



2015

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Recommended Citation

Victor C. Romero, *The Prodigal Illegal: Christian Love and Immigration Reform*, 92 *Denv. U. L. Rev.* 917 (2015).

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THE PRODIGAL ILLEGAL: CHRISTIAN LOVE AND IMMIGRATION REFORM

VICTOR C. ROMERO[†]

INTRODUCTION

Despite the impasse around immigration reform, most everyone believes the United States' immigration system is broken. And most agree that the key issue is what to do with the eleven million or so undocumented persons¹ currently residing in the United States. As a Christian immigration law teacher,² I have been interested in the debate among the churches as to what such reform should look like. In this Article, I use Professor Jeffrie Murphy's conception of agapic love as a lens through which to examine reform proposals.³ I then evaluate the two positions Christian churches have seemed to embrace—permanent legal status on the one hand, full citizenship on the other—from both a gospel and legal perspective. To aid my analysis from the Christian perspective, I turn to Dr. Timothy Keller's interpretation of the Parable of the Prodigal Son;⁴

[†] Associate Dean of Academic Affairs, Maureen B. Cavanaugh Distinguished Faculty Scholar & Professor, Penn State Law. The idea for this paper came from the "Love and Law" Conference, sponsored by the Herbert and Elinor Nootbaar Institute on Law, Religion, and Ethics at Pepperdine School of Law in February 2014 (<http://law.pepperdine.edu/nootbaar/annual-conference/loveandlaw/schedule.htm>). Although winter weather prevented me from attending that symposium, I am grateful for the inspiration. An earlier version of this paper was presented at the Denver Law Review's *CrImmigration* symposium and at the Interdisciplinary Roundtable on Immigration (IRI) at Penn State Law. Thanks to participants at those events for their helpful comments and perspectives. Particular thanks to César Cuauhtémoc García Hernández and Jennifer Lee Koh for their thoughtful insights on an earlier draft and to Dean Jim Houck for his support of my work. Most important, thanks to Corie, Ryan, Julia, and Matthew for their constant love and for reminding me of what's most important in life. All biblical references are to the New International Version (NIV) except as noted. All errors that remain are mine alone.

1. Jeffrey S. Passel, D'Vera Cohn & Ana Gonzalez-Barrera, *Population Decline of Unauthorized Immigrants Stalls, May Have Reversed*, PEW RES. CENTER: HIS. TRENDS (Sept. 23, 2013), <http://www.pewhispanic.org/2013/09/23/population-decline-of-unauthorized-immigrants-stalls-may-have-reversed/> (estimating undocumented population at 11.7 million in 2012); Michael Hoefler, Nancy Rytina & Bryan Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, U.S. DEP'T OF HOMELAND SECURITY OFFICE OF IMMIGRATION STATISTICS 3 (Mar. 2012), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf (estimating undocumented population at 11.5 million in January 2011).

2. This is my third essay exploring legal issues from my faith perspective. My primary audience are other Christians well aware that I see but "through a glass, darkly" (*1 Corinthians* 13:12 (King James)). I am grateful for the perspective of others and offer mine as but one view on these complex issues. For the other essays, see Victor C. Romero, *Christian Realism and Immigration Reform*, 7 U. ST. THOMAS L.J. 310 (2010) [hereinafter Romero, *Christian Realism*]; Victor C. Romero, *An "Other" Christian Perspective on Lawrence v. Texas*, 45 J. CATH. LEGAL STUD. 115 (2006) [hereinafter Romero, *An "Other" Christian Perspective*].

3. Jeffrie G. Murphy, *Law Like Love*, 55 SYRACUSE L. REV. 15, 18–23 (2004).

4. See generally TIMOTHY KELLER, *THE PRODIGAL GOD XI–XV* (2008) (arguing that the parable was really about the "lostness" of both sons, not just the prodigal).

from the legal perspective, I examine the lived experiences of those subject to our current deportation laws. I argue that a thick conception of agapic, neighborly love requires embracing a pathway to citizenship as the only available reform option.

This Article explores what agapic love might look like in the context of formulating immigration policy regarding the undocumented. Despite what appear to be the strict borders of law that create categories of immigrant status and belonging, the Christian tradition of sacrificial love suggests a willingness to promote equality and reject subordination—in a sense, to set captives free.⁵

I. AGAPIC LOVE AND THE PRODIGAL GOD

In his seminal article, Jeffrie Murphy asks, “What would law be like if we organized it around the value of love and thought about and criticized law in terms of that value?”⁶ Murphy answers by focusing on agape, which he equates with a “love of neighbor.”⁷ Elaborating further, Murphy asserts that “[s]uch love is concerned not simply with satisfying preferences, alleviating distress, providing for people’s material well-being, and thereby making their lives more pleasant (i.e., liberal compassion) but is also centrally concerned with promoting their moral and spiritual good—helping each one to grow in virtue.”⁸

In Christian circles, the Parable of the Good Samaritan⁹ is usually invoked as the paradigmatic illustration of neighborly love. When the young lawyer asks Jesus to define who his neighbor *is*, the teacher replies by telling a story of what a neighbor *does*.¹⁰ Jesus challenged his listeners by choosing a despised minority as his hero, as it was the Samaritan traveler—and not the priest or the Levite—who showed agapic love to the Jewish crime victim on the side of the road, caring for him despite the social boundaries that divided their cultures. Indeed, immigration scholar Michael Scaperlanda cited this parable as an important touchstone for his Catholic Christian vision of a just immigration policy.¹¹

5. Cf. *Luke* 4:18 (“The Spirit of the Lord is on me, because he has anointed me to proclaim good news to the poor. He has sent me to proclaim freedom for the prisoners and recovery of sight for the blind, to set the oppressed free . . .”) (quoting *Isaiah* 61:1) (internal quotation mark omitted).

