

**Am I My Brother's Keeper?: Immigration Law Reform and the Liberty that is America
(A Legal, Theological and Ethical Observation on the Debate of Allowing Immigrant Amnesty).**

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Abstract

In response to the undocumented immigrant debate, article seeks to clarify and review U.S. immigration law reform and public policy measures regarding enforcement in relation to undocumented immigrants. Article notes U.S. constitutional and legal shortcomings regarding proposed U.S. immigration law reform. Article posits that examining U.S. immigration law reform and public policy measures through a coupling of legal, economic, theological and ethical bases of thought offers a better path toward treating undocumented immigrants with human dignity and balancing a sovereign's right in relation to the common good regarding border security, protecting U.S. citizens and promoting the humane treatment of immigrants. Article suggests that combining such disciplines provides solutions (*e.g.*, a guest worker program) regarding undocumented immigrants within the U.S.

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DRAFT. THIS ARTICLE IS A DRAFT.

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I. Immigration

This article addresses immigration law issues in relation to ongoing debates concerning immigrant amnesty or “changed legal status” as some in the discussion like to phrase the characterization. The goal of this article is to present an argument in support of immigrant amnesty based on economic, religious and ethical motivations. The hope is that such considerations might assist legislative and public policy gatekeepers to reflect beyond that of absolute legal stricture. That is not to say that the law as a matter of authority and guiding structure in its own right does not adequately address immigration issues. Yet, where the law offers a narrow lens and addresses in static measure immigration policies based on national security control, economic analysis and health concerns—theology and moral ethics offer additional and viable considerations. Such considerations include the humane and benevolent treatment of undocumented immigrants, which the legislature, as well as immigration law proponents ought to consider in the face of advocating strict deportation and restricted entry structures concerning legal and public policy measures regarding current and proposed U.S. immigration laws.

The methodology of this article initially involves observing the historical development of U.S. immigration law regarding U.S. Constitution rationales, the Immigration Nationality Act (the “Act”), immigration policy as a practical concern and the purpose and sunset or expiration of Section 245(i) of the Act.¹ After a review and

¹ The best characterization of U.S. immigration law or the Act offers a comprehensive set of all of the immigration sections enacted to cover immigration matters. The laws in entirety include: (i) the Immigration Reform and Control Act of 1986 (“IRCA”), (ii) the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), (iii) Section 245(i) of the Act and (iv) the Legal Immigration Family Equality Act (“LIFE”). See Bryn Siegel, Note, *The Political Discourse of Amnesty in Immigration Policy*, 41 AKRON. L. REV. 291, 292-304 (2008); see also Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); Illegal Immigration Reform and Immigrant Act, Pub. L. No.

commentary of the legal issues, this article will present several perspectives of why reforms of future U.S. immigration laws should allow immigrant amnesty. Such perspectives shall rest on supporting research, as well as advocate the position that philosophical and/or religious policy considerations should also augment the rigors of current legal and public policy reservations surrounding present U.S. immigration controls. Finally, the analysis will include thoughts and motivations in theological, economic and moral ethics as suggested components in determining U.S. immigration law and public policy decisions. Such considerations should help to reasonably guide and analyze immigration policy decisions regarding proposed solutions concerning the current undocumented immigrant debate. Thus, the hope is that this article's contribution to the current U.S. immigration debate will inject a benevolent component of theology and ethics as additional considerations to that of the *dead hand of the law*.

II. History

Historically, the United States Supreme Court interprets the U.S. Constitution as liberally yielding immigration enforcement and immigration policy matters to the supervision of Congress.² Such control is effectively absolute. This is so even when legislative motivation reaches the lows of racism and/or demonstrates capricious, arbitrary and ill-willed based rationales.³ The Court has ruled an over-arching and save-all power preservation regarding legislative power over immigration policy by stating,

104-208, 110 Stat. 3009 (1996); 8 U.S.C. § 1255(i) (West 2006), repealed; Legal Immigration Family Equity Act, § 1(a)(2), 8 U.S.C. § 1255 (2000).

² See *The Chinese Exclusion Case*, 130 U.S. 581, 602-06 (1889); Louis Henkin, *The Constitution and the United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 856-63 (1987).

³ See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Shaugnessy v. United States ex rel. Mexei*, 345 U.S. 206 (1953); *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc); see also Adam B. Cox and Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 822-23 (2007).

“Congress has the inherent power to control immigration based on the sovereignty and nationhood of the United States.”⁴ Moreover, “. . . the Constitution does not bar Congress from enacting laws inconsistent with the international obligations of the United States”⁵ Based on this broad stroke interpretation of legislative power regarding immigration control and enforcement, the Court *usually* restricts the application of Constitutional rights and freedoms from alien matters.⁶ Consequently, the Act largely governs the process of immigration enforcement and that of policing alien citizenship.

A. 1986 Act

In 1986, President Ronald W. Reagan signed the Immigration Reform and Control Act (the “IRCA”) of 1986.⁷ The purpose of the IRCA was to increase border security and immigrant amnesty in a bid to resolve the undocumented immigrant dilemma.⁸ It is largely accepted that the purpose of the IRCA failed regarding reigning in undocumented immigrants.⁹

Following suit of the IRCA, the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), attempted to remedy the influx of undocumented immigrants. The IIRIRA’s greatest teeth came in the form of re-entry bans that barred undocumented immigrants from making application for citizenship and reentry into the

⁴ Henkin, *supra* note 2, at 853-54 and 857; *see also The Chinese Exclusion Case*, 130 U.S. at 603-06.

⁵ *See supra* text accompanying note 4.

