

Reforming Immigration Law in a Matrix of Exile

Rev. Craig B. Mousin

Summary for conference on "Religious Critiques of the Law"

March 9-12, 20017

We live in a time of fear. We are told to fear the resident alien in our midst. We expend millions to detain and deport persons living with us for years. We enact new procedures to pick up and remove resident aliens with little due process right to legal hearings. We forget that God told the Israelites, "When a stranger sojourns with you in your land, you shall not do the stranger wrong. The stranger who sojourns with you shall be to you as the native among you, and you shall love the stranger as yourself; for you were strangers in the land of Egypt, for you too were slaves in Egypt."¹ Indeed, next to reminding them that they must love God, this exhortation appears more than thirty times in the Bible, more than any other commandment.² Formed as a people bookmarked by two great exiles—the time in Egypt followed by the Exodus and the exile in Babylon, the faith story found in the biblical narrative arises out of a people who knew the pain and sorrow of being excluded from their native land. After reviewing much of Old Testament scholarship, Walter Brueggemann argues that for both Jews and Christians, "the core of faith...is situated in the matrix of exile."³ He stresses that those "members of the community that have never been physically or materially displaced must, as children and products of this text, understand and imagine themselves as displaced and as waiting for homecoming."⁴

¹ Lev. 19:33-34. See also Exod. 12:49: "The same law applies to the native-born and to the alien living among you."

² W. Gunther Plaut, *Jewish Ethics and International Migrations*, 30.1 INT'L MIGRATION REV. 18 (1996).

³ WALTER BRUEGGEMANN, *THEOLOGY OF THE OLD TESTAMENT: TESTIMONY, DISPUTE, ADVOCACY* 77 (1997).

⁴ *Id.*

The global preeminence and power of the United States make that task of imagination difficult, but it also undermines understanding a core of faith founded on engaging life in exile. As people of faith, we live in a nation that has been torn over the last thirty years in discerning the appropriate law to address the sojourner in our midst. Founded as a nation welcoming immigrants and refugees, our nation has seen increasingly more restrictive laws and policies implemented to control the perceived problem. Surprisingly, as our laws have become more restrictive, we have seen the unauthorized population expand from approximately three million to over ten million spurred on by legal wall of restrictions. These laws have encouraged persons who would otherwise have returned to their native lands under a more forgiving regime to stay and not lose potential remedies. Almost all agree that our immigration system is broken, yet solutions are difficult to find. The last presidential campaign highlighted the contrast between building the wall on the Mexican border combined with mass deportations to a plea for comprehensive immigration reform. Since the election, the administration has issued Executive Orders that grant increased power to federal authorities to deport unauthorized persons, many without opportunity for a hearing or any due process. It is precisely in this context, that the biblical narrative can serve those who question the deportation apparatus in existence today.

Daniel Smith-Christopher writes that these biblical texts

presume the viability of a community in exile, and the ability to engage in resistance, even outside of the nationalist aspiration or imperial connivance. I then propose that such readings may inform a radical Christian theological resistance to our own history of imperial connivances and the theologies that have so long excused and supported them.⁵

This paper argues that this biblical narrative critiques immigration law, especially, its reliance on deportation, and proposes instead a regime of forgiveness and mercy. Although this is a conference on religious critiques of the law, we must first engage in a religious critique of

⁵ DANIEL SMITH-CHRISTOPHER, A BIBLICAL THEOLOGY OF EXILE 25 (2002).

religion. As Thomas Shaffer suggests a culture of ethics must self-criticize itself to avoid falling into improper beliefs and habits.⁶ For too long, persons of faith who follow the biblical narrative have accepted deportation as a necessary part of the nation-state's existence. I argue for a review of that belief.

Most immigration debates commence with an acceptance that the nation state has the right to control its borders and deport those whom the nation determines do not belong.⁷ Traditional biblical religion, however, names a different sovereign—God—that raises challenges about immigration law. This paper argues, however, that a biblical narrative that holds its core of faith within a matrix of exile calls its people to deny deportation as a government remedy.⁸ Israel attempted to model a different alternative from the imperial states surrounding it for centuries, based on its covenant with the God of Israel and its experience of exile. Given its profound sorrow over exile, their text suggests welcome and hospitality, not deportation. If one is called to treat the stranger as a native and the native cannot be deported, then how can the state deport the immigrant? If the immigrant did something wrong that might make them deportable, then punish them like a native would be punished, not with exile. Perhaps, deportation would be a last resort in cases of extreme violence, but not a regular tool as we use in the United States.

This paper follows an earlier article that examined United States immigration law in light of the biblical narrative: “You Were Told to Love the Immigrant, But What if the Story Never

⁶ THOMAS SHAFFER WITH MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES, ETHICS IN THE LEGAL PROFESSION*, 59, (1991).

⁷ *See generally*, DAVID MILLER, *STRANGERS IN OUR MIDST: THE POLITICAL PHILOSOPHY OF IMMIGRATION* (2016).

⁸ Recognizing how broken our immigration legal system is, many have written proposals for reform of the system. *See, e.g.*, David A. Martin, *Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 *J. OF L. AND POLITICS* (2015); Jennifer Lee Koh, *Rethinking Removability*, 65 *FLA. L. REV.* 1803 (2013); and Elizabeth McCormick and Patrick McCormick, *Hospitality: How a Biblical Virtue Could Transform United States Immigration Policy*, 83 *U. DET. MERCY L. REV.* 857, 2006. This paper's default position is not reform, but the elimination of deportation as a state mechanism. Certainly in a pluralistic republic, others may argue for deportation as a national necessity. But if people who follow the biblical narrative start with the position denying deportation, the national debate has a different starting point than traditionally followed.

Happened? Hospitality and United States Immigration Law.”⁹ In that paper, I conducted a thought experiment about immigration law and the biblical narrative: what would have happened if American immigration law was in effect at the time of the formation of the biblical narrative? The paper argued that every major biblical protagonist would have been deported or excluded. In effect, no narrative would have occurred. From Cain to St. Paul, each of the major biblical figures had committed crimes or broke elements of the immigration law that would have prevented them from fulfilling their biblical destiny. Deportation precludes people of faith from being Shaffer’s “custodians of the story” for there would be no story to be told.¹⁰ Currently those laws remove thousands of persons each year who were contributing members of our society. The article asks what losses has the nation incurred today in implementing a law with little discretion or mercy. The article concluded that the biblical narrative offers an alternative “community that welcomes the sojourner while still holding them accountable”¹¹ citing Shaffer’s call for a community emphasizing forgiveness.¹²

One frequent response to the “Loving the Immigrant” article asks whether the Bible simply calls for open borders with no regulation. Some border control will be necessary, but deportation does not have to be the primary enforcement mechanism. This paper urges that United States immigration law build upon Shaffer’s jurisprudence of forgiveness instead of deportation. It will address major themes in the Old Testament and the New Testament that suggest people of faith follow a different model than deportation and exile. Deportation and

⁹ Craig B. Mousin, *You Were Told to Love the Immigrant, But What if the Story Never Happened—Hospitality and United States Immigration Law*, 33 VINCENIAN HERITAGE, VOL. 1, ART. 8 (2016).

http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2784951

¹⁰ SHAFFER, LAWYERS, *supra*, at 201.

¹¹ *Id.* at fn. 177.

¹² Cited in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, 321 (Michael McConnell, Robert F. Cochran Jr., and Angel C. Carmella, eds, 2001).

banishment are permanent and destructive policies to both the individual and the community and will suggest some means of accountability short of deportation.

The first part of the paper will provide explore historical arguments supporting my view against deportation. Second, it will examine some major themes in the Old Testament to support the argument that deportation is not the only remedy a nation need follow. Third, it will argue that Jesus of Nazareth's ministry provided an alternative to exclusion from the community. Finally, it will provide arguments that people of faith could offer demonstrating how discretion and mercy could be implemented.

At one time, politicians talked of banishment rather than deportation. Victor S. Navasky reminds that in 1798, when "the Alien and Sedition Laws were enacted which gave the President power to rid the nation of those 'dangerous to the peace and safety of the nation' or 'suspected of being concerned in treasonable machinations'" James Madison asserted: "...if a banishment of this sort be not punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied."¹³ In the Supreme Court's first case upholding the congressional plenary power to control immigration, Justice Brewer wrote in dissent: "Deportation is punishment. It involves first an arrest, a deprivation of liberty; and, second, a removal from home, from family, from business, from property."¹⁴ In almost religious terms, Justice Brandeis later wrote that deportation "may also result in loss of both property and life, or of all that makes life worth living."¹⁵ This is not merely speculative. We witness today the deaths of individuals recently deported from the United States.¹⁶

¹³ Victor S. Navasky, *Deportation as Punishment*, 27 U. KAN. CITY L. REV. 213, 221 (1958-1959).

¹⁴ *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

¹⁵ *Ng Fung Ho v. White*, 269 U.S. 276, 284 (1922).

¹⁶ See, e.g., Sibylla Brodzinsky and Ed Pilkington, "US government deporting Central American migrants to their deaths," THE GUARDIAN, October 12, 2015 (<https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america>); see also, Geraldine Brooks, "Offered Sanctuary: Scores of U.S.

Old Testament Themes

1. The *ger*, the stranger living in the midst of Israel, should be treated as the native. This section will explore what Israel's distinctive model of caring for the vulnerable. The *ger* are similar to the millions of unauthorized residents living within the United States. Many unauthorized immigrants living in the United States have lived here for more than a decade, paying taxes and Social Security, building community and supporting those institutions that make our communities stronger.¹⁷

2. Leviticus 25 develops the theme of the Jubilee Year; the Year of God's favor with its notions of forgiveness and continued involvement in the community. Human sinfulness and finitude will lead persons over time to lose property, fall into debt, or fall outside the parameters of the community. Israel's Jubilee called for forgiveness and resettling community life to avoid concretizing an elite, further reinforcing the haves against the vulnerable have-nots. Deportation denies the opportunity for a reset in the community. If within fifty years, an immigrant did objectionable conduct, a Jubilee-inspired community would look for ways to reset the community rather than deport them out of the community. This is especially critical today where many families contain individuals with mixed immigration status from citizen, naturalized citizen, lawful permanent resident, and unauthorized resident. By deporting the unauthorized individual, who may often be the primary wage earner, we fracture our communities and families. A Jubilee-oriented immigration law would seek to transform the situation to enable the

Churches Take in Illegal Aliens Fleeing Latin America—Midwesterners Follow Lead of Other Congregations in Welcoming Refugees—Why Anna Left El Salvador.” THE WALL STREET JOURNAL, June 21, 1984.

¹⁷ See Chart “Larger Share of Unauthorized Immigrants are Long-Term Residents” in Pew Research Center, *5 Facts About Illegal Immigration in the United States* (Nov. 3, 2016), <http://www.pewresearch.org/fact-tank/2016/11/03/5-facts-about-illegal-immigration-in-the-u-s/>

family to remain together and become participants in community building. As Sharon Ringe points out:

The Jubilee laws are significant in that, in the very midst of the Holiness Code with its emphasis on cultic matters, these laws bear witness to the continuing power of the image of God as sovereign over Israel, and to the fact that such an image of God has ethical consequences. To confess God as sovereign includes caring for the poor and granting freedom to those trapped in a continuing cycle of indebtedness. God's sovereignty is presented as a fact bearing on people's daily life and structuring their relationships with one another and with the rest of the created order.¹⁸

Ending deportation would fulfill the spirit of a Jubilee-inspired law.

3. The book of Ruth, written at a time when the political struggle within Israel sought greater reliance on the law as a source of control. As André LaCocque writes, the book of Ruth teaches that, “the Law is no longer a means of control and power...but the instrument of peace, reconciliation, and equality. All the legal categories are transcended by an interpretation according to an amplifying and nonrestrictive norm. This is the reason the book of Ruth reminds one of the hermeneutic of Jesus.”¹⁹

New Testament Themes

1. Jesus showed kindness and inclusion to many who had suffered under the cleanliness and holiness codes. Jesus teaches that “God’s holiness does not segregate the impure as undesirable (Matt.5:48; Luke 6:36), for God’s mercy is unconditional.”²⁰ Such codes often excluded persons outside of the community, much like deportation. Today our immigration laws become extremely technical and detailed with many grounds that exclude persons for minimal violations of civic life as an extreme manifestation of a code-based life, rather than forgiveness and mercy.

¹⁸ SHARON H. RINGE, JESUS, LIBERATION, AND THE BIBLICAL JUBILEE: IMAGES FOR ETHICS AND CHRISTOLOGY 28 (1985).

¹⁹ ANDRÉ LACOCQUE, RUTH, A CONTINENTAL COMMENTARY 27 (2004).

²⁰ ANDRÉ LACOCQUE, JESUS, THE CENTRAL JEW, HIS TIMES AND HIS PEOPLE 85 (2015).

2. The Good Samaritan parable provides a model of how we think about the other and whether deportation can be consistent with a Christian life. The parable is a reminder of who our neighbor is, but also a reminder of how we should be a neighbor to the other.²¹
3. Thomas Ogletree characterizes Jesus' citation from Isaiah in Luke 4:16-21 as the "platform" of Jesus' ministry.²² Freeing those captives from detention and eliminating deportation would certainly coincide with that platform of ministry.

Forgiveness and Mercy

Thomas Shaffer argued that "communities of faith have cooperated with these political processes of appropriation, submission and privatization because they have forgotten what they are."²³ We have not remained custodians of the ancient story. Indeed, immigration law, as I have suggested, reveals a legal mechanism that could have killed the story before it began and today deprives this nation of the gifts of the stranger. By reclaiming the story, we may begin to start anew. Accordingly, I suggest not reform of deportation but elimination. Urging this goal will not simply make it happen. The infrastructure supporting the detention-deportation-industrial complex has expanded greatly. Today the Border Patrol is the largest law enforcement agency in the nation. Our laws require the federal government to house over 133,000 undocumented detainees in private prisons each day at great expense to the government. Our nation, in defense of national sovereignty, has built a huge apparatus based on deportation and removal.

A faith based on a matrix of exile calls for an alternative approach. For example, we could reduce and eliminate many of the minor violations that lead to deportation. Congress frequently increases the number of criminal convictions that lead to deportation. The recent Executive

²¹ *Id.*, 119-30.

²² THOMAS W. OGLETREE, HOSPITALITY TO THE STRANGER, DIMENSIONS OF MORAL UNDERSTANDING, 131, (1985).

²³ SHAFFER, LAWYERS, 210.

Orders expand basis for removing persons without benefit of a hearing before an Immigration Judge. Instead of exercising discretion to grant stays of deportation, the Executive and Congress currently seek to grant Customs and Border Patrol officials more discretion to arrest and remove unauthorized persons.

Raising a faith-based argument against deportation may also have other benefits. Debate on immigration reform has become paralyzed by reliance on polar opposites of 100% border control as opposed to granting a pathway to citizenship for the unauthorized living in the land and a more efficient and effective system. If people of faith bring these arguments to the debate, it changes the focus once Christians refuse to concede that deportation is a necessary law within their nation. Dana W. Wilbanks argues "Precisely what is most needed is the enlivening of public moral discourse through the encounter to persons and communities that bear genuine different ethical perspectives....religious ethics can best serve the public ethos by dislocating the stale conventional conversation by narratives and symbols which stimulate the moral imagination."²⁴ He continues that looking to how Israel treated the vulnerable, the *ger*, "the Levite who represented the dependence and vulnerability which characterizes all human existence" will offer "an imaginative and challenging point of reference for interpreting and responding to these dilemmas" about migrants.²⁵

Conclusion

This conference highlights religious critiques of law. This paper, however, begins with a religious critique of religion. The Old Testament themes of community that includes the vulnerable stranger and the alien residing within provides a different understanding of community than our current regime of detention and deportation. Jesus' ministry of love fulfills

²⁴ Dana W. Wilbanks, *Response to Christiansen and Plaut*, 30.1 INT'L MIGRATION REV. 27 (1996).

²⁵ *Ibid.*, 33.

the love of the stranger established in that ancient story. Most political debate in the public square involves what to do with the “illegals” in our midst as if the legal status of a person diminishes the God-given dignity of the person. If we were to envision a community where the law treated the stranger as the native-born, we could begin to work toward a deportation-free law and reclaim that ancient story.