6. Murphy, *supra* note 3, at 18.

7. *Id.*

8. *Id.* at 22.

9. *Luke* 10:25–37.

10. *Luke* 10:36–37 (“Which of these three do you think was a neighbor to the man who fell into the hands of robbers?” The expert in the law replied, ‘The one who had mercy on him.’ Jesus told him, ‘Go and do likewise.’”).

11. See Michael Scaperlanda, *Who Is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 *CONN. L. REV.* 1587, 1612–13 (1997) (“The Parable of the Good Samaritan provides an excellent backdrop to illustrate my Catholic Christian vision of America’s constitutional duty toward permanent resident aliens.”). There has been some excellent recent scholarship regarding immigration policy and biblical principles, though primarily from a Catholic per-

While Professor Scaperlanda's work focused primarily on legal immigrants and lawful permanent residents, I am interested in exploring the other end of the immigrant population: the undocumented—those here without proper papers. In this analysis, I turn to a different Bible story that has helped me better understand the debate regarding the legalization of this population: the Parable of the Prodigal (or “Lost”) Son:

Jesus continued: “There was a man who had two sons. The younger one said to his father, ‘Father, give me my share of the estate.’ So he divided his property between them.

“Not long after that, the younger son got together all he had, set off for a distant country and there squandered his wealth in wild living. After he had spent everything, there was a severe famine in that whole country, and he began to be in need. So he went and hired himself out to a citizen of that country, who sent him to his fields to feed pigs. He longed to fill his stomach with the pods that the pigs were eating, but no one gave him anything.

“When he came to his senses, he said, ‘How many of my father’s hired servants have food to spare, and here I am starving to death! I will set out and go back to my father and say to him: Father, I have sinned against heaven and against you. I am no longer worthy to be called your son; make me like one of your hired servants.’ So he got up and went to his father.

“But while he was still a long way off, his father saw him and was filled with compassion for him; he ran to his son, threw his arms around him and kissed him.

“The son said to him, ‘Father, I have sinned against heaven and against you. I am no longer worthy to be called your son.’

“But the father said to his servants, ‘Quick! Bring the best robe and put it on him. Put a ring on his finger and sandals on his feet. Bring the fattened calf and kill it. Let’s have a feast and celebrate. For this son of mine was dead and is alive again; he was lost and is found.’ So they began to celebrate.

spective. See, e.g., Michael A. Scaperlanda, *Immigration Law: A Catholic Christian Perspective on Immigration Justice*, in RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW 292, 292–310 (Michael A. Scaperlanda & Teresa S. Collett eds., 2007); MICHELE R. PISTONE & JOHN J. HOFFNER, STEPPING OUT OF THE BRAIN DRAIN: APPLYING CATHOLIC SOCIAL TEACHING IN A NEW ERA OF MIGRATION xv–xix (2007); Mary Ann Glendon, *Principled Immigration*, FIRST THINGS (June 2006), http://www.firstthings.com/article.php?year=2007&month=12&title_link=principled-immigration---31. One recent non-Catholic analysis of immigration policy comes from an evangelical Christian congressional staffer. See James R. Edwards, Jr., *A Biblical Perspective on Immigration Policy*, in DEBATING IMMIGRATION 46, 46 (Carol Swain ed., 2008). For other Old and New Testament texts relevant to immigration see Romero, *Christian Realism*, *supra* note 2, at 323–29. Rather than focusing on specific biblical texts, Professor Jennifer Koh’s forthcoming article deftly analyzes the immigration debate through the lens of grace. See Jennifer Lee Koh, *Christianity, Grace, and the Immigration Laws* (unpublished manuscript) (on file with author).

“Meanwhile, the older son was in the field. When he came near the house, he heard music and dancing. So he called one of the servants and asked him what was going on. ‘Your brother has come,’ he replied, ‘and your father has killed the fattened calf because he has him back safe and sound.’

“The older brother became angry and refused to go in. So his father went out and pleaded with him. But he answered his father, ‘Look! All these years I’ve been slaving for you and never disobeyed your orders. Yet you never gave me even a young goat so I could celebrate with my friends. But when this son of yours who has squandered your property with prostitutes comes home, you kill the fattened calf for him!’

“‘My son,’ the father said, ‘you are always with me, and everything I have is yours. But we had to celebrate and be glad, because this brother of yours was dead and is alive again; he was lost and is found.’”¹²

In his book, *The Prodigal God*, Dr. Timothy Keller¹³ retitles the narrative “The Two Lost Sons,” not only because it comports with Jesus’s own telling of the story, but also because Jesus’s listeners would likely not have focused solely on the younger, prodigal son, but rather on the elder, upstanding one, as well.¹⁴ The story of the Two Lost Sons follows two other shorter ones in Luke’s gospel, all in response to a snide remark uttered by Pharisees who observed that Jesus “welcomes sinners and eats with them,” for he had attracted a crowd of tax collectors and other outsiders eager to listen to his teaching.¹⁵

Dr. Keller uses this parable to explain how the conventional title and reading of this story fails to fully capture the context and importance of its message about *both* sons’ “lostness” and the redeeming (and agapic) nature of the father’s love for them. The conventional reading of the parable focuses on the younger son’s profligacy—his utter disrespect for his father by insisting on receiving his inheritance (prior to his father’s death!) and then squandering it all on reckless living. Once spent and downtrodden, this son contritely returns to plead for his father’s mercy, not that he be restored to the status of son but that of hired hand.