⁶ Yet, the Court does apply the Fourteenth Amendment to allow equal protection of U.S. laws to aliens. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). The term “alien” appears in this part of the discussion because it is the nomenclature of U.S. Constitutional law cases. Throughout the remainder of this article, the more appropriate term immigrant will follow.

⁷ Immigration Reform and Control Act of 1986, Pub. Law No. 99-603, 100 Stat. 3359 (1986) (Codified as amended in scattered sections of 8 U.S.C.)

⁸ *See* Michael A. Scaperlanda, *Reflections on Immigration Reform, the Workplace and the Family*, 4 U. ST. THOMAS L.J. 508, 509 (2007).

⁹ *Id.*; *see also* Siegel, *supra* note 1, at 296-98.

United States when deported for illegal immigration violations or criminal activity.¹⁰ The reentry bans included three and ten-year bars when an immigrant suffered deportation from the United States and his or her illegal status existed for more than six months or greater than a year prior to deportation.¹¹ Many viewed the IIRIA as problematic because it resulted in stiff hardships and penalties against undocumented immigrants who for years had lived in the U.S. and made overall legal and positive contributions to the U.S. economic and social structure system.¹² Section 245(i) of the Act, however, offered to remedy the problem of the strictures of the IIRIA.

B. Section 245(i)

Section 245(i) of the Act offered undocumented immigrants the grace of applying for citizenship domestically versus having to return to a home country and then suffering application and citizenship bans.¹³ Section 245(i), then, offered undocumented immigrants a final alternative to the problematic catch-22 of the IIRIA.¹⁴ That is to say, undocumented immigrants could avoid deportation and suffering a bar from applying for citizenship even if they were living in the U.S. in violation of immigration laws. The only mechanical drawback to Section 245(i), in simplistic terms, was that it contained an active sunset or expiration date.¹⁵ Thus, undocumented immigrants who missed the expiration date faced the enforcement aspects of the IIRIA. As a last attempt to assist undocumented immigrants who might have an investment in years of positive contributions to the United States economic and social structure system, the Legal

¹⁰ See Siegel, *supra* note 1, at 298-300.

¹¹ *Id.*

¹² See Siegel, *supra* note 1, at 298-99; *see also* Scaperlanda, *supra* note 8, at 511.

¹³ See Siegel, *supra* note 1, at 300-04.

¹⁴ *Id.*

¹⁵ *Id.*

Immigration Family Equality Act (“LIFE”) offered an extension of Section 245(i) as a somewhat partisan compromise regarding immigration law policy.¹⁶ The deadline of Section 245(i) has passed, however, and the unimpeded strictures of the IIRIA are again effective.

In 2004, President George W. Bush offered proposed guidelines for legislation to provide for a temporary or guest worker program to offer undocumented immigrants a way to citizenship.¹⁷ The measure failed based on public perception that the worker program offered amnesty for undocumented immigrants to avoid deportation for violating U.S. immigration laws.¹⁸ The concept of amnesty plays a difficult spoiler and serves as an emotional prod toward negativity concerning immigration policy and undocumented immigrants.¹⁹ Let’s examine why immigrant amnesty is such a volatile concept.

III. Immigrant Amnesty

Why should the U.S. allow immigrant Amnesty? What are the benefits? Do the benefits outweigh the risks? Do the risks matter? The main objection to immigrant amnesty is that most U.S. citizens express a fundamental commitment to the legitimacy and enforcement of U.S. immigration laws.²⁰ That is to say, most Americans expect the application and enforcement of immigration laws regarding the prevention of illegal entry and residency into the United States.²¹ Their viewpoint is that the law of the land strictly

¹⁶ See Siegel, *supra* note 1, at 302-03.

¹⁷ *Id.* at 323 n. 187.

¹⁸ *Id.* at 323-25.

¹⁹ *Id.* at 320-25.

²⁰ Notable is that most Christians rely on scripture to accommodate the position that undocumented immigrants are not following the structure of law and therefore are outside the boundaries of righteousness. See, e.g., Aquiles Ernesto Martinez, *The Immigration Controversy and Romans 13:1-7*, 27 APUNTES: THEOLOGICAL REFLECTIONS FROM A HISPANIC-LATINO CONTEXT 124 (2007).

²¹ See John F. Kavanaugh, *Amnesty? ‘Let Us Be Vigilant and Charitable,’* ETHICS NOTEBOOK: AM. 8 (March 10, 2008) (noting sentiments of criminality and strictures of legal enforcement by those opposed to undocumented immigrant hospitality or amnesty).

controls. Yet, is there a possibility that the law, while amoral in application, is existentially immoral? Stated differently, is immigrant amnesty likely to present a challenge and/or burden to the U.S. that justifies withholding a helping hand to individuals persecuted and/or marginalized in their home country? Some assert that immigrant amnesty is problematic because an inflow of immigrants over saturates labor into U.S. job markets and presents notable health risks to citizens.²² These two arguments have some merit.²³ Yet, there are several other considerations regarding the question of immigrant amnesty that paint alternative pictures and offer compelling pros versus any perceived negatives.

A. An *ex post* status is okay

Before examining the pros of immigrant amnesty, a basic question is how to determine who receives amnesty? A related analysis concerning immigrant entry screening is useful. Adam B. Cox and Eric A. Posner discuss generally the effectiveness of procedural methods concerning immigrant entry into the United States in relation to enforcement and administration of U.S. immigration laws.²⁴ Cox and Posner advocate an *ex post* selection criteria for screening immigrants upon entry into the U.S. This type of immigration procedure offers an effective manner to enforce U.S. immigration laws. The method involves the quality of information regarding the evaluation of individual immigrants concerning overall contributions to the U.S.

