walzer, *supra* note 11 at 31.

[21] See "Liberalism, Globalism, and Immigration," *supra* note 7; D. Galloway, "Strangers and Members: Equality in an Immigration Setting" (1994) 7 Can. J. L. & Jur. 149 [hereinafter "Strangers and Members"]; and D. Galloway, "Three Models of (In)equality" (1993) 38 McGill L.J. 64. For additional commentary on Galloway's work, see C. Dauvergne, "Beyond Justice: The Consequences of Liberalism for Immigration Law" (1997) 10 Can. J. L. & Jur. 323.

[22] "Liberalism, Globalism, and Immigration," *supra* note 7 at 286.

[23] *Ibid.* at 294.

members' moral duties."[24] Individual members have no duty to strangers beyond the duty of mutual aid. As the liberal state exists to promote the various aims of individuals with these duties, its existence cannot create a right of outsiders to become members. Galloway further asserts that individuals in the original position would not believe that they had unlimited freedom of movement, as this would infringe the autonomy of others, which they would bind themselves to respect.

Galloway introduces equality into his argument through the claim that, while a liberal state need not permit immigration, if it does, it must do so in a non-discriminatory way. But he defends exclusionary immigration law creating "us" and "them" groups as a necessary and non-discriminatory aspect of liberalism.[25] Galloway advocates a "human dignity" model of equality as the appropriate measure of non-discrimination for the immigration context. He states that

> [a] key implication of the dignity model is that a rule applying to applicants for entry will be discriminatory if (i) its impact is such that a subgroup identified by a characteristic has experienced, by reason of this characteristic, stereotyping, disdain or hatred towards individuals, *or* (ii) if it imposes conditions upon entry which in themselves can be interpreted as an attack upon the person's dignity.[26]

This view of equality aims at countering particular forms of discrimination that liberal human rights law attempts to address, but falls short of preserving the liberal commitment to the equal moral worth of all individuals. Galloway's argument that distinctions between an "us" and a "them" group are neutral is particularly difficult to accept.[27] He bases this assertion on liberalism's account of a differentiation between self and other as an early step in formation of societies.[28] The two distinctions are not truly parallel. To enter into a political community, a self must recognize others with whom to cooperate. The "us" group is then composed of differentiated individuals, of "others." This premise does not extrapolate neatly to the state system. A state, or political community, does not need other communities to bring it into existence by differentiating it. Even in

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[24] *Ibid.* at 295.

[25] *Ibid.* at 301.

[26] "Strangers and Members," *supra* note 21 at 167-68.

[27] See M. Minow, *Making All The Difference: Inclusion, Exclusion, and American Law* (Ithaca, N.Y.: Cornell University Press, 1990). Minow details the insidious hierarchies and discrimination created by legal boundaries in a variety of contexts.

[28] See "Liberalism, Globalism, and Immigration," *supra* note 7 at 301.

Galloway's analysis, a state emerges as a self-help organization to meet certain aims of cooperating individuals. One state may theoretically exist in the absence of other states, but a "self" cannot be differentiated—or brought into being—without creating "others." The us/them boundary at the border of the nation is necessarily hierarchical. Outsiders are not equal in a number of ways familiar in liberal theory: they do not have equal opportunity, equal access to basic liberties, or equal distribution of certain values. Galloway's argument that exclusion is not discriminatory depends on accepting that the "us" group has a superior claim to these entitlements.

Even if we were to overlook these discrepancies and accept Galloway's version of equality as sufficient to meet the standards of classical liberalism, it is too narrow to provide a standard of justice that responds to many of the most difficult practical questions in immigration law. The two factors that he proposes, historical discrimination and detriment to dignity, provide little guidance when faced with issues such as whether to favour family immigrants or skilled immigrants; whether parents should be part of the "family class;" or whether successful entrepreneurs should be able to "buy" entry visas. Galloway draws his own examples from the realm of refugee law, where his reasoning requires less attenuation. This reinforces the liberal humanitarian consensus. The theoretical argument about open or closed borders has humanitarian admissions as its focus and responds most cogently to humanitarian scenarios.

The erosion of liberal equality that is demonstrated by Walzer and defended by Galloway is the primary reason that liberal arguments for closed borders are not sufficient to attract large-scale consensus in liberal societies. Part of liberalism's promise, particularly popular in its mass-consumption form, is the respect for individual equality. To accept a defence of closed borders that undermines universal equality is unacceptable to many liberals. This refusal is a factor behind a consistent but not majoritarian general public support for immigration, even in difficult economic times.[29] The closed border argument departs from this central liberal tenet and therefore loses some of its resonance in liberal societies. The alternative position, that liberalism requires open borders, is vulnerable in a similar way. Proponents of open borders also depart from a core liberal value, making the closed/open border debate particularly intractable.

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[29] See F. Hawkins, *Critical Years in Immigration: Canada and Australia Compared* (Kingston, Ont.: McGill-Queen's University Press, 1989) c. 4.

