

**HOPES AND DREAMS:
AN ASSESSMENT OF THE DEVELOPMENT, RELIEF, AND EDUCATION
FOR ALIEN MINORS ACT OF 2003 AND EARNED ADJUSTMENT PROGRAMS
IN THE UNITED STATES**

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INTRODUCTION: ILLEGAL IMMIGRATION REFORM IN THE UNITED STATES

Illegal immigration poses a challenge to the United States, a challenge that has spanned many decades, administrations, and legislation.¹ There is a universal consensus that illegal immigration in itself is wrong. The continued presence of a large contingent of individuals outside the law adversely affects the institutional health of the United States. Lax enforcement both at the border and within U.S. territory has led to a de facto acceptance of the illegal entry of undocumented immigrants which in turn damages the rule of law and hurts those who desire to enter the country through legal channels.² Indeed, as the federal government allegedly has sovereign authority to regulate the entry of persons into the United States, the existence of illegal flows usurps the sovereign authority of the state and undermines the institution of independence. Furthermore, undocumented immigrant workers help fuel a growing shadow economy that exists beyond the color of law and hinders community building among minority groups.³ Thus, illegal immigrants, regardless of their length of stay in the United States,⁴ all endanger the fundamental health of the state; yet, they should be approached with sympathy not contempt. Criticism of illegal immigration should not lead to criticism of the immigrants

¹ A description of the terms that will be employed is necessary before any discussion can be attempted. As such, the terms illegal alien, undocumented immigrant, and illegal immigrant will be used interchangeably and will refer to the same individual: one who, for all intents and purposes, is present within the United States illegally, either through illegal entry or by violation of their visa limitations. See Frank D. Bean, Barry Edmonston, and Jeffrey S. Passel ed., *Undocumented Migration to the United States: IRCA and the Experience of the 1980s* (Washington, DC: The Urban Institute Press, 1990): 11-12.

² Elizabeth Hull, *Without Justice for All: The Constitutional Rights of Aliens* (Westport, CT: Greenwood Press, 1985): 80-81.

³ Robert Suro, *Watching America's Door: The Immigration Backlash and the New Policy Debate* (New York: The Twentieth Century Fund Press, 1996): 34.

⁴ A more important distinction is based on the degree of commitment to reside in the United States. There are three main categories: settlers, sojourners, and commuters. Settlers are those undocumented immigrants who intend to reside in the country permanently. Sojourners, in contrast, reside only for a period of time— though the length of residence may actually be quite extended— and intend to return to their country of origin. Commuters differ from sojourners in that they cross the U.S. border on a regular, almost daily, basis. These distinctions are not absolute. See Bean, et al., 4.

themselves, because illegal immigration is a structural problem which stems from macroeconomic and social factors that are beyond the control of individual immigrants.⁵

Not only does the individual violate U.S. immigration law by entering or residing within the country illegally, but often times the entry itself is hazardous to their own person. Attempting to cross the U.S.-Mexico border illegally often leads to ransoms, high-speed chases, and even death by exposure to the deserts and mountains of the region.⁶ Crossing by sea is just as dangerous. The water route to the Bahamas, for example, is risky; starvation and murder are not uncommon.⁷ Moreover, no one disputes that “maintaining a large permanent illegal population [is] not a healthy thing for the United States.”⁸ Exploitation and abuse have spillover effects on local neighborhoods, increasing crime and lowering living standards. Law enforcement is particularly ineffective in protecting undocumented immigrants from these tactics, since seeking redress through law enforcement or criminal justice would expose them to deportation.⁹ The presence of illegal immigration may even increase in the future as a result of the continued need agricultural workers and others to work in various low-wage jobs.¹⁰ Not surprisingly, undocumented immigrants are often scapegoats, sometimes unjustly so, for many of the nation’s ills such as crime, unemployment, and fiscal deficits.

⁵ These factors include international labor recruiting networks, family reunification, and wage differentials. See Marcelo M. Suarez-Orozco ed., *Interdisciplinary Perspectives on the New Immigration Volume I: Theoretical Perspectives* (New York: Routledge, 2001): 232-233.

⁶ James G. Gimpel and James R. Edwards Jr., *The Congressional Politics of Immigration Reform* (Needham Heights, MA: Allyn & Bacon, 1999): 12.

⁷ Mark A. Siegel, Nancy R. Jacobs, and Patricia A. Von Brook, *Immigration and Illegal Aliens: Burden or Blessing?* (Wylie, TX: Information Plus, 1989): 70.

⁸ Suro, 36.

⁹ *Ibid.*, 36.

¹⁰ Barry Edmonston, ed., *Statistics on U.S. Immigration: An Assessment of Data Needs for Future Research* (Washington, DC: National Academy Press, 1996): 22.

A general consensus has been adopted regarding estimates on undocumented immigrants in the United States.¹¹ In the mid-1990s, there were approximated 3.8 million undocumented immigrants.¹² However, recent estimates now peg the total population as high as 7.5-9.5 million which, though considerably higher than previous estimates, is largely on the account of a large increase in the number of undocumented adults aged 20 to 45.¹³ The growing number of undocumented immigrants highlights not just how the inability of past measures to halt illegal immigration into the United States have failed, but also the greater need for the government to pursue immigration reform with the seriousness that it deserves.

Moreover, the burden placed on states by undocumented immigrants is not evenly distributed. According to INS estimates, around 40 percent of the undocumented population resides in California which is distantly followed by New York (15 percent) with the primary determinant being the ability to find employment.¹⁴ Eighty-five percent of all undocumented immigrants in the United States live in just six states: California, New York, Texas, Florida, Illinois, and New Jersey. The result of this has been disproportionate financial burdens placed on these states relative to the rest of the country, with California being its own unique case. This has important ramifications on the ability of states to fund important programs and services for undocumented

¹¹ Accurate data on undocumented immigrants is inherently all but impossible. Large-scale data sets regarding illegal aliens are virtually nonexistent. See Daniel B. Levine, Kenneth Hill, and Robert Warren, ed., *Immigration Statistics: A Story of Neglect* (Washington, DC: National Academy Press, 1985): 132. In fact, statistics are often politically influenced. See Bean, 16-18.

¹² Statement by Senator Mark O. Hatfield. See United States, Senate Committee on Appropriations, *Increasing Costs of Illegal Immigration*, Hearing, One Hundred Third Congress, second session, special hearing (Washington: U.S. GPO, 1994): 15.

¹³ Since the increase is attributed largely to working-age immigrants, the increase of undocumented children is thought to be negligible. See Jeffrey S. Passel, "Further Demographic Information Relating to the DREAM Act," *The Urban Institute*, 21 October 2003, 19 April 2004, <http://www.nilc.org/immlawpolicy/DREAM/DREAM_Demographics.pdf>.

¹⁴ Gimpel, 15.

immigrants within its borders such as education and health care.¹⁵ The presence of undocumented immigrants in concentrated clusters throughout the country means that the economic and social ramifications of their presence are also concentrated. The burdens placed on both the states as well as the federal government cannot be discounted; yet, the contributions that undocumented immigrants make towards American society also cannot be ignored.

Consequently, a clear need for comprehensive immigration reform exists in order to address the needs of the government, U.S. society, and the undocumented immigrants themselves. Efforts to control and reduce illegal immigration fall into two main categories: controlling the flow of illegal immigration into the United States and reducing the stocks of undocumented immigrants already residing within the country.¹⁶ This discussion focuses on the latter issue and addresses the viability of various proposals to reduce undocumented immigrant stocks. The control of illegal immigrant flows into the United States— which typically take the form of either border control or employer sanctions— is beyond the scope of this discussion. Generally speaking, two main avenues for policy exist for reducing stocks of undocumented immigrant stocks: deportation and legalization.