Several benefits accompany the *ex post* method of immigration.

²² See, e.g., Peter Burns and James G. Gimpel, *Economic Insecurity, Prejudicial Stereotypes, and Public Opinion on Immigration Policy*, 115 POL. SCI. Q. 201 (2000) (noting economic concerns and even racial stereotypes as negative opinions toward immigrant entry into the United States);

²³ See William W. Chip and Michael A. Scaperlanda, *The Ethics of Immigration: An Exchange*, FIRST THINGS: A MONTHLY J. OF RELIGION AND PUB. LIFE (May 2008) (commenting on contending views about, *inter alia*, the economic effect of undocumented immigrants on U.S. labor markets).

²⁴ Cox and Posner, *supra* note 3, at 826-31.

First, an *ex post*-factor examination of immigrants deters those immigrants who are not friendly toward assimilation into the U.S. economic and social structure system.²⁵ This is so as a matter of the mere likelihood of the risk of the immigrant facing rejection and deportation back to his or her home country.²⁶ The sentiment is why risk the trouble of committing to the immigration process if the end-result does not garnish permanent entry for the immigrant?²⁷ Second, *ex post* evaluations offer a more complete evaluation of immigrants in the sense that pre-entry, or as Cox and Posner note “*ex ante*,” evaluations by comparison are often incomplete and don’t offer a full evaluation of an immigrant’s potential contribution to the fabric of the U.S. economic and social structure system.²⁸ Cox and Posner’s contribution to the immigration law debate, then, offers a potential methodology for immigration law reform and public policy measures concerning undocumented immigrants and immigrant amnesty.

From a perspective similar to Cox and Posner, generally, one might synthesize that immigration enforcement regarding undocumented immigrants might also account for *ex post* factors in relation to immigrant amnesty. In such an instance, through allowing immigrant amnesty provisions within the Act, officials can account for and justify retention of undocumented immigrants within in the U.S. in relation to whether such individuals during a period of illegal status demonstrated desirable and legitimate contributions to the U.S. economic and social structure system. The advantage, then,

²⁵ Cox and Posner, *supra* note 3, at 827-8. Cox and Posner define such risk as a “Country-Specific Investment,” meaning a risk akin to a financial investment as related to the status of the immigrant or a “relationship-specific investment.” *Id.* The ultimate goal is “continued residency in the country.” *Id.* This article will forego the discussion concerning risks associated with *ex post* evaluations regarding immigration. For further reading, however, Cox and Posner, *supra* note 3, at 831 sufficiently cover such risks.

²⁶ Cox and Posner, *supra* note 3, at 827-29.

²⁷ *Id.*

²⁸ See *Supra* note 25 and accompanying text.

becomes that those undocumented immigrants who meet the requirements of such a proposed statute in conjunction with perhaps time lived in the U.S. would also face the obligation of demonstrating positive work history and an absence of criminal activity. Thus, the burden falls on the immigrant to demonstrate *ex post* evidence that yields satisfactory evaluations of his or her contributions to the United States economic and social structure system.

1. Migration and contribution

Since economic contribution will drive a large part of allowing amnesty to undocumented immigrants, a brief discussion regarding economic viability is in order. In discussing economics concerning immigration laws and factual matters, Howard F. Chang asserts that the benefits of migration and the contributions to labor from immigrants in the U.S. are economically positive.²⁹ Chang posits that migration of workers into countries of superior wages, such as the U.S., is akin to free trade and distributive justice.³⁰ Such expressions demonstrate economic normalcy in a capitalist market system such as the U.S. Thus, arguably migration offers continued effective labor and desired diversity within the U.S. economic system. It seems counter intuitive then to place needless restrictions on the migration market and consequently free market system to the detriment and well-being of millions of immigrants and others throughout the world.³¹

As noted earlier, there are other considerations beyond law and economics regarding U.S. immigration policies. As a country of religious freedom, honor and

²⁹ See Howard F. Chang, *The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory*, 41 CORNELL INT'L L.J. 1, 6-10 (2008).

³⁰ *Id.* at 5-7.

³¹ *Id.* 6-12.

arguably superior humanitarian initiatives—morality and ethics must also serve as measuring tools in the debate of immigrant amnesty concerning U.S. immigration laws.

B. Immigration through ethics and theology

1. The human being as worth.

There is a point where ideology (religious or otherwise), moral considerations and ethics determine a conversation beyond the rigor of blind justice and deontological mandates. When considering questions that involve human classifications and existential consequences, religious and moral determinants must become a part of the discussion. In fact, let's examine such a discussion from the Catholic and other religious positions concerning virtue ethics.³² That is to say, let's enter into conversation about U.S. immigration policies from a human dignity perspective.³³

As a matter of religious or theological thought regarding human dignity, human beings exist in the image of God.³⁴ From this perspective, there is an innate human dignity.³⁵ That means that as created in the image of God, human dignity requires that human beings enjoy an existential freedom to participate equally in the benefits of

³² In the simplest terms, virtue ethics means how one responds to God, self and neighbor, as Charles E. Curran notes:

The Catholic tradition has generally seen virtue as a part of human flourishing and the call of God to strive for perfection in response to God's gift. The Catholic tradition has always insisted on a proper love of the self and the importance of happiness and self-fulfillment, not with the individual as absolute and the ultimate, but as a part of God's gracious reign and love. Love of God, love of neighbor, and love of self ultimately fit together. The Christian [, then,] brings the human to its greatest perfection. There is virtue in this context of this theologically grounded vision of human flourishing and happiness.