The assertion that liberalism mandates open borders begins from the commitment to individual freedom and equality. With these values as a focus, the open borders position is treated almost as a self-evident presumption by some theorists. Frederick Whelan expresses the logic of the argument this way:

> [I]t seems clear from the outset that a moral theory that sets out to attend to the claims of all human beings as such, on an equal basis, is going to have some difficulty in justifying borders that set off groups of people from each other and act as barriers to the free movement of individuals.[30]

This assertion is most acceptable when liberalism is treated as primarily a moral rather than a political theory, a distinction that Whelan explores in some detail. The problem with this formulation, however, is that immigration laws raise questions of community rather than individual morality. Some proponents of open borders do, nonetheless, state their claim in political terms. John Scanlan and O.T. Kent write that "in a truly liberal polity, then, national borders would simply lack moral significance. Relying upon them to argue for immigration restriction would offend basic principles of justice."[31]

Carens provides more insight into the liberal argument for open borders by treating it as contentious rather than assumed and by analyzing various dimensions of the position.[32] He argues that three strands of contemporary liberalism (utilitarian, Rawlsian, and Nozickian) each support an argument for open borders, or at least for significant reductions in present immigration restrictions. He claims an open borders position is inherent to liberalism in part because these varying theories converge on this point.

Carens draws out his reasoning using Rawls's original position, arguing that in a global version of the original position, where individuals did not know their place of birth or which society they would be a member of, they would insist on the right to migrate as one of the basic liberties.[33] Carens argues that a parallel can be drawn between liberal arguments for open immigration and liberal arguments of an

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[30] Whelan, *supra* note 19 at 7.

[31] Scanlan & Kent, *supra* note 18 at 68.

[32] See "Aliens and Citizens," *supra* note 1; J.H. Carens, "Membership and Morality: Admission to Citizenship in Liberal Democratic States" in Brubaker, ed., *supra* note 2, 31 [hereinafter "Membership and Morality"]; J.H. Carens, "Who Belongs? Theoretical and Legal Questions About Birthright Citizenship in the United States" (1987) 37 U.T.L.J. 413; and "Refugees and the Limits of Obligation," *supra* note 18.

[33] See "Aliens and Citizens," *supra* note 1 at 258.

earlier era for extension of the franchise, and problematically asserts that restrictions infringe classical liberalism in the same way.[34] While open borders would not mean no distinctions between members and non-members, he states that

> [f]or people in a different moral tradition, one that assumed fundamental moral differences between those inside the society and those outside, restrictions on immigration might be easy to justify. Those who are *other* simply might not count, or at least not count as much. But we cannot dismiss the aliens on the ground that they are other, because *we* are the products of a liberal culture.[35]

Carens takes issue with Walzer's communitarian closed borders and would accept only the narrowest restrictions on immigration. Whelan also draws on Rawls in concluding that "pure" liberalism requires open borders. He asserts that freedom of international movement could, as Carens suggests, be considered a basic liberty, that fair equal opportunity could require all jobs be open to individuals regardless of nationality, and that the difference principle could require the maximum number of equally possible admissions to a polity.[36]

The view that open borders are a self-evident conclusion of liberal theory, derived from individual equality, requires us to view liberalism as a moral theory, rather than a political *and* moral theory. This tenuous distinction loses its power to provide insights when we consider that liberal theory in the immigration context is foremost about political organization. Liberalism has never been asserted theoretically without the presumption of a state. While Whelan separates "pure" liberalism from liberal statism, liberal democracy, and liberal communitarianism, the separation is artificial. Once the political community is reasserted an important aspect of the open borders argument falls away.

Carens does not remove the political community from his theory, but, as was the case with closed border advocates, he minimizes a central liberal value. Carens rejects the distinction between self and other that Galloway argues is central to liberalism. While Galloway inappropriately applies this dichotomy to the existence of states, Carens fails to appreciate the relationship between liberal individuals and the societies they form. He argues that moral liberal individuals do not discount the

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[34] This assertion ignores the border of the nation entirely.

[35] "Aliens and Citizens," *supra* note 1 at 269 [emphasis in original].

[36] See Whelan, *supra* note 19 at 7-9. Whelan continues his analysis, at 23, by stating that restrictions to immigration can be morally justified when liberalism is combined with statism, democracy, or communitarianism, which account for existing liberal polities.

moral worth of non-members of the community. This ignores liberal explanations of societal formation. Rawls's social theory is a contemporary social contract, as Carens acknowledges when drawing on it.[37] Members join to form societies in order to gain certain benefits. Liberal selves join with particular others, in distinction from alien others. The result is a gain for all those joining the contract. This gain distinguishes members from outsiders. If this distinction had no value, and was not discriminating, membership would be meaningless. It clearly is not, even in Carens's view. When Carens asserts that an insider-outsider distinction does not establish a moral hierarchy, he not only unduly minimizes the importance of the polity in liberal theory, he ignores the insidious discrimination that is inherent to these distinctions.

The failure of both closed and open border advocates to establish their arguments within the confines of classical liberalism has important consequences for their debate. Classical liberal theory does not provide an answer to whether the community's borders should be open or closed.[38] Both arguments are supported by certain aspects of liberalism. Liberal theories of justice have been elaborated against the background assumption of a closed community. They are ill-adapted to the questions arising in the immigration context. To this extent, the search for "just" immigration law in liberal society is futile. Liberal societies rely upon liberal conceptions of justice. As these do not accommodate the immigration setting, immigration law is left in a zone of amorality, an area where the core liberal values of the society do not indicate a resolution. Popular debates about immigration remain fractious. Indeed, the philosophy that underpins the liberal democracies and percolates through the popular cultures of the Western states most immigrants target, cannot provide a basis for societal consensus. This amorality is not the same as immorality. It is equally impossible to draw the conclusion that liberal immigration laws are "unjust." Neither conclusion is possible, hence the label "amoral." Many individuals in these nations feel passionately about immigration and would argue fervently for morally-based legal change. Nonetheless, these moral claims are personal and cannot reach political consensus as long as broad-based liberalism remains the hegemonic popular and political discourse. I now turn to consider the causes and consequences of the absence of a liberal justice standard.