Deportation, while initially appealing, does not offer a feasible solution to the presence of millions of undocumented immigrants current residing in the United States. The best example of the difficulties that such a mass deportation would entail is “Operation Wetback” launched in 1954 by Attorney General Herbert Brownell and INS

¹⁵ Statement by Senator Mark O. Hatfield. See United States, *Increasing Costs of Illegal Immigration*, 15.

¹⁶ Discussion of illegal immigration can generally be categorized into stocks and flows. Flows refer to the actual movement of people across the U.S. border at a given time. Stocks are the numbers of undocumented immigrants already present in the United States at a given time. See Bean et al., 6.

Commissioner Joseph May Swing. The campaign was an attempt to essentially purge the country of undocumented workers through a massive repatriation effort: more than one million Mexican nationals were expelled. However, the campaign— which involved the use of late-night sirens and special forces— also resulted in the flagrant violation of the civil rights of U.S. residents.¹⁷ A similar operation can no longer be conducted, for though the public may favor the deportation of undocumented immigrants, they would not do so at the cost of civil liberties. Moreover, the judiciary, while acknowledging the right of the government to exclude aliens from the territory of the state, has also upheld certain constitutional guarantees for illegal immigrants including due process and equal protection under the Constitution.¹⁸

The only feasible alternative, therefore, is the legalization of undocumented immigrants, thereby bringing them into the embrace of the law. Senator Kennedy himself stated, “No reform will be complete without an adjustment program... All similarly situated, long-time, hard-working residents should have the same opportunity to become permanent members of our community.”¹⁹ Legalizing undocumented immigrants present within the United States alleviates the detrimental consequences of their presence and provides them the opportunity to contribute even more to American society. In fact, increasing the proportion of immigrants who are legal would benefit almost everyone. Legalized immigrants contribute more to government taxes on all levels and also possess a higher incentive to acquire skills and education. Moreover, the net fiscal cost of

¹⁷ Hull, 84-85.

¹⁸ In particular, *Wong Wing v. United States* establishes that anyone within the territorial jurisdiction of the United States is entitled to due process under the Fifth and Fourteenth Amendment of the Constitution. This finding has been upheld in *Graham v. Richardson* and *Plyler v. Doe*. See *Ibid*, 88-89.

¹⁹ Statement by Senator Kennedy in United States, Senate Committee on the Judiciary, *U.S.-Mexico Migration Discussion: A Historic Opportunity*, Hearing, One Hundred Seventh Congress, first session, September 7, 2002 (Washington: U.S. GPO, 2002): 4.

legalization is likely to be small, especially since even legal immigrants are excluded from many government assistance programs. Employers also stand to gain from reduced labor turnover and legal risks that would likely compensate for the higher wages they would have to pay. Legalization offers an avenue for immigration reform that leads to more beneficial consequences than deportation.²⁰

Typically, three main paths for legalization exist: amnesties, guest-worker programs, and earned adjustment programs. Amnesties generally adjust the status of undocumented immigrants to that of permanent resident, provided they meet broad criteria that include a certain length of stay in the United States and good moral conduct. Guest-worker programs allow undocumented immigrants to attain legal status for a limited amount of time, usually by issuing work permits. The majority of guest-worker programs target employment in industries such as agriculture and construction where a strong demand—often seasonal—for cheap labor exists. Earned adjustment, like amnesty, offers permanent resident status to qualified individuals, but they condition the adjustment of status on specific achievements such as educational attainment or consistent employment.

The intent of this discussion is twofold. The principal argument is that earned adjustment programs offer a superior alternative for reducing stocks of undocumented immigrants in the United States. In comparison to amnesties and guest-worker programs, earned adjustment is an approach to immigration reform that is more fair, compassionate, and effective. The second goal complements the first by focusing on a piece of specific earned adjustment legislation currently in Congress: the Development, Relief, and

²⁰ See the commentary by Gordon H. Hanson in Wayne A. Cornelius, Takeyuki Tsuda, Philip L. Martin, and James F. Hollifield, eds., *Controlling Immigration: A Global Perspective* (Stanford, CA: Stanford University Press, 2004): 86-87.

Education for Alien Minors (DREAM) Act of 2003. In advocating its passage, the hope is to show how a specific case of earned adjustment benefits all the actors involved: the beneficiaries of the Act, the government, and the American people as a whole. Furthermore, in supporting the DREAM Act as a model for the legalization of specific stocks of undocumented immigrants, earned adjustment programs gain further credibility as an effective method of immigration reform, thus reinforcing the primary intent of the thesis.

This thesis will first tackle the history of immigration reform and previous legislation on undocumented immigrants. In doing so, the need for an approach to immigration reform that differs significantly from the attempts at amnesty and guest-worker programs becomes apparent. Also, in highlighting the curtailment of immigrant rights, notably access to higher education, one can see that the inability of the federal government to resolve the problems of illegal immigration has led to legislation that impairs the rights of undocumented immigrants and their ability to contribute to U.S. society. The second section highlights the plight of a specific segment of the undocumented population: long-term resident minors who attend high school in the United States and cannot afford the non-resident tuition fees that state colleges and universities would charge them. As such, one can see how an injustice has been committed against individuals who have tremendous potential for achievement. Section three discusses the details of the DREAM Act and then goes on to present the various arguments for and against the Act. These arguments have been further sub-grouped into economic, moral, legal, and political debates. Finally, the fourth section looks at earned adjustment programs in general and compares them to amnesties and guest-worker

programs, thus highlighting the advantages earned adjustment programs have over the other two options.

I. THE IMPACT OF IRCA AND OTHER RELEVANT LEGISLATION

An understanding of America's previous attempts at immigration reform is vital for appreciating the importance of the current illegal immigration debate and the DREAM Act in particular. An assessment of the Act cannot take place within a bubble; a comparison of its approach with those taken in the past is essential for determining its worth. An account—albeit brief—of the efforts taken by the U.S. government to address the flow undocumented immigrants into the country as well as those already present within its border is necessary. The purpose of this overview is twofold. First, it helps showcase the failures of past U.S. programs to curb illegal immigration and address the situation of illegal immigrants already residing within the country. Second, it casts the current debate on the DREAM Act within the greater context of U.S. illegal immigration policy in order to better understand why earned adjustment is both different from past approaches and necessary for the United States.

The issue of illegal immigration—though present through most of American history—became a pressing concern to the government following World War II. Acknowledging the presence of those who entered the United States outside of legal channels (often referred to as EWIs because they “enter without inspection”)²¹ from Mexico, known then as “wetbacks,” Congress implemented the Mexican *Bracero* guest-

²¹ Another category of undocumented immigrants are those who enter with legal visas but violate their provisions, usually by remaining beyond the authorized time limit. These distinctions as to how undocumented immigrants enter the country are often made by the government to measure illegal immigration. See Bean, et al., 3.

worker program in 1942 in an attempt to curb the flow of illegal immigrants into the Southwestern United States while simultaneously recruit needed war-time labor, especially in the agricultural sector. This program “provided temporary work permits to Mexican nationals holding jobs in the United States, mostly in agriculture and construction.”²² Though the U.S. government argued that the program ensured that Mexican laborers were legally employed and thus spared from exploitation, the problems outweighed the program’s benefits. In reality, exploitation and abuse were never wholly cured. In fact, the Mexican government temporarily withdrew its support from the program due to widespread complaints by contracted workers. Most importantly, the *Bracero* program did nothing to reduce illegal immigration to the United States; it actually acted as a stimulant for illegal migration rather than an anathema by attracting more laborers than the program could accommodate. Additionally, when Congress finally terminated the program in 1964, many Mexican laborers could not feasibly return to Mexico because they were too dependent on their employment in the United States. As many as one million Mexican workers remained in the country even though their status became illegal.²³

Guest-worker programs do little to resolve the presence of illegal workers in the country since they do nothing to curb further illegal immigration. In fact, the 1942 *Bracero* program led to an increase in illegal immigration, as evidenced by Operation Wetback and by events following the termination of the program in 1964.²⁴ Once the program ended, individuals who received guest-worker status were immediately marginalized. As most guest-worker programs provide no avenue for the individual to

²² Gimpel, 11-12.