12. Luke 15:11–31.

13. Through his writings and his ministry, Dr. Keller has quietly built a reputation for thoughtful, accessible Christian apologetics for modern readers. See, e.g., Michael Luo, *Preaching the Word and Quoting the Voice*, N.Y. TIMES, Feb. 26, 2006, <http://www.nytimes.com/2006/02/26/nyregion/26evangelist.html?pagewanted=all&module=Search&mabReward=relbias%3Aw>; Anthony Sacramone, *21st-Century Apologetics: Pastor Timothy Keller Makes the Case for Faith*, BOOKS & CULTURE: A CHRISTIAN REV. (2008), <http://www.booksandculture.com/articles/webexclusives/2008/march/080331.html?paging=off>.

14. KELLER, *supra* note 4, at XIV (“I will not use the parable’s most common name: the Parable of the Prodigal Son. It is not right to single out only one of the sons as the sole focus of the story. Even Jesus doesn’t call it the Parable of the Prodigal Son, but begins the story saying, ‘a man had two sons.’ . . . The parable might be better called the Two Lost Sons.”).

15. Luke 15:1–2 (internal quotation mark omitted).

But the son never gets a chance to repent, for the patriarch, in an utterly unbecoming act, runs to him, embraces and kisses him, and calls for an extravagant feast (complete with fattened calf) in celebration of his son's return! Read this way, the "Parable of the Prodigal Son" teaches Christians of God's limitless grace to the abjectly penitent. This is an attractive interpretation, for it gives hope to those who, like the younger son, have wallowed in obviously sinful behavior. Yet, this reading of the story is nonetheless incomplete, for it does not reckon with the status of the older son.

Dr. Keller reminds us that the conventional reading fails to explain how the older son—the elder brother—fits into the narrative. The elder brother's equally sinful nature is revealed when he learns of his younger sibling's return. While he was dutifully working in the fields, the elder brother heard celebratory music; he discovered that a feast was being held to honor his licentious brother's return. At this revelation, the older brother became angry, refused to join the festivities, and disrespectfully rebuked his father. From the elder brother's perspective, it was blatantly unfair for the father to celebrate his sibling's return when the elder son had never been rewarded for his years of faithful service: "Look! All these years I've been slaving for you and never disobeyed your orders. Yet you never gave me even a young goat so I could celebrate with my friends. But when this son of yours who has squandered your property with prostitutes comes home, you kill the fattened calf for him!"¹⁶ In pleading with him to join the celebration, the father spoke firmly yet kindly, reminding the elder brother of his privileged status and entreating him also to extend grace to his younger sibling for returning to the fold: "'My son,' the father said, 'you are always with me, and everything I have is yours. But we had to celebrate and be glad, because this brother of yours was dead and is alive again; he was lost and is found.'"¹⁷

Keller notes two lessons in the elder brother's strong reaction and the father's gentle response. First, the elder brother is just as sinful and as lost as the younger one. And second, the father's response is the corrective to both sons' "lostness"; the father's grace, then, is the perfect example of agapic love.

Most people, whether Christian or not, understand where the younger brother went astray but may have a harder time finding fault in the elder brother's actions. Even in today's age, demanding one's inheritance from a still-living parent and then wasting it on far-flung, hedonistic pursuits would be, to many, foolish if not immoral. And so, the idea that the younger son was a "prodigal"—an impudent, extravagant spendthrift—translates well in most moderns' minds. The elder brother's la-

16. *Luke* 15:29–30 (internal quotation marks omitted).

17. *Luke* 15:31–32.

ment and refusal to join in the father's feast, in contrast, seems eminently reasonable. Wasn't the elder brother justified in his envious anger because he had been nothing if not the perfect son? Didn't the father owe him for the years of his slavish obedience? Why did the father choose to celebrate the prodigal over the moral? Keller argues that by extolling his moral uprightness, the elder brother revealed a heart that was just as sinful as his younger brother's:

What did the older son most want? If we think about it we realize that he wanted the same thing as his brother. He was just as resentful of the father as was the younger son. He, too, wanted the father's goods rather than the father himself. However, while the younger brother went far away, the elder brother stayed close and "never disobeyed." That was his way to get control. His unspoken demand is, "I have never disobeyed you! Now you have to do things in my life the way I want them to be done."

The hearts of the two brothers were the same. Both sons resented their father's authority and sought ways of getting out from under it. They each wanted to get into a position in which they could tell the father what to do. Each one, in other words, rebelled—but one did so by being very bad and the other by being extremely good. Both were alienated from the father's heart; both were lost sons.¹⁸

The elder brother thought he could earn his way into the father's good graces. Hence, it was utterly appalling to him that his father would then treat a disobedient younger son better than an obedient older one. The elder brother was estranged from the father because he felt superior to the younger one and believed his father's grace to his sibling unmerited.

