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Hospitality: How a Biblical Virtue Could Transform United States Immigration Policy

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I. INTRODUCTION

When millions of United States voters in the 2004 presidential election identified “moral values” as their central concern, the vast majority of these largely church-going Christians were no doubt referring to religious and biblical teachings on abortion and homosexuality.¹ It is unlikely that more than a handful were referring to the oft repeated biblical command to show hospitality to the stranger, or that they were seeking immigration reforms that bring United States policy more in line with biblical directives to protect and provide for the “resident alien” in our midst. It is even less likely that they were voicing their opposition to the ways America’s war on terror has violated the biblical directive to “love the alien as our neighbor” by unfairly targeting immigrants and aliens.² Yet hospitality to the stranger is a core biblical value, demanding justice, mercy and welcome for the alien in our midst. As Great Britain’s chief rabbi Jonathan Sacks reports, while the Hebrew Bible has but one commandment to love the neighbor, it includes thirty-six commands to love the stranger.³ Moreover, a mandate to offer hospitality to the stranger is a

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1. Katharine Q. Seelye, *Moral Values Cited as a Defining Issue of the Election*, N.Y. TIMES, Nov. 4, 2004, at 4 (discussing the results of an Election Day poll from which a “striking portrait of one influential group emerged – that of a traditional, church-going electorate that leans conservative on social issues”). *Id.*

2. For an extensive treatment of the war on terror’s unjust targeting of aliens, see DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (New Press 2003).

3. Barbara Brown Taylor, *Guest Appearance*, CHRISTIAN CENTURY, Sept. 20, 2005, at 37. To be sure, the Bible also contains some examples of hostility and suspicion toward the

central principle of many faith traditions, commanding Christians, Jews, Hindus, and Muslims alike to welcome the aliens in our midst.⁴ Thus it

stranger. The Book of Ezra tells the story of how the prophet, upon learning that member of his community had married women of “neighboring peoples,” ordered them exiled from the community. *Ezra* 9-10. In Deuteronomy, the Israelites are commanded to destroy and show no mercy to people of other nations, and are forbidden from intermarrying with them. *Deuteronomy* 7:1-4. In addition, those who led others to worship other gods or adopt the practices of the nations around them were to be stoned. *Deuteronomy* 12-13. Reconciling these and other Old Testament examples of fearing and punishing the alien with the Biblical call to practice hospitality is part of a larger conversation about scriptural interpretation that we will not undertake here. Like Rabbi Sacks, we would suggest that the frequency with which the hospitality theme appears throughout the Old and the New Testaments, suggests the overwhelming importance of this teaching. *The Prophet of Hope*, GUARDIAN, Aug. 27, 2002 (“You cannot ignore a command that is repeated 36 times in the Mosaic books.”), available at <http://www.guardian.co.uk/israel/comment/0,10551,781134,00.html>.

Nevertheless, it seems clear that Biblical hospitality is not an unqualified virtue. See discussion *infra* Part III.D. In addressing how a nation can practice hospitality toward outsiders and at the same time maintain its sense of national identity, Rabbi Sacks suggests an important link between a society’s members’ understanding of and appreciation for who they are and how they got there, and their capacity to welcome the stranger into that community:

The Bible is eloquent on the subject - 36 times the Mosaic books command us to love the stranger. At the same time, Moses endlessly instructs his people never to forget their history. That is what we do on Passover and in all our prayers. We endlessly remind ourselves of who we are and why. Identity is like a home. If you feel safe, you offer hospitality to others. If you are afraid, you keep the doors locked. Only a confident society is an inclusive society.

Chief Rabbi Professor Jonathan Sack, *It is Time for Britons to Pitch their Tabernacle*, TIMES, Mar. 12, 2005, available at <http://www.timesonline.co.uk/article/0,,3933-1521284,00.html>.

4. See Naomi Schaefer Riley, *Welcoming the Stranger, Faith Based Groups Say Its Time to Reform Immigration*, WALL ST. J., Aug. 12, 2005, at 11, available at <http://www.opinionjournal.com/forms/printThis.html?id=110007101> (discussing efforts of faith-based groups to support immigration reforms because they find “a religious imperative in what is often seen as a secular political debate”). *Id.* For example, the Hindu principle, *Atithi devo bhava*, commands believers to look upon the guest as God. *Id.* See also Hebrew Immigrant Aid Society, *A Jewish Vision For the Future of American Immigration and Refugee Policy*, HIAS NEWS AND POL’Y, Jul. 5, 2005, available at http://www.hias.org/news/releases/2005_JReform.html. In addition to the scriptural mandates to welcome the stranger, “Jewish tradition also includes principles of *Piddyon Shevuyim* (redeeming the captive), *Chesed* (kindness), and *Hachnast Orchim* (hospitality) that create a solid framework for a compassionate response to the needs of immigrants and refugees.” *Id.* In Islam as well, hospitality to the stranger is encouraged and expected of believers. See *Qur’an* 4.36-37:

Be kind to parents, and the near kinsman, and to orphans, and to the needy, and to the neighbor who is of kin, and to the neighbor who is a stranger, and to the companion at your side, and to the traveler, and to [slaves] that your right hands own. Surely God loves not the proud and boastful such as are selfish, and bid other men to be selfish, and themselves conceal the bounty that God has given them. *Id.*

See also AN-NAWAWI, FORTY HADITH 56 (Ezzedin Ibrahim & Denys Johnson-Davies trans., Islamic Texts Society 1997) (“Let him who believes in Allah and the Last Day be generous

would have made perfect sense for any voters demanding a government that shared their moral and traditional values to examine the candidates' positions on immigration policy before deciding how to cast their votes in November 2004.

Despite the lack of attention paid to immigration policy as a moral issue during the 2004 presidential election campaign, the intense debate which has arisen around this issue since that time confirms that the United States' policies, laws, and practices towards non-citizens do in fact raise a whole host of moral and ethical concerns about which many Americans feel very strongly. At the heart of the immigration debate is disagreement about the appropriate response to a multi-faceted crisis created by the existing outmoded immigration regime, a crisis which involves an estimated ten to twelve million undocumented migrants currently living in the United States, and hundreds of thousands more entering every year; the widespread exploitation and abuse of non-citizens working without authorization in an underground economy; hundreds of migrants dying in the desert each year as they attempt to cross the border from Mexico illegally; and lengthy and painful separation of family members because mothers, fathers, sons, and daughters of citizens and lawful residents are unable to obtain visas to legally immigrate. Among the most prominent voices speaking to this issue are faith-based groups and religious leaders who insist that immigration is a moral issue, and who—for the most part—have called for comprehensive immigration reform that restores humanity and justice to the system and that includes opportunities for those non-citizens currently in the United States illegally to obtain lawful residence and for families separated by lengthy visa backlogs to reunite.⁵ At a recent

to his neighbor, and let him who believes in Allah and the Last Day be generous to his guest.”).

5. More than 100 national and local religious groups, including the National Council of Churches, U.S. Conference of Catholic Bishops, Hindu American Foundation, Islamic Center of Southern California, Episcopal Migration Ministries, Lutheran Immigration and Refugee Services, Hebrew Immigrant Aid Society, Islamic Circle of North America, American Friends Service Committee, United Methodist Committee on Relief, National Association of Evangelicals World Relief, and B’Nai Brith International, joined together in a statement to the President and Congress demanding reforms consistent with their moral values and that provide an opportunity for legalization, family reunification, and increased legal migration. See Interfaith Statement in Support of Comprehensive Immigration Reform (Oct. 18, 2005), *available at* <http://www.immigrationforum.org/documents/PressRoom/InterfaithCIRStatement.pdf> (“As faith-based leaders and organizations, we call attention to the moral dimensions of public policy and pursue policies that uphold the human dignity of each person, all of whom are made in the image of God.”). On the other hand, “[t]hose who argue the other side, that immigration must be curtailed and the border secured, also couch their position in moral terms, saying it is unprincipled to aid and abet those who have entered the U.S. illegally.” Daniel B. Wood, *Churches Resist Tougher Immigration Laws*, CHRISTIAN SCI. MONITOR, Mar. 14, 2006, at 1. Some conservative Christians have come out strongly in support of stricter immigration enforcement. Sadie Fields, Chair of the Christian Coalition of Georgia, calls illegal immigration the number one issue for her membership. See Carlos Campos,

interfaith press conference in support of comprehensive immigration reform, Cardinal Theodore McCarrick, Archbishop of Washington, D.C., summarized this position as follows:

As we all know, immigration is not a simple issue, but one that evokes strong passions and economic, legal, social and national security debates. We are here today, representing our individual faith communities, because we believe that immigration is not just a theoretical policy issue, but ultimately a humanitarian issue that impacts the basic dignity and life of the person, created in the image and likeness of God. It is because of its impact on basic human dignity and human life that we believe immigration is, first and foremost, a moral issue. All sides in the debate agree on

Activist Slams Illegal Influx, Christian Coalition Backs Strict Bills, ATLANTA J.-CONST., Jan. 31, 2006, at B3, available at 2006 WLNR 1675649. According to Fields, the Christian Coalition is involved in the immigration issue because "we must uphold the rule of law. God is not just love and mercy, he's also a god of justice, and he expects us to be law-abiding." *Id.* With the exception of World Relief, a branch of the National Association of Evangelicals ("NAE"), the NAE, the largest evangelical group in America, has been largely absent from the recent public debate on immigration. However, the NAE issued official resolutions related to immigration in 1957, 1965, and 1995, and these documents reflect a dramatic change in the NAE's position on this issue, from supporting a restrictive national origins quota system that strongly favors assimilation to calling for an end to racist immigration policies and demanding generosity, compassion and hospitality to those seeking a new life in the United States. Compare Immigration Laws 1957, National Association of Evangelicals (1957), available at <http://www.nae.net/index.cfm?FUSEACTION=editor.page&pageID=207&IDCategory=9> ("Whereas, any departure from the liberal provisions of our present immigration laws would endanger these freedoms for the future of America by assimilating into the population large numbers of people who have little historic attachment to, or understanding of, the American Christian heritage."), and National Association of Evangelicals, *Immigration Laws 1965* (1965), available at <http://www.nae.net/index.cfm?FUSEACTION=editor.page&pageID=207&IDCategory=9>:

Whereas the present U.S. immigration laws incorporating the national origins quota system permit the maximum number of immigrants to enter this country who can be assimilated into our society without undermining our Bill of Rights, and . . . these laws protect our society against infiltration by influences subversive of the American way of life.

Id., with Compassion for Immigrants and Refugee [sic] - 1995, National Association of Evangelicals (1995), available at <http://www.nae.net/index.cfm?FUSEACTION=editor.page&pageID=277&IDCategory=9>:

The National Association of Evangelicals (NAE) is deeply concerned by a growing spirit of hostility towards immigrants and refugees who have become residents in our communities. While we recognize that some of our constituency feel strongly concerning issues of justice and law, we are all compelled by the love of Christ to act with compassion to our neighbors. Therefore, we pledge to eliminate the spirit of racism in any of our responses. While we recognize the right of nations to regulate their borders, we believe this responsibility should be exercised with a concern for the entire human family in a spirit of generosity and compassion.

Id.

one thing: our nation's immigration policy is flawed and needs to be repaired. It is a matter of human justice. . . . Changing the status quo is an issue of moral gravity.⁶

While acknowledging the legitimate need of the United States to protect its borders and to address the reality of millions of unauthorized migrants currently living here, national religious leaders have rallied against immigration legislation that focuses exclusively on enforcement and border security and fails to address the root causes of illegal immigration or provide adequate opportunities for legal immigration by non-citizens desperate to provide for or reunite with family.⁷ Rejecting proposals for immigration reform that undermine immigrants' human dignity and tear families apart, they have called instead for immigration laws that are consistent with their religious values and with American values like justice, compassion, and family. In doing so, they point to the rich tradition of hospitality to the stranger found both in their religious narratives and in the history of the United States.⁸

Today hospitality is seen as a matter of etiquette, not ethics, a gracious welcome extended to dinner guests, or the patrons of a restaurant. But in the Bible hospitality is a basic virtue demanded of every disciple and community.⁹ Much more than courtesy to friends or clients, the biblical

6. Cardinal Theodore E. McCarrick, Archbishop of Washington, Statement on Comprehensive Immigration Reform (Mar. 1, 2006), available at <http://www.usccb.org/mrs/mccarrick.shtml>.

7. Interfaith Statement in Support of Comprehensive Immigration Reform, *supra* note 5; Statement on Comprehensive Immigration Reform from the National Council of Churches (Mar. 1, 2006), available at <http://aila.org/content/default.aspx?docid=18754>; World Relief Statement in Support of Comprehensive Immigration Reform (Feb. 27, 2006), available at http://media.pfaw.org/PDF/Immigration/2_27_06WorldRelief; Letter on Comprehensive Immigration Reform from Thirty National and Local Jewish Community Organizations to Members of the Senate Judiciary Committee and Senate Leadership (Feb. 22, 2006), available at <http://www.aila.org/content/default.aspx?docid=18758> [hereinafter Letter on Comprehensive Immigration Reform]; Rabbi Scott Sperling, Director, Union for Reform Judaism's Mid-Atlantic Regional Council, Statement at an Interfaith Press Conference in Support of Comprehensive Immigration Reform (March 1, 2006), available at <http://www.aila.org/content/default.aspx?docid=18755> (last visited Mar. 30, 2006).

8. See Sperling, *supra* note 7.

In addition to our historic experience, our tradition also demands of us concern for the stranger in our midst. The Torah contains over 36 references to this principle. . . . Throughout two millennia of diaspora and disenfranchisement, Jews have clung to this principle, which permeates not only our religious tradition but the American legal tradition as well.

Id.; Letter on Comprehensive Immigration Reform, *supra* note 7 ("As leaders of Jewish community organizations we look both to the teaching of our Jewish religious and ethical tradition, and to core American values relating to immigrants, for guidance on immigration reform.").

9. As we have noted earlier, hospitality is a virtue essential to many religious traditions in addition to Christianity and Judaism. We focus here on Biblical hospitality, and the Christian tradition in particular, in order to draw attention to the conflict between the

hospitality demanded by God in both the Hebrew and Christian Scriptures requires that believers breach the walls separating them from needy strangers, welcoming the alien as an honored guest by offering food, shelter and protection, as well as companionship and service.¹⁰

The Scriptures did not invent hospitality. Hampton Morgan notes that “the ancient peoples of the Near East considered hospitality as an essential value,” and Christine Pohl adds that “most of the ancient world regarded hospitality as a fundamental moral practice . . . necessary to human well-being and essential to the protection of vulnerable strangers.”¹¹ In a world without hotels, credit cards or social safety nets, strangers and sojourners depended on the hospitality of the communities they entered to secure food, shelter and any sort of a welcome, while the practice of hospitality strengthened and nurtured the bonds that held communities together.