²³ Hull, 84.

²⁴ Bean et al., xxi.

seek permanent legal residency and eventual citizenship, the result is merely the temporary alleviation of the symptoms— exploitation and abuse— of undocumented immigration rather than addressing the root causes. Consequently, though the guest workers received some degree of protection, they still lacked job security, collective bargaining, and the ability to live permanently with their families in the United States. Furthermore, guest-worker programs often lack any access public benefits, such as unemployment coverage, Social Security, or Medicare.²⁵

By 1986, the INS conceded that it was simply unable to handle the number of undocumented immigrants that passed through its borders and resided in the United States. That year, Congress enacted the Immigration Reform and Control Act (IRCA) in an effort to halt the flow of illegal immigration and appease the public pressure placed on the government to solve this issue. IRCA had two main components: first, it contained a legalization program that provided amnesty to undocumented immigrants who had been present in the United States since 1982 and a guest-worker program for special agricultural workers (SAWs); second, it attempted to reduce the flow of illegal immigration through a combination of increased border patrols and employer sanctions. To date, IRCA has legalized approximately 1.8 million undocumented immigrants through its amnesty program and another 1.3 million as SAWs.²⁶ Despite this, IRCA did not meet the ambitious goal of U.S. lawmakers to put an end to illegal immigration primarily because employer sanctions have been poorly enforced.

The legalization program established by IRCA may have initially reduced the number of undocumented immigrants residing in the United States. However, their

²⁵ Charles Thompson Jr., “Dream or Déjà vu?” *Hemisphere: A Magazine of the Americas*, Vol. 14 (Fall 2004): 32.

²⁶ Bean et al., 2.

numbers were replaced by more undocumented immigrants entering the country since those who received amnesty moved on to higher-wage jobs. In effect, more undocumented immigrants replaced those that were legalized under IRCA. Many criticized IRCA for giving undocumented immigrants essentially a free ride and encouraging more individuals to enter the country illegally in the hope of future amnesties. Similarly, the SAW program did not reduce the number of undocumented agricultural workers in the United States: it only spread them further into the country. The internal migration of undocumented workers from primary states such as California and New York to other states such as those in the Midwest was largely due to IRCA's SAW program. This was particularly acute with the establishment of labor networking systems that allowed families to sneak into the country and find employment in all corners of the country.²⁷

The effectiveness of IRCA in reducing the flow of undocumented immigration has been uncertain at best. The first years of IRCA's implementation saw a decline in the number of apprehensions of undocumented immigrants by approximately 47 percent in 1989 despite border patrol increases. This decrease can possibly be attributed to IRCA's legalization programs. However, though the total number of apprehensions declined, reports indicated that the number of women and children crossing the border increased after 1986.²⁸ This may have been the result of family reunification where the newly-legalized worker brings his or her family into the country in the hope of legalizing them as well. Employer sanctions themselves did little to deter illegal immigrants from seeking employment in the United States. Inadequate enforcement, both of the sanctions

²⁷ Peter Duignan and L.H. Gann ed., *The Debate in the United States over Immigration* (Stanford, CA: Hoover Institution Press, 1998): 16.

²⁸ Bean et al., 152-153.

and along the border, negated the decreasing effect of IRCA's legalization programs, and thereby brought the rate of illegal immigration back to pre-IRCA levels, if not higher.²⁹

IRCA's amnesty and guest-worker provisions have thus been insufficient in addressing undocumented immigrants already present within the United States. One of the more subtle but potentially most damaging caveat of blanket amnesties such as IRCA was the effect on the perception of U.S. law. By granting legalization to individuals who have essentially violated the law to enter and stay in the country— with no particular criteria for their legalization— the United States effectively encouraged further illegal immigration into the country. Furthermore, it undermined the attitude both immigrants and natives had towards the rule of law.³⁰ Thus, while legalization may be necessary for immigration reform, amnesty does not provide an effective mode of legalization because its effects on public attitudes are tremendous.

The failure of IRCA to reduce both the flow of illegal immigration and stocks of illegal immigrants within the country may thus be partly responsible for the immigration backlash the United States witnessed in the mid-1990s. One of the more prominent examples was California's Proposition 187 that passed in 1994 by a vote of 59 percent to 41 percent. The Proposition denied undocumented immigrants access to schools, hospitals, and other public services. It also denied them access to higher educational institutions.³¹ Though many parts of the Proposition were struck down in federal court, the support for the Proposition shows the dissatisfaction that many citizens had towards the current state of illegal immigration. The denial of public benefits in California, where

²⁹ Michael C. Le May, *U.S. Immigration: A Reference Handbook* (Santa Barbara, CA: ABC-CLIO, Inc., 2004): 17.

³⁰ United States, *Increasing Costs of Illegal Immigration*, 4.

³¹ Duignan et al., 18.

the concentration of undocumented immigrants is the highest, was a reflection of anti-immigrant sentiments. Much in the same vein, the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) was also an embodiment of these negative feelings.

The IIRIRA and the 1996 Personal Responsibility and Work Opportunity Act (PRWOA) contained numerous anti-immigrant provisions that curtailed the benefits and services that were accessible undocumented immigrants. The PRWOA denied federal funds for “any grant, contract, loan, professional or commercial license, or retirement, welfare, disability, food assistance, or unemployment benefits.”³² For undocumented immigrants in particular, the Act specifically prohibited states from providing state or local benefits, with the exception of primary education and emergency medical assistance.³³ Thus, the two Acts reflected certain basic attitudes towards the role of immigration law: “protecting against an influx of criminal aliens, protecting against an influx of aliens likely to become public charges, protecting against the spread of disease, and protecting labor concerns.”³⁴ These are perennial concerns regarding U.S. immigration, and it is not surprising that— given IRCA’s failure to reduce illegal immigration— these fears returned to influence public policy.

By imposing additional restrictions on access to certain benefits, the IIRIRA attempted to provide federal and state governments relief from having to provide services for the growing number of undocumented immigrants in the United States. Most pertinent to this discussion is IIRIRA’s provision on public benefits and its attitude towards immigrant education. The antagonism towards immigrants is seen in the

³² Le May, 25.

³³ Ibid, 27.

³⁴ Nicholas Capaldi ed., *Immigration: Debating the Issues* (Amherst, NY: Prometheus Books, 1997): 134.

withdrawal of educational access for even legal immigrants. Section 505(a) of the IIRIRA is particularly insidious in barring undocumented immigrants from pursuing higher education and is of particular import in this discussion on undocumented immigrants and higher education. Though it does not explicitly prohibit states from providing in-state tuition to undocumented immigrants, it nevertheless mandates that states who choose to confer such benefits must also confer the same benefits to all U.S. citizens or nationals, regardless of state residency. Providing lower tuition fees to everyone is simply not within the financial capabilities of most state colleges and universities.³⁵

As the previous efforts at addressing undocumented immigration have so far met in failure, a new approach is required in order to resolve this issue at hand. While it is clear that a blanket amnesty such as IRCA does more harm than good, the opposite end of the pendulum— guest-worker programs— offer no hope for citizenship or permanent legal status. Furthermore, the political infeasibility of amnesties makes them unable to address the curtailment of immigrant rights. Similarly, guest-worker programs do nothing with regards to educational rights since they only apply to workers and not their families. Consequently, earned adjustment programs should be looked at as a serious alternative to immigration reform.