Charles E. Curran, *THE CATHOLIC MORAL TRADITION TODAY: A SYNTHESIS* 122 (Georgetown University Press 1999).

³³ See, e.g., Michael A. Scaperlanda, *Immigration Justice: Beyond Liberal Egalitarian and Communitarian Perspectives*, 57 *REV. SOC. ECON.* 523, 533-35 (1999).

³⁴ *Id.* at 533-35.

³⁵ *Id.*

creation.³⁶ This is so no matter the status of an individual regarding race, gender, socio-economic or nationality concerns.³⁷ Charles E. Curran notes that the doctrine of creation from one perspective of virtue ethics presents the position that “human beings [enjoy the right] to a minimally decent human existence”³⁸ In this line of thinking, Catholic and Christian protestant tradition hold truth that as a matter of the state, or rather a prosperous commonwealth enjoying a vast abundance of God’s created goods, “[such] goods of creation exist primarily to serve the needs of all.”³⁹ “All other rights whatsoever, including private property rights and free commerce, are to be subordinate to [the God mandated principle] of the goods [in relation to] creation.”⁴⁰ The commonwealth’s task in relation to this mandate is to provide for its members *and* others *via* the shared benefits of goods. Thus, Curran posits that “[t]he doctrine of creation recognizes that God made the world and material creation to serve the needs of all God’s people not just a few.”⁴¹

A shallow response to such virtue reasoning would offer an immediate condemnation of it being a socialist and/or communist propaganda. Yet, Curran notes, “[s]uch an approach [regarding the doctrine of creation and goods] does not deny the

³⁶ See cf. James H. Cone, BLACK THEOLOGY AND BLACK POWER 42-43 and 143 (Orbis Books 1997) (1969). From Cone’s perspective, an Afro-American liberation perspective, such existential freedom and enjoying the benefits of creation would suggest that this means being able to exist as one is created to exist. *Id.* at 42-43 and 143.

³⁷ Scaperlanda, *supra* note 33, at 534.

³⁸ Curran, *supra* note 32, at 122.

³⁹ *Id.*

⁴⁰ *Id.*; see also cf. Mathias Risse, *On the Morality of Immigration*, 22 ETHICS AND INT’L AFFAIRS 25, 28 (2008) (discussing the concept of “Egalitarian Ownership,” as meaning other than theological construct but standing for the proposition that “. . . humanity owns the earth in common [and that] mean[s] . . . everyone has a claim to an equal share of the planet’s overall resources; or . . . a collective process is needed to satisfy each co-owner as far as any use of . . . resources is concerned”)

⁴¹ Curran, *supra* note 32, at 122.

right of private property, but this right to private property is meant to order the destination [that is the purpose] of the goods of creation to serve the needs of all.”⁴²

a. comparative theology and ethics regarding human rights—world religions’ perspectives regarding the human being.

Other religions, as a matter of perspective, share similarly in the Catholic view regarding human dignity/rights; at least concerning the worth of human beings. There are not many differences between world religions’ positions concerning what Christianity (Catholic and/or Protestant) terms the doctrine of creation regarding human beings. Each faith tradition either promotes the belief that human beings deserve dignity as creatures of God or as a matter of obligation because of interrelatedness.⁴³ There is, however, vast doctrinal differences concerning why human beings deserve such dignity. Consequently, the goal of this part of the discussion is to offer a balanced view of how world religions might follow several theological constructs to coagulate such notions in relation to reforming U.S. immigration laws.

b. world religions regarding theology, ethics and U.S. immigration law reform and public policy.

The Buddhist tradition approaches human rights from the perspective of “the interdependence of all life.”⁴⁴ That is to say, the Buddhist perspective is one of interrelatedness. From the Buddhist worldview, the individual as a matter of self-awareness functions with others.⁴⁵ Thus, Buddhist hold, “as we affirm our own individual rights we must also be willing to give up ourselves in order to affirm the rights of

⁴² Curran, *supra* note 32, at 122 (citing David J. O’Brien and Thomas A. Shannon, editors, *Populorum Progression*, n. 22, CATH. SOC. THOUGHT (___)).

⁴³ Robert Traer, FAITH IN HUMAN RIGHTS: SUPPORT IN RELIGIOUS TRADITIONS FOR A GLOBAL STRUGGLE 99-146 (Georgetown University Press 1991) (as revised, *available at* <http://religionhumanrights.com/religion.htm> (select Religion, Buddhists, Hindus, Jews and Muslims).

⁴⁴ *Id.* at 133-41 (as revised, *available at* <http://religionhumanrights.com/religion.htm> (select Buddhists)).

⁴⁵ *Id.*

others.”⁴⁶ Islam approaches human rights from the perspective that human beings, as a creation, are a gift from God.⁴⁷ Even though Islam recognizes that human beings are made in the image of God, the faith views the importance of human beings as more of a benevolent gift, holding:

The value of the human person is absolute because the individual is humankind as a whole [and] “[t]he value of the individual is neither numerical nor rational nor social . . . it is the gift of God himself, a gift to man as such—without regard either for attributes of civilization or for historic renown or for the excellence of his self-consciousness.”⁴⁸

Islam, then, observes humanity as precious because of uniqueness. Thus, as a matter of Islamic principle, individuals belong to a collective common good of human existence.