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[37] See "Aliens and Citizens," *supra* note 1 at 270.

[38] See M. Tushnet, "Immigration Policy in Liberal Political Theory" in Schwartz, ed., *supra* note 14, 147. Tushnet argues that the explanation for this theoretical lacuna is largely that immigration has become a social issue only relatively recently.

III. A CENTRAL TENSION IN LIBERALISM

The tension in the liberal debate about closed or open borders parallels the central tension in liberalism that James Fishkin considered to constitute the limit of liberal obligations.[39] The immigration debate in liberal societies provides an example of Fishkin's thesis that the core liberal commitments to impartiality and individuality are in unresolvable conflict. The attractiveness of the idea that we are bound to all other individuals through a minimal duty of mutual aid (in Fishkin's terms, "minimal altruism") is the core of liberal morality. To each person, we have a minimal duty to save his or her life when the cost to us of doing so would be negligible. Yet on a large scale, even such a minimal obligation pushes us to accept heroic personal sacrifice that liberalism's commitment to individual autonomy will not countenance. Fishkin relied on donations to famine relief as his primary reasoning device, but the open borders argument has the same features. The modern debate about immigration law in liberal democracies takes place against the often unstated, but potentially quite truthful, spectre of millions of individuals wanting to become members of these wealthy societies. At some point, far beyond existing immigration quotas in these nations,[40] admitting more people would decrease the standard of living of existing members. To accept that immigration should be permitted until living conditions have been equalized throughout the world is surely, in Fishkin's terms, a heroic stance. A similar equalization of living standards is postulated at one extreme of the famine relief scenario. Fishkin bases his call for a re-examination of liberal morality on this tension between liberalism's dual commitments to equality and to limits on individual moral sacrifice:

> This argument also has a further implication for *political* theory in that the overload problem exemplifies the incompatibility, at the large scale, of two central components of liberalism: (a) *impartiality* or "equal concern and respect" and (b) *individualism*. Notions of impartiality … press us toward acceptance of general obligations. Notions of individualism require, or implicitly assume, limits on the moral demands that can be made of each individual … .[41]

The two principles check each other with the result that we do not require heroism as a standard of moral behaviour, and we permit moral individuals a robust sphere of indifference within which their choice of whether to respond compassionately to those in need is "free" in that it

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[39] See J.S. Fishkin, *The Limits of Obligation* (New Haven, Conn.: Yale University Press, 1982).

[40] See Singer & Singer, *supra* note 18.

[41] Fishkin, *supra* note 39 at 170 [emphasis in original].

is morally neutral. The border argument fits well on the central axis Fishkin describes: the open borders argument emphasizes impartiality, while the closed borders position emphasizes the limits to individual sacrifice that are inherent in individualism.

The intractability of the argument, and the central tension in liberalism it reflects, do not justify rejecting liberal discourse about immigration as a source of insight. Liberal hegemony in domestic and international political spheres requires that we seek to understand immigration debates in liberal terms. The limits of liberal theorizing about immigration are important to this debate. International order is built on a liberal infrastructure, and the prosperous countries attracting aspiring immigrants are liberal democracies. This means that debates about immigration law and policy use liberal terms whether they take place in the political arena, the supermarket, or the university lecture theatre. Efforts to move the argument away from liberal theory, to a framework where questions of justice could perhaps be more easily answered, lose their resonance in the face of liberalism's hegemony. Real consequences for a society's members, and its new and would-be immigrants, happen more often in the political arena and the supermarket than in the lecture theatre. In the international arena, liberal hegemony means immigration questions are tightly bound up with state sovereignty. Consensus of any sort is hard to achieve. It is therefore important to examine liberalism's responses to immigration questions rather than solely argue that liberal theory does not answer these questions adequately.

The remainder of this article looks beyond the open or closed border dilemma to discuss liberalism's structuring of the immigration debate. I first consider attempts to develop standards of justice that are internal to the societies in question. I then examine the bifurcation of the migration law question into immigration and refugee law, and the centrality of humanitarianism to both of these branches of law. I conclude by reflecting on the constitutive role of immigration law in liberal society. Each discussion contributes to understanding why attempts to establish liberal immigration policy on principled bases do not alter the amorality of liberal immigration law. The basic structures of immigration law result from the absence of a justice standard.

IV. NARROW JUSTICE STANDARDS

One response to the absence of a liberal standard of justice that informs decisions about what is fair between members and non-members

of a society is to articulate standards for principled decisionmaking *within* a particular society. While such standards cannot answer the question of whether liberalism mandates open or closed borders, or whether a particular policy is just from the perspective of an applicant for admission, they provide a guard against capricious or self-serving political decisionmaking. They also conform to the traditional liberal tenet that questions of equality and justice are to be resolved within the community. The justice, or fairness, established by such standards applies to those who are already members of the society. That is, we establish "fair" standards for admission given who we imagine ourselves to be and what our aims as a nation are. This type of fairness standard provides a way of arbitrating disputes about immigration that arise because of the interests of sub-groups *within* the community. These standards of justice are well-developed and conform to liberal postulates. The problem is only in their almost xenophobic narrowness. They define justice based on community norms when those to whom just consideration is arguably most important in immigration matters are outside the community.