³⁵ Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. 104-208, 30 September 1996. Stat. 100.3009.

II. THE PROBLEM: HIGHER EDUCATION AND UNDOCUMENTED IMMIGRANTS

*Education was and is the key to equality and progress. Access to education is access to the future, and if you would condemn an individual or a group to subservience and dependence, you need only deny them access to education.*³⁶

~Wayne Johnson, President of the United Teachers of Los Angeles, 1985

The future does not seem as bright for Jackie as it once did. An outstanding high school student from Miami-Dade, Florida, Jackie had dreams of becoming a lawyer, but she cannot attend college or even get a student loan. As an undocumented immigrant, she is forced to pay non-resident tuition fees to attend college— something she cannot afford. Jackie cannot even reveal her last name or high school without fear of being deported, but she is just one of the thousands of undocumented high school students who have grown up in the United States and lack the financial capacity to attend college simply because they lack immigration documents.³⁷

“I studied here and graduated from school here, from kindergarten through elementary school and high school. I had really good grades. Now, I’m faced with this problem that has totally disrupted my life, and I feel like I deserved so much more,”³⁸ Jackie said when interviewed by the *Miami Herald*. Often times, these individuals only realize they are undocumented when they start applying to college. Jackie is one of the many victims of America’s flawed immigration system, but not the only one to speak out. Carl Schusterman, an immigration lawyer in Los Angeles, laments this fact: “They go through school as football stars, cheerleaders, and with straight A’s... When they try to

³⁶ See United States, House Committee on the Judiciary, *Impact of Illegal Immigration and Background on Legalization: Programs of Other Countries*, Ninety-ninth Congress, First Session, November 1985 (Washington: U.S. GPO, 1985): 64.

³⁷ See Alfonso Chardy, “Bill a Dream for Students ‘Stuck in Immigration Hell,’” *The Miami Herald*, 26 October 2003: 1B.

³⁸ See *Ibid.*

get to college, their parents come and ask me how to tell them they're illegal. It's heartbreaking. It's devastating."³⁹

Angela Perez also doubts that she will be able to attend college, even though she has lived in the country since she was 12— her parents originally brought her to the United States from Colombia. A straight-A student, volunteer, and a star on a Spanish radio show, her dreams of attending CUNY are dashed because she simply cannot afford it.⁴⁰ Jackie and Angela are just two of the estimated 65,000 undocumented immigrants who have lived in the United States for five years or more and graduate each year from U.S. high schools.⁴¹

Higher education is not the only obstacle that these young high-school graduates face, however. Even if their families could afford it, a degree means nothing when they are not legally entitled to hold a job. With the implementation of employer sanctions under the 1986 IRCA, employers are deterred from hiring individuals who lack adequate proof of their eligibility to work, thereby preventing undocumented immigrants from seeking decent jobs. The documents include U.S. passports or Alien Registration Receipt Cards, among others, which are necessary to establish proof that the individual is authorized to work in the United States.⁴² Since undocumented immigrants— even those with a college degree— lack these documents, they cannot be employed. Granted, many employers continue to hire undocumented immigrants and violate IRCA regulations for

³⁹ Statement by Carl Schuster in Robert C. Johnston, "Green Card Blues," *Teacher Magazine*, 12.1 (Aug/Sep 2000): 35.

⁴⁰ See Daniela Gerson, "Undocumented Immigrant Students Pin Education Hopes on DREAM Act." *The New York Sun*, 4 November 2003: 4.

⁴¹ Data from the study indicates that there are approximately 80,000 undocumented immigrants in the United States that have lived in the country for five years or more that reach the age of 18 each year, but about one-sixth to one-fifth fail to graduate from high school. This leaves 65,000 that graduate and could potentially enroll in higher education. See Passel.

⁴² "Immigration Reform and Control Act of 1986," *U.S. Department of Agriculture*, 24 August 2001, 28 December 2004 <<http://www.usda.gov/oce/oce/labor-affairs/ircasumm.htm>>.

various reasons; in fact, the existence of a phony-documents industry that encourages the flow of undocumented immigrants is testimony that employer sanctions have not been an effective deterrent.⁴³ However, those employers that continue to knowingly employ undocumented immigrants are typically in the agricultural sector or other low-wage labor industries that rely on undocumented immigrants for the backbone of their labor force: they are not jobs that require higher education. Consequently, without legal residence in the United States, even the most educated of the undocumented can only work the low-wage jobs which most undocumented immigrants are resigned to hold.

This irony— that the potential of these highly intelligent and educated individuals is being wasted— has not been lost on undocumented immigrants themselves. Perla, an undocumented immigrant from Texas and an excellent student in high-school, was sought after by three state universities— one even offered a \$2,000 a year scholarship. Yet, if she cannot even find a job after graduation her dreams of attending college would be for naught.⁴⁴ Similarly, Laura, a native of Mexico and a recent graduate of Lee High School in Texas, feels that even undocumented immigrants that hold U.S. college degrees lack future career options. “I don’t want to be in a country of opportunities cleaning houses,”⁴⁵ she said. Her story is but one of thousands, and each story ends with the same bleak future.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 denies states the ability to classify undocumented immigrants as state residents for educational

⁴³ Le May, 17.

⁴⁴ Juan Castillo, “Degree of Uncertainty,” *The Austin American Statesman* 23 May, 2004: A1.

⁴⁵ See Juan Alanis, “Local teenagers lobby lawmakers to support DREAM Act; Undocumented high school students seek legislation,” *The Houston Chronicle* 13 May 2004: 3.

purposes unless they confer those same benefits to non-state residents as well. This is stated in Section 505(a):

Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.⁴⁶

In many cases, public colleges and universities simply cannot afford to grant in-state tuition benefits to undocumented immigrants since they would be forced to do the same for non-state-residents as well. However, the IIRIRA is not the only obstacle for these individuals to attend college. A recent ruling by federal courts says that it is constitutional for states and colleges to deny admission to undocumented immigrant applicants.⁴⁷ Many states, such as Virginia, have taken this initiative and barred undocumented immigrants from higher education and resident status. Sadly, there is nothing to stop these states from pursuing such anti-immigrant agendas. These obstacles prevent the majority of undocumented immigrant high school graduates from attending college due to fiscal or legal constraints.⁴⁸

Coupled with the steady increase in tuition fees, the denial of educational benefits for those wishing to attend college practically eliminates the possibility of a college degree for the majority of undocumented immigrants. At Georgia State University for example, undocumented immigrants are charged the same \$6,772 as non-state residents for one semester's tuition in comparison to \$1,960 for in-state residents: almost 3.5 times

⁴⁶ Section 505(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 reads, This provision applies to benefits provided on or after July 1, 1998. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. 104-208, 30 September 1996. Stat. 100.3009.

⁴⁷ Sara Hebel, "Federal Judge Rules that Colleges May Deny Admission to Illegal Immigrants," *The Chronicle of Higher Education*, 50.25 (27 February 2004): A22.