Hinduism offers an experiential approach to human rights through providing a moral duty or reflective position based on one living in a positional manner regarding one’s lot or station in life.⁴⁹ Yet, reinterpreted Hindu notions present the belief, “[a]ll humans are equal as God’s creation but are not the same . . . therefore, all should give and receive according to their own nature.”⁵⁰ Thus, as a matter of traditional and revised Hindu perspectives, “[r]ights and duties of different people in different situations are different, but each human being deserves and should have equal consideration and concern.”⁵¹ Judaism provides specific religious guidelines concerning human rights. This is so particularly in the case of immigrants or the “stranger.”⁵² Judaism presents “no matter how lowly his origin, a man is here only by the grace of God—he owes his life to

⁴⁶ Traer, *supra* note 43, at 133-41.

⁴⁷ *Id.* at 111-23.

⁴⁸ *Id.* at 111-23 (citing Mohammed Allal Sinaceur, “Islamic Tradition and Human Rights,” IN PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 211 (UNESCO 1986).

⁴⁹ *Id.* at 129-133.

⁵⁰ *Id.*

⁵¹ *Id.* at 129-133.

⁵² *Id.* at 99-107.

no one but God. He has an equal right to pursue . . . life, liberty and . . . happiness [as a simple] virtue of the fact that he is a live human being.”⁵³

c. world religions and immigrant amnesty?

As a matter of synthesis regarding the various world religions, it appears that a common theological perspective exists concerning human dignity. The common world faiths’ notions present: (i) human beings exist in the image of God and have an innate human dignity; (ii) individual rights relate to the rights of others; (iii) human beings as individuals exist as a gift from God to all of humanity; (iv) while individual rights and abilities may differ, all human beings deserve equal consideration; and (v) no matter what differences, each human being has a right to live as a human being—meaning a pursuit of the good life.⁵⁴

From the foregoing synthesis regarding the world faiths’ notion of human beings, it seems one may legitimately address the matter of immigrant amnesty from a broad theological perspective that accounts for the balancing of competing U.S. resources (*e.g.*, economic concerns), citizenship and the common good of the country with that of the needs, considerations and existential worth of the immigrant. Thus, world religions’ perspectives buttress the notion that religious considerations usefully augment and assist in furthering the debate of U.S. immigration law reform and public policy matters concerning the view and treatment of undocumented immigrants.

The building block here, then, is to establish the framework that as a theological and ethical concern, the vast resources of the U.S., even as a matter of sovereign right and private capitalist doctrine concern, exist as goods created by God. Consequently, such

⁵³ Traer, *supra* note 43, at 99-107.

goods exist to benefit all of humanity—even in scarce situations. The question of immigration or migration by this reasoning, then, will naturally turn on how the abstract goods of democracy (*i.e.*, citizenship) in relation to finite goods such as property, food, and income should be destined or distributed toward all of humanity? From this perspective, the rule of law existing only in a vacuum offers a short-stepped solution to the problem of undocumented immigrants and the role of the U.S. people regarding immigration policy.

2. Where the law ends

The law as a unique manner reflects the will of any society that prescribes its controlling hand. Thus, the term the “dead hand of the law” describes our objective attempts at justice, fairness and humane solutions to societal shortcomings. Yet, the law can only guide the static course of society. The reflective wisdom of morality and ethics must also play a part in legislative decisions—the legislative intent—regarding U.S. immigration law and public policy. From such intent, society derives a common good. Unlike the U.S. Constitution in relation to not applying to a majority of alien rights, the theological notion of the common good applies to citizens and undocumented immigrants alike. Thus, where the law can’t apply in relation to morality or beneficial application to aliens, theology offers a bridge to those marginalized by factual oppression or invisible legal rights. What exactly, however, is the *common good*?

As a way of explaining the common good, an examination of what Robin Lovin notes as “the good life” is helpful. As a matter of simplicity, Lovin discusses the good life as “. . . giving up what is obviously and immediately good [as a personal concern or self

⁵⁴ For a discussion of the “good life,” *see* Robin Lovin, CHRISTIAN ETHICS: AN ESSENTIAL GUIDE 11 (Abingdon Press 2000).

related matter] in order to do something that makes a good life possible for others.”⁵⁵

From a protestant perspective, then, Lovin notes, “[i]f this is a world created by God as a place for human life, then our [personal] search for a good life . . . is not something that we have to give up in order to be a part of God’s people. *But we do have to pursue the good life in the context of a world that is shaped by God’s love for [all]*” (*emphasis added*).⁵⁶ The notion is equivalent to Curran’s Catholic discourse regarding creation discussed *supra*. Thus, for purposes of this article, the common good is living in relation to the benefits of the U.S. economic and social structure system and citizenry in light of the benefits derived to and from immigrants. That is to say, for one to consider effectively the common good for U.S. citizens and immigrants (whether legal or undocumented), one must move beyond fear toward a righteous or legitimate understanding of humanity from a theological and/or global concern.⁵⁷ This requires adjusting legal restrictions or at least forming legal policies in conjunction with theological and ethical considerations.

National security in terms of border patrols and deterring unauthorized migration into the United States is illustrative of what one might consider when forming legal

⁵⁵ Lovin, *supra* note 54, at 11-13.

⁵⁶ *Id.*, at 13.

⁵⁷ See, e.g., William R. O’Neill, S.J., and William C. Spohn, *Rights of Passage: The Ethics of Immigration and Refugee Policy*, 59 THEOLOGICAL STUD. 84, 99-100 (1998). Article examines the common good from a global perspective and notes:

In modern Catholic social teaching, the legitimate sovereignty of states in regulating immigration serves the global common good. This means that states are morally bound to respect and promote the basic human rights of both citizen and resident alien, especially the most vulnerable. *** [Thus, those most vulnerable (e.g., refugees, migrants, women and children, etc.) have the right to] emigrate, but [also] the right to immigrate . . . ‘when there are just reasons for it’”

Id. at 100.