Scanlan and Kent advocate standards of fairness for American immigration law that draw on American political culture and recognize the constraints of domestic politics:

> [W]e will argue that the moral basis for establishing a restrictive immigration ceiling is, at best, problematical. But we will suggest that the dominance of realpolitik concerns about jobs, housing, environment, and standard of living make it impossible in any practical way to bring this moral insight to bear on the political process. On the other hand, we will show that other questions, including those involving the rights of racial minorities and political asylum applicants are more amenable to politically effective moral advocacy, in part because of their different effects on "native" interests, but, more important, because they are so closely connected to fundamental American political and social concepts of liberty and equality.[42]

They assert that liberalism requires open borders, but argue that this morally just position is politically impossible. Pragmatic solutions are to be sought by making arguments that resonate with American cultural morality. What is just must be defined in narrow American terms. Scanlan and Kent acknowledge that an open borders argument will not win popular or political support in the United States, but claim that policies that emphasize the human rights of immigration applicants and asylum applicants' need for political freedom will garner support. They urge the expansion of admission quotas on these bases, rather than on the basis of liberal justice. The standard for principled policy that they

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[42] Scanlan & Kent, *supra* note 18 at 64.

develop depends explicitly on American political history and political culture; it is designed to rally support among the American populace rather than to act as a standard for liberal societies. As such, it is a pragmatic stance, casting aside the search for an ideal in favour of policy strategy. While Scanlan and Kent recognize the limitations of the principles they articulate, they also appreciate that a great deal of change in the directions they propose is possible before their principles will cease to provide guidance. I have labelled their stance "narrow" or "internal" because its point of departure is, "We are Americans, so this is what fair immigration policy is for us."

A similar, internally principled approach is put forward by Andrew Shacknove, who stipulates that the principle of mutual aid implies three positive duties towards refugees: (1) to avoid depriving them of basic security, subsistence, and liberty, unless some actual proximate and compelling interest of state is implicated; (2) to assume responsibility for our own actions that directly deprive others of their basic needs; and (3) to treat all persons whose lives are in jeopardy as equal before the law.[43] While these duties are articulated in universal terms, they are internally based. In Shacknove's analysis these principles apply to people who are already within the borders of the nation awaiting decisions about whether they will be permitted to remain. As with Scanlan and Kent, important principled improvements in actual practice could be made on the basis of Shacknove's three duties. Nonetheless, these duties do not address the important questions of whether refugees should be admitted for permanent settlement at all, who should be considered a refugee, and how many people should be admitted. The case of immigrants is also beyond the scope of these principles and is clearly beyond the reach of Shacknove's argument. He derives his position from liberalism's minimal principle of moral duty rather than from a conception of justice. To this extent, his argument is pragmatic because he draws on an aspect of liberal theory that attracts the most consensus in questions of immigration: the idea that some people are so needy they cannot be turned away. His perspective is narrow because compelling state interests trump even the basic subsistence of refugee claimants. The interests of the "us" group have enormous primacy.

Howard Adelman has developed a highly sophisticated model for determining questions of justice in immigration and refugee law that

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[43] See A.E. Shacknove, "American Duties to Refugees: Their Scope and Limits" in Gibney, ed., *supra* note 18, 131.

provides an elaborate exemplar of a narrow standard.[44] He asserts that the universality of Rawls's theory of justice means it ought to be applicable to the immigration and refugee context, yet the rights emphasis of Rawls's theory makes it inappropriate for these questions. Adelman develops a framework for just decisionmaking that shows how immigration and refugee policy meets different aims within a society, and that differing conceptions of justice prevail in relation to each of these.[45] He claims justice is not abstract and that we must look at actual policy decisions to see which conceptions of justice underlie them: "[I]n immigration policy, justice is achieved by adjudicating among various utilities and normative rights criteria, as well as the capacity of the society to absorb those immigrants and refugees."[46]

Adelman views justice as a variable concept; its moral content is determined by its context. He examines various types of immigration decisions and considers how justice standards could be inserted into the decisionmaking. This yields a set of principles for policymaking, however, rather than a model of liberal justice. While ultimately of great use to decisionmakers, in many instances his taxonomy of values driving decisions is more explanatory than normative. For example, he discusses how an ecological perspective can lead to support for either more or less immigration depending on whether national or global ecology is emphasized, and how economic self-interest can take policy in diverging directions depending upon what other values are also considered.[47] Adelman would agree that his aim is to articulate principles to guide enlightened policymaking. The principles he outlines do, in some instances, incorporate the perspective of admission applicants. What Adelman ignores is that Rawlsian justice is inapplicable to the immigration and refugee context because, as the open/closed borders debate shows, Rawls assumes community and this assumption is not easily cast aside. Adelman's own work, like that of Scanlan and Kent and of Shacknove, demonstrates that principled policymaking stems from the values of one society and puts the needs of members first. He is compelled to develop flexible principles because no liberal justice

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[44] See H. Adelman, "Justice, Immigration and Refugees" in H. Adelman *et al.*, eds., *Immigration and Refugee Policy: Australia and Canada Compared*, vol. 1 (Carleton, Vic.: Melbourne University Press, 1994) 63 [hereinafter "Justice, Immigration and Refugees"].