Still, the Bible offers a compelling set of arguments in support of hospitality to the stranger. The God of the Scriptures “loves the alien, giving him food and clothing”¹² and commands believers to “love the alien as yourself,” and to “treat the stranger as a native born.”¹³ Interjecting these biblical principles into the debate on the United States’ admittedly broken immigration system could lead to reforms that are at once workable and humane. While no nation has the duty to embrace or welcome every alien, or to provide every stranger with all the benefits associated with full citizenship, the biblical mandate to welcome and protect the stranger, and to treat the alien with justice provides a moral siren, summoning the United States – nominally, the world’s most Christian nation¹⁴ – to reverse recent

teachings of this tradition about hospitality and the failure of some in the Bush Administration’s conservative Christian base to support a just and humane approach to immigration reform.

10. CHRISTINE D. POHL, *MAKING ROOM: RECOVERING HOSPITALITY AS A CHRISTIAN TRADITION* 3-6 (1999); Hampton Morgan Jr., *Remember to Show Hospitality: A Sign of Grace in Graceless Times*, 87 INT’L REV. OF MISSION 535-39 (1998).

11. *Id.* at 535; POHL, *supra* note 10, at 17.

12. *Deuteronomy* 10:18.

13. *Leviticus* 19:34.

14. Bill McKibben, *The Christian Paradox: How a Faithful Nation Gets Jesus Wrong*, HARPER’S, Aug. 2005.

When we say we are a Christian nation—and, overwhelmingly, we do—it means something. People who go to church absorb lessons there and make real decisions based on those lessons; increasingly, these lessons inform their politics . . . America is simultaneously the most professedly Christian of the developed nations and the least Christian in its behavior. . . . Ours is among the most spiritually homogenous rich nations on earth. Depending on which poll you look at and how the question is asked, somewhere around 85 percent of us call ourselves Christian. Israel, by way of comparison, is 77 percent Jewish . . . [t]here is nothing else that unites more than four-fifths of America. Every other statistic one can cite about American behavior is essentially also a measure of the behavior of professed Christians. That’s what America is: a place saturated in Christian identity.

trends unduly restricting the rights and protections afforded aliens and to make its immigration policies more just, equitable and hospitable.

The vast majority of U.S. citizens and their elected representatives perceive themselves and this country as “Christian,” and regularly (though somewhat inconsistently) turn to the religious and moral values embedded in the Bible to inform their personal and political choices. We argue in this essay that the central biblical command to offer hospitality to the stranger has been overlooked and/or ignored in recent debates over U.S. policy concerning the treatment of immigrants, that there are good reasons for considering this biblical command when setting public policy about immigration,¹⁵ and that the religious command to show hospitality to the stranger should – at the very least – lead us to reconsider (and oppose) several policy changes currently under consideration.

In Part II of this essay, we describe the ways in which both the Hebrew Bible and New Testament command believers to practice hospitality to the stranger, requiring that anyone seeking to be a righteous person or faithful disciple extend welcome, equal protection, and justice to the alien in our midst. In Part III, we suggest why and how these faith-based narratives can and should contribute to and enrich the current debate over immigration reform. Finally, in Part IV, we offer three specific examples of how United States immigration law and policy might be brought more in line with the biblical mandate to show hospitality to the stranger, and how doing so could lead to a more just and effectual immigration system.

II. A BIBLICAL VIRTUE FOR OUR TIMES

A. *The Hebrew Scriptures*

The Hebrew Scriptures offer two arguments in support of hospitality to strangers. One set of narratives, found in Genesis 18-19, Joshua 2-6, and 1 and 2 Kings, suggests that the stranger could be God or an agent of God, and that life-saving hospitality will be rewarded with a comparable gift of life. Another set of texts, found in Exodus, Leviticus, Deuteronomy and the Prophets, reminds the Hebrews of God’s hospitality to them in Egypt and the wilderness and demands a similar hospitality to the alien in their midst.

In Genesis, Abraham and Sarah welcome three strangers approaching their tent in the noonday heat, offering their guests a shady place to rest, water to wash off the dust of the road, and a sumptuous meal.¹⁶ One of these three turns out to be God, who rewards the ninety year old and barren

Id. at 31-32.

15. In Part III, *infra*, we also consider whether relying on biblical commands as a basis for setting public policy might be problematic.

16. See *Genesis* 18:1-15.

Sarah with a child.¹⁷ A life is given in return for the life-saving offer of hospitality.¹⁸

When the two angels accompanying God travel on to Sodom they encounter gross inhospitality, and the Sodomites are appropriately punished.¹⁹ Abraham's nephew Lot – himself a resident alien in the city – greets the two travelers at the city gate and invites them to his house for dinner and a night's rest, but after supper Sodom's entire male population comes pounding at Lot's gate, seeking to gang rape his guests and threatening the "immigrant" Lot with even worse treatment for daring to condemn their barbaric inhospitality.²⁰ After blinding and dispersing the mob, the angels inform Lot that he and his household will be spared the destruction God is about to send on Sodom.²¹ Those who show hospitality will receive life; those who show inhospitality will earn death.

The book of Joshua offers a similar tale of one family offering hospitality to strangers needing protection in a dangerous city. In Joshua 2:1-21 two Hebrew spies sent to prepare for the invasion of Jericho receive hospitality and protection from the innkeeper or harlot Rahab, who deceives her own king to save the lives of her guests.²² Joshua rewards this hospitality by sparing Rahab's household the destruction visited on the rest of Jericho and allowing her descendants to flourish among the Israelites.²³

First and second Kings offer two further accounts of God's agents receiving a hospitality that is rewarded with life. The guests in these narratives are the prophets Elijah and Elisha, and the hosts are two unnamed foreign women, a poor widow and a wealthy matron.²⁴

During a drought God sends on Israel as punishment for King Ahab's sins, the Lord dispatches Elijah to the foreign town of Zarephath, where a

17. *Id.*

18. *Id.*

And the Lord appeared to him by the oaks of Mamre, as he sat at the door of his tent in the heat of the day. He lifted up his eyes and looked, and behold, three men stood in front of him. When he saw them, he ran from the tent door to meet them, and bowed himself to the earth, and said, 'My lord, if I have found favor in your sight, do not pass by your servant. Let a little water be brought, and wash your feet, and rest yourselves under the tree, while I fetch a morsel of bread, that you may refresh yourselves, and after that you may pass on—since you have come to your servant.' So they said, 'Do as you have said.' *Id.*

See Virgil Wiebe, *Washing Your Feet in the Blood of the Wicked: Seeking Justice and Contending with Vengeance in an Interprofessional Setting*, 1 U. ST. THOMAS L.J. 182 (2003). Turning to the story of Abraham and Sarah offering hospitality by washing the feet of three strangers, Wiebe notes that "[t]he washing of feet and the provision of a meal to strangers often became the first step to greater obligations of protection." *Id.* at 192.

19. *Genesis* 19:1-4.

20. *Id.*

21. *Id.*

22. *Joshua* 2:1-21.

23. *Joshua* 6:22-25.

24. *Id.*

poor widow on the verge of starvation agrees to share her last handful of food with the prophet.²⁵ God rewards this generous hospitality by continuously replenishing her food supply, sustaining Elijah, the widow and her young son through the entire course of the drought. And when the woman's child falls deathly ill, the Lord brings the boy back to life.²⁶

In 2 Kings 4:8-37 the prophet Elisha is offered hospitality by a wealthy Shunammite woman who has her husband build a spare room for the traveling holy man.²⁷ Like Sarah, this generous host, who is also without child and married to a man of advancing years, receives a child in return for her hospitality.²⁸ And, like the poor widow of 1 Kings 17, when the matron's child falls ill and dies, he is brought back to life by the Lord's servant. Once again, lifesaving hospitality merits a gift of life.²⁹

Each of the previous narratives recommends hospitality on the grounds that the stranger could be an agent of God, and that life-saving hospitality will earn a comparable reward. But it is also important to note that the hosts in these narratives are themselves "strangers." Abraham, Sarah and Lot are "aliens" in Canaan and Sodom; Rahab and the two women offering Elijah and Elisha hospitality are foreigners. Perhaps, then, these strangers offer hospitality because they know of the need for such a welcome, or are repaying a debt for hospitality previously received.

It is this notion of hospitality as the repayment of a debt that underlies Israel's central reason for offering hospitality to the alien. Time and again the Hebrew Scriptures remind the Israelites that they owe hospitality to the alien in their midst because when they were oppressed aliens in Egypt and homeless sojourners in the wilderness God came to their aid. In Exodus, Leviticus and Deuteronomy the command to protect and provide for the stranger is repeatedly accompanied by the reminder that "you were once aliens in Egypt," and that the Lord your God "brought you out of Egypt and gave you Canaan."³⁰ So now the Hebrews must practice God's hospitality to the foreigner and sojourner at their door.

Unlike their Egyptian taskmasters, the Hebrews are not to abuse or oppress the resident alien in their midst. As God commands the Israelites in Exodus 22:21, "You shall not molest or oppress an alien, for you were once aliens yourselves in the land of Egypt."³¹ The resident alien must receive equal justice and protection from the law, for the Lord tells the Hebrews in Leviticus 24:22, "You must have one and the same law for

25. 1 Kings 17.

26. *Id.*

27. 2 Kings 4:8-37.

28. *Id.*

29. 1 Kings 17.

30. *Exodus* 23:9.

31. This command is repeated in *Exodus* 23:9; *Deuteronomy* 24:17, 27:19; *Jeremiah* 7:6, 22:3; *Ezekiel* 22:7, 22:29; *Zechariah* 7:10; and *Psalms* 94:6.

resident alien and native Israelite.”³² Moses reiterates this command in his instructions to Israel’s judges in Deuteronomy 1:16. “Hear the cases that arise among your kinsmen and judge fairly between one person and another, whether fellow-countryman or resident alien.”³³

Indeed, like the widow and the orphan, the alien is part of a protected class, the *anawim*,³⁴ or “little ones” who are especially beloved and protected by God. And righteous Hebrews must imitate God’s special love for the stranger by caring for the foreigner as one of their own. Deuteronomy 10:18-19 reminds the Hebrews that the “Lord your God . . . shows love towards the alien who lives among you, giving him food and clothing. You too must show love for the alien.”³⁵ And in Leviticus 19:33-34 God instructs the Hebrews, “When an alien resides with you in your land, you must not oppress him. He is to be treated as a native born among you. Love him as yourself.”³⁶ This inclusion of the resident alien reaches its fullest expression in Ezekiel’s vision of Israel’s return from the Babylonian captivity, where God commands the Hebrews to offer the resident alien a share in their land.

‘You are to distribute this land among yourselves according to the tribes of Israel. You are to allot it as an inheritance for yourselves and for the aliens who have settled among you and who have children. You are to consider them as native-born Israelites; along with you they are to be allotted an inheritance among the tribes of Israel. In whatever tribe the alien settles, there you are to give him his inheritance,’ declares the Sovereign Lord.³⁷

Aside from condemning abuse and demanding equal treatment and inclusion, the biblical command to show hospitality to the alien includes several concrete directives. Deuteronomy 24:14 forbids withholding the daily wages of the alien laborer, warning that such injustice against the poor is a sin against God.³⁸ Deuteronomy 14:28-29 instructs the Hebrews to tithe a portion of their produce so that “the aliens . . . in your settlements

32. See also *Numbers* 15:14-16 (“The community is to have the same rules for you and for the alien living among you; this is a lasting ordinance for the generations to come. You and the alien shall be the same before the LORD: The same laws and regulations will apply both to you and to the alien living among you.”).

33. *Deuteronomy* 1:16.

34. See THE NEW JEROME BIBLICAL COMMENTARY 532 (Raymond Edward Brown et al. eds., Prentice Hall 1989) (explaining that *anawim* is a Hebrew term meaning “overwhelmed by want” that has been variously translated as “meek” and “poor” and came to represent those aware of their dependence upon God).

35. See also *Psalms* 146:9.

36. *Leviticus* 19:33-34.

37. *Ezekiel* 47:21-23.

38. *Deuteronomy* 24:14.

may come and have plenty to eat.”³⁹ Leviticus 19:9-10, 23:22, and Deuteronomy 24:19-21 require that harvest gleanings of grain, grapes and oil be left for the alien, reminding the Hebrews that “you were slaves in Egypt; that is why I command you to do this.”⁴⁰ And Exodus 20:10, 23:12, and Deuteronomy 5:12-15 demand that the Sabbath rest be extended not only to the members of the Hebrew household, but also to “the alien residing among you.”⁴¹ Finally, Deuteronomy 23:15-16 commands that runaway slaves seeking refuge in Israel are not to be returned to their foreign masters, but offered safe haven in whatever Hebrew communities they enter.⁴² “You shall not hand over to his master a slave who has taken refuge from him with you. Let him live with you wherever he chooses, in anyone of your communities that pleases him. Do not molest him.”⁴³

B. The New Testament

Christianity continues and intensifies the call to practice hospitality, with Christ as both the stranger in need of a welcome and the prophet proclaiming the hospitality of God’s reign. The infant born in a manger and driven into exile by a murderous tyrant and the itinerant preacher with “no place to lay his head” preaches about a heavenly banquet where all the world’s outcasts are welcome and practices hospitality by feeding multitudes and breaking bread with strangers.⁴⁴ And anyone who would become a disciple of Christ or enter into the reign of God must practice a similar hospitality.

“Do not neglect to show hospitality,” Hebrews 13:2 advises, for “by doing this some have entertained angels unawares,” echoing the sentiment of Genesis 18 and 19.⁴⁵ In the New Testament, however, the stranger offered hospitality is not merely God’s messenger; but Christ himself, and the reward given those practicing such hospitality is not life, but life eternal, snug in the bosom of Abraham and seated at the heavenly banquet.⁴⁶ In Matthew’s parable of the Last Judgment (25:31-46) Jesus instructs the righteous, “[c]ome, take possession of the kingdom that has been ready for you since the world was made. For when . . . I was a stranger, you took me into your home.”⁴⁷ And when did they show Christ such hospitality? Whenever they welcomed the “least of these” brothers and sisters. Hospitality to the needy stranger is hospitality to Christ, and such hospitality is the hallmark and gateway to God’s reign.

39. *Deuteronomy* 14:28-29.

40. *Leviticus* 19:9-10, 23:22; *Deuteronomy* 24:19-21.

41. *Exodus* 20:10, 23:12; *Deuteronomy* 5:12-15.

42. *Deuteronomy* 23:15-16.

43. *Id.*

44. *Luke* 2:7; *Matthew* 2:14; *Luke* 9:58, 14:23.