Certainly political persecutions and poverty qualify as just reasons.

policies in conjunction with theological and ethical considerations concerning the common good for U.S. citizens and immigrants. What is important concerning the common good in relation to a sovereign's obligation to protect its borders and citizens, as well as extending humane care to the immigrant?

a. national security—a sovereign's responsibility concerning the "common good" in relation to border security to protect its citizens and balancing such security with humane immigration laws and public policy rationales.

“My own Christian faith tradition recognizes the rights of the sovereign (nation) to protect and control its borders in service of the common good of its citizens.”

*-Cardinal Daniel N. DiNardo of Galveston-Houston*⁵⁸

The notion of the common good cuts two directions regarding legal, theological and ethical analyses in relation to U.S. immigration law and public policy concerns in relation to border protection mandates. On the one hand, as noted from the discussion in the previous section, the immigrant deserves dignity and respect based on theological reasoning no matter what faith tradition one chooses to follow. On the other hand, a sovereign must protect its citizens and its God-given authority over resources concerning the prevention of waste and/or evil intentions of certain individuals against the sovereign and its citizens. Based on such competing perspectives, one might liken the notion that U.S. immigration law reform and public policy matters regarding the treatment of immigrants and border protection initiatives as a just war. Thus, it serves a reasonable purpose for this discussion to cover the notion of the common good in relation to border protection initiatives and U.S. immigrant law reform and public policy matters as calculated from a just war perspective.

b. just war and border protection.

A good starting point is to provide a definition of just war.

A just war involves taking forcible action in light of considering three principles governed by seven criteria. The first principle is akin to the common good. It states, “God, who is the Creator and Ruler of all, is in covenant with all.”⁵⁹ This notes God’s concern for all human beings as living in neighbor with one another and as trusting and loving.⁶⁰ The second principle is that “the world is persistently beset by conflicts among people.”⁶¹ Therefore, social conflicts and circumstances involving crime, group conflicts, “intentional and serious destructive attacks”⁶² and abuse of military power are active threats.⁶³ As a matter of course, then, because of the perpetual instance of social and circumstantial conflict, the third principle of just war is that a requirement exists that “. . . sometimes . . . the use of force [is appropriate] to protect victims from their attackers” (*emphasis added*).⁶⁴

There are seven criteria involving just war: (1) justifiable cause, (2) legitimate authority, (3) last resort observations, (4) a declaration of aims, (5) measurements of proportionality, (6) the reasonableness regarding the chance of success, and (7) right intention. Let’s briefly examine each criterion.⁶⁵

⁵⁸ Erik Noreiga, *Common Sense Needed to Resolve Immigration Crisis, Says Cardinal*, *THE PILOT*, Jun. 17, 2008.

⁵⁹ Joseph L. Allen, *WAR: A PRIMER FOR CHRISTIANS* 32 (Southern Methodist University Press 2001 (Originally Published by Abingdon Press 1991)).

⁶⁰ *Id.*

⁶¹ *Id.* at 33.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 34.

⁶⁵ *Id.* at 35-43.

Justifiable cause. As a matter of just cause, a just war involves the instance where “a valid reason for resorting to war [exists].”⁶⁶ Such reasons include (i) protecting citizens or people from an unjust attack, (ii) restoring rights wrongly taken away and (iii) defending or reestablishing political order.⁶⁷ Thus, as to just cause one must consider the basis of war or action. This is to occur beyond simple considerations regarding the purity or merit of either side.⁶⁸ The essence of just cause for war is judgment.

Legitimate authority. Authority for a just war involves judgment regarding “[w]ho should decide?”⁶⁹ That is to say, a just war must consider “the aims of serving the public and not merely private purposes.”⁷⁰ This requires that “legitimate authority . . . decide[s] for [its citizens,]”⁷¹ as well as “citizens [deciding] for themselves [to support a commonwealth’s decisions and/or actions regarding war.]”⁷²

Last resort. Any force taken must be a measure of last resort. That is to say, “[i]t is justifiable to resort to war only after all peaceful alternatives to war have been exhausted without success.”⁷³

Declaration of aims. In any war, the aims must be clear to a world community, as well as the enemy faced.⁷⁴ Thus, “. . . a government [and its citizens must] deliberate [and] reflect on the outcome it seeks in a war.”⁷⁵

Proportionality. The measures of war must be appropriate given the threat. In other words, a war is not just if it makes matters worse from the evil it sought to address.⁷⁶

⁶⁶ *Id.* at 36-38.

⁶⁷ Allen, *supra* note 59, at 36.

⁶⁸ *Id.* at 37.

⁶⁹ *Id.* at 38-39.

⁷⁰ *Id.* at 38.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 39.

⁷⁴ *Id.* at 40-41.

Chance of success. The overall chance of success must be valid or reasonable. Is the desired outcome reasonably attainable?⁷⁷

Right intention. The purpose of the war must be appropriate regarding intentions. Intentions involve two measures. First, the motives for going to war must not follow from hatred or revenge.⁷⁸ Second, the intention should be to reach a resulting and greater level of peace.⁷⁹

c. just war and immigration.

One should understand that the question of U.S. border security and the means to undertake such security regarding immigration matters is not entirely a matter of war, but the analogy is quite close. Thus, let's examine the notion of border security and immigration policy matters from the several criteria of the just war perspective while substituting "action" for the word "war."