⁴⁸ Rodolfo F. Acuna, *U.S. Latino Issues* (Westport, Connecticut: Greenwood Publishing Group Inc., 2003): 124-125.

as much.⁴⁹ Even less expensive two-year community colleges must charge the higher non-state fees due to federal regulations. For instance, Miami Dade College in Florida charges \$197.50 per credit for non-state residents and undocumented immigrants but only \$56.50 for in-state students.⁵⁰

Undocumented immigrants cannot depend upon federal or state financial assistance to finance their education, as most require proof of citizenship or legal residence. As such, they are ineligible to apply for federal loans or work study grants as well as financial aid including Pell Grants or Federal Special Educational Opportunity Grants.⁵¹ While some undocumented immigrants can secure out-of-state tuition waivers for certain state universities, these waivers are limited to only two percent of all students and only a limited number of colleges and universities use them.⁵² The very task of applying to college or university itself can be at times difficult when the applications require documentation such as Social Security numbers.⁵³ Even for those private scholarships or applications that have no such requirements, many undocumented immigrants are still hesitant to apply for fear of exposing their illegal status and possible deportation.⁵⁴

These legal and financial barriers destroy future educational and economic opportunities for undocumented immigrants. Senator Orrin Hatch (R-UT) effectively characterizes the double-bind that these immigrants face: “Many of these youngsters find themselves caught in a catch-22 situation. As illegal immigrants, they cannot work

⁴⁹ Bridget Gutierrez, “Illegal Immigrants Get a Shot at College with Scholarships,” *The Atlanta Journal-Constitution*, 24 January 2004: A1.

⁵⁰ Chardy, 1B.

⁵¹ Gerson, 4.

⁵² Gutierrez, A1.

⁵³ *Ibid*, A1.

⁵⁴ Georges Vernez and Allan Abrahamse, *How Immigrants Fare in U.S. Education* (Santa Monica, California: RAND, 1996): 51.

legally. They are also effectively barred from developing beyond high school because of the high cost of pursuing higher education.”⁵⁵ This perpetuates the socioeconomic problems that plague the majority of undocumented immigrants because they cannot pursue better employment due to the inability to attain a university degree.

There is no questioning that educational levels have a strong correlation with economic well-being. That undocumented immigrants lack access to higher education is something that cannot be ignored, especially since 20 percent of all low-wage workers who live in low-income families in the United States are not U.S. citizens.⁵⁶ Studies indicate that low family income reduces the likelihood of high school graduation, college attendance, and college continuity. Immigrants also have low test scores and high-drop out rates.⁵⁷ Furthermore, the higher the education of the parents is, the higher the educational achievement of their children: smarter parents help promote smarter kids. Consequently, the low-wage jobs that many undocumented immigrants have are an anathema to higher education, and poorly educated parents are an impediment to their children’s educational future. Barring the children from any chance at higher education perpetuates a vicious cycle whereby undocumented immigrants who lack education are forced into low-income jobs, hurting their families in the process and circumventing social mobility. Not surprisingly then, the children of these families are in jeopardy of being unable to fulfill their academic pursuits and forced to join the ranks of their parents

⁵⁵ Statement by Senator Orrin Hatch (R-UT). See Gerson, 4.

⁵⁶ Randolph Capps, Micheal E. Fix, Jeffrey S. Passel, Jason Ost, and Dan Perez-Lopez, “A Profile of the Low Wage Immigrant Workforce,” *The Urban Institute* 27 October 2003, 28 December 2004 <<http://www.urban.org/url.cfm?ID=310880>>.

⁵⁷ Acuna, 129-130.

in low-wage labor. Education is seen as the key to economic mobility and a way to help raise the well-being of all families, illegal or not.⁵⁸

This problem is compounded by additional factors. First, the education level of immigrants, both legal and illegal, has been decreasing nationwide for years. Immigrants today are 30 percent less likely to have a college degree than natives: a sharp decrease from equal chances between natives and immigrants in 1970.⁵⁹ Second, nine out of ten new jobs created in the United States will require more than a high school education.⁶⁰ In California alone, 85 percent of the newly created jobs were given to workers who had completely some degree of higher educational training.⁶¹ Third, school participation rates for Hispanic immigrants— who account for the vast majority of undocumented immigrants— is alarmingly low compared to other ethnic groups. “In 1990, one of every four immigrants from Mexico in the 15-17 age group was not in school.”⁶² Fewer high school graduates mean fewer individuals who can move on to pursue higher education. This, coupled with the already low education and income levels of undocumented immigrant parents, means that both they and their children are ill equipped to meet the skills demanded in the future.

Higher education is increasingly being seen as a necessity in the United States. As the U.S. economy shifts further towards high-tech industries and services, the demand for high-skilled labor and knowledge also increases. As such, denying undocumented

⁵⁸ Ibid, 52.

⁵⁹ Georges Vernez and Kevin F. McCarthy, “Benefits and Costs of Immigration: The California Experience,” in Duignan, 57.

⁶⁰ Statement of Hon. Lamar Smith. See United States, House Committee on the Judiciary, Subcommittee on Immigration and Claims, *Benefits to the American Economy of a More Educated Workforce*, Hearing, One Hundred Sixth Congress, first session, March 25, 1999, (Washington: U.S. GPO, 2000): 3.

⁶¹ Georges Vernez and Kevin F. McCarthy, *Immigration in a Changing Economy* (Santa Monica, CA: RAND, 1998): xv.

⁶² Georges Vernez and Allan Abrahamse, xii.

immigrants access to higher education hampers their ability to compete in the U.S. job market and relegates them to low-skilled, low-wage jobs. Moreover, education benefits not just the individual and his or her family, but the U.S. economy as well. Higher education leads to greater job opportunities and disposable income as well as lower income disparities between ethnic groups. Public benefits can be accrued through savings as a result of lower spending for public welfare, health, and law enforcement. Additionally, immigrant tax contributions also increase with better employment and education. For example, estimates by the Congressional Budget Office indicate that a 30 year-old immigrant female college graduate pays \$5,300 more in taxes annually and costs \$3,900 less in criminal justice and welfare expenses than a similar female high-school dropout.⁶³ These benefits could largely offset the costs needed to fund education for these undocumented immigrants.⁶⁴

Recognizing that undocumented immigrants are being shut out of higher education, states, schools, and even private groups have attempted to provide some degree of redress. For instance, the Animo Leadership Charter High School in California raised over \$60,000 so that 19 undocumented students from its graduating class could attend college.⁶⁵ Efforts such as this highlight both the importance of this issue and the federal government's failure to remedy the problem as of yet.

Despite the fiscal difficulties, many states have in fact passed domestic legislation to permit in-state tuition for undocumented immigrants. Currently, seven states have enacted bills to provide in-state tuition to certain undocumented immigrants— California,

⁶³ Castillo, A1.

⁶⁴ See Georges Vernez and Lee Mizell, *Goal: To Double the Rate of Hispanics Earning a Bachelor's Degree* (Santa Monica, California: RAND, 2001): viii.

⁶⁵ Mary Ann Zehr, "Immigrant Grads Get Charter's Help," *Education Week*, 24.6 (6 October 2004): 9.

Illinois, Oklahoma, New York, Texas, Utah, and Washington. In addition, 18 states currently have similar bills pending in their state legislatures. That these states are willing to brave the financial burdens of pursuing and enacting these laws while remaining compliant to Sec. 505 of the IIRIRA shows how determined their constituencies are to providing adequate access to education for their undocumented populations. In contrast, only two states so far— Alaska and Virginia— have introduced bills that restrict undocumented immigrant access to higher education.⁶⁶

The passing of state legislation that allows for in-state tuition presents a legal conundrum that has yet to be resolved by federal courts: do these bills violate federal law? Officials from states with high undocumented immigrant populations such as California, New York, and Texas— all of whom have provided in some way in-state tuition for undocumented immigrants— say that these new laws do not violate IIRIRA provisions. However, in Maryland and Wisconsin, the governors of these states vetoed similar bills citing incompatibility with Section 505 of the IIRIRA as the principal reason for their opposition.⁶⁷ With no clear judgment from federal courts, neither side can claim a legal victory on this issue, but evidently the uncertainty over whether these state bills violate federal law remains a factor in the reluctance of most states to follow suit and grant in-state tuition to their eligible undocumented populations. The federal government should task itself with resolving this issue by enacting further legislation on the subject.