The similar estrangement of both sons to the father leads to Keller's second argument: that the father is equally gracious to the immoral and moral, which should then prompt "moral" elder brothers to extend the same mercy to their "immoral" younger brethren. Keller contends:

If the elder brother had known his own heart, he would have said, "I am just as self-centered and a grief to my father in my own way as my brother is in his. I have no right to feel superior." Then he would have the freedom to give his brother the same forgiveness that his father did. But elder brothers do not see themselves this way.¹⁹

Because they view themselves as morally superior, elder brothers refuse to partake in the father's feast. It is the metaphor of the father's feast—the extension of God's grace and mercy—that sheds light on the meaning of agapic, or neighborly, love. By accepting the father's invita-

18. KELLER, *supra* note 4, at 35–36.

19. *Id.* at 57.

tion to celebrate the younger son's return, the elder brother would embrace and thus convey to his sibling the grace, forgiveness, mercy, and reconciliation evident in the feast. For the "elder brother" Pharisees who disdained Jesus's ministry to the "younger brother" tax collectors and prostitutes, this parable would have been an invitation to reflect not only on their own hard-hearted sinfulness, but also on the peace and reconciliation that comes with extending mercy to outcasts, just as God extends mercy to them. Just as the Good Samaritan modeled neighborly behavior, Jesus's Parable of the Two Sons reminds even so-called moralists that agapic love calls all of us to share grace with others just as we each receive grace from above. In the end, both sons are lost, and it is therefore the father's forgiveness to both that is the model of true agapic love.

Agapic love, then, requires a humility and awareness of one's own fallibility as a way of selflessly seeking the good of one's neighbors. Understanding one's lostness may well be a prerequisite to accepting solutions to situations that advance neighborly well-being in the furtherance of agapic love.

II. CHRISTIAN CHURCHES AND LEGAL STATUS FOR THE UNDOCUMENTED

But how might agapic love manifest in the context of immigration policy? How does the love of neighbor extend to those whose citizenship lies beyond our borders but who are currently living among us without papers?

Like many politicians, various Christian churches have weighed in on how to deal with the possible legalization of the millions of undocumented persons currently in the United States. The good news is that there is much common ground.²⁰ Citing various texts and traditions, churches seem to uniformly favor some form of legalization of those already here. Typically, this would involve those who either entered surreptitiously or whose visas have expired to pay a fine and adjust their status to a legal one. The main difference stems from what form that legalization might take. While some advocate a pathway to citizenship, others are reluctant to embrace such a solution. Advocates of a citizenship pathway include the United States Conference of Catholic Bishops, which supports what they term "Earned Legalization":

20. This common ground contrasts with the 2012 national platforms of the Democrats (pathway to citizenship) and Republicans (opposing any legalization program as amnesty). *Compare Moving America Forward: 2012 Democratic National Platform*, 2012 DEMOCRATIC NATIONAL COMMITTEE [hereinafter Democratic Platform], available at <http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf> and *We Believe in America: 2012 Republican Platform*, 2012 REPUBLICAN NATIONAL COMMITTEE [hereinafter Republican Platform], available at <http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf>. This divide is also currently reflected in the differing stances of the current Senate and House, where the Senate has endorsed a pathway to citizenship while certain House members favor legal status at best. See, e.g., *Immigration Impasse*, HOUS. CHRON., May 2, 2014, <http://www.chron.com/opinion/editorials/article/Immigration-impasse-5449547.php>.

An earned legalization program would allow foreign nationals of good moral character who are living in the United States to apply to adjust their status to obtain lawful permanent residence. Such a program would create an eventual path to citizenship, requiring applicants to complete and pass background checks, pay a fine, and establish eligibility for resident status to participate in the program. Such a program would help stabilize the workforce, promote family unity, and bring a large population “out of the shadows,” as members of their communities.²¹

Similarly, the United Methodist Church “supports a pathway to status that will allow those who now hide in the shadows to pursue their dreams openly, whether those dreams lead to citizenship, a work permit, permanent residence, or cyclical migration.”²²

In contrast, the Church of Jesus Christ of Latter-day Saints endorses legalization without requiring citizenship as an option: “The Church supports an approach where undocumented immigrants are allowed to square themselves with the law and continue to work without this necessarily leading to citizenship.”²³ Similarly, Texas Congressman Joe Barton (R-Ennis) announced that he would propose legal status—but not citizenship—for adults who came here without proper documents; opponents decry the proposal as amnesty in disguise.²⁴

Which of these two positions—legal status only, on the one hand, and a pathway to citizenship, on the other—best promotes agapic love? Keller’s interpretation of The Two Lost Sons helps me choose between the two. I see this policy debate mapping quite nicely onto the biblical story: Just as the father’s mercy enriches our understanding of agapic love, his approach provides an answer that helps us choose between these two policy options.

In my view, the undocumented migrants are represented in the parable by the younger brother. Regardless of how one views the seriousness of their transgression,²⁵ many in society believe that those who

21. Migration and Refugee Serv./Office of Migration Policy and Public Affairs of the U.S. Conference of Catholic Bishops, *Catholic Church’s Position on Immigration Reform*, U.S. CONF. OF CATHOLIC BISHOPS (Aug. 2013), <http://www.usccb.org/issues-and-action/human-life-and-dignity/immigration/churchteachingonimmigrationreform.cfm>.