[45] A similar type of analysis is seen in Jules Coleman and Sarah Harding's essay, where justice is also deduced from current practice: see J.L. Coleman & S.K. Harding, "Citizenship, the Demands of Justice, and the Moral Relevance of Political Borders" in Schwartz, ed., *supra* note 14, 18.

[46] "Justice, Immigration and Refugees," *supra* note 44 at 70.

[47] *Ibid.* at 72-73, 80.

standard fits the context he is considering. By arguing that what is just depends upon our goals (including our desire to be humanitarian) in a given context, Adelman demonstrates that there is no one standard that applies to immigration and that the goals of non-members are irrelevant to "fair" policymaking.

Internal standards of justice are a crucially important device. They articulate goals for immigration law and policy that, in practical terms, would be a marked improvement on political reality. These standards contribute more to the debate about pragmatic improvements in the immigration realm than the more ethereal open/closed border debate. They are more compelling to community members who ultimately must make or support rules about admittance to the polity. What I want to highlight about these views of just immigration law is that their existence does not mean liberalism provides standards for justice in immigration. Internal justice standards only address the question of fairness from the perspective of society members. They announce that certain laws are fair, if they are fair to all of "us." To speak of justice in this narrow sense does not affect the argument that immigration law is amoral, and is beyond or, at the border of, liberal conceptions of justice. Justice for those who will not be directly touched by these laws is not a full conception of justice.

V. REFUGEES AND OTHER IMMIGRANTS

One consequence of the positioning of immigration discourse within liberalism is that there is an incongruity between popular discourse about fairness in immigration law and the theoretical propositions that I have analyzed to this point. Most of the popular outcry is about fair *immigration* law, while most of the theoretical work is about just *refugee* admissions. The liberal philosophical debate is occurring at the margins of the popular concern in liberal societies. The reason for this is embedded in the amorality of liberal immigration law in the absence of a justice standard for liberal immigration discourse.

Although a standard is lacking, liberal immigration theorists do agree on some points. Closed border liberals seeking to articulate what is just in immigration law turn to the principle of mutual aid: an individual has a duty to save the life of a stranger if he or she can do so with minimal cost or risk to him or herself. The archetypal example is the duty of a stranger to stop and save a drowning child when it would be easily done. Fishkin emphasizes how minimal this duty is. Walzer and Galloway both acknowledge that on the basis of the duty of mutual aid,

refugee admissions must be an exception to their arguments for closed borders. Open border theorists, seeking support for their view, develop their arguments by taking the example of those most in need. As a result, there is a convergence in open and closed border arguments around the principle of assistance for those most in need: the principle of mutual aid. There are doubtless some difficulties in adapting a moral duty of individuals to save lives to an obligation upon states to admit outsiders. Nonetheless, consensus around the use of this principle in this context justifies analyzing the consequences of that consensus. In the case of the most needy, admission to settle in a prosperous Western nation is lifesaving.

It is because of the consensus that the duty of mutual aid is applicable to the question of who should be admitted to a liberal society that theoretical discussions of admission are largely devoted to refugees, or at least to those considered in popular parlance as refugees (given the narrowness of the legal definition). There is very little theoretical discussion of whether and how those seeking permanent admission to a prosperous country in order to gain a better job or to increase their standard of living should be treated.[48] The ironic problem with this is that the vast majority of those admitted to settle in Western democracies each year are not refugees, but immigrants.[49] This is one way in which the philosophical debate misses the mark. While the admission controversy has its only point of consensus around admitting the most needy, most of those in fact admitted do not fall into this category. Even though in several ways the legal category "refugee" may not correspond with neediness, need is the logic that underlies the category and the debate about it. In the United States, Canada, and Australia—all of

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[48] The moral aspects of admission of guest workers have attracted considerable attention. Guest workers, however, are not admitted to permanent settlement and therefore are not in the same category as immigrants or refugees. The exploitative nature of guest worker policies is discussed in Walzer, *supra* note 11 at 52-61; and "Membership and Morality," *supra* note 32.

[49] This is true even in countries that have international reputations for accepting refugees. In Canada, the 1999 Immigration Plan targets admitting 22,100-29,300 refugees of a total 200,000-225,000 admissions: see online: Canadian Annual Immigration Plan, 1999 <http://www.cic.gc.ca/english/pub/anrep99e.html#plan1> (date accessed: 22 October 1999) [hereinafter *CAIP*]. In Australia, the planning levels for 1998-1999 include 12,000 humanitarian admissions (of which 6,000 are to be refugees) and 68,000 non-humanitarian admissions: see online: Australian Department of Immigration and Multicultural Affairs Website <http://www.immi.gov.au/facts/40human.htm#program> (date accessed: 21 July 1999); and <http://www.immi.gov.au/facts/20progra.htm> (date accessed: 22 October 1999) [hereinafter *Non-humanitarian Admissions*]. In the United States, in 1997, 626,378 immigrants in the family and employment categories arrived, and 112,158 refugees and asylees were given permanent resident status: see online: Immigration to the United States in Fiscal Year 1997 <http://www.ins.usdoj.gov/graphics/aboutins/statistics/index.htmstatistics> (date accessed: 5 October 1999) [hereinafter *U.S. Immigration*].