Is there a justifiable cause to initiate and enforce stronger border policy and immigration laws based on the current positions concerning the debate regarding immigration law reform? Perhaps. As noted earlier, the debate hinges on security motivations, economic motivations and legal concerns. Therefore, all of these "causes" are just considerations in examining the need to take action regarding immigration law reform and border security measures.

Is the authority legitimate? On the one hand, there are legitimate considerations for border defenses regarding immigration law and public policy. As Cardinal DiNardo notes regarding the debate on immigration law and policy, "[a] sovereign [has the right] to

⁷⁵ *Id.*

⁷⁶ *Id.* at 41-42.

⁷⁷ Allen, *supra* note 59, at 42-43.

⁷⁸ *Id.* at 43.

protect and control its borders in service of the common good of its citizens.”⁸⁰ For sure, a commonwealth and its citizens have a right to protect the inflow and outflow of immigrants. Yet, there also must exist a notion that the common good toward human dignity, assisting the poor and those who are legitimately positive concerning intents toward the common good of the sovereign and its citizens apply equally and perhaps greater than taking a mere cavalierly attitude in resisting immigration into the commonwealth.

Are there other methods for addressing the immigration problem? There are. Yet, there will never be an eradication of all undocumented immigrants. Consequently, action taken regarding immigration law and public policy measures must consider various other means for accomplishing the goal of reducing undocumented immigrants. The distinction is not the erasure of immigration and migrant moves all together, but securing a legal status for those individuals who desire to come into the U.S. to add legitimate value and meaningful contributions to the country and better themselves.

Are the aims clear or emotional? Emotion often blinds good causes. That is to say, the aim regarding immigration law reform is to reduce undocumented immigrants versus resisting immigrants in total based on racial, socio-economic or nationality motivations. Thus, such knee-jerk reactions regarding immigration law reform offers meaningless measures and illegitimate action.

Is there proportionality? A growing issue exists regarding the question, measure and/or methods of the implementation of physical means concerning border security. There are recent calls to provide electric fencing and other forceful measures (*e.g.*,

⁷⁹ *Id.*

⁸⁰ Noreiga, *supra* note 58.

probes) to deter undocumented immigrants from entering into the U.S. Any legislation regarding immigration law reform and/or public policy concerning enforcement acts in relation to border security must be proportionate to the harms posed toward those illegally migrating into the U.S. The emphasis is that undocumented immigrants are human beings versus inanimate objects that one might callously suffer and subject to harsh physical deterrents.

Is there a reasonable chance of success? For sure, it is a difficult feat to eliminate all undocumented immigrant inflow into the U.S. If the stated measure is to reduce undocumented immigrants in the U.S., however, then there should be an objective policy concerning what number is acceptable. Obviously, no number of undocumented immigrants from a legal and administrative perspective is acceptable. Yet, arbitrarily assessing a number of reduction concerning undocumented immigrants is not a thinkable or reasoned solution. Certain measures should exist regarding why the U.S. should or shouldn't allow a set number of immigrants within the country. Such measures allow the commonwealth as well as its citizens to deliberate toward assessing acceptable immigration levels. A good position is Cox and Posner's suggestions regarding *ex post* measures as a solution for determining immigration policy measures to benefit the commonwealth and the immigrant.⁸¹

Are the intentions acceptable? This measure of just action regarding immigration law reform and public policy measures regarding border protection returns the discussion to more altruistic considerations. While the common good allows sovereigns to protect their borders, such protection must exist under legitimate intentions and righteous

⁸¹ Cox and Posner, *supra* note 3, at 822-23.

considerations. Thus, hatred, racism, selfishness and arbitrary responses to shape and motivate immigration law and public policy considerations are not fibers of just action.

d. law and theology applied.

Let's return to the analysis of considering theology in the debate of immigration law and public policy. From the perspective of just war and border security, immigration law and public policy considerations offer a duality of balance. On the one hand, protection of countries, their citizens and natural resources are just reasons for considering action regarding immigration control. On the other hand, the human dignity and balance of the immigrant still must come into the deliberation concerning any action to further the aims of immigration law reform. Thus, while a sovereign has the right to add to the common good of its citizens and protect the same against very real threats associated with immigration matters, a blind disregard of the common good concerning the immigrant is not permissible in the deliberation of a just cause to effect and implement border security or immigration law reform. Therefore, seemingly, the best path forward to a reasonable solution regarding immigration reform is to, at a minimum, have rationale and considered positions concerning goals and methods that balance between immigration laws and public policy measures in relation to border security and the existential state of immigrants.

e. avoiding fear

To have a meaningful discussion regarding immigrant amnesty, legal or otherwise, the conversation must move beyond fear. Most public opinion behind U.S. immigration law and policy involve dogmatic national security concerns, economic prosperity and

misapplications of scripture regarding the call to subject to government authority.⁸² That is to say, many U.S. Christians use scripture as a sword of truth to accomplish a desired means of personal and/or group lived notions to secure the good life. Here, there is not a vast measure of common good playing out for those underneath the thumb of legal or social normative interpretations. To address effectively undocumented immigration problems and legal immigration policy, our society as a whole must move beyond fear of outsiders. It is possible to uphold the laws of our society without relying upon fear of and/or intimidation of the immigrant.

f. accepting benefits beyond excuses

It is necessary to accept the benefit of immigrant amnesty beyond the reasons of no, never and not right now. In relation to the negative use of theology to justify the denial of immigrant amnesty, consider the most popular use of scripture to make the argument for denying undocumented immigrants amnesty—Romans 13:1-7.⁸³ This biblical passage

⁸² See, e.g., Martinez, *supra* note 20, *passim* (noting shallow use of scripture to justify current mistreatment of undocumented immigrants); Chang, *supra* note 29, *passim* (discussing inaccurate economic theory regarding undocumented immigrants); Chip and Scaperlanda, *supra* note 23, *passim* (same); see also, e.g., Virgil H. Goode, Jr., *Save America: Stop Illegal Immigration*, 42 U. RICH. L. REV. 831 (2008) (discussing national security concerns regarding undocumented immigrants from seemingly personal and extreme viewpoints).