22. *Terminology 2: Amnesty vs. Pathway; United Methodist Statements on Immigration*, UNITED FOR OUR NEIGHBORS, <http://www.tnjfon.org/resources/united-methodist-statements-on-immigration/> (last visited July 6, 2015).

23. *Immigration: Church Issues New Statement*, MORMON NEWSROOM (June 10, 2011), <http://www.mormonnewsroom.org/article/immigration-church-issues-new-statement>.

24. Maria Recio, *Barton To File Immigration Bill*, STAR-TELEGRAM (Apr. 28, 2014, 5:50 PM), <http://www.star-telegram.com/2014/04/28/5774065/barton-to-file-immigration-bill.html?rh=1>.

25. I do not consider surreptitious entry a criminal offense and have argued for its decriminalization. See generally Victor C. Romero, *Decriminalizing Border Crossings*, 38 FORDHAM URB. L.J. 273, 273 (2010). That notwithstanding, nearly half of all unauthorized migrants initially entered the U.S. with legal documents, according to the Pew Hispanic Center. See *Modes of Entry for the Unauthorized Migrant Population*, PEW RES. CENTER: HISP. TRENDS (May 22, 2006), <http://www.pewhispanic.org/2006/05/22/modes-of-entry-for-the-unauthorized-migrant-population/>.

break the law should pay their public debt. In this analogy, undocumented migrants are willing to pay a fine and step out of the shadows so that they may join their American brethren as productive community members. Like the younger son returning home, they are ready to rejoin society.

The elder brother plays the role of immigration reformers willing to allow for some legal status for the undocumented, but not citizenship. Just as one might question the earlier analogy between the younger brother and the undocumented, one may bristle at the comparison here, especially given the open disdain the elder brother had for the younger in the parable, something not present in any of the churches' statements on immigration. Indeed, one might argue that a better analogue for the elder brother would be the xenophobe who believes nothing short of criminal sanction and permanent expulsion would serve the ends of justice. Here is where Keller helps. The analogy works because persons and institutions that hold the "legal status only" view are blind to the privileges that come with U.S. citizenship, just as the elder brother failed to see that everything the father had was his. Citizenship is the only failsafe against deportation; by definition, U.S. citizens may not be deported from the United States. Lawful permanent residents and temporary guest workers, however, may be removed, if they run afoul of the law. Hence, just as the elder brother was blind to the privileged status he enjoyed living under his father's roof, legal status only advocates likely underestimate the difference citizenship makes.

And the difference that citizenship makes is a serious one, especially when it comes to one's deportability for committing even minor criminal offenses. For instance, the government may deport any noncitizen—whether a longtime lawful permanent resident or temporary visitor—who commits an "aggravated felony."²⁶ Although initially defined to target only serious offenders, the aggravated felony ground for deportation has grown exponentially since 1996, subsuming within it a whole host of low-level, nonviolent crimes including drug possession, drug addiction, petty theft, shoplifting, and undocumented entry following deportation.²⁷ Some of these crimes would not be felonies under relevant state law, and

Nor does current law treat overstaying one's visa a criminal offense. *See, e.g.*, ALISON SISKIN ET AL., CONG. RESEARCH SERV., RL33351, IMMIGRATION ENFORCEMENT WITHIN THE UNITED STATES 8 (2006), available at <http://fpc.state.gov/documents/organization/64931.pdf> ("The INA [Immigration and Nationality Act] includes both criminal and civil components, providing both for criminal charges (e.g., alien smuggling, which is prosecuted in the federal courts) and for civil violations (e.g., lack of legal status, which may lead to removal through a separate administrative system in the Department of Justice). Being illegally present in the U.S. has always been a civil, not criminal, violation of the INA, and subsequent deportation and associated administrative processes are civil proceedings." (footnote omitted)).

26. 8 U.S.C. § 1227 (2012); *Id.* § 1101(a)(43) (defining "aggravated felony").

27. OVERNING IMMIGRATION THROUGH CRIME: A READER 1, 15 (Julie A. Dowling & Jonathan Xavier Inda eds., 2013); *see also Aggravated Felonies: An Overview*, IMMIGR. POL'Y CENTER (March 2012), <http://www.immigrationpolicy.org/just-facts/aggravated-felonies-overview>.

the Supreme Court has occasionally intervened to curb immigration authorities' overreaching. Recently, the United States Supreme Court held that Adrian Moncrieffe's Georgia conviction for possession of marijuana with intent to distribute was not an aggravated felony.²⁸

At other times, however, the Supreme Court has allowed Congress to draw distinctions within naturalization law that have highlighted the divide between U.S. citizens and even longtime lawful permanent residents.²⁹ Tuan Anh Nguyen was born in Vietnam to an American father and Vietnamese mother who were not married. When he was six years old, Tuan moved to the U.S. with his father, Joseph Boulais, and became a lawful permanent resident. Boulais did not, however, seek to have Tuan naturalized as a U.S. citizen. Some sixteen years after living in the United States, Tuan pleaded guilty to sexual assault and was adjudged deportable. On appeal, Boulais presented an order of parentage from a state court based on DNA evidence, but the Board of Immigration Appeals dismissed the claim for Boulais's failure to comply with the statutory requirements to convey citizenship to Tuan, which specified different rules for birth mothers and birth fathers.³⁰ The Supreme Court upheld this gender distinction, deferring to Congress's judgment that, because birth mothers and fathers are differently situated at the child's birth, it was constitutionally permissible to require that fathers take extra steps to establish paternity notwithstanding uncontroverted evidence of a biological relationship between father and son.³¹ Whether one agrees with the Court's analysis or not, *Nguyen v. INS* illustrates the difference that citizenship makes. Had the Court acknowledged Boulais's parenthood—which it would have, had Boulais been Tuan's mother—Tuan would

28. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). Based on the recent oral argument, it appears the Court is headed toward a similar result favoring the noncitizen deportee in the recent crimmigration case, *Mellouli v. Holder*, in which the government sought removal based on Mellouli's conviction for possessing "drug paraphernalia"—in this case, a sock used to hide drugs. See Kevin Johnson, *Argument Recap: Mellouli v. Holder and Removal for a Misdemeanor Drug Paraphernalia (Sock) Conviction*, SCOTUSBLOG (Jan. 15, 2015, 2:59 PM), <http://www.scotusblog.com/2015/01/argument-recap-mellouli-v-holder-and-removal-for-a-misdemeanor-drug-paraphernalia-sock-conviction/>; see also *Online Symposium on Crimmigration Law: Supreme Court Hears Mellouli v. Holder*, CRIMMIGRATION (Jan. 13, 2015, 4:05 AM), <http://crimmigration.com/2015/01/13/online-symposium-on-crimmigration-law-supreme-court-hears-mellouli-v-holder/> (contributing commentary by Alina Das, Jennifer Lee Koh, Nancy Morawetz, Maureen Sweeney, and Craig Shagin).

29. See *Nguyen v. INS*, 533 U.S. 53, 57 (2001).

30. *Id.* at 57–58. For a recent, thought-provoking examination of removal practice and the murky contours of U.S. citizenship, see Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1829–30 (“[C]itizenship is clear for many individuals. But where the claims are not clear—and where the human stakes are arguably highest—the level of factual and legal complexity runs deep and has meaningful consequences that go to the heart of the government's immigration enforcement power. Citizenship claims thus illustrate how removability matters, how it is complicated, and how outcomes in citizenship claims may depend just as much on the government's actions—in responding to individual claims, in imposing difficulties to obtaining proof, or in construing the law—as on the merits of the individual's claim.”).

31. *Nguyen*, 533 U.S. at 73 (“To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it.”).

have been deemed a U.S. citizen and would not have been subject to deportation. U.S. citizens who commit crimes more heinous than Tuan's could not be banished by the immigration authorities because they are U.S. citizens.³²

Given this significant difference that citizenship plays, returning to the parable, it is the "citizenship option" proponents that are represented by the father and his example of true agapic love. These advocates' willingness to confer full citizenship upon those immigrants who opt for it parallels the father's welcoming embrace of his prodigal son home. And indeed, the father invites the elder brothers—those upstanding Christians who may not see the full value of their U.S. citizenship—to also celebrate their younger brothers' formal integration into our community.

Even assuming some accept my analogy, others may claim that there are at least three reasons why legal status only should be preferred to a citizenship option from both a legal and agapic love perspective. Limiting relief to legal status only (1) advances respect for the rule of law, (2) deters future undocumented migration, and (3) maximizes the migrant's options by permitting the opportunity to return home. While each holds some initial appeal, these reasons ultimately fall short from both a legal and gospel perspective.

First, proponents of the legal status only idea may believe that this option best advances respect for the rule of law. If submitting to legitimate government is both a biblical³³ and legal imperative, then there should be consequences for transgressing the law. As such, undocumented migrants should not be rewarded with citizenship for having failed to follow the law. Even under Professor Murphy's view of agapic love, criminal punishments are justifiable so long as they are not cruel;³⁴ in contrast, the proposal here is one that allows for integration through

32. Similarly, I discuss this difference in a recent article, comparing the effects of a minor marijuana charge against a U.S. citizen versus a noncitizen. See Victor C. Romero, *A Meditation on Moncrieffe: On Marijuana, Misdemeanants, and Migration*, 49 GONZ. L. REV. 23, 28–32 (2013). Admittedly, the U.S. government may seek to exile a U.S. citizen, but only after she relinquishes her citizenship; indeed, this is what happened to suspected terrorist Yaser Hamdi. Following the federal government's failure to convince the U.S. Supreme Court of its ability to indefinitely detain Hamdi, the government offered to return him to Saudi Arabia if he renounced his U.S. citizenship. See, e.g., *Hamdi Voices Innocence, Joy About Reunion*, CNN.COM (Oct. 14, 2004, 5:39 PM), <http://www.cnn.com/2004/WORLD/meast/10/14/hamdi/> ("Under the terms of his release, he was to renounce his U.S. citizenship and never travel to Afghanistan, Iraq, Israel, Pakistan, Syria, the West Bank or Gaza. He is also required to report any intent to travel outside Saudi Arabia for the next 15 years. If accused of any wrongdoing, Hamdi is to be subject to Saudi law.")

33. Paul's Letter to the Romans is often cited as a command to obey the government as God's representative on earth. See *Romans* 13:1-2 ("Let everyone be subject to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, whoever rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves.")

34. Murphy, *supra* note 3, at 29 (noting that hatred, cruelty, and callous indifference are inconsistent with agape).

eventual adjustment to permanent resident status while dispensing discipline by withholding citizenship.

It seems to me that those who oppose the citizenship option on “rule of law” grounds should oppose any form of legalization or amnesty.³⁵ Once some path to legalization is proposed, then the rule of law objection weakens. As to the notion that discipline—and therefore agapic love—is furthered by withholding citizenship, adjusting status already requires a penalty under both proposals because immigrants will need to pay a fine. If part of agapic love involves selflessly promoting the flourishing of the other, then the citizenship option does that, not just by safeguarding against deportation, but also by conferring the right to vote,³⁶ a privilege critical to the country’s commitment to democratic governance.

Relatedly, it may also be that legal status only advocates view undocumented migrants as criminals or criminals-to-be, that their willingness to transgress immigration law is equivalent to theft or worse.³⁷ Such advocates may fear the slippery slope. If undocumented migrants receive citizenship, what about those immigrants who have been convicted of minor crimes—may they receive citizenship, too? Legal status only becomes a hedge then: an opportunity to hold the Damocles sword of deportation over someone who, given their alleged criminal proclivity, would still be subject to removal.

While agapic love does not require tolerating ongoing sin, neither should it operate out of fear. Given the ever-broadening removal power of immigration authorities over even minor offenses, agapic love should err on the side of the powerless immigrant, not the powerful government. Apart from true threats to the polity,³⁸ immigrants should be embraced and welcomed as full citizens, not relegated to second-class status be-

35. Indeed, such opposition forms the basis of the Republican National Party’s platform in 2012. See Republican Platform, *supra* note 20, at 25 (“That is why we oppose any form of amnesty for those who, by intentionally violating the law, disadvantage those who have obeyed it. Granting amnesty only rewards and encourages more law breaking.”).

36. U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

37. I have heard these views expressed from time to time. One email I received intimated that border crossing may be similar to “breaking into a bank and stealing other people’s money.” Romero, *supra* note 25, at 281 (internal quotation marks omitted).

38. I agree with Dean Kevin Johnson that those who are true threats to the republic—like terrorists and serious criminals—may be subject to deportation. KEVIN R. JOHNSON, OPENING THE FLOODGATES 196–99 (2007). While some might argue that this simply shifts the locus of debate, I believe this shift is an important one, for it focuses the discussion on the right issues rather than on unspecified fears based on fear and prejudice. For instance, Professor Bill Ong Hing’s editorial regarding the influx of children and families from Central America correctly asks us to rethink whether deporting so-called “gang bangers” is the right approach, or whether investing in rehabilitation and societal integration of these minors would be a better policy. Bill Ong Hing, *Border Crisis Lesson: Reform Deportation Policies Toward Gang Bangers*, HUFFPOST POL. BLOG (July 22, 2014, 3:48 PM), http://www.huffingtonpost.com/bill-ong-hing/border-crisis-lesson-refo_b_5609667.html.

cause of some amorphous fear that their foreignness forever implies their criminal propensity.

The second claim appears to be an empirical one: that withholding rather than providing a citizenship option might be a better deterrent to future undocumented migration. If the best an undocumented person might aspire to is adjustment to legal residence, that still leaves open the possibility of future deportation, as illustrated above. Such a safeguard may deter further surreptitious border crossings.

While this claim has some appeal, studies of the inflow of undocumented migrants from Mexico do not list amnesty policies as a possible incentive to immigrate. A 2009 working paper estimating the cyclical inflow of undocumented migrants surmises that larger inflows into the United States correlate with poorer economic conditions in Mexico.³⁹ Similarly, a 2012 Pew Research report noted that net migration from Mexico has fallen to zero based on a number of factors related to economic opportunities and border enforcement initiatives.⁴⁰ While it is true that since the last immigration amnesty in 1986 there has been a large influx of migration from south of the border, a 2011 study by Joshua Linder concluded that the 1986 amnesty did not encourage such migration.⁴¹

Third, and finally, proponents of legal status only might assert this alternative maximizes the migrant's options by permitting the opportunity to return home. By limiting legalization to permanent resident status, the proposal permits the adjusting migrant to retain her original foreign citizenship, which would arguably facilitate her return home, if she so chooses.

In actuality, however, it is the citizenship option alternative that provides the most number of choices to the adjusting migrant. With the citizenship option, the lawfully resident migrant need not naturalize, but may choose to do so. Such a choice is not open to her under the legal status only proposal. Eliminating one option—full citizenship—actually diminishes choice. Consistent with agapic love, the United Methodist Church recognizes that leaving the full panoply of options on the table

39. Scott Borger, *Estimates of the Cyclical Inflow of Undocumented Migrants to the United States 2* (Ctr. for Comparative Immigration Studies, Working Paper No. 181, 2009), available at <http://ccis.ucsd.edu/wp-content/uploads/WP181.pdf>.

40. Jeffrey S. Passel, D'Vera Cohn & Ana Gonzalez-Barrera, *Net Migration from Mexico Falls to Zero—and Perhaps Less*, PEW RES. CENTER: HISP. TRENDS (Apr. 23, 2012) <http://www.pewhispanic.org/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less/>.

41. Joshua Linder, *The Amnesty Effect: Evidence From the 1986 Immigration Reform and Control Act*, PUB. PURPOSE 13, 14 (Spring 2011), available at <https://www.american.edu/spa/publicpurpose/upload/2011-Public-Purpose-Amnesty-Effect.pdf> (“[T]he findings refute unsubstantiated claims that the amnesty program encouraged further illegal immigration.”).

maximizes human flourishing and individual choice, allowing adjusting migrants to “pursue their dreams openly.”⁴²

While none of these three defenses appears to withstand closer scrutiny, there may be a practical reason for preferring the legal status only option—political viability. Recent surveys of Latina/o and Asian Americans suggest support for legalization, with or without citizenship: “[W]hen dealing with the issue of unauthorized immigration, being able to live and work in the U.S. legally without the threat of deportation is more important than a new government plan to obtain citizenship. This may reflect a possible opening for legislative compromise on immigration reform.”⁴³ Perhaps a politically viable compromise would be better than a preferable, though unviable, alternative. But the problem with the compromise is that it contains an erroneous assumption, which is embedded in the above quote: Legalization does not mean freedom from deportation. As *Nguyen* implicitly illustrates, citizenship provides the one sure defense against involuntary exile.⁴⁴

CONCLUSION

In *The Four Loves*, noted Christian apologist C.S. Lewis reminds us that our natural loves—Affection, Eros, Friendship—are nothing without Charity, for Charity reflects God’s love within us, helping us to love others above self.⁴⁵ Commentators read Lewis’s “Charity” as the equivalent of “agape”—“that deep, unconditional Gift-love that God has for us and that completes all other loves.”⁴⁶ Because God is love, we, as fallible humans, even at our best, can express love only imperfectly. Our natural loves die when we do, but God’s love endures. Like the father in the parable, God calls us “elder brothers,” we U.S. citizens who also claim to be Christ followers, to accept our younger brothers, those undocumented persons who now want to rejoin the fold. On our own, we cannot do this. But as Lewis and Keller remind us, with God’s help, we can reflect true agapic love in the policies we adopt. Perhaps as U.S. citizens it is difficult to fully comprehend our immunity from deportation, but once we grasp its import, we might realize that a pathway to citizenship appears best to promote the agapic love of our undocumented neighbors. Politically daunting it may be, but to seek anything less risks adopting the

42. See *United Methodist Statements*, *supra* note 22.

43. Mark Hugo Lopez & Anna Brown, *Hispanics Prioritize Legalization for Unauthorized Immigrants Over Citizenship*, PEW RES. CENTER (Jan. 23, 2014), <http://www.pewresearch.org/fact-tank/2014/01/23/hispanics-prioritize-legalization-for-unauthorized-immigrants-over-citizenship/>.

44. See *supra* notes 29–30 and accompanying text.

45. C.S. LEWIS, *THE FOUR LOVES* 116–40 (Houghton Mifflin Harcourt 1991) (1960) (chapter on Charity).

46. Brenton Dickieson, *And the Greatest of These . . . : A Review of C.S. Lewis’ Four Loves*, A PILGRIM IN NARNIA (Sept. 1, 2011), <http://apilgriminnarnia.com/2011/09/01/and-the-greatest-of-these-a-review-of-c-s-lewis%E2%80%99-four-loves/>; accord Art Lindsley, *C.S. Lewis on Love*, C.S. LEWIS INSTITUTE, http://www.cslewisinstitute.org/CS_Lewis_on_Love (last visited March 7, 2015) (noting that “charity” is C.S. Lewis’s word for “agape”).

stance of the elder brother, refusing to partake of the father's feast of love and reconciliation.

* * *

In Rembrandt's evocative depiction of *The Return of the Prodigal Son* below, one might contrast the kind, gentle hands of the father's embrace⁴⁷ with the concerned look of the elder brother, unaware of his spiritual distance from his father as he simultaneously keeps his physical distance. Echoing Keller's interpretation, theologian Henri Nouwen recorded the following reflection on Rembrandt's own duality:

Rembrandt is as much the elder son of the parable as he is the younger. When, during the last years of his life, he painted both sons in *Return of the Prodigal Son*, he had lived a life in which neither the lostness of the younger son nor the lostness of the elder son was alien to him. Both needed healing and forgiveness. Both needed to come home. Both needed the embrace of a forgiving father. But from the story itself, as well as from Rembrandt's painting, it is clear that the hardest conversion to go through is the conversion of the one who stayed home.⁴⁸

47. Unlike Keller's interpretation of the parable and Nouwen's reflections on the painting, this description of Rembrandt's work focuses exclusively on the relationship between the father and younger son, following the more conventional reading of the story:

Unforgettable is the image of the repentant sinner leaning against his father's breast and the old father bending over his son. The father's features tell of a goodness sublime and august; so do his outstretched hands, not free from the stiffness of old age. The whole represents a symbol of all homecoming, of the darkness of human existence illuminated by tenderness, of weary and sinful mankind taking refuge in the shelter of God's mercy.

Rembrandt's *Prodigal Son*, REMBRANDTPAINTING.NET,
http://www.rembrandtpainting.net/rembrandt%27s_prodigal_son.html (last visited March 7, 2015).

48. HENRI J.M. NOUWEN, THE RETURN OF THE PRODIGAL SON 65–66 (1992).