Controversy aside, granting in-state tuition is not the only key component of the legislation passed by states on the subject. An important element in many of the state

⁶⁶ “State Proposed or Enacted Legislation Regarding Immigrant Access to Higher Education,” *National Immigration Law Center*, 11 November 2003, 13 April 2004
<http://www.nilc.org/immlawpolicy/DREAM/DREAM_Bills.pdf>.

⁶⁷ Eric Hoover. “Immigrant Students Ask for a Chance at College,” *The Chronicle of Higher Education*, 50.34 (30 April 2004): A1.

bills that have gone into effect on this issue is that they require those undocumented immigrants that take advantage of in-state tuition fees to pursue legalization upon graduation— similar to the provisions contained within the DREAM Act. In Kansas, a bill on immigrant tuition, HB 2145, took effect on July 1, 2004, which requires immigrants to file an affidavit with the educational institution to which they will attend in order to ensure that they will seek legal immigration status as soon as they are eligible.⁶⁸ The Governor of Kansas, Kathleen Sebelius, believes that providing education and skills to these immigrants will improve the quality and numbers of the state’s work force and boost the economy.⁶⁹ The federal government should follow the initiative of the states in enacting earned adjustment legislation. Granting in-state tuition to undocumented immigrants is essential for them to be able to attend state colleges. In the 2004-2005 school year, the average annual tuition for public colleges in Kansas is \$3,113 for state residents compared to \$10,432 for non-state-residents.⁷⁰ Education can only go so far, and undocumented immigrants face the additional hurdle of finding employment in a hostile environment. Employment in the United States almost always requires legal residency or special visa status: neither of which undocumented immigrants possess. Even if an undocumented immigrant could afford attending college, a degree by itself does not secure decent employment.

On the other hand, while these states recognize the social and economic significance of these undocumented populations, there are some states that still remain opposed to aiding them. A federal judge, T.S. Ellis III of the U.S. District Court in

⁶⁸ Kan. Sess. Laws 172, 20 May 2004, HB 2148.

⁶⁹ John Hanna, “Governor Keeps Promise to Sign Immigrant Tuition Bill,” *Associated Press State & Local Wire*, 20 May 2004.

⁷⁰ Sara Hebel, “Kansas Tuition Breaks Draw Objections,” *Chronicle of Higher Education*, 50.48 (6 August 2004): A24.

Alexandria, Va., ruled that “colleges could deny admission to anyone they chose, without violating the U.S. Constitution or exceeding their authority”⁷¹ so long as the standards used to determine admission met federal guidelines. This ruling was the result of a lawsuit filed by two undocumented immigrants in Virginia who wished to attend college in the state. In addition, the Virginia Attorney General, Jerry W. Kilgore, “urged the state’s public colleges to reject illegal immigrants and to report them to federal authorities.”⁷² Even in Kansas the situation is not without final resolution, as a legal challenge was filed in a U.S. District Court in 2004 on behalf of 24 American citizens who pay out-of-state tuition rates. The plaintiffs argued that they are being improperly denied the benefits that Kansas now offers to undocumented immigrants. They also have the support of numerous anti-immigrant groups such as the Federation for American Immigration Reform (FAIR).⁷³ This highlights the current dispute among states on how best to deal with undocumented immigrants who wish to attend college. It also displays the wide spectrum of attitudes towards undocumented immigrants in general; while some states see them as a potential boon, others see them as an endangerment to the state and society. Looking at the contrast between the circumstances in Kansas and Virginia, the pendulum of public perception clearly swings in both directions.

The current controversy highlights the pressing need for legislative change. First, Section 505 of the IIRIRA requires clarification, either through its total repeal or by letting courts determine what options states have under the provision. Second, Congress must address the growing number of undocumented immigrant children that graduate

⁷¹ Kendra Nichols, “Va. Judge Dismisses Immigrants’ Lawsuit,” *Chronicle of Higher Education*, 50.48 (6 August 2004): A24.

⁷² *Ibid*, A24.

⁷³ Hebel, “Kansas Tuition Breaks Draw Objections,” A24.

each year from U.S. high schools. One tempting option would be to clamp down on this subsection of the illegal population in the country through further efforts at deportation, repatriation, and sanctions. However, there is an alternative approach that acknowledges the significance of the undocumented individual's role in his or her local community through earned adjustment: the Development, Relief, and Education for Alien Minors Act of 2003. This bill walks the fine line between enforcing immigration law and disregarding it by giving certain undocumented immigrants a path towards legalization. Nevertheless, it is arguably the best option available to address the current dilemma.

III. THE DREAM ACT: A SOLUTION?

The Development, Relief, and Education for Alien Minors Act of 2003 (S. 1545) is a bipartisan bill in Congress that is currently waiting to be voted on. The DREAM Act of 2003 is sponsored by Senator Orrin Hatch (R-UT) and was introduced in the Senate on 31 July 2003. The legislation itself is not entirely new: an earlier version also sponsored by Senator Hatch, S. 1291, was introduced in the Senate during the 107th Congress (2001-2002) and was placed on the Senate legislative calendar.⁷⁴ The DREAM Act has two main provisions that deal with higher education and the role of the undocumented immigrant in American society. First, it calls for the repeal of Section 505 of the IIRIRA, thereby allowing states the freedom of classifying undocumented immigrants as residents for the purposes of in-state tuition if they so decide. The second provision provides

⁷⁴ The DREAM Act of 2001 was introduced in the Senate on 1 August 2001. It was referred to the Committee on the Judiciary and was placed on the Senate Legislative Calendar under General Orders (Calendar No. 425). For more information on the bill status, see "Bill Summary and Satus for the 107th Congress: S. 1291," THOMAS. 19 August 2004 <<http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SN01291:@@L&summ2=m&>>.

means for undocumented immigrants that meet certain criteria to change their status to legal residents of the United States.

Section 3(a) of the DREAM Act states, “In general– Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1623) is repealed.”⁷⁵ The repeal of Section 505 of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act would restore to states the option to determine resident status– if they choose to do so– for undocumented immigrants within their borders for the purposes of higher education benefits. States would no longer be supposedly bound to confer the same status to out-of-state citizens as stipulated by the IIRIRA. Granted, some states already have domestic legislation that does in fact grant in-state tuition, but the repeal of Section 505 would dispel any fears or reluctances as to the whether these bills would violate federal law. However, because states only have the option to grant in-state tuition, and not an obligation to do such, the DREAM Act does not guarantee that all states would confer such benefits to undocumented immigrants.

Section Four establishes who are to be the beneficiaries of the Act. It calls for the adjustment of status of undocumented immigrants to that of “an alien lawfully admitted for permanent residence subject to the conditional basis described in section 5.”⁷⁶ Unlike IRCA which had physical presence as the only principal requirement for status adjustment, the DREAM Act only applies to a select number of individuals. Specifically, only those undocumented immigrants who have resided within the United States for a continuous period of five or more years and entered the country before the age of sixteen are eligible. Furthermore, in addition to basic requirements such as good moral conduct,

⁷⁵Development, Relief, and Education for Alien Minors Act of 2003, S. 1545.

⁷⁶ Ibid.

the individual must also have graduated from high school (or received a GED) or has been admitted to an institution of higher education at the time he or she files for adjustment of status. Section 4(f) deals with the cancellation of removal and deportation proceedings for any alien whose application for conditional status is pending. Though this in itself is not enough to guarantee that all qualified individuals will apply, this section is vital to encourage undocumented immigrants to apply for the adjustment of status without fear of exposing themselves to deportation.⁷⁷

The terms of the conditional permanent resident status are spelled out in Section Five. Conditional status lasts for six years under which individuals are entitled to the same benefits and privileges that are available to any other permanent resident of the United States. An immigrant's status may be terminated if they violated specific parts of Section Four pertaining to good moral conduct, continuous stay, and the falsification of documents; they would then return to being illegal and can be deported. For the most part, however, the conditional basis of an individual's status may be removed if they have completed at least one of the following within six years: (1) obtained a degree from a higher educational institution in the United States or has been a student in good standing for at least two years; or (2) served in the U.S. Armed Forces for at least two years and received an honorable discharge. Prior to the amendments made on 25 November 2003, the DREAM Act also allowed for the removal of conditionality if the individual performed at least 910 hours of community service at a government approved organization.⁷⁸

⁷⁷ The IRCA amnesty, for example, only legalized 60 percent of the undocumented population in the United States. See Suro, 38.