which consider themselves nations of immigration and have organized immigration programs—most migrants are admitted either because of their potential economic benefit to the nation or because they have close family there. In both Australia and Canada, the 1990s have been marked by a debate about whether economic migration or family reunion migration should be the larger group. There is no suggestion in public debate that humanitarian migration should be anything but a distant third category.[50] The current popular immigration debate concerns mostly how many immigrants should be admitted, not how many refugees. In Australia, one popularly debated question is the extent to which the culture is being influenced by Asian immigration. In the Canadian press, concern is expressed about the impact on culture and communities of an influx of wealthy Hong Kong Chinese. By contrast, there is considerable societal consensus in both Canada and Australia that genuine refugees should be admitted.[51]

One result of the liberal consensus over the mutual-aid principle is that humanitarian scenarios are the core of theoretical concern with migration. Another perhaps more disturbing aspect of liberal treatment of migration is that the mutual-aid principle provides little real policy guidance even for refugee law. While almost every theorist who weighs questions of justice in immigration law finds that Western nations should be admitting more refugees,[52] how many more is an open question. The mutual-aid principle simply pushes the debate away from admission to the thornier question of numbers. This does little to reduce intransigency. Renata Singer and Peter Singer develop a utilitarian argument that the number of refugee admissions should be increased until, considering the interests of the groups affected, the consequences of further admissions would outweigh the benefits.[53] Both Walzer, a

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[50] In both Canada and Australia, the economic group is currently larger than the family reunion group as a result of policy changes in 1995 and 1997, respectively. In Canada, the economic category targets for 1999 total 117,700-195,700 admissions, and the family category targets are 53,500-58,300: see *CAIP*, *supra* note 49. In Australia, the targets for 1999 and 2000 are 35,000 and 32,000, respectively: see *Non-humanitarian Admissions*, *supra* note 49. The United States maintains a strong emphasis on family-linked migration, with 535,771 family category admissions in 1997, compared to 90,607 admissions in the "employment-based preferences" category: see *U.S. Immigration*, *supra* note 49.

[51] See Hawkins, *supra* note 29.

[52] Of the theorists discussed above, this position is taken explicitly by Walzer, Adelman, Carens, Scanlan and Kent, Singer and Singer, and Tushnet, and implied by Galloway.

[53] See Singer & Singer, *supra* note 18. They illustrate their argument by stating, at 125, that doubling Australia's target refugee intake of 12,000 (1986-1987) would leave 12,000 people clearly better off and would have no clear effect on others. This doubling could likely continue for some

closed border advocate, and Scanlan and Kent, open border proponents, offer the vague concept of "state capacity" as a limit for refugee admissions. There is clearly still room to move towards fairer policy in Western nations by admitting more refugees. Nonetheless, by focusing on refugees, the question of fairness in immigration is sidelined. Immigrant numbers are far greater, and many immigrants are driven by circumstances that would qualify them as "needy" in liberal theory, but not as "refugees" in international law.

A further problem with the division of migration law into immigrant and refugee streams is that it facilitates the assumption that immigrants are not the most needy. This assumption provides a moral justification for theorists, on the basis of the mutual-aid principle, to devote more attention to refugees. The present distinction between immigration and refugee law was cemented by post-World War II efforts by the Western powers to address the needs of displaced persons in Europe.[54] The main response was the 1951 Convention relating to the Status of Refugees.[55] The definition of refugee set out in this Convention has become the standard in international law and is used in the domestic law of the prosperous Western nations considered here. A refugee is a person who is already outside his or her country of nationality and who is fleeing persecution on the basis of one or more enumerated grounds. Thus, being a refugee is not necessarily related to starvation or destitution. While many refugees do fit the vision of those most in need that is conjured as part of the theoretic discussion, others who are equally or more destitute are not refugees.[56] Conversely, some successful refugee claimants do not fit our vision of need in the least.[57] While many "official" refugees do want to move to new countries and

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time until any detrimental effects could be noticed, and still longer until those detriments outweighed the benefits to those admitted.

[54] See J.C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 6-10; and J.C. Hathaway, "Preface" in J.C. Hathaway, ed., *Reconceiving International Refugee Law* (The Hague: Martinus Nijhoff, 1997) xvii.

[55] See *Convention*, *supra* note 16.

[56] See P. Tuitt, *False Images: Law's Construction of the Refugee* (London: Pluto Press, 1996). This issue is at the root of competing definitions of refugee, and underlies growing use of the term "de facto refugee." These alternative definitions have made few if any inroads in the refugee law of prosperous liberal democracies.