⁸³ Romans 13:1-7 reads:

1Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. 2Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. 3For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and he will commend you. 4For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer. 5Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also because of conscience. 6This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing. 7Give everyone what you owe him: If you owe taxes, pay taxes; if revenue, then revenue; if respect, then respect; if honor, then honor.

Romans 13:1-7 (NIV).

mandates subjection to the rule of law and governmental authority. Aquiles Ernesto Martinez suggests that there is an improper understanding of the social, purposeful and authoritative intent behind Romans 13:1-7. Simply stated, “[those who advocate and respond to Romans 13:1-7] to encourage the church to submit to [immigration] laws . . . on the basis that they have been established by God, . . . [short sell the purpose and meaning of Romans 13:1-7 with] superficial [interpretations] and [a lack of] critical thinking.”⁸⁴ As noted, in most instances, U.S. immigration law and public policy offer the use of national security, economic corruptibility and public health concerns to justify the fear and exclusion of immigrants. Such fear complicates even theological considerations.

For the church, as well as those who would consider the ethical and moral implications of immigrant amnesty, moving beyond excuses such as the improper use of scripture, national security, health and even simple biases is necessary. As noted concerning the economic discussion regarding migration, immigrant contributions offer financial benefits to the U.S. economy.⁸⁵ Moreover, the argument of national security is more effectively addressed when it focuses on better immigration screening policies such as those suggested by Cox and Posner regarding *ex post* examinations of immigrants.⁸⁶ Such reasonable and innovative measures offer keenly sophisticated thought and deliberation versus inept and narrowed minded immigration policies that advocate the total annihilation and/or an isolationist position regarding immigration into the U.S.⁸⁷ Thus, the better course of action regarding U.S. immigration law and public policy is to

⁸⁴ See, e.g., Martinez, *supra* note 20, at 144 and *passim*.

⁸⁵ See, e.g., Chang, *supra* note 29, *passim*.

⁸⁶ See, e.g., Cox and Posner, *supra* note 3, at 826-31.

⁸⁷ See, e.g., Goode, Jr., *supra* note 82, *passim* (discussing closed border policies.)

scrutinize the benefits of citizens and immigrants regarding the U.S. economic and social structure system by observing immigrants from, at minimum, a relational point of view.

IV. Moral Relational Ethic

When a relational point of view comes into practice, the analysis examines how immigrant amnesty offers an opportunity for citizens and hopeful citizens of the U.S. to forge a combined ingenuity to keep America strong with diverse minds and creativity toward empowering a great nation to even greater accomplishments. Returning to the notion of the common good, Cox and Posner's theory that an *ex post* examination of immigrants results in better immigration policy based on better information regarding government and individual needs assessments offers almost a fortuitous brush of divine inspiration. That is to say, their legal analysis fits squarely with the doctrine of person in relation to the common good. Thus, a mixture of law and theology seemingly offers a highly effective course of action toward revising U.S. immigration law and public policy concerning undocumented immigrants.

If immigration policy allows migrants into the U.S. in line with a more "relationship-specific investment" model as suggested by Cox and Posner, a positive upside exists in that a relational model for accepting and responding to the labor contributions of many migrants is set into place. It makes sense that if recognition of such contributions of immigrants materializes then perhaps recognition of the human dignity of immigrants might also occur. Consequently, U.S. immigration policies could achieve the common good if an amnesty provision along similar lines extends to the many undocumented immigrants now within the United States.

Should an *ex post* examination of undocumented immigrants ensue based on a “relationship-specific investment” course of thought, which by theological account is the common good, then many undocumented immigrants once and for all would likely seek legitimacy through a probationary process versus a shadowy process. Thus, a relational immigration policy based on *ex post* measures might remedy the U.S. immigration dilemma. In this light, immigration amnesty for current undocumented immigrants—perhaps similar to the guest worker program suggested in 2006—could go far toward a first step in solving the U.S. undocumented immigration concern. For sure, the theology and ethics components as considerations suggest that such a relational model is viable.

V. Conclusion

In response to the undocumented immigrant debate, this article sought to clarify and review the U.S. legal history regarding constitutional law observations, legislative enforcement and public policy concerns regarding undocumented immigrants in the U.S. The purpose of this article sought to articulate that it is better to examine certain public policy matters such as immigration along not only legal strictures, but also as a matter of a rational religious basis of thought. From this perspective, this article offers that as a matter of human dignity and a state’s sovereign balance, the common good of U.S. citizens and immigrants results where a righteous discourse occurs regarding immigration problems in light of combining economic, legal, theological and ethical considerations. The combination of such disciplines seeks solutions regarding undocumented immigrants within the U.S. As a matter of such solutions, the combination of legal, religious and economic principles, then, results in offering immigrant amnesty as a matter of a relational and/or common good ethic (*e.g.*, a guest worker program). This result should

ensure to work a first step toward alleviating the U.S. undocumented immigrant dilemma and assist in effectively revising U.S. immigration law and public policy.

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