⁷⁸ Development, Relief, and Education for Alien Minors Act of 2003, S. 1545.

In sum, the DREAM Act's main intention is to ensure that undocumented immigrant children who grow up and graduate from American high schools have the opportunity to attend college and become legal permanent residents who may eventually pursue citizenship. The focus here is on the nature of the individuals that the Act targets: long-term resident minors who have just graduated high school. These individuals are often brought into the country by their parents without their say or consent because they were too young at the time. They grew up in the United States and attended U.S. public schools. In many ways, especially given the guaranteed accessibility of U.S. public primary and secondary schools to all regardless of status, these undocumented immigrants are no different from natives themselves— more often than not, they actually consider themselves natives. In dealing with illegal immigration, much emphasis is often placed on illegal workers and employment, but neglecting to address the plight of the children that enter the United States illegally would be a travesty to both the country and the children themselves. As Senator Orrin Hatch (R-UT) stated, "...I think that emphasis should also be placed on the plight of illegally present children and their efforts to better themselves by pursuing higher education."⁷⁹ Undocumented immigrant children deserve the attention that the DREAM Act provides because the current system affords little attention to their situation.

The DREAM Act currently has 47 sponsors and was referred to the Senate Committee on the Judiciary on 31 July 2003. On 25 November 2003, the bill was placed on the Senate legislative calendar under General Orders following an amendment in the

⁷⁹ Statement by Senator Orrin Hatch. See United States, *U.S.-Mexico Migration Discussion: A Historic Opportunity*, 7.

form of a substitute that was made in the Committee mark-up session.⁸⁰ There were numerous attempts to modify the bill, many in ways that would have been detrimental to its scope and purpose. The main opponents of the bill, Senators Sessions, Kyl, and Chambliss, circulated over 30 amendments with the intent to significantly weaken almost every section of the bill. The amendments that were accepted by a margin of 18-1 (with Senator Session being the sole negative vote) were those proposed by Senators Grassley and Feinstein. There were three significant changes that the Grassley-Feinstein amendment implemented. First, it removed the community service option under Section Five. Second, it mandated that all DREAM Act beneficiaries must enroll in the Student and Exchange Visitor Information System (SEVIS). Third, it specified and limited the federal financial assistance that DREAM Act beneficiaries may receive.⁸¹

The amendments, though a compromise, weaken the effectiveness of the DREAM Act. The removal of the community service options means that beneficiaries would not be able to satisfy their requirements by joining organizations such as the Peace Corps. In addition, the SEVIS requirement is seemingly nonsensical. SEVIS “is a web-based system for maintaining information on international students and exchange visitors in the United States.”⁸² SEVIS was established shortly after the September 11 terrorist attacks for national security concerns in an attempt to facilitate the movement of international students across America’s borders. There is a fundamental difference between international students, who enter the United States on student visas for the purpose of

⁸⁰ For a complete list of sponsor names and dates, see “Bill Status for the 108th Congress: S. 1545,” THOMAS, 3 January 2005, <<http://thomas.loc.gov/cgi-bin/bdquery/z?d108:s.01545:>>.

⁸¹ See United States, Senate Committee on the Judiciary, *Amending the Illegal Immigration Reform Act of 1996*, Report, One Hundred Eighth Congress, second session, February 9, 2004, (Washington, GPO, 2004): 5-6.

⁸² “SEVIS – Student and Exchange Visitor Information System,” *U.S. Immigration and Customs Enforcement*, 29 December 2004, 3 January 2005, <<http://www.ice.gov/graphics/sevis/>>.

attending American schools and DREAM Act beneficiaries who have been long-term residents of the United States. The latter pose no similar national security threat, nor are they in the country on a non-resident visa with the eventual intent to return to their country of origin. Regular permanent residents of the United States are not required to register under SEVIS; it would be a double-standard to mandate DREAM Act beneficiaries to do so as well.

Lastly, the Grassley-Feinstein amendments restricted financial assistance from the federal government to student loans under Parts B, D, and E, and work study programs under Part C of Title IV of the Higher Education Act of 1965.⁸³ This means that while they are eligible to receive all loans available Title IV, they would not be able to receive any grants assistance such as Pell Grants or other types of federal scholarships. This too is a disappointment, because of its double-standard: an individual who qualifies for Pell grants or other scholarships would be denied simply because they are a DREAM Act beneficiary. This inadvertently makes a distinction between DREAM residents and other permanent residents, even though beneficiaries are supposed to be considered identical to permanent residents who have entered the country legally according to Section 5(e) of the DREAM Act. Nonetheless, while the amendment restricts access to federal grants and scholarships, it does not withhold access to any government assistance programs or financial assistance from a non-federal entity because the restrictions apply only to Title IV of the Higher Education Act.⁸⁴

There is a companion bill to the DREAM Act in the House of Representatives entitled the Student Adjustment Act of 2003 (H.R. 1684). The bill was originally

⁸³ See the Higher Education Act, Public Law 89-329, 8 November 1965, 79 STAT 1219.

⁸⁴ See United States, *Amending the Illegal Immigration Reform Act of 1996*, 6.

sponsored by Rep. Chris Cannon and currently has 152 co-sponsors. The most recent change in the bill's status was on 2 May 2004 when it was referred to Subcommittee on 21st Century Competitiveness of the House Education and Workforce Committee.⁸⁵ While the basic intent of both the DREAM Act and the Student Adjustment Act is the same, their methodologies differ slightly. Whereas both are identical in their repeal of Section 505 of the IIRIRA, perhaps the biggest difference is the lack of conditionality in H.R. 1684: the individual's status is changed to permanent resident without any conditional basis similar to Section Five of the DREAM Act. Arguably, this weakens the earned concept behind the two bills, making it more akin to a targeted, albeit limited, amnesty. H.R. 1684 also applies to any undocumented immigrants who are enrolled in the 7th grade or higher (or who is pursuing admission to an institute of higher education) provided they have resided in the United States for at least five years prior to their application. Furthermore, IIRIRA is not the only legislation that H.R. 1684 proposes to amend: it also calls for changed to Section 240A of the Immigration and Nationality Act and Section 431(b) of the Personal Responsibility and Work Opportunity Reconciliation Act.⁸⁶

The DREAM Act is but one of numerous 'earned adjustment' bills regarding undocumented immigrants in American society. The Earned Legalization and Family Unification Act of 2003 in the House of Representatives (H.R. 1830) is another example of a bill that follows the same philosophy. H.R. 1830 seeks the adjustment of status of aliens present in the United States to that of lawful permanent resident provided that they

⁸⁵ For more information about bill status and co-sponsors, see "Bill Summary and Status for 108th Congress: H.R. 1684," *THOMAS*, 3 January 2005, <<http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h.r.01684>>.