45. *Hebrews* 13:2; *Genesis* 18, 19.

46. *Id.*

47. *Matthew* 25:31-46.

Along with this story, two of Luke's most famous parables confirm that hospitality is required of anyone hoping to enter God's Reign. In Luke 10:29 a lawyer wants to know which neighbor he must love to inherit eternal life, and Jesus responds with the tale of the Good Samaritan (10:30-37), in which a despised foreigner offers an injured Jew unexpected and lavish hospitality.⁴⁸ Clearly, then, the neighbor-love or hospitality God demands of those seeking eternal life must include the alien, the stranger and the foreigner. "Go and do likewise," Jesus instructs his audience.⁴⁹ Hospitality is also essential in Luke's parable of the rich man and the beggar Lazarus (16:19-31).⁵⁰ Here a wealthy man is condemned to eternal suffering for the scandalous inhospitality of ignoring the desperate needs of a beggar at his door. As Abraham tells this tormented fiend, his failure to reach out to the needy stranger has made him a permanent exile of God's heavenly banquet.⁵¹

Those hoping to enter the reign of God must practice a radical and inclusive hospitality because their Host welcomes strangers, foreigners and aliens to the heavenly banquet. In Luke's parables of the Narrow Gate (13:22-30) and the Great Feast (14:15-24) God's invitation to dine in the kingdom extends beyond the borders of nation and tribe and reaches out to those "from the east and the west and from the north and the south" and includes those strangers and foreigners on "the highways and hedgerows."⁵²

We see Jesus practice the hospitality of God's reign in the various accounts of the multiplication of the loaves and fishes and in narratives about his breaking bread and sharing food and drink with all sorts of outcasts and strangers.

The New Testament has six accounts of Jesus feeding a multitude that has followed him out to a deserted place.⁵³ Biblical scholar Eugene LaVerdiere describes these miraculous feedings as "hospitality meals," evoking memories of God's hospitality to the Hebrews in the wilderness.⁵⁴ As the Lord God provided manna and quail for the Israelites in the desert, so Jesus provides loaves and fishes for the hungry crowds that have followed him out to these isolated spots.

In the stories of the loaves and fishes Jesus teaches his disciples to practice God's hospitality and extends that hospitality to include strangers. In each account Jesus instructs the twelve (who wish to send the crowds away to find their own food) to "give them something to eat yourselves,"

48. *Luke* 10:29, 30-37.

49. *Id.*

50. *Luke* 16:19-31.

51. *Id.*

52. *Luke* 13:22-30, 14:15-24.

53. *Matthew* 14:13-21; 15:32-39; *Mark* 6:30-44; 8:1-10; *Luke* 9:10-17; *John* 6:1-21.

54. EUGENE LAVERDIERE, *DINING IN THE KINGDOM OF GOD: THE ORIGINS OF THE EUCHARIST ACCORDING TO LUKE 86* (Liturgy Training Press 1994).

and has the disciples seat the crowds, serve them their food, and pick up after them.⁵⁵ In this way Jesus not only practices God's hospitality, but also trains his followers to do likewise. And Mark's second account of this miraculous feeding (8:1-10) has the loaves and fishes being shared with Gentiles.⁵⁶ As Donald Senior notes, this account has Jesus feeding "the hungry multitudes on both [the Jewish and Gentile] sides of the lake,"⁵⁷ teaching his disciples (and the early Church) to extend God's hospitality to the foreigner, alien and stranger. As a result of such lessons the early Church welcomed Samaritans, Gentiles and every sort of stranger, creating a community that was "open to all, excluding no one by reason of race, sex, nationality, ethnic background, tribe, caste, social or economic status, or language."⁵⁸

At the same time Jesus also practices the hospitality of God's reign by breaking bread with outcasts and strangers. Whether dining at the home of customs officials like Levi and Zacchaeus or allowing an unclean woman to bathe his feet, Jesus is repeatedly chastised for "eating with sinners and tax collectors," something he must have done with great regularity, for Mark tells us that there were many such folk among his followers.⁵⁹ Nor was the reach of his hospitality limited to sinful Jews. In John 4:1-54 Jesus brings salvation to a Samaritan woman (and her village) with whom he has shared a cup of water, and in Matthew 15:21-28, Mark 7:24-30 and Luke 7:1-10 he extends his healing reach to the children of two foreign women and the servant of a Roman centurion.⁶⁰ God's hospitality reaches out to the stranger.

Following this example, the early Church saw hospitality as an essential virtue. As Pohl notes, "[h]ospitality to needy strangers distinguished the early church from its surrounding environment. . . . [O]ffering care to strangers became one of the distinguishing marks . . . of the church."⁶¹ Indeed, hospitality was so important that the apostles themselves were entrusted with the daily distribution of food, and when the community grew too large, seven members "full of the Spirit and of wisdom" were selected and ordained for this critical task.⁶²

55. *Mark* 8:1-10.

56. JOSEPH A. GRASSI, *LOAVES AND FISHES: THE GOSPEL FEEDING NARRATIVES* 26 (Liturgical Press 1991).

57. Donald Senior, *The Eucharist in Mark: Mission, Reconciliation, Hope*, 12 *BIBLICAL THEOLOGY BULL.* 69 (1982).

58. *See Acts* 8:4-25; 10:1-11:18; EUGENE LAVERDIERE, *THE BREAKING OF THE BREAD: THE DEVELOPMENT OF THE EUCHARIST ACCORDING TO THE ACTS OF THE APOSTLES* 94 (Liturgy Training Press 1998).

59. *Mark* 2:13-17. *See also Matthew* 9:9-13; *Luke* 5:27-32, 7:36-50, 19:1-10.

60. *Matthew* 15:21-28; *Mark* 7:24-30; *Luke* 7:1-10.

61. POHL, *supra* note 10, at 33.

62. *Acts* 6:1-6.

Other New Testament witnesses testify to the importance of hospitality. Paul tells his audience in Romans 12:13 to “contribute to the needs of God’s people, and practice hospitality.”⁶³ The author of 1 Peter tells his readers to “be hospitable to one another without grumbling.”⁶⁴ And 1 Timothy 3:2 and Titus 1:8 list hospitality as a requirement for leadership and ministry in the church.⁶⁵ Moreover, both Paul and James argue that any inhospitality to the poor is a grave sin.

Early Christian writers continued to stress the biblical virtue of hospitality.⁶⁶ Justin Martyr reports that at the Sunday Eucharist a collection for the poor is entrusted to the bishop, who then “takes care of . . . strangers who are sojourning among us.”⁶⁷ The *Didascalia Apostolorum* instructs bishops to show hospitality to any poor stranger who enters the Eucharistic assembly. “If a poor man or woman should arrive . . . and there is no place for them, then you, the bishop, with all your heart provide a place for them, even if you have to sit on the ground.”⁶⁸ Jerome tells the clergy of his day to “let poor men and strangers be acquainted with your modest table, and with them Christ shall be your guest.”⁶⁹ And Lactantius argues that “the house of a just man ought not to be open to the illustrious, but to the lowly and abject.”⁷⁰

By the fourth and fifth centuries Christians began implementing the biblical command by establishing institutions of hospitality for those in need. Basil, bishop of Caesarea, organized efforts to care for famine victims and established hospitals and other institutions providing for orphans, widows, and strangers. A generation later John Chrysostom

63. *Romans* 12:13.

64. *1 Peter* 4:9.

65. *1 Timothy* 3:2; *Titus* 1:8.

66. Hospitality also remains an important theme in post-Biblical Jewish law and sacred writing. Examples of the command to practice hospitality from the Talmud include: “Let your house be opened wide and let the poor be members of your household.” (*Pirkei Avot* 1:5); “When R. Huna had a meal, he would open the doors of his house and say, ‘Let whoever is in need come and eat.’” (*Ta’anit* 20b-21a); and “Rav Dimi of Nehardea said: *Hachnasat orchim*—the welcoming of guests takes precedence over the *beit midrash*—the house of study . . . Rav Judah said in Rav’s name: *Hachnasat orchim*—the welcoming of guests takes precedence over welcoming the divine presence—the *Shechinah*” (*Shabbat* 127a). Nevertheless, as discussed *supra* note 9, our particular focus here is on the development of the hospitality principle in the Christian tradition, so a discussion of the treatment of this issue in post-Biblical scripture and commentaries is not included here.

67. Justin Martyr, 1 Apology 67.7, in *ST. JUSTIN MARTYR: THE FIRST AND SECOND APOLOGIES* 71 (Ancient Christian Writers, no. 56, Leslie William Barnard trans., Pueblo 1997).

68. WILLIAM R. CROCKETT, *EUCHARIST: SYMBOL OF TRANSFORMATION* 255 (1989) (citing *Didascalia Apostolorum* 12).

69. Jerome, *Letter 52: To Nepotian*, in *SELECT LETTERS OF ST. JEROME* 217-19 (F.A. Wright trans., 1954).

70. Lactantius, *The Divine Institutions*, 6.12, in *7 THE ANTE-NICENE FATHERS* 176 (Alexander Roberts & James Donaldson eds., Charles Scribner’s Sons 1899).

established hospitals in Constantinople, offering care to the sick and elderly, as well as orphans, widows and aliens. Meanwhile, monasticism gave an important place to hospitality to strangers and “the Rule of Benedict required that monks graciously receive clerics, pilgrims and the poor because of Christ’s identification with the stranger in Matthew 25:35.”⁷¹

III. INTRODUCING THE VIRTUE OF HOSPITALITY INTO THE IMMIGRATION DEBATE

Obedying a biblical command to provide all needy strangers with aid and all aliens with the same protections and rights as citizens would result in an abundance of reforms in United States immigration policy, including: the elimination of laws prohibiting or restricting non-citizens’ access to education, public services and benefits, and employment;⁷² the end of harsh immigration consequences for criminal prosecutions and convictions;⁷³ and amnesty for undocumented aliens.⁷⁴ At present, however, most Americans would probably view such sweeping reforms as radical and unacceptable,

71. POHL, *supra* note 10, at 47.

72. The Old Testament commands generosity and fairness to strangers. See *Deuteronomy* 10:18-19 (“He defends the cause of the fatherless and the widow, and loves the alien, giving him food and clothing. And you are to love those who are aliens, for you yourselves were aliens in Egypt.”); *Ezekiel* 47:21-23.

You are to distribute this land among yourselves according to the tribes of Israel. You are to allot it as an inheritance for yourselves and for the aliens who have settled among you and who have children. You are to consider them as native-born Israelites; along with you they are to be allotted an inheritance among the tribes of Israel. In whatever tribe the alien settles, there you are to give him his inheritance,’ declares the Sovereign LORD.

Id.

73. The Bible also commands equal treatment of citizen and alien. See *Leviticus* 19:34 (“The alien living with you must be treated as one of your native-born. Love him as yourself, for you were aliens in Egypt. I am the LORD your God.”); *Deuteronomy* 23:15-16 (“If a slave has taken refuge with you, do not hand him over to his master. Let him live among you wherever he likes and in whatever town he chooses. Do not oppress him.”); and *Deuteronomy* 1:16 (“And I charged your judges at that time: Hear the disputes between your brothers and judge fairly, whether the case is between brother Israelites or between one of them and an alien.”). However, although non-citizens do the same time for a crime as citizens, non-citizens are additionally and uniquely subject to removal for these convictions.

74. The Gospels call for forgiveness and mercy for law-breakers. See *Mark* 2:15-17.

While Jesus was having dinner at Levi’s house, many tax collectors and “sinners” were eating with him and his disciples, for there were many who followed him. When the teachers of the law who were Pharisees saw him eating with the “sinners” and tax collectors, they asked his disciples: “Why does he eat with tax collectors and ‘sinners’?” On hearing this, Jesus said to them, “It is not the healthy who need a doctor, but the sick. I have not come to call the righteous, but sinners.”

Id.; see also *Matthew* 9:9-13; *Luke* 5:27-32.

and the majority of immigrant advocates would likely describe such a legislative shopping list as currently unattainable.

Indeed, the very notion that immigration policy should be concerned with welcoming or protecting the stranger is highly controversial. Most of the public debate about immigration reform focuses on ways to protect the United States' national interest – almost always narrowly defined in terms of national security and the economy. The limited discussion of immigration issues in the 2004 presidential debates focused on national security and was rife with calls for increased toughness and border security.⁷⁵ Both candidates called for immigration reform, but very little of either's message was pro-immigrant, and neither one addressed the positive aspects of immigration or acknowledged the duties a nation of immigrants might have to the alien in our midst.⁷⁶

So too the most recent State of the Union address only focused on economic benefits or burdens that increased migration can bring,⁷⁷ while discussions about the need for a new guest worker program have most often focused on the need to provide businesses with willing workers, rather than the duty to offer protection to those fleeing persecution, to stop the exploitation of immigrant workers in the underground economy, or to bring an end to the tragedies wrought by illegal border crossings.⁷⁸

The tradition of hospitality epitomized by the story of Abraham and the traditional opening of the Passover Seder. "All who are hungry come and eat," is thus directly at odds with an immigration policy that – because it demands self-sufficiency and deplors reliance on public resources⁷⁹—

75. The word "immigration" was not even uttered by either candidate until the third Presidential debate. Then, though both President Bush and Senator Kerry said they favored some sort of guest worker program, the primary focus of the dialogue was border security and cracking down on the flood of illegal migrants. Commission on Presidential Debates, *Transcript of the 3rd Bush-Kerry Presidential Debate* (Oct. 13, 2004), available at http://www.debates.org/pages/trans2004d_p.html.

76. *Id.*

77. George Bush, President, 2006 State of the Union Address, in *'America is Addicted to Oil'*, WASH. POST, Feb. 1, 2006, at A14.

78. While some of these more immigrant-friendly themes have begun to emerge more recently in the Congressional debates over immigration reform, concerns about national security and the economy still provide the central framework for the conversation.

79. With a few exceptions, the Immigration and Nationality Act specifically excludes from admission to the United States anyone who "is likely at any time to become a public charge." I.N.A. § 212(a)(4); see I.N.A. § 207(c)(3) (exempting refugees from the public charge exclusion); see also The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 8 U.S.C. and 42 U.S.C.). Commonly known as the Welfare Reform Act, certain provisions of this statute restrict access of documented immigrants to a wide range of government programs such as food stamps, supplemental security income, Medicaid, Medicare, assisted housing, and educational grants. *Id.* §§ 401–404, 411A, 110 Stat. 2105, 2261–2267 (1996) (codified as amended at 8 U.S.C. §§ 1611–1614, 42 U.S.C. §§ 6119, 1437y (Supp. III 1997)).

deliberately seeks to exclude those immigrants that would appear to be the most hungry or the most in need of shelter and protection. In addition, rather than acknowledging our common humanity with the alien, this protectionist approach to immigration reform has given credence to those who insist on casting the immigrant in the role of untrustworthy outsider at best, and dangerous enemy at worst.

But why should United States immigration policy be informed by a biblical mandate to show hospitality to the neighbor? What role should this or any other religiously based value play in our public conversations and political decisions about immigration policy? In a secular pluralistic society committed to the separation of church and state, why should those responsible for forming public policy give any weight to a biblical command to show hospitality to the stranger?

Admitting that the debate about the role of religious values in the formation of public policy continues to be waged,⁸⁰ we nonetheless seek to

80. See, e.g., KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995) (comparing rational secular grounds of political decision making with grounds based on religious convictions and concluding that religious convictions can impact an individual's decisions about them, and that reliance on those convictions is compatible with liberal democratic premises); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

Central to the idea of public reason is that it neither criticizes nor attacks any comprehensive doctrine, religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity. The basic requirement is that a reasonable doctrine accepts a constitutional democratic regime and its companion idea of legitimate law. While democratic societies will differ in the specific doctrines that are influential and active within them—as they differ in the western democracies of Europe and the United States, Israel, and India—finding a suitable idea of public reason is a concern that faces them all.

Id. at 765.

Clearly, in a pluralistic society, the state should certainly be free from the influence of an established church . . . But, in a pluralistic society, it is precisely my point that churches and believers should be able to weigh in on controversial public questions. To counsel against their input is to betray the principles of liberalism, not to support them.

Steven Schiffrin, *Religion and Democracy*, 74 NOTRE DAME L. REV. 1631, 1656 (1999).

An attempt to keep religious communities and convictions entirely separated from matters of policy will silence this conversation [between religious communities and the larger society], especially at moments when it is most urgently needed. Only when such conversation occurs does a free society or a community of freedom really exist. Religious arguments have a proper place in this conversation. And their presence should be governed by the conditions necessary for all genuine conversation and mutual inquiry: pursuit of the truth and respect for the other in an atmosphere of freedom.

David Hollenbach, S.J., *Contexts Of The Political Role Of Religion: Civil Society And Culture*, 30 SAN DIEGO L. REV. 877, 901 (1993); MICHAEL J. PERRY, *UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY* 20-52 (2003) (arguing that political reliance on religiously grounded moral belief does not violate the nonestablishment norm or the morality of liberal democracy); STEPHEN CARTER, *GOD'S NAME IN VAIN:*

offer four reasons why U.S. citizens and legislators considering proposed changes in our nation's immigration laws should attend to and be informed by the biblical command to offer hospitality and protection to the stranger.

A. *Consistency*

First, there is little question that most Americans and their representatives believe that the religious and moral values found in the Bible should be important in the formation of personal character *and* national policy, or that such religious and moral values play an important role in the political process.⁸¹ The political influence of the Christian right over the past few decades makes it clear that one particular set of biblical values, or one interpretation of biblical morality, has entered the public square with loudspeakers and exerted tremendous influence on public policy. And there is no questioning the fact that President Bush's biblical faith plays a central role in both his domestic and foreign policy decisions.⁸²

At the same time, it is evident that the biblical morality (or moralities) shaping U.S. politics and law is incomplete and inconsistent. In order to be coherent, the religiously grounded opposition to abortion and physician assisted suicide must be accompanied by a biblical critique of a broader range of issues, including war, poverty, the environment, and immigration policies that violate our duty to welcome and protect the alien in our midst. If, in the real world in which we live, *some* religious arguments enter the public square with vigor, and politicians publicly proclaim their support of

THE WRONGS AND RIGHTS OF RELIGION IN POLITICS (2000) (noting that religion has long motivated social change in America, in particular the civil rights movement and crusades such as abolitionism, labor and temperance, and arguing that people of faith should not be required to abandon their religion when they enter public life); RICHARD NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (2d ed. 1986) (rejecting the notion of a "naked public square" that would exclude religious values from the conduct of public business, and asserting that politics is an inescapably moral exercise); J. David Bleich, *Godtalk: Should Religion Inform Public Debate?*, 29 *LOY. L.A. L. REV.* 1513 (1996).

The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Id. at 1523.

81. McKibben, *supra* note 14, at 31-32.

82. James G. Lakely, *President Outlines Role of his Faith*, *WASH. TIMES*, Jan. 12, 2005, at A1; *President Bush's Religious Rhetoric*, *PBS RELIGION & ETHICS NEWSWEEKLY*, Feb. 7, 2003, available at <http://www.pbs.org/wnet/religionandethics/week623/news.html>; Jane Lampman, *New Scrutiny of Role of Religion in Bush's Policies; The President's Rhetoric Worries even some Evangelicals*, *CHRISTIAN SCI. MONITOR*, Mar. 17, 2003, available at <http://www.csmonitor.com/2003/0317/p01s01-uspo.html>.

the biblical morality informing western civilization, then intellectual honesty and a simple sense of fair play demand that we pay equal attention to central biblical notions like the command to show hospitality to the stranger – even if it challenges our currently restricted notion of neighbor-love and national interest. If the Bible is to be brought into the public sphere as a guarantee of the rightness of our laws, then we cannot in good conscience exclude the central command to love the stranger because it is inconvenient or radical.

B. Universality

Second, the religious command to welcome the stranger challenges us to embrace a broader, more inclusive moral paradigm than the one offered by a narrowly defined notion of national interest. While many are rightly concerned about the sectarian tendencies of religion – most clearly seen in the recent rise of religious violence – religion also has the capacity to remind us of our membership in a universal human community, a body in which there is neither Jew nor Greek; and the command to welcome the stranger best exemplifies this religious lesson.

In this vein theologian Dana Wilbanks offers compelling arguments for welcoming contributions from religious traditions to the political dialogue about immigration, and for permitting the religiously inspired virtue of hospitality to infuse a wider human community. “The thrust of these traditions is to challenge the logic of nation states, to counter the current mood to control borders even more tightly, and to keep alive the moral tradition for admitting migrants.”⁸³ And in the current international environment, where there seem to be few voices and little institutional weight to defend the cause of migrants, there is a serious need for religious communities to persist in public advocacy.⁸⁴

Wilbanks contends that the biblical norm of hospitality supported by faith communities has a “universalizing” tendency, and that their teachings and actions in support of this norm presses the larger society to recognize the universal dignity and rights of *all* persons.⁸⁵ Thus, the moral imperative in the Jewish tradition to be hospitable to the stranger, rooted as it is in the historical experience of Jews being enslaved as aliens, gives the Jewish perspective on immigration a moral depth and legitimacy that is authoritative and persuasive to a larger audience.⁸⁶ Similarly, the Catholic Church’s teaching that migrants are to be treated as persons with whom we are related in bonds more fundamental than national, ethnic, or religious identities, and its recognition of the rights of every person to a homeland, to

83. Dana W. Wilbanks, *Commentary: Response to Christiansen and Plaut*, 30 INT’L MIGRATION REV. 27, 27 (1996).

84. *Id.* at 27-28.

85. *Id.* at 32-33.

86. *Id.* at 32.

work, and to sustenance for his family, express a universal ethical norm that is accessible to all people of conscience.⁸⁷

Thus, Wilbanks concludes, religious traditions can contribute to nourishing the moral capacities of the national society to sustain a hospitable immigration policy, though this contribution has no claims to a privileged place in that political debate. Rather, echoing the words of Justice Brennan in *McDaniel v. Paty*,⁸⁸ Wilbanks suggests that these religious voices should be heard and contested publicly in the same way that more universalistic or secular arguments are subjected to public assessment.⁸⁹

C. *Historical Resonance*

The Bible demands that Israel offer hospitality to the stranger because the Hebrews were themselves once strangers taken in and offered hospitality by God – and so should have sympathy and compassion for the alien in their midst. So, while acknowledging the Israelites' strong desire for cultural and religious cohesion, the Torah provided specific injunctions against xenophobia.⁹⁰ As W. Gunther Plaut notes, "the Israelites were reminded that the stranger shares with them a common humanity and that this humanity finds its roots in the Divinity that cares for all its children."⁹¹ Thus, even the stranger accused of killing could find security from his avengers in Israel's cities of refuge.⁹²

This biblical command grounded in memory and gratitude has a striking resonance in a nation where the vast majority of citizens are themselves the descendants of (legal and illegal) immigrants. Thus, a third reason for introducing the biblical principle of hospitality to the stranger to public conversations about immigration law is that Americans have similar moral warrants for extending such a welcome to the alien in our midst.

Just as the Israelites were commanded to offer hospitality to the alien in their midst because they had once been homeless sojourners in the wilderness (and later exiles and refugees in Babylon), so too Americans might well view their obligations to immigrants in light of a heritage shaped by centuries of immigration from places from which our own ancestors fled in search of food and freedom. As Israel's moral obligations were shaped by a common history of liberation, so America's immigration laws should be informed by our shared identity as a nation of immigrants

87. *Id.* at 33.

88. 435 U.S. 618, 642 (1978) ("The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at that polls.").

89. Wilbanks, *supra* note 83, at 32.

90. W. Gunther Plaut, *Jewish Ethics and Migration*, 30 INT'L MIGRATION REV. 18, 22 (1996).

91. *Id.*

92. *Id.* at 22-23.

and children of immigrants, bound not by common religious or ethnic ties but by a commitment to the liberty and equality of all people.

D. A Moral Compass

Decisions about public policy must weigh competing goals, and an unavoidable dilemma in any immigration debate involves maintaining a balance between the rights of immigrants and the rights of governments to limit their admission. To be credible participants in this debate, religious communities committed to offering hospitality to the stranger need to acknowledge the existence of countervailing interests, such as an obligation to the poor already residing in the United States, a desire to admit immigrants of diverse nationalities, and issues of national security, that might legitimately impact decisions about immigration policy.

Nevertheless, these communities can at the same time help to define what kinds of considerations should have the greatest weight in making these determinations, reject an unqualified national interest paradigm as a framework for the formation of immigration policy, and argue against restrictions on admissions of certain immigrants, such as refugees and asylum seekers, who have the weightiest claims for admission from a human rights or moral perspective.

It goes without saying that the United States government may have compelling and morally justifiable reasons for limiting the admission of certain immigrants. The fourth and final reason for including the biblical command regarding hospitality to the stranger in the public conversation about immigration policy is that the religious perspective offers a moral compass helping us to weigh and set priorities when balancing competing demands and concerns. Including this religiously grounded norm forces a serious discussion of all the competing values involved in setting immigration policy and challenges a worldview in which a narrowly defined notion of national interest is trump. The biblical command does not end the conversation about public policy. It opens it.

IV. UNITED STATES IMMIGRATION POLICY THROUGH THE LENS OF HOSPITALITY

As this article goes to press, the debate over immigration reform is at a fever pitch, with no fewer than five legislative proposals for immigration reform currently under review by Congress.⁹³ Many of these proposals

93. See The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (1st Sess. 2005); The Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (1st Sess. 2005); The Comprehensive Enforcement and Immigration Reform Act of 2005, S. 1438, 109th Cong. (1st Sess. 2005); The Comprehensive Immigration Reform Act, S. 2611, 109th Cong. (2d Sess. 2006) [hereinafter Chairman Arlen Specter's Mark]; The Securing America's Borders Act, S. 2454, 109th Cong. (2d Sess. 2006); and The Welcoming Immigrants to a Secure Homeland Act ("The WISH Act") of 2006, S. 2326, 109th Cong. (2d Sess. 2006). On May 25, 2006, the Senate

contain provisions for increased border security and interior enforcement of immigration laws, as well as punitive measures directed at non-citizens living or working in the United States without authorization.⁹⁴ They also restrict non-citizens' access to judicial review of immigration decisions—even requiring non-citizens to waive their right to due process in exchange for an opportunity to apply for certain benefits, and make it illegal for anyone to offer assistance of any kind to a non-citizen in reckless disregard of the non-citizen's immigration status.⁹⁵ In addition, there are provisions that expand the circumstances under which certain non-citizens, including asylum seekers, can be removed without any judicial review whatsoever, and that would permit the prolonged and potentially indefinite detention of certain non-citizens.⁹⁶

passed the Comprehensive Immigration Reform Act of 2006 by a vote of 62-36. S. 2611, 109th Cong. (2d Sess. 2006). By adopting this compromise immigration reform legislation, the Senate has set the stage for what is likely to be a contentious House-Senate conference, in which the Senate-passed bill will now have to be harmonized with the harsh, enforcement-only bill (H.R. 4437) passed by the House in December. Given the timing of the vote on S. 2611, and because the debate is still very much alive, we have added references to the final Senate bill's provisions that relate to our discussion here, but we have not removed references to the other Senate bills, since some of the proposals contained in these bills and not included in S. 2611 may be revived in the House-Senate conference process.

94. See S. 2454 § 106 and S. 2611 § 106 (providing for the construction of a triple layer border fence along the southern border of the United States); S. 2454 § 101 (providing for an increase in border patrol personnel of 14,400 agents by 2011); S. 2454 § 203, H.R. 4437 § 203, and Chairman Arlen Specter's Mark § 203 (providing for criminal penalties for presence in the U.S. in violation of the immigration laws or regulations).

95. See S. 2454 §§ 501 and 507, and Chairman Arlen Specter's Mark §§ 701 and 707 (shifting jurisdiction over petitions for review of removal orders to the U.S. Court of Appeals for the Federal Circuit and providing for a screening process in which a single judge determines if an appeal has merit before it can be heard). S. 2611 orders a GAO study of the process for appealing immigration matters, including a specific instruction to consider consolidating appeals in a single court of appeals. See S. 2611 § 707. See also H.R. 4437 § 806 (prohibiting the issuance of a non-immigrant visa unless the applicant first waives the right to review of any subsequent decision about the applicant's admissibility or removability); H.R. 4437 § 202, S. 2454 § 205(c), and Chairman Arlen Specter's Mark § 205 (expanding the definition of alien smuggling in order to make it a crime for anyone to facilitate or assist a non-citizen entering or remaining in the U.S. in reckless disregard of that non-citizen's immigration status). S. 2611 creates an exception for "an individual or organization to provide an alien who is present in the United States with humanitarian assistance, including medical care, housing, counseling, victim services, and food, or to transport the alien to a location where such assistance can be rendered." S. 2611 § 274.

96. See H.R. 4437 § 401 and S. 2454 § 225 (requiring the Department of Homeland Security to detain all aliens apprehended at ports of entry or along the international land and maritime borders until they are removed from the U.S. or a final decision granting their admission has been made). See also H.R. 4437 § 407, S. 2454 § 227 and S. 2611 § 227 (expanding expedited removal procedures to non-citizens other than Mexicans and Canadians who are apprehended within 100 miles of the border and within fourteen days of entry into the U.S.).