[57] See *Canada (A.G.)* v. *Ward*, [1993] 2 S.C.R. 689 [hereinafter *Ward*]. One of the most important Canadian cases on refugee law, *Ward* involved a refugee claimant who was a former member of the Irish National Liberation Army, a paramilitary terrorist group the appellant described in his testimony as "more violent than the Irish Republican Army." Mr. Ward was held not to be a refugee because his dual nationality meant he had an alternative home. His former terrorist activities were not considered a bar to his claim of refugee status.

establish new homes, most are hoping to be able to return to their homelands once the events that drove them away have passed.[58] This shows the difficulty of using "refugee" as an alternative term for those most in need. The refugee definition is largely the result of self-interested negotiation among those prosperous liberal democracies where the debate about fair immigration policy is now raging. Adherence to the narrow definition allows the calculation of the number of refugees in the world at present to be limited by these nations.[59] Although at both a philosophical and a popular level the possibility of establishing consensus is much greater on refugee issues than on immigration issues, this consensus bypasses the important questions of fairness in immigrant admission decisions. Hence, those decisions are left in the realm of amorality.

Liberalism's theoretical cohesion around the principle of mutual aid as applied in questions of migration leads to a bifurcation in the law between refugees and immigrants. This bifurcation in turn obscures the problems these two labels mask, making it all too easy to consider one group needy and the other not. The division is also paralleled by a divergence between popular and philosophical discourses on migration, leaving each impoverished without the insights of the other. The two discourses seem at first glance to be related, but in fact address few common points. The debate about fairness in immigration goes critically and theoretically unexamined, despite the concentration of popular angst in this area. What the mutual-aid principle does ensure, however, is that humanitarianism is a core concept in Western immigration laws.

VI. HUMANITARIANISM IN IMMIGRATION AND REFUGEE LAW

Humanitarianism has become the defining mark of immigration and refugee law in Western democracies. Nations view themselves as humanitarian, and have or seek international reputations for humanitarianism.[60] Humanitarianism is the term describing all the best

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[58] See J.C. Hathaway & R.A. Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection" (1997) 10 Harv. Hum. Rts. J. 115.

[59] See Tuitt, *supra* note 56.

[60] See Canada, *Immigration Act*, R.S.C. 1985, c. I-2, s. 3(g), which states that one of the objectives of the *Act* is "to fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted." See also Scanlan & Kent, *supra* note 18 at 63, in which the authors write of the humanitarian phenomenon that "[t]he myth of American generosity is well established where immigration is concerned."

and most generous elements of liberal immigration laws. It sums up the emotional appeal of "give us your huddled masses" and defines our willingness to share our prosperity. Liberal humanitarianism, which is the pride of many nations that have comparatively open borders and are important international actors in questions of refugee assistance, is based on inequality rather than justice. The central role of humanitarianism in immigration law makes the search for fair law and policy more difficult because it emphasizes beneficence despite being ostensibly derived from duty.

Humanitarianism is viewed as the core virtue in immigration and refugee law. When we label a law humanitarian, we label it as good, fair, or just. But humanitarianism and justice are not the same. The difference between the two points again to liberalism's failure to yield a standard for assessing justice in migration law. Humanitarianism provides a stand-in for justice while reinforcing the boundary between an "us" group and a "them" group. Humanitarianism differs from justice because it is grounded in inequality. Justice is a standard that implies—and applies—equality between individuals. Humanitarianism is the opposite. In the case of migration law, we have something that they do not: membership in a prosperous state. Humanitarianism in migration law functions only because of the profound *inequalities* between members and non-members.

Humanitarianism is central to immigration and refugee law because of the liberal consensus about the principle of mutual aid. This individual moral duty both becomes the basis for a nation's moral commitments and reinforces the inequality that makes humanitarianism possible. Recall that it derives from the idea that individuals are morally bound to save the lives of others when they would suffer little or no risk or loss to do so. There is a profound inequality between someone whose life is in grave danger and one who can save him or her with little effort; between the paradigmatic drowning child and capable adult. The imbalance is clear. This inequality is at the heart of the best impulses in liberal sentiments about migration. Humanitarianism is a virtue that a nation, on behalf of its members, expresses toward non-members.

Keeping humanitarianism as the central concept in immigration and refugee law ensures that the law is about what "we" can give to "them." Humanitarianism is not a standard of obligation, as justice would be, but rather of charity. Humanitarianism defines us as good when we are able to meet the standard, and justifiable when we are not. As is the case with the principle of mutual aid, humanitarianism is very flexible. It does not provide principled guidance about whom to admit when. Depending on subjective perceptions of state capacity, the

obligation is minimal, entailing actions that can be taken with no risk or loss. It is well suited to the ways liberal societies manipulate their immigration law; it can expand and contract easily with the domestic political environment. Fishkin's threshold of heroism, beyond which actions are considered heroic rather than obligatory, can be placed indeed quite low. Canada, for example, has been internationally praised for its commitment to refugees and enjoys an international reputation as humanitarian, yet addresses fewer refugee claims per capita than the average in Western nations.[61] The inequality that humanitarianism enshrines reinforces differences between members and others, providing a mirror image of the self/other distinction that both Galloway and Carens argue is benign, but which expresses an insidious hierarchy.

Although humanitarianism is a feature of immigration and refugee law in Western nations, it is important to understand the context it is set in. Immigration laws are highly restrictive documents. They are about letting a few in, but keeping most out.[62] Despite the extent to which humanitarianism dominates the rhetoric about migration, just as mutual aid dominates theoretical discussions of closed borders, it is the exception rather than the rule in migration laws. As liberal migration law occupies an amoral plane, the claim to humanitarianism is subject to little scrutiny. Humanitarianism parallels the threshold of heroism: we are good simply by being humanitarian. There is no standard available to judge whether a nation is admitting a "fair" number of immigrants or refugees; no examination of whether those admitted are really the most needy. Humanitarianism is an act of grace that any nation can claim to make. Humanitarianism is an exception to the general tenor of these laws, despite the amount of talk about it.