⁸⁶ See Student Adjustment Act of 2003, H.R. 1684.

meet the specified criteria. In this case, the requirements are not specific to high school graduates pursuing higher education: they are broader in scope. For example, adults must have worked in the country for a minimum of 520 days over the past five years and possess basic citizenship skills such as the understanding of the English language. Children, on the other hand, must show proof of being enrolled in school. The common characteristics between H.R. 1830 and S. 1545 are that they insist each applicant be actively involved in the community, whether it be through employment or schooling. The social commitment that the individual possesses is the key determinant of whether he or she deserves an adjustment of their status.⁸⁷

The idea behind earned adjustment programs rests on the belief that benefits should be accorded to those individuals whose accomplishments benefit society as a whole. In this case, supporters of the DREAM Act acknowledge the potential contributions of undocumented immigrants who obtain college degrees to the country. Thus, these supporters understand that while higher education is a boon to the immigrant recipient, it is also beneficial to society by improving the quality and pay of the work force. In fact, a study conducted in 1997 by the National Academy of Sciences found that immigrants contribute about \$10 billion to the U.S. economy annually and provide more revenues to state and federal governments through taxes than they cost in government services.⁸⁸ Similar studies report that undocumented immigrants are more of an economic benefit than hindrance even on the state and local level. Consequently, by

⁸⁷ See Sec. 2 of the Earned Legalization and Family Unification Act of 2003, H.R. 3271.

⁸⁸ United States, *U.S.-Mexico Migration Discussion: A Historic Opportunity*, 41.

improving the education and skills of this highly motivated and hardworking labor force, the United States stands to gain tremendously.⁸⁹

The effectiveness of the DREAM Act in alleviating the problems associated with large numbers of undocumented immigrants in the United States is clearly the key determinant of its worth— as well as its prospects of enactment. Despite this, there is considerable debate as to whether the effects of the bill are more beneficial than detrimental. Undoubtedly there are significant costs associated with the DREAM Act, particularly on state education budgets. However, economics is not the only arena that the DREAM Act plays in: passage of the bill would have strong moral, legal, and political implications as well. Consequently, an assessment of the various arguments put forth both in support of and in opposition to the bill is vital in order to determine the effectiveness of this proposed solution to undocumented immigration. There are essentially four principal debates regarding the DREAM Act: the economic, the moral, the legal, and the political.

The Economic Debate

A key argument in support of the DREAM Act is that the education of undocumented long-term resident aliens benefits the U.S. economy. The logic behind this argument is that an individual with a college degree contributes more in taxes over his or her lifetime than the cost of tuition. In the same vein, individuals who lack a college degree consume more in public welfare than they contribute in taxes and the savings from not providing them tuition. This is an especially powerful line of reasoning, because it acknowledges

⁸⁹ Los Angeles estimates that Mexican undocumented workers contribute as much as \$154 billion to the U.S. GNP, with \$77 billion to the GSP of California alone. See *Ibid*, 41.

that these undocumented immigrants have the opportunity to benefit not just themselves, but the whole country, if given the chance.

Moreover, the benefits are not limited to tax revenues alone. Educated immigrants are a bigger boost to the U.S. economy than uneducated ones because they can take higher-skilled jobs and receive better wages. This in turn corresponds to higher rates of saving and investment. Senator Hatch himself pointed out, “An average immigrant who completes college will earn \$13,500 more annually than her counterpart who drops out of high school.”⁹⁰ The Congressional Budget Office estimates that around 46,000 college students would meet the requirements for status adjustment under the DREAM Act over the 2004-2014 period.⁹¹ With an immigrant paying an average of \$5,300 more in taxes if he or she holds a college degree as opposed to a high school dropout, this would amount to an increase of \$243,800,000 per year in tax revenues alone. Moreover, not only do better educated immigrants contribute more in tax revenues, but they are less of a public burden through decreased costs in criminal justice and welfare.⁹² Higher savings and investments also improve the macroeconomic balance of the country and help to catalyze social mobility for immigrant communities.

Hence, higher education also plays an important role in poverty alleviation and social mobility. College graduates typically earn higher pay than those only holding a high school diploma; this is important for households— especially those that have recently adjusted their status and can avail of public benefits— because increased wages help to reduce the dependency of low-income families on government programs. Another

⁹⁰ Statement by Senator Hatch. See Christopher Smith, “Hatch Bill to allow illegal immigrants in-state tuition has \$90M federal cost,” *Salt Lake Tribune* 16 March 2004: A9.

⁹¹ United States, *Amending the Illegal Immigration Reform Act of 1996*, 10.

⁹² Castillo, A1.

important consequence of allowing undocumented immigrants access to higher education is that it subsequently allows them to escape employer exploitation and abuse that characterizes much of the low-income employment that undocumented workers presently have. With a college degree and permanent residency, a DREAM beneficiary does not have to worry about being forced to follow the footsteps of their parents or other undocumented immigrants who work for low wages in grueling jobs simply for lack of any other option.

Yet the benefits of the DREAM Act are not without cost. DREAM Act opponents frequently cite fiscal pressures on both state and federal levels that would escalate should the DREAM Act pass. The administrative costs of adjustment coupled with the additional burden of more students enrolled in public education could be more than the government can afford. For example, Senator Chambliss in a Senate Committee hearing on the DREAM Act made reference to the HOPE scholarships that Georgia provides for college students. DREAM Act beneficiaries would qualify for the HOPE scholarships should they have their status adjusted to conditional permanent resident. Chambliss argues that since the HOPE scholarship is already under severe financial difficulties, the notion of granting illegal immigrants access to resources such as state scholarships—which are limited and under budgetary strain—is unfair to legal residents and American citizens.⁹³

Alleged unfairness aside, Senator Chambliss raises an excellent point regarding the fiscal state of the government on the federal and state level. With a dramatic budget deficit and most states in a financial crisis, the DREAM Act is asking for greater state

⁹³ United States, *Amending the Illegal Immigration Reform Act of 1996*, 18.

expenditures on education when many states are cutting back on their school spending;⁹⁴ but, the situation may not be as drastic as the Senator claims, because he fails to acknowledge the increased tax contributions on the state level by newly adjusted immigrants. Since illegal immigrants are more likely to pay federal taxes than state taxes, legalization would increase state tax revenues. In this respect, it makes even more sense to subsequently allow the adjustment of immediate family members as soon as possible so that entire households can contribute to the state budgets.

The discrepancy between state and federal tax contributions raises a more important issue: federal reimbursement of states. Since undocumented immigrants contribute more in taxes to the federal government than to state and local governments, a noticeable disparity exists between state educational burdens and the revenues that states receive from undocumented immigrant populations. This disparity is not exclusive to undocumented immigrants alone. State and local studies indicate that native-born U.S. residents and citizens also do not pay their way at the state and local level.⁹⁵ This can be remedied if the federal government reimbursed the costs associated with undocumented populations, namely education and health care.

The adjustment of status of thousands of undocumented immigrants currently present within the country would likely lead to an increase in the use of public benefits by these immigrants such as Medicaid and food stamps. The CBO estimated that the “cost for Medicare and food stamps will be \$90 million from 2009 through 2014.”⁹⁶ Additionally, the expansion of SEVIS to include DREAM beneficiaries could cost as much as \$1

⁹⁴ Ibid, 18.

⁹⁵ Georges Vernez and Kevin F. McCarthy, *The Costs of Immigration to Taxpayers* (Santa Monica, CA: RAND, 1996): 17.

⁹⁶ United States, *Amending the Illegal Immigration Reform Act of 1996*, 7.

million. However, these costs were deemed to be insignificant and well below the \$120 million threshold for private-sector mandates that is defined under the Unfunded Mandates Reform Act (UMRA).⁹⁷ Even if the newly adjusted students enrolled in federal student loan programs and qualified for other programs such as food stamps or Medicaid (this is especially applicable for pregnant women), the estimated costs on federal spending are negligible.⁹⁸

Thus, the concerns voiced over financing the DREAM Act may be exaggerated in the public eye, because the costs of funding the bill are insignificant compared to the revenues that it would provide in the long term. In fact, Congress has been well aware of the fact that illegal immigrants are not