And these are just the highlights. While some of the proposals also contain provisions for a temporary worker program and some opportunity for the millions of undocumented migrants to attempt to regularize their status,⁹⁷ there is much about these reform proposals that is anything but hospitable to the stranger. Rather than welcoming the alien with compassion and justice, these reforms would turn millions of non-citizens already in the United States into criminals, and quite literally build a barricade to keep new non-citizens from arriving.⁹⁸ Indeed, in this regard, the proposed reforms may actually be worse than the existing immigration regime, which itself is far from welcoming to newcomers and outsiders.

We will focus our attention here on just a few of the most egregious examples of the failure of these proposed reforms to offer hospitality to immigrants, and suggest alternatives that are more just, effective, and consistent with American values and the biblical command to show hospitality to the stranger.

A. *Denying Hospitality to Refugees and Asylum Seekers*

Many, if not most, citizens and politicians are not prepared to accept a system providing all non-citizens, particularly criminal or undocumented ones, with the same rights and protections as citizens. Moreover, the Supreme Court has agreed that Congress may treat aliens in ways that would be unacceptable if applied to citizens,⁹⁹ and both the Welfare

97. Title VII of S. 1033 provides a mechanism for eligible undocumented non-citizens present in the U.S. on the date of the bill's introduction to adjust to temporary non-immigrant status, with the possibility of eventually adjusting to permanent residence. See S. 1033, §§ 701-705. Title III of S. 1033 would establish a guest worker program for non-citizens outside of the U.S., also with the possibility of adjusting to permanent residence. See S. 1033, §§ 301-309. Chairman Arlen Specter's Mark would also provide for a non-immigrant temporary worker program for persons coming temporarily to the U.S. to perform certain jobs. See Chairman Arlen Specter's Mark, §§ 401-411. The final Senate bill provides temporary visas to allow 200,000 persons to come legally each year and take jobs that are not being filled by American workers, and provides a path to permanent residence for certain of these workers. S. 2611, § 402.

98. See S. 2454 § 106 and S. 2611 § 106 (providing for the construction of a triple layer border fence along the southern border of the United States); H.R. 4437 § 101 and S. 2611 § 101, *et seq.* (providing for enhanced surveillance and physical infrastructure to prevent unlawful entry by aliens, as well as increased deployment of border patrol personnel to border areas where there are high levels of unlawful entry by aliens).

99. See *Mathews v. Diaz*, 426 U.S. 67 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.* at 79-80); *Zadvydas v. Davis*, 533 U.S. 678 ("The liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens." *Id.* at 718 (Kennedy, J., dissenting)). Compare *Demore v. Kim*, 538 U.S. 510 (2003) (holding that the government does not violate the due process rights of classes of lawful permanent residents by detaining them without failing to provide individualized bond hearings to determine whether they pose a flight risk or danger to the community); *with United States v. Salerno*, 481 U.S. 739 (1987) (due process allows pre-trial detention of citizens only "[w]hen the Government proves by clear and convincing evidence that an

Reform Act¹⁰⁰ and the Patriot Act¹⁰¹ include rules which specifically target and burden non-citizens in ways that would not be tolerated if applied to citizens.

On the other hand, most Americans understand and appreciate the refugee's desperate need for hospitality and would support an immigration policy that responded appropriately to that need. Unfortunately, many of us are acutely unaware of how United States refugee law and practice fail to provide that basic welcome. Therefore, applying the biblical virtue of hospitality to the reform of United States immigration law and policy might best begin by improving the treatment of persons seeking refuge in the United States.

Such reforms are appealing for a couple of reasons. First, to the extent that they would lead to a more welcoming and generous policy toward asylum-seekers and refugees, they would go to the very heart of the definition of biblical hospitality – making room for the acutely needy stranger. The refugee represents most precisely that alienated sojourner, in need of shelter, food, protection, and comfort. Second, since hospitality is a normative virtue, the adoption by the United States of policies and practices providing welcome and aid to needy aliens¹⁰² and protection for victims of injustice¹⁰³ would confirm America's role as a standard-bearer in the protection of human rights and dignity, and enhance its recently weakened legitimacy in the international community.¹⁰⁴

arrestee presents an identified and articulable threat to an individual or the community." *Id.* at 751).

100. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 401–404, 411A, 110 Stat. 2105, 2261–2267 (1996) (codified as amended at 8 U.S.C. §§ 1611–1614, 42 U.S.C. §§ 6119, 1437y (Supp. III 1997)).

101. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism* ("USA Patriot Act") Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

The USA Patriot Act deprives immigrants of their due process and First Amendment rights through two mechanisms that operate in tandem. First, Section 411 vastly expands the class of immigrants who are subject to removal on terrorism grounds through its broad definitions of the terms 'terrorist activity,' 'engage in terrorist activity,' and 'terrorist organization.' Second, Section 412 vastly expands the authority of the Attorney General to place immigrants he suspects are engaged in terrorist activities in detention while their removal proceedings are pending.

Nancy Chang, *The USA Patriot Act: What's So Patriotic About Trampling on the Bill of Rights?*, CENTER FOR CONSTITUTIONAL RIGHTS (Sept. 2001), available at http://www.ccr-ny.org/v2/reports/docs/USA_PATRIOT_ACT.pdf.

102. *Deuteronomy* 10.

103. *Exodus* 22.

104. In its war on terror, the United States has been widely criticized for its failure to heed its obligations under international law, its prolonged detention of hundreds of foreign nationals, and for its unwillingness to abide by rules that govern the rest of the world. Judge Johan Steyn, a senior judge in Britain's House of Lords, called the United States' indefinite detention of alleged enemy combatants at Guantanamo Bay a "monstrous failure of justice."

While many of the reforms being debated in Congress would harm all non-citizens, some would be particularly unjust to refugees or asylum-seekers, an already very vulnerable population to whom the United States has both a legal obligation¹⁰⁵ and a moral commitment. We focus our attention here on proposed amendments to the expedited removal and mandatory detention provisions, reforms that would further deprive asylum-seekers of a fair process to have their claims heard and which would needlessly require the detention of thousands of non-citizens fleeing persecution.¹⁰⁶

See Stevenson Jacobs, *Terror Suspects Reach 2-Year Mark At Guantanamo - Prisoners Still Waiting For Charges, Trials*, S. FLA. SUN-SENTINEL, Jan. 11, 2004, at A7. The Economist magazine declared America's abuse of power over the Guantanamo prisoners "unworthy of a nation which has cherished the rule of law from its very birth," accused the United States of "alienating many other governments at a time when the effort to defeat terrorism requires more international co-operation in law enforcement than ever before," and concluded that "America's casual brushing aside of the Geneva Convention . . . made America's invocation of these same conventions on behalf of its own soldiers during the recent Iraq conflict sound hypocritical." *A Place in the Sun, Beyond the Law*, ECONOMIST, May 10, 2003, at 12. See generally COLE, *supra* note 2, at 195-97 (arguing that the United States' double standards have hindered international cooperation and compromised the United States' ability to maintain broad international support in its efforts to combat terrorism). COLE, *supra* note 2, at 195 (quoting *Legal Double-Standards Are Not the Way to Win a War Against Terrorism*, INDEPENDENT, Jan. 14, 2002, at 3).

An effective campaign against terrorism requires the support, not just of Arab and Muslim countries, but of many other countries in the developing world which are quick to sniff out Western hypocrisy. If the alleged terrorists detained in Guantanamo Bay are denied democratic standards of justice or treated inhumanely, the campaign will be seriously damaged. *Id.*

105. The 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees are the principal international instruments providing protection to people fleeing persecution. See Convention relating to the Status of Refugees art. 33, *opened for signature* July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150 [hereinafter *Refugee Convention*]; Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (1967) [hereinafter *Refugee Protocol*]. The Protocol incorporates by reference the central provisions of the Refugee Convention. *Refugee Protocol*, art. I. Article 33 of the Refugee Convention establishes the basic norm of non-refoulement that prohibits states from expelling or returning refugees to countries where they would be threatened on account of race, religion, membership in a particular social group, nationality, or political opinion. *Refugee Convention*, art. 33, *incorporated by reference* in *Refugee Protocol*, art. I(1). In 1968, the United States acceded to the *Refugee Protocol* and became obliged to abide by its provisions.

106. The two reform proposals discussed later in this paper are also particularly problematic as applied to asylum-seekers. See *infra* sections IV.B. and IV.C. In addition to the more general criticisms outlined below, a proposal making illegal presence in the United States a crime, see H.R. 4437 §§ 201, 203; S. 2454 §§ 203, 206; Chairman Arlen Specter's Mark §§ 203, 206, if applied to asylum applicants, would also violate United States obligations under Article 31 of the *Refugee Convention*, which prohibits the penalization of asylum-seekers for their irregular entry into or unlawful presence in the country of refuge. *Dissenting Views to Accompany H.R. 4437, the 'Border and Immigration Enforcement Act of 2005'*, available at http://www.house.gov/judiciary_democrats/demviews/hr4437immigrationdissent109.pdf

Under current law, asylum seekers, like other non-citizens, who arrive in the United States at a port of entry without valid travel documents are subject to an expedited removal process.¹⁰⁷ These individuals, some of whom have endured torture, imprisonment and other forms of persecution before arriving in the United States, are confronted with a gauntlet of inspection procedures designed to prevent fraudulent entry into the United States. Though they may speak no English and be traumatized by their experiences of persecution, if they fail to express a fear of return to their country or an intention to apply for asylum, they will be refused entry and detained until their removal can be arranged. Those who do ask for asylum are transported in handcuffs and shackles to detention centers, jails and prisons, where they may be strip searched, isolated from friends and family, and otherwise treated like criminals.¹⁰⁸ Those who are later determined to have a credible fear of persecution are technically eligible to apply for parole,¹⁰⁹ but parole practices vary widely depending on the practices of the local immigration authorities.¹¹⁰ Many remain in detention for long periods of time waiting for their asylum claims to be heard by an immigration judge.¹¹¹

The proposed reforms would make this already dire situation far worse. Instead of applying only to non-citizens examined at ports of entry, the expedited removal procedure would also apply to any non-citizens –

(last visited Mar. 30, 2006) [hereinafter *Dissenting Views to Accompany H.R. 4437*]. Similarly, the provision which criminalizes the work of individuals and charitable organizations who offer assistance to asylum-seekers and other non-citizens who are not lawfully present, could prevent an asylum-seeker from receiving critical services ranging from food and shelter to legal services and spiritual counseling. See H.R. 4437 § 202; S. 2454 § 205(c); and Chairman Arlen Specter's Mark § 205. S. 2611 does not contain a provision criminalizing unlawful presence and creates an exception from prosecution for organizations and individuals providing humanitarian aid to non-citizens. S. 2611 § 274.

107. I.N.A. § 235(b)(1), 8 U.S.C.A. § 1225(b)(1) (West 1996).

108. HUMAN RIGHTS FIRST, *IN LIBERTY'S SHADOW, U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY* 35 (2004) [hereinafter *IN LIBERTY'S SHADOW*], available at http://www.humanrightsfirst.org/asylum/libertys_shadow/Libertys_Shadow.pdf (last visited Mar. 30, 2006).

109. I.N.A. § 235(b)(1)(B)(iii)(IV), 8 U.S.C.A. § 1225(b)(1)(B)(iii)(IV) (West 2006).

110. See *IN LIBERTY'S SHADOW*, *supra* note 108, at 8 (“The current parole criteria are set out in ‘guidelines,’ articulated in various INS memoranda, rather than in formal and enforceable regulations.”).

111. *Id.* at 13.

Neither U.S. laws nor regulations set a limit on the length of time an asylum seeker may be detained while his or her asylum proceedings are pending. In fact, human rights organizations and news reports have documented cases of asylum seekers who have been detained for three, four, and even five years. In researching the U.S. immigration detention system, the Dallas Morning News obtained statistics revealing that 361 asylum seekers and other detainees who had not been convicted of any crime had been detained for over three years.”

Id. at 14.

except Mexicans and Canadians—who enter the United States without inspection and are apprehended within fourteen days of entry and 100 miles of any border.¹¹² Thus, asylum seekers who manage to escape persecution by risking a perilous journey by sea, by being smuggled across a land border, or by entering the United States using fraudulent documents,¹¹³ and

112. H.R. 4437 § 407; S. 2454 § 227. These amendments mandate an expansion of expedited removal that the Secretary of the Department of Homeland Security had already implemented as a matter of discretion when he announced by public notice in August 2004 that DHS would expand expedited removal to any non-citizens “encountered by an immigration officer within 100 miles of any U.S. international land border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the 14 day period immediately prior to the date of encounter.” 69 Fed. Reg. 48,877 (Aug. 11, 2004). By amending the statute as proposed, Congress would *require* rather than permit the DHS Secretary to apply the expedited removal provisions to this particular group of non-citizens found within the United States. See H.R. 4437 § 407; S. 2454 § 227.

113. Asylum seekers who enter or attempt to enter the United States using fraudulent passports or other documents will also be subject, under the proposed amendments, to prosecution as aggravated felons and subject to imprisonment for up to fifteen years. See H.R. 4437 §§ 213, 216; S. 2454 §§ 208, 209, 223; and Chairman Arlen Specter’s Mark §§ 208, 209, 221. Conviction for an aggravated felony renders a non-citizen removable and can be used as a basis for denying or revoking asylum. See I.N.A. § 208(b)(2), 8 U.S.C.A. § 1158(b)(2) (rendering aggravated felons ineligible for asylum) and I.N.A. § 208(c)(2)(B), 8 U.S.C.A. § 2158(c)(2)(B) (allowing the Attorney General to terminate asylum where an asylee has been convicted of an aggravated felony). Only S. 2611 provides an exception to this provision for refugees and asylum seekers, many of whom would be unable to safely obtain valid travel documents and would have no choice but to use false documents in order to escape persecution in their home countries. S. 2611 § 1555. However section 1555 only provides protection to refugees and asylum seekers who commit fraud while attempting to enter the United States and who, without delay, indicate an intention to apply for asylum or for relief under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *Id.* It would not apply to sixty-five percent of asylum applicants, those who succeed in entering the United States and are later apprehended or voluntarily come forward to apply for asylum. See Memo from Professor Michele Pistone, Villanova Law School, to Juria Jones, Office of Senator Specter (Apr. 5, 2006) (on file with author). Senator Joseph Lieberman (D-CT), joined by Senator Sam Brownback (R-KS) introduced an amendment to S. 2611 that would have prohibited the prosecution under the fraud statute of anyone seeking asylum or similar relief until their application for relief is adjudicated and denied. See S. 2611, Amendment No. 4036. The Senate invoked cloture on May 24 and the amendment was not put to a vote. American Immigration Lawyers Association, *Cloture is Invoked, Final Vote Expected Tomorrow* (May 25, 2006), available at <http://www.aila.org/content/default.aspx?docid=19496>. If any of the remaining proposals regarding the fraud provisions become law, bona fide refugees who admit their use of fraudulent documents in order to prove a claim for asylum may be prosecuted and returned to their persecutors for the very act that saved their lives. This is not only inconsistent with a moral obligation to offer hospitality to the refugee; it is inconsistent with international law. See Refugee Convention, *supra* note 105, art. 31(1):

Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in the territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

who are subsequently apprehended inside the United States, would also be subject to expedited removal.

Even those who meet the fourteen day physical presence requirement may still be at risk of expedited removal if they are unable to prove their date of entry into the U.S.,¹¹⁴ and this is a burden not easily met. Asylum seekers who enter without inspection are not likely to possess proof of their date of entry and the very nature of the expedited removal process makes it almost impossible for an alien to present evidence to corroborate a claim of continuous presence.

After an individual has been apprehended, s/he will be interviewed immediately, either at the arrest site or after being taken back to a border patrol office. The individual will have no chance to collect documents or to contact family, friends, or an attorney. Thus, the immigration officer has virtually unchecked authority to reject an individual's sworn statement regarding presence in the U.S.¹¹⁵

Since a non-citizen subject to expedited removal does not have the right to legal counsel, an interpreter, an evidentiary hearing, an impartial adjudicator or judicial review, this expansion of the expedited removal program would subject thousands of non-citizens who are currently entitled to an evidentiary hearing before removal to a summary process conducted by a border patrol agent. The implications for potential asylum-seekers are substantial. "Although expedited removal procedures allow for credible fear determinations for potential asylum seekers, many individuals fleeing persecution may be unable or reluctant to express their fears upon arrival due to trauma, language barriers, or cultural or gender considerations."¹¹⁶ Even in cases where an alien does express a fear of persecution, the

Id. See also United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1992). "In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently without personal documents." *Id.* at para. 196; UNHCR, "Detention of Asylum Seekers and Refugees: the Framework, the Problem and Recommended Practice," a Conference Room Paper for the Standing Committee, EC/49/SC/CRP.13, at para 15 (June 4, 1999). "[T]he very circumstances which prompt the flight may compel an asylum-seeker to leave without documents or to have recourse to fraudulent documentation when leaving a country where his/her safety or freedom is endangered." *Id.*

114. The burden of proof rests with the alien to show that he has the required continued physical presence necessary to avoid expedited removal. See 8 C.F.R. § 235.3(b)(1)(ii) (2006).

115. See Mary Kenney, *DHS Announces Unprecedented Expansion of Expedited Removal to Interior*, American Immigration Law Foundation Legal Action Center Practice Advisory (Aug. 13, 2004), available at http://www.aifl.org/lac/lac_pa_081704.pdf.

116. Letter from Robert D. Evans, Director Governmental Affairs Office, American Bar Association, to Members of the United States House of Representatives (Dec. 13, 2005), available at http://www.abanet.org/publicserv/immigration/HR4437_Letter_to_House.pdf (regarding the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005).

immigration inspector may improperly fail to make the required referral for an asylum.¹¹⁷ As a result of the increased number of people that would be subject to this expanded procedure, many more non-citizens with bona fide asylum claims might be removed and returned to their persecutors without having an opportunity to have their claims heard.

If these reforms become law, those who are fortunate enough to be found to have a credible fear of persecution will, with very few exceptions, be subject to mandatory detention until their cases are heard or they are removed.¹¹⁸ Most will be imprisoned for months or even years while their asylum applications are pending.¹¹⁹ Only those non-citizens permitted to withdraw their applications for entry and immediately depart from the United States, or who are paroled into the United States for urgent humanitarian reasons or significant public benefit will be exempt from the mandatory detention requirement.¹²⁰ Determinations about parole will be made by the Department of Homeland Security and will not be subject to review or appeal.¹²¹

As is currently the case, a severe shortage of detention space will likely require the placement of many asylum-seekers in state or county

117. According to a study of the expedited removal program by the United States Commission on International Religious Freedom (USCIRF):

[I]n 15 percent (12/79) of observed cases when an arriving alien expressed a fear of return to the inspector, the alien was not referred. Moreover, among these twelve cases were several aliens who expressed fear of political, religious, or ethnic persecution, which are clearly related to the grounds for asylum. Of particular concern, in seven of these twelve cases, the inspector incorrectly indicated on the sworn statement that the applicant claimed he had no fear of return.

UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, 1 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 53 (2005), available at http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/volume%20i.pdf (last visited Mar. 31, 2006) [hereinafter USCIRF Report].

118. H.R. 4437 § 401(1); S. 2454 § 225.

119. Some could be detained for even more extended periods of time if their asylum applications are denied and they are ordered removed. See S. 2454 § 202; Chairman Arlen Specter's Mark § 202; H.R. 4437 § 602. These provisions would modify Department of Homeland Security detention and removal procedures for non-citizens ordered removed and permit extended and even indefinite detention of non-citizens who cannot be removed to their home country. These proposals are an attempt to override U.S. Supreme Court decisions in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005), holding, respectively, that a non-citizen determined to be removable or inadmissible can be detained only for an amount of time reasonably necessary to determine whether there is a country to which the non-citizen can be removed. If they become law, a non-citizen fleeing persecution who refuses to cooperate with the United States' efforts to send him back to his persecutor, or whose home country refuses to accept him, could languish in detention for years and would have very limited opportunities to have the detention decision reviewed.

120. H.R. 4437 § 401(1); S. 2454 § 225.

121. *Id.*

facilities for criminal detainees.¹²² These facilities are generally staffed by individuals untrained and ill-equipped to deal with the particular needs – psychological, linguistic, cultural—of this vulnerable population.¹²³ Lack of detention space also can result in movement of detained asylum applicants to remote regions far from friends or family and where legal counsel experienced in asylum law is not widely available.¹²⁴

The deleterious impact of detention on asylum seekers' mental and physical health has been widely documented.¹²⁵ Instead of providing comfort and welcome, lengthy periods of detention in crowded, remote detention centers where they are isolated from family members, treated like criminals, subject to abuse and harassment, unable to access necessary medical care and psychological counseling, and unable to find legal representation, leave many asylum seekers desperate and defeated. Some have contemplated or attempted suicide,¹²⁶ while others, unable to bear the pain and degradation of further detention, have abandoned their claims for

122. See *IN LIBERTY'S SHADOW*, *supra* note 108, at 34-35.

123. *Id.* at 33-36. The USCIRF Report noted that in a survey of approximately twenty detention facilities that house more than seventy percent of the population of asylum seekers subject to Expedited Removal, only one facility indicated that line officers or guards were explicitly told which detainees were asylum seekers. In addition, staff at very few facilities were given any specific training designed to inform them of the special needs or concerns of asylum seekers, and in only one facility did the staff receive any training to enable them to recognize or address any of the special problems which victims of torture or other victims of trauma may have experienced. USCIRF Report, *supra* note 116, at 69. See also MARK DOW, *AMERICAN GULAG, INSIDE U.S. IMMIGRATION PRISONS* (2004) (documenting illegal beatings and psychological torment, prolonged detention, racism, and inhumane conditions endured by non-citizens held in immigration detention).

124. *IN LIBERTY'S SHADOW*, *supra* note 108, at 39.

125. See *id.* at 33 (detailing the physical and psychological toll that detention extracts from survivors of rape, torture, and other traumatic experiences); PHYSICIANS FOR HUMAN RIGHTS AND THE BELLEVUE/NYU PROGRAM FOR SURVIVORS OF TORTURE, *FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS* (2003), [available at](http://www.phrusa.org/campaigns/asylum_network/detention_execSummary/detention_pdf.pdf) http://www.phrusa.org/campaigns/asylum_network/detention_execSummary/detention_pdf.pdf [hereinafter *FROM PERSECUTION TO PRISON*] (finding that the mental health of asylum seekers interviewed was extremely poor and worsened the longer the individuals were in detention; that high levels of anxiety, depression and Post Traumatic Stress Disorder ("PTSD") could be attributed to the length of detention time; that access to mental health services was limited; and that many of the study participants also believed that their physical health worsened while in detention); Cheryl Little, Executive Director, Florida Immigrant Advocacy Center, Statement Before the Senate Subcommittee on Immigration, 107th Cong. 11 (2003). "The conditions in the facilities in which Haitians have been detained further compromise their ability to seek asylum. These facilities have been terribly overcrowded, unsanitary, and traumatizing for many. Families have been separated into different detention centers, sometimes thousands of miles apart." *Id.*

126. See *FROM PERSECUTION TO PRISON*, *supra* note 125, at 55-86 (discussing asylum seekers who attempted or contemplated suicide while detained).

asylum and asked to be returned home.¹²⁷ In part because of asylum seekers' particular vulnerabilities, the United Nations High Commissioner for Refugees ("UNHCR") has condemned the detention of asylum seekers except in the most limited circumstances,¹²⁸ noting that:

Detention of asylum seekers is inherently undesirable as it can have a significant impact on their ability to access the asylum process and can be a traumatizing experience. Detention may make it more difficult for asylum seekers and refugees to secure legal counsel, communicate with family members and access legal materials and interpreters to assist in preparing their claims. These obstacles particularly affect vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs. Many asylum seekers may have endured torture or trauma in their home countries and detention could easily cause further mental suffering.¹²⁹

In addition, UNHCR has denounced mandatory detention of asylum seekers as an arbitrary deprivation of liberty, calling instead for an individualized determination of necessity before ordering the detention of any asylum seeker:

In accordance with international human rights law, as well as international refugee protection standards, a relationship is

127. LAWYERS COMMITTEE FOR HUMAN RIGHTS, REFUGEE WOMEN AT RISK, UNFAIR LAWS HURT ASYLUM SEEKERS 12 (2005), available at http://www.humanrightsfirst.org/refugees/reports/refugee_women.pdf:

After being separated from her young child for a year while in INS detention, Karyna Sanchez abandoned her asylum claim and returned to her country, despite fearing for her safety. Karyna had endured a long history of beatings, stalking, kidnapping, death threats, and rape at the hands of her politically powerful husband. . . . Karyna was desperately worried about her 3-year-old, and the trauma she was enduring because of the separation. After a year in INS detention, Karyna decided to abandon her asylum case and be returned with her daughter to her country, despite the fact that she feared for her safety.

Id. at 12.

128. Letter from Guenet Guebre-Christos, Regional Representative, United Nations High Commissioner for Refugees, Regional Office for the United States of America & the Caribbean, to Rebecca Sharpless, Florida Immigrant Advocacy Center (Apr. 15, 2002) [hereinafter UNHCR Letter to FIAC], available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=3d1c87fe4>:

In view of the hardship of detention and its inherent undesirability, the Executive Committee has identified only four instances when detention may be 'necessary,' as follows: (i) to verify identity; (ii) to determine the elements on which the claim for refugee status or asylum is based; (iii) to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or (iv) to protect national security or public order.

Id.

129. *Id.*

required between the use of detention and the ends to be achieved. Therefore, in each case, there must be an individualized analysis of the need to detain a particular individual. . . . States should not detain an entire group of asylum seekers on the formal basis that they are likely to abscond prior to a determination of their asylum claims. Even if the State's national law allows for detention when an individual is likely to abscond, "international standards dictate that there must be some substantive basis for such a conclusion in the individual case." There should be a compelling need to detain that is based on the personal history of each individual asylum seeker.¹³⁰

Arguably, the expedited removal and detention of asylum seekers presents the most compelling case for bringing United States asylum and refugee policy into closer alignment with the Biblical virtue of hospitality. The asylum seeker is the epitome of the stranger in need of protection and welcome. Yet, instead of reaching out to the refugee and offering compassion and justice, the proposal to expand the expedited removal and mandatory detention provisions sends the message that the refugee's story is not worth listening to or trying to understand. And instead of taking steps to breach the walls that separate the non-citizen in need from the native born, the mandatory detention policy literally maintains a fortress that prevents the asylum-seeker from joining our community. This lack of hospitality inherent in expedited removal and mandatory detention has costs not just for the refugee but for the wider community as well, which is deprived of the opportunity to welcome the asylum applicant, to live with her, get to know her, and to be enriched by her differences. As a result, perceptions of the alien as dangerous, untrustworthy, and criminal persist, and the whole community is diminished.

The failure of both the expedited removal and mandatory detention policy to provide non-citizens with thoughtful, individualized determinations based on the particular circumstances of each case conflicts with both Biblical and American concepts of justice and compassion. "[R]emoving individuals without at least some sort of hearing undermines the perception that the United States is a Nation that believes in a fair judicial process governed by the rule of law."¹³¹ Similarly, a failure to provide reasoned consideration of individual circumstances and to create exemptions from mandatory detention for vulnerable populations, such as the elderly, unaccompanied minors, pregnant women, or the critically ill is in conflict with these values.

130. *Id.* (citing UNHCR, *Detention of Asylum Seekers and Refugees: The Framework, the Problem and Recommended Practice*, a Conference Room Paper for the Standing Committee, EC/49/SC/CRP.13 (June. 4, 1999), paras. 14, 26) (internal citations omitted).

131. *Dissenting Views to Accompany H.R. 4437*, *supra* note 106, at 465.

The recommendations of the United States Commission on International Religious Freedom, in particular those that would result in a speedier adjudication of certain asylum claims,¹³² well-defined parole standards,¹³³ and improved conditions for those asylum seekers who are detained,¹³⁴ could lead to a significantly more hospitable asylum policy. In addition, to the extent that detention of asylum seekers is required for purposes of national security or ensuring appearance at asylum hearings, providing an individualized assessment of the risk posed by each asylum applicant would achieve those goals in a manner that is far less costly from both a human and an economic perspective. Such an approach would also comport with a conception of hospitality that views the refugee as a person, a neighbor, an individual with whom to enter a relationship, rather than as a monolithic and faceless “other.”

B. Criminalizing Unlawful Presence

No doubt in response to pressure to do something about the millions of undocumented migrants currently living in the United States, each of the reform proposals under consideration makes it a crime for a non-citizen to be present in the United States in violation of the immigration laws or

132. USCIRF recommended that the Department of Homeland Security “decrease the burdens on immigration courts, the detention system, and the applicants by permitting asylum officers to grant asylum claims during the credible fear interview.” USCIRF Report, *supra* note 117, at 66-67. If this recommendation were adopted, asylum officers would have three options at the close of the credible fear interview: (1) find that the alien has no credible fear and order him removed; (2) find that the alien has demonstrated that he suffered persecution or had a well founded fear of persecution and grant him asylum; or (3) find that the alien has established that he has a credible fear and refer the alien to an immigration judge for a hearing on his asylum claim. *Id.* “Allowing asylum officers to grant asylum at this stage would reduce demands on detention beds, EOIR resources, trial attorney time, and reduce the time the bona fide asylum seeker spends in detention.” *Id.*

133. USCIRF also recommended that the parole standards be codified into formal regulations and that procedures be put in place to ensure that the standards were applied consistently across the country. *Id.* at 67-68. Developing regulations, as well as standardized forms to implement the parole criteria and a review process to ensure that the criteria are consistently and properly applied, “will help ensure that asylum seekers who do not pose a security risk and who establish a credible fear of persecution, community ties, and identity are not improperly detained.” *Id.* at 68.

134. The USCIRF Report called for the detention of non-criminal asylum seekers in non-jail-like facilities. *Id.* Rather than implementing detention standards based on the penal or correctional model, USCIRF noted “that asylum seekers have different issues and needs than those faced by prisoners or even other aliens,” and recommended that “standards should be developed in recognition of this important distinction.” *Id.* In line with the special needs of detained asylum seekers, USCIRF also recommended that that “personnel in institutions where asylum seekers are detained [be] given specialized training to better understand and work with a population of asylum seekers, many of whom may be psychologically vulnerable due to the conditions from which they are fleeing.” *Id.* at 69.

regulations.¹³⁵ Currently, unlawful presence is a civil, not criminal, violation. Yet if any of these proposals were approved, all of the more than eleven million non-citizens present without authorization would be guilty of a crime, punishable by imprisonment from six months to twenty years.¹³⁶ In addition, even lawfully present non-citizens who commit a minor or technical violation of immigration laws – permanent residents who fail to report a change of address within ten days or university students who drop a course and fall below the minimum course load requirements—would be in violation of this new federal crime. What’s more, some non-citizens convicted of this crime would be guilty of an aggravated felony and, as such, subject to mandatory detention and removal, as well as permanent bars to any other immigration benefits or legal entry to the United States.¹³⁷

It is far from clear what would be accomplished by such a provision, other than giving a nod to constituents who demand a tough immigration enforcement bill. The amendment is not likely to solve the “problem” of the estimated eleven million non-citizens currently living in the United States without authorization. The burden on the government of prosecuting (not to mention incarcerating) even ten percent of the violators would be exorbitant, particularly if unlawful presence is made a felony and each non-citizen is entitled to the same rights as other criminal defendants, such as the right to appointed counsel and a jury trial.¹³⁸ It is also unlikely to compel violators to leave the country voluntarily or to deter future violators, given the remote possibility that they will be apprehended and

135. H.R. 4437 §§ 201, 203; S. 2454 §§ 203, 206; Chairman Arlen Specter’s Mark §§ 203, 206.

136. See H.R. 4437 § 203 (amending I.N.A. § 275 to make presence in the U.S. in violation of the immigration laws punishable by a maximum of one year and one day for a first offense, and up to two years for subsequent offenses); S. 2454 § 206 and Chairman Arlen Specter’s Mark § 206 (amending I.N.A. § 275 to make presence in the U.S. in violation of the immigration laws punishable by a maximum of six months for a first offense, and up to twenty years for repeat offenders and certain convicted felons).

137. See H.R. 4437 § 201; S. 2454 § 203; Chairman Arlen Specter’s Mark § 203 (amending the definition of aggravated felon to include any violation of I.N.A. § 275 for which the term of imprisonment is at least one year). I.N.A. section 237(a)(2)(iii) authorizes the removal of any non-citizen who has been convicted of an aggravated felony at any time after entry. I.N.A. section 208(c)(2)(C) provides for the termination of asylum by the Attorney General if an alien is found to have been convicted of an aggravated felony. Therefore, this expansion of the aggravated felony definition would be particularly harsh as applied to non-citizens applying for or granted asylum, who could potentially be returned to their country of persecution based on a conviction related to a period of unlawful presence in the United States before filing their applications for asylum.

138. It is hard to imagine that the law could even be widely enforced against the undocumented population. If the government were to prosecute violators of this new crime, they would be entitled to the same rights as other criminal defendants, such as the right to a jury trial and appointed counsel. The cost would be prohibitive. See Stanley Mailman & Steve Yale-Loehr, *Immigration Reform: Restrictionists Win in the House*, 11 BENDER’S IMMIGR. BULL. 1 (2006).

then targeted for criminal prosecution.¹³⁹ Nonetheless, to those who would support criminalizing unlawful presence, this provision might be viewed as a long overdue response to rampant illegal migration and appropriate punishment for those who violate our laws by entering illegally. In their minds the solution to the “problem” of illegal immigration may appear quite simple. If you want to come to the United States, you must come here legally – apply for a visa, get in line, wait your turn. If you choose to break the law and come without authorization, you will suffer the consequences. Of course, the reality is far less simple.

Most of those who enter the United States without authorization would not be eligible to enter legally for many years, if ever. This is because the principal avenues for legal immigration to the United States – through the sponsorship of a family member or employer in the United States – provide few viable options for the majority of people trying to come to the United States. For example, there are only 5,000 immigrant visas available each year to accommodate the demand in the United States for millions of low-skilled workers in construction, factory, housekeeping and landscaping jobs.¹⁴⁰ Although some additional non-immigrant visas for temporary low-skilled workers are available,¹⁴¹ these are restricted to agricultural or other temporary or seasonal work, so are not available to fill the demand for workers in year round jobs in hotels, restaurants, factories, meat packing and many other industries.¹⁴² Thus, there is no legal mechanism to match American employers offering jobs in these industries with capable and willing workers outside the United States. Unable to obtain employment-based visas, unskilled workers without an immediate United States citizen relative¹⁴³ face even more daunting challenges if they want to enter the United States through the family-based immigration system. With the exception of spouses, minor children and parents of United States citizens, non-citizens seeking to immigrate based on a family

139. In 2004, the Border Patrol apprehended approximately more than a million aliens who unlawfully entered or attempted to enter the United States from Mexico. Department of Homeland Security, Office of Immigration Statistics, *YEARBOOK OF IMMIGRATION STATISTICS: 2004* (2005), at table 38. Only about 16,000 aliens (mostly serial offenders) were convicted of the crime of unlawful entry. *Id.* at table 50.

140. I.N.A. section 203(b)(3)(B) allows for a maximum of 10,000 visas annually for unskilled workers, but Congress has temporarily reduced the number of these visas to 5,000 per year. Nicaraguan Adjustment and Central American Relief Act (NACARA) (enacted as tit. II of District of Columbia Appropriations Act of 1998, Pub. L. No. 105-100 § 203(e), 111 Stat. 2160, 2199 (1997)).

141. See I.N.A. § 101(a)(15)(ii).

142. I.N.A. section 214(g)(1)(b) limits the number of visas for non-agricultural temporary workers to 66,000 annually. See Rob Paral, *No Way In: U.S. Immigration Policy Leaves Few Legal Options for Mexican Workers*, IMMIGRATION POLICY IN FOCUS (July 2005), available at <http://www.aifl.org/ipc/nowayin.asp>.

143. Immediate relatives are spouses and minor children of United States citizens. Immediate relatives may immediately obtain visas to immigrate to the United States, and are not subject to any numerical limitations. I.N.A. §§ 201(b)(2)(A); 224.

relationship with a citizen or lawful permanent resident must endure prolonged waiting periods due to arbitrary numerical caps on available visas that can create delays of more than a decade.¹⁴⁴ In light of the strong economic incentive, as well as a desire to be reunited with family members in the United States, it is not surprising then that many non-citizens make the decision to enter or remain in the United States without authorization. For them, the certain consequences of not entering—unemployment, dire poverty, and painful separation from family—are likely far worse than the potential consequences of entering illegally and risking criminal charges and removal for being unlawfully present. After all, why would so many risk their lives to get here, if that were not true?¹⁴⁵ Once in the United States, why would they work the longest hours at the dirtiest, most dangerous jobs if their lives truly did not depend on it?¹⁴⁶

Nevertheless, by seeking to turn millions of non-citizens into criminals with the stroke of a pen, the United States would succeed in taking away their humanity and disconnecting from the tragedy of their situations. The United States would have not only sent the message that these non-citizens are not welcome in our communities, but would have further isolated and demonized an entire class of people that many would just as soon not really have to think about. Indeed, perhaps those who would criminalize non-citizens do so in order to satisfy themselves that their refusal to find ways to make room for non-citizens in our communities is justified. “We use harmful labels – such as illegal aliens –

144. Paral, *supra* note 142, at 5. In the case of Mexican nationals, wait times for visas under the “family preference” system are currently seven to ten years for the spouse of a lawful permanent resident, and ten to twelve years for the unmarried adult child of a United States citizen. *Id.* Brothers and sisters of United States citizens may endure waiting periods from twelve to twenty-two years. See 8 U.S. DEP’T OF STATE, VISA BULLETIN 94 (May 29, 2006), available at http://travel.state.gov/visa/frvi/bulletin/bulletin_2924.html#.

145. See George Bush, President, Briefing on Immigration Proposal (Jan. 7, 2004), AILA InfoNet Doc. No. 04010890, available at <http://www.aila.org/content/default.aspx?bc=1016%7C9600%7C9602%7C18598%7C9859>:

Their search for a better life is one of the most basic desires of human beings. Many undocumented workers have walked mile after mile, through the heat of the day and the cold of the night. Some have risked their lives in dangerous desert border crossings or entrusted their lives to the brutal rings of heartless human smugglers. Workers who seek only to earn a living end up in the shadows of American life, fearful, often abused and exploited. . . . The situation I have described is wrong. It is not the American way.

Id.

146. Daniel Groody, *A Theology of Immigration*, NOTRE DAME MAG., Autumn 2004, available at <http://www.nd.edu/~ndmag/au2004/groody.html>:

Willing to work at the most dangerous jobs, an immigrant a day will also die in the work place, even while for others the work place has become safer over the last decade. Immigrants die cutting North Carolina tobacco and Nebraska beef, chopping down trees in Colorado, welding a balcony in Florida, trimming grass at a Las Vegas golf course and falling from scaffolding in Georgia.

Id.

to effectively preclude our ever having to consider them as members of our neighborhoods and congregations."¹⁴⁷

While creating these harmful distinctions between native and non-citizen is clearly at odds with a Biblical mandate to practice a hospitality that breaches the walls of nationality, ethnicity, race, language, or economic status separating one from the other, this is not to say that hospitality demands amnesty for each of the more than eleven million undocumented non-citizens in the United States. In addition to an obligation to welcome the stranger, the United States has a clear moral obligation to respond to the suffering and needs of the citizens and residents already living within its borders.¹⁴⁸ The United States also has a moral obligation to offer relief to those suffering around the world as a result of war, poverty, and disease. Responding fairly to all of those obligations requires the drawing of lines and the making of choices, and this compromise can be accomplished in a manner that is humane and consistent with religious values. So, when thinking about immigration reforms, it is appropriate to simultaneously consider issues of national security and the economy and to recognize that we live in a universe of finite resources. Nevertheless, while a fair balancing of these competing values might not lead to the eradication of all restrictions on a person's right to immigrate to the United States, it would suggest that arresting, detaining, convicting, and removing undocumented non-citizens simply because they entered the United States seeking a job and a better life for their families cannot be morally justified. It would also suggest that we cannot neglect our responsibility toward our neighbor simply because he is not "one of us" or because we believe he has no right to be here.¹⁴⁹ Indeed, though the Biblical narratives suggest that the duty to welcome the stranger in need falls on everyone, those who have the most to offer,¹⁵⁰ as well as those who have very little to give,¹⁵¹ the United States, with its abundant

147. Lilia Fernandez, *Strangers in Our Midst: The Good Samaritan Today*, NEW WORLD OUTLOOK, Mar.-Apr. 1997, available at <http://gbgm-umc.org/umcor/refugees/goodsamaritan.stm>.

148. Many of the Biblical commands to offer hospitality address not only the stranger or the alien, but other vulnerable populations, including the widow, the orphan, the sick and the poor. See *Leviticus* 19: 9-10; *Deuteronomy* 26: 11-13. There are also explicit commands to reach out to our neighbor. See *Matthew* 22:35-39; *Luke* 6:31; *Galatians* 5:14.

149. See Plaut, *supra* note 90 (discussion of cities of refuge); see also *Mark* 2:13-17; *Matt* 9:9-13; *Luke* 5:27-32; 7:36-50, 19:1-10 (for examples of Jesus offering hospitality to lawbreakers and other sinners).

150. *Luke* 16:19-31. Relating the parable of a rich man who did nothing to help a sick and hungry beggar named Lazarus lying in his doorstep. When Lazarus died, he went to heaven, but when he died, the rich man went to hell, doomed by his failure to show mercy for the poor.

151. *1 Kings* 17. Relating the story of the prophet Elijah, commanded by God during a drought to go to a poor widow to demand water and bread. Though the widow has nothing for herself or her son, she shares what little she has with Elijah and is later rewarded when Elijah brings her son back to life.

resources, has a clear moral responsibility to do whatever is possible to ease the suffering of the migrant on their doorstep.¹⁵² The sovereign right of the United States to control its borders should not have priority over basic human rights.

Instead of criminalizing and deporting millions of undocumented non-citizens – an option that is likely to be unworkable in any event – we should find a way to effectively welcome them as full members of our community. This response would be both practical and just. First, providing a real opportunity for these non-citizens to regularize their status and eventually become legal residents would make it possible to find out who they are, where they come from, what they do, and why they are here. Having this information would not only make it easier to monitor the activities of all non-citizens, but would make it possible to identify those who might pose a threat to our security. Second, by regularizing their status and authorizing them to work, these non-citizens would no longer be at the mercy of and subject to the exploitation and abuse of unscrupulous employers, and would be more likely to receive fair compensation and benefits for their work. Employers in need of workers would also have a pool of willing and able workers to fill job openings without having to turn to an underground and illegal workforce, and these workers would continue to contribute to the economy of the United States and, through remittances to family members, the economies in their home countries.¹⁵³ Finally, no longer burdened by their illegal status, non-citizens would not have to live in fear and isolation and would be able to become full members of the community, with their contributions to that community appreciated and respected.

152. The Catholic Church, which has long recognized the right of all people to conditions worthy of human life and, if these conditions are not present, the right to migrate, has expressed this moral obligation as follows:

The Church recognizes the right of sovereign nations to control their territories but rejects such control when it is exerted merely for the purpose of acquiring additional wealth. More powerful economic nations, which have the ability to protect and feed their residents, have a stronger obligation to accommodate immigration flows.

United States Conference of Catholic Bishops, *Strangers No Longer: Together on the Journey of Hope*, at para. 36 (Jan. 22, 2003), available at <http://www.usccb.org/mrs/stranger.shtml>.

153. See *id.* at 35:

A broad legalization program of the undocumented would benefit not only the migrants but also both nations. Making legal the large number of undocumented workers from many nations who are in the United States, would help to preserve the labor market in the United States, to preserve family unity, and to improve the standard of living in immigrant communities.

Id.

C. *The Anti-Good Samaritan Provision*

Many of us remember the final episode of the television series *Seinfeld*, when Jerry Seinfeld and his friends were prosecuted for violating a Massachusetts law that required citizens to come to the aid of their neighbors in need. There were probably many water cooler discussions the next day about whether or not a law which requires someone to offer assistance to a stranger is a good thing, and there was no doubt some disagreement about whether or not the state ought to punish a person who chooses not to help his neighbor. On the other hand, it is hard to imagine that there would be much debate or disagreement about a law that *punished* a person who actually chose to help his neighbor. Most would agree that such a law would be absurd. Indeed, the idea that members of Congress would seriously consider a bill that criminalizes humane behavior is something one would expect to see on an episode of *Seinfeld*, but not on *CSPAN*. Unfortunately, this is precisely what Congress is currently doing.

Several of the current proposals for immigration reform contain provisions that amend the definition of the crime of alien smuggling. The existing alien smuggling provision is generally limited to activities more plainly related to alien smuggling and trafficking, such as harboring, concealing, transporting, and shielding non-citizens from detection.¹⁵⁴ The proposed amendments would expand that definition to include anyone who encourages, induces, assists or directs a non-citizen to reside or remain in the United States, if that person knows or acts in reckless disregard of the fact that the non-citizen is present without authorization.¹⁵⁵ Like the existing law, the amendments would target and provide harsh penalties for actual alien smugglers and traffickers, whose activities have led to an increasing number of migrant injuries and deaths.¹⁵⁶ However, the more

154. I.N.A. § 274, 8 U.S.C. § 1324 (2005).

155. See S. 2454 § 205(c); Chairman Arlen Specter's Mark § 205; H.R. 4437 § 202. The provision in H.R. 4437 is the most expansive of the three proposals, adding to the definition anyone who "assists" or "directs" a non-citizen to reside or remain or to "attempt to reside or remain" in the United States. H.R. 4437 § 202. The final Senate bill provides a limited exception for prosecution under this provision for religious organizations working with certain missionaries and ministers and for,

an individual or organization, not previously convicted of a violation of this section, to provide an alien who is present in the United States with humanitarian assistance, including medical care, housing, counseling, victim services, and food, or to transport the alien to a location where such assistance can be rendered.

S. 2611 § 274. Although this exception is an improvement over the provision in H.R. 4437, and the other Senate bills, it is far from clear how such a provision, in particular the limitations to persons who have not previously been convicted of a violation under the statute, would be applied to individuals and organizations engaged on a regular basis in this type of humanitarian work.

156. *Desperados/Human Smugglers Deserve Harsh Penalties, But It Will Take More Than Prosecutions To Stem The Deadly Trade In Illegal Immigrants*, HOUSTON CHRONICLE, Feb. 14, 2006, at B8, available at 2006 WLNR 2578610 (reporting the death of nineteen illegal immigrants, including a five-year-old boy, of thirst, suffocation and heatstroke after

expansive language of the proposed amended definition could also reach almost any American who has regular contact with non-citizens, including friends, neighbors, family members, school teachers, doctors, nurses, social workers, members of the clergy, and legal service providers. A social worker counseling a non-citizen victim of domestic violence, an attorney who advises an illegally present person to apply for asylum, a church member who offers a member of her congregation a ride home, or a United States citizen living with an undocumented spouse, could all be prosecuted under the statute and face penalties if convicted including fines, seizure of assets, and imprisonment of up to five years or more.¹⁵⁷

Such an amendment not only flies in the face of any moral obligation to show hospitality, it quite literally turns the parable of the Good Samaritan on its head. Rather than encouraging citizens to reach out to strangers and aliens in need, regardless of who they are or how they got there, it would punish citizens for their acts of compassion and kindness. So, for example, Evangelical Christians like Maryada Vallet who are quite literally living out the gospel in the desert, bringing food and water to migrants and washing their blistered feet, could end up in jail for their efforts.¹⁵⁸ As could a law student working with a volunteer income tax

being locked in a stifling truck trailer by a smuggler and suggesting that increased penalties are unlikely to discourage human trafficking across the border); Richard Marosi, *Passage Poses Peril For Illegal Migrants*, CONTRA COSTA TIMES, Oct. 2, 2005, at Q4, available at 2005 WLNR 15512683 (suggesting that harsher penalties may lead to more migrant deaths since smugglers will be more likely to abandon migrants in the desert in order to avoid arrest).

157. See S. 2454 § 205(c)(1); Chairman Arlen Specter's Mark § 205(c)(1); H.R. 4437 § 202(a). Each of these proposals provides for fines and penalties, including up to five years imprisonment, for individuals who were not engaged in any of the prohibited activities for financial gain. Where the offense was committed for profit, maximum sentences ranging from twenty years to life can be imposed. *Id.* It is worth noting that in each of these proposals, the penalties are much higher for those engaged in the activity for profit. Presumably, this is meant as a disincentive for those engaged in the business of alien smuggling and trafficking, but the language of the provisions is broad enough that it could conceivably apply to attorneys engaged in the private practice of immigration law.

158. G. Jeffrey MacDonald, *On Immigration Issue Big Evangelical Groups Conspicuously Mum*, CHRISTIANITY TODAY, Jan. 20, 2006, available at www.christianitytoday.com/ct/2006/103/52.0.html. According to Vallet, "anyone who believes in the biblical story of the gentile who stopped to help a wounded man, should be outraged . . . that the government is making it a crime to be a Good Samaritan." *Id.* Even before this legislation was introduced, citizens were already being prosecuted for offering aid to migrants in the desert. See Andrew Gumbel, *Immigration Clampdown*, Mother Jones, Jan. 18, 2006, available at <http://www.motherjones.com/news/update/2006/01/immigration.html> (discussing the arrests of Daniel Strauss and Shanti Sellz, volunteers with the Tucson-based humanitarian aid group No More Deaths, for "transportation in furtherance of an illegal presence in the United States" and "conspiracy to transport in furtherance of an illegal presence in the United States," felonies punishable by up to fifteen years in prison, after they encountered three migrants with severe symptoms of dehydration in the Arizona desert last July and drove them to Tucson to get medical help).

assistance program who helps a low-income non-citizen prepare her federal income tax return.¹⁵⁹ If the proposal becomes law, the biblical promise that those who show hospitality to the stranger will be richly rewarded for their good works would be upended.

Religious leaders and others who work with immigrant communities have denounced this provision, saying it would jeopardize their work, compromise their moral integrity, and destroy their relationships with the immigrant community.¹⁶⁰ Los Angeles Cardinal Roger M. Mahoney, the leader of the nation's largest archdiocese, promised to defy the provision if it becomes law.¹⁶¹ In a December 30, 2005 letter to President George Bush condemning this provision, as well as the enforcement only immigration legislation that had just been passed in the House of Representatives, Cardinal Mahoney wrote:

While I am surely in favor of taking appropriate government action to protect the borders of our country, not every step is feasible or advisable. In effect, priests, ministers, rabbis, and others involved in various Church-related activities will be forced to become 'quasi-immigration enforcement officials.' It is staggering for the federal government to stifle our spiritual and pastoral outreach to the poor, and to impose penalties for doing what our faith demands of us.¹⁶²

For their part, the drafters of the legislation insist that the expansion of the definition of alien smuggling is not intended to harm or intimidate immigrant advocates and service providers. Jeff Lungren, a spokesman for House Judiciary Committee Chairman James Sensenbrenner, who is the primary sponsor of H.R. 4437, called complaints by Catholic leaders "a hysteria," asserting that the proposal merely tweaks current law so that law enforcement can more aggressively target human smugglers.¹⁶³ Similarly, a representative of Congressman Tom Tancredo denied any substantial changes to the definition and dismissed the possibility that the federal

159. Undocumented non-citizens who are working are required to file federal income tax returns. Though they cannot obtain a social security number, they can apply for a tax identification number. The immigration service also considers whether a non-citizen has filed returns and paid taxes when making decisions on application for citizenship. See Ginnie Graham & Jim Myers, *Illegal Immigrant Arrested*, TULSA WORLD, Apr. 21, 2005, at A1 (describing the arrest of a non-citizen after she was featured in a Tulsa newspaper article about a free tax service for non-citizens).

160. See Darryl Fears, *Latino Ministries Worried About Immigration Bill*, WASH. POST, Jan. 17, 2006, at A2; *Faith Leaders Say Criticism of Immigration Campaign Won't Deter Them*, available at www.usccb.org/mrs/faithleaders.shtml; MacDonald, *supra* note 158.

161. Katherine Jean Lopez, *Gospel of Dealing with Illegal Immigrants*, TIMES UNION, Mar. 20, 2006, at A7.

162. Letter from Cardinal Roger M. Mahoney, to George Bush, President of the United States (Dec. 30, 2005), in *Verbatim Verbatim The Clergy as Quasi Immigration Officials*, PHILADELPHIA INQUIRER, Mar. 12, 2006, at D2.

163. Fears, *supra* note 160.

government would prosecute charities under this law, insisting that any assertion to the contrary “isn’t in touch with reality.”¹⁶⁴ Nevertheless, that these reassurances might be less than convincing to the organizations and individuals potentially impacted by the new law is not surprising.

If in fact the proposed amendments to the definition of alien smuggling were not intended to alter or expand the scope of activity prohibited by the law, it would have been unnecessary for both Chairman Specter’s bill and S. 2454, offered by Senate Majority Leader Bill Frist, to carve out two new exceptions to the amended definition of alien smuggling. Both of these bills specifically exclude from prosecution under the amended alien smuggling provision religious organizations that provide room and board to certain undocumented non-citizens serving as missionaries and individuals providing emergency humanitarian care.¹⁶⁵ The existing definition of alien smuggling contains no such exceptions, presumably because the language is clear and narrow enough that such explicit exceptions were not necessary.¹⁶⁶ The exceptions in the Frist and Specter bills suggest that the drafters did in fact contemplate that the expanded language would encompass a broader category of activities than the existing law, including some non-criminal conduct by humanitarian organizations and individuals, and wanted to avoid that result. Thus, the fact that H.R. 4437, sponsored by Representative James Sensenbrenner, redefines alien smuggling more expansively than of any of the proposals by including “assisting” and “directing” a non-citizen to reside in or remain in or “to attempt to reside in or remain in” the United States, and does not contain even the narrow exceptions contained in the other bills, is a significant and understandable cause for concern among immigrant advocates.¹⁶⁷

Notwithstanding claims that immigrant advocates are suffering from hysteria or out of touch with reality, both H.R. 4437 and S. 2454 are

164. *Id.*

165. See S. 2454 § 205(c) and Chairman Arlen Specter’s Mark § 205(c). Both provisions create an exception to the definition of alien smuggling for bona fide non-profit religious organizations and their agents who,

encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of minister or missionary . . . in the United States as a volunteer who is not compensated, notwithstanding the provision of room, board, travel and medical assistance, and other basic living expenses.

Id. Each also provides an exception for individuals providing an alien with “emergency humanitarian assistance, including emergency medical care or food, or to transport the alien to a location where such assistance can be rendered, provided that such assistance is rendered without compensation or the expectation of compensation.”

Id. Neither of these fairly limited exceptions would protect the majority of religious workers, attorneys, social workers, teachers, family members, or other Good Samaritans providing non-emergency but nonetheless critical services to non-citizens.

166. I.N.A. § 274(a), 8 U.S.C. § 1324(a).

167. H.R. 4437 § 202.

focused almost exclusively on border protection and immigration enforcement,¹⁶⁸ and it is reasonable to suppose that the broad and ambiguous language in the proposed amendments would be interpreted very expansively, as that would be the interpretation most likely to prevent and discourage illegal immigration. Indeed, despite claims that the amendments are not intended as a tool to prosecute churches and charities providing aid to non-citizens, the reality is that the government is already using the alien smuggling provisions for that purpose,¹⁶⁹ and the more broad language of the amendment can only serve to increase the circumstances under which such prosecutions might be possible.

If the intention of the amendments is not to criminalize the Good Samaritan, but only to facilitate prosecution of true alien smugglers, and if the more expansive proposed language is necessary to achieve that, then exceptions for churches, humanitarian agencies and other individuals and organizations living and working with non-citizens and providing them with critical services, must be made explicit in the law. To do otherwise would not only be inhospitable to the strangers among us, but would also jeopardize vital programs providing services to those non-citizens, and unfairly punish individuals and organizations that recognize a moral imperative to treat their neighbor with justice and humanity.

V. CONCLUSION

The vast majority of United States citizens identify themselves as Christian, and a large number of this nation's voters and politicians believe that religious and specifically biblical values should inform our personal and political choices. At the same time, many of those calling for immigration reform at the present time pay little or no attention to the central biblical norm of hospitality to the needy stranger, and several key elements of these proposed reforms fly in the face of a biblical commitment to hospitality.

A consistent approach to the place of religiously informed arguments in our public discourse demands that the biblical virtue of hospitality to strangers be given appropriate weight in our debates about immigration reform. Moreover, the Bible's command to offer hospitality to the stranger

168. The titles of the various bills emphasize this point well. Compare H.R. 4437, the Border Protection, Anti-Terrorism, and Illegal Immigration Control Act of 2005, and S. 2454, the Secure America's Borders Act, with the Comprehensive Immigration Reform Act offered by Senator Specter, and with Senator Domenici's Welcoming Immigrants to a Secure Homeland Act ("WISH").

169. See Gumbel, *supra*, note 158. According to one humanitarian volunteer currently being prosecuted under existing law, "[i]f you find someone that is sick and dying in the desert, it's not just a legal question, it's a moral question." Kaira Espinoza, *Humanitarian Aid Volunteers Face Possibility of Prison*, EL TECOLOTE, Jan. 17, 2006, available at http://news.eltecolote.org/news/view_article.html?article_id=d3d3885648897ee3e669baa2aad1d7c3.

reminds us of moral duties beyond a narrow understanding of national security and provides a moral compass for weighing competing ethical claims in the immigration debate.

No nation can offer unlimited hospitality to all the world's peoples, nor is the American public prepared to accept an immigration policy based on hospitality alone. Still, paying serious attention to the biblical command to provide hospitality to the needy stranger demands, at the very least, offering special protection to those seeking refugee status and opposing proposals to criminalize and punish either the eleven million persons unlawfully present in the U.S. or the Good Samaritans coming to their aid. Indeed, when considering such proposals, the most nominally Christian nation in the world might do well to remember the fate of the Bible's most inhospitable city, Sodom.