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[61] See "Justice, Immigration and Refugees," *supra* note 44 at 90: Canada has an average of 1 claimant per 1,000 of population, compared with an average of 1 per 850 across Western nations. The majority of the world's refugees are not in Western nations, but in places literally on the border of the major refugee-producing countries of Africa and Asia.

[62] One example is provided by the Canadian *Immigration Act*, *supra* note 60. If an immigration applicant has been refused a permanent resident visa in a number of categories, his or her sponsor within Canada can appeal the decision on the basis of error or on "humanitarian and compassionate grounds." That is, once it has been established that an applicant does not meet the criteria—does not deserve entry by the standards we have set—he or she may apply for an act of grace. Similarly, in sections 351 and 417 of the Commonwealth of Australia *Migration Act*, 1958 (Cth) the minister may personally alter a review tribunal's decision. While these sections do not refer to humanitarianism, they provide an avenue for executive acts of grace and are used in practice in this way. The basic premise of immigration law is that non-citizens—non-members—do not have a right of entry. Discretionary exceptions to this rule can be made. Humanitarianism is one permissible category of discretion.

Examining the nature of humanitarianism reinforces the argument that liberalism cannot provide a standard of justice for immigration law. Humanitarianism is a virtue that is at home amidst amoral immigration law. It defines a morality of beneficence and bestowal rather than equality and justice. Understanding how and why humanitarianism is central to immigration and refugee issues helps one to understand which arguments will resonate within liberal cultures. As Scanlan and Kent argue, appealing to a tradition of generosity, and not to a sense of justice, can sway public sentiment in immigration matters.[63] Because the successful arguments must rely upon an impulse towards heroism, towards doing more than is necessary, it is difficult to make arguments that more non-humanitarian immigrants should be admitted. These arguments will only succeed when they are rooted in economic self-interest, or when the immigrants in question can be portrayed as sufficiently needy to capture the liberal humanitarian spirit. Being humanitarian allows the "us" group to take pride in its actions; to feel good about itself. Those seeking admission are in the unequal position of any seeker of mercy or grace. This is portrayed in the structure of international refugee law where there is not under any circumstances a right to admission, only a right not to be returned to certain kinds of horrific conditions.[64] As they are asking for a gift in a realm with no justice standard, they cannot assert a right or claim to be equals.

VII. CONCLUSION

Liberal immigration law exists in a realm of amorality and is dominated by a rhetoric of humanitarianism. As liberal justice measures do not apply to immigration laws, these laws are outside liberal morality—beyond the moral system of the societies they are situated in. Notwithstanding this, liberal theory shapes immigration law in important ways. The liberal consensus around the minimal principle of mutual aid, within the migration context, means that philosophical discussions of just migration are dominated by discussions of refugees, and that liberal

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[63] An example of this type of appeal is found in the comments by the Australian minister for immigration, referring to an Australian woman of Vietnamese origin named Young Australian of the Year for 1997: see The Honourable P. Ruddock, Address (National Press Club, 18 March 1998) [unpublished], in which the minister said that "[t]hose who applauded this young woman, not only applauded her individual courage and achievements, but, I suspect, applauded themselves for being members of a community that, as she said in her acceptance speech, welcomed her so unquestioningly."

[64] See *Convention*, *supra* note 16, art. 33.

migration laws use humanitarianism as a stand-in for justice. This has important consequences for the way we think about migration laws, as humanitarianism and justice have little in common. Humanitarianism is a gift; justice an entitlement. Justice rests on a view of equality and similarity between individuals: humanitarianism rests on a profound inequality between haves and have-nots. As such, humanitarianism emphasizes the "us/them" line drawn at the border of the community, and is therefore in harmony with, rather than exceptional to, restrictive immigration laws.

Humanitarianism, of course, remains an important liberal virtue. A great deal of reform in immigration and refugee law could be achieved by making laws more humanitarian, more generous. As the theorists canvassed here have discussed, most contemporary immigration rules are unjust by narrow internal standards as well as non-humanitarian in many respects. The argument therefore is not to reject humanitarianism, but rather to understand fully how it fits into the liberal framework of international order and to appreciate the inherent limitations of arguing in humanitarian terms. The core tension in liberal thought between individualism and equality means that we cannot achieve a lasting consensus in liberal democratic societies to answer the question "how many is just." The fragility of the humanitarian consensus means that any humanitarian action is valued as good, obscuring examination of who are truly the most needy. Reform of immigration law and policy cannot be achieved by aiming to resolve this intransigence; there simply is no answer. The pragmatic approach must be to cast arguments in humanitarian terms, accepting that these terms have consequences of inequality.

Beyond the pragmatic, there of course remains the visionary argument that both liberalism and the liberal state are unable to respond to current global population pressures. Moving the argument onto this plane seems an obvious choice from one perspective, but risks ignoring liberalism's decisive hegemony in global affairs and in the legal culture of those nations with the most to protect by closing their borders. The visionary argument should not be pursued without its pragmatic parallel, else accusations of irrelevant theorizing will be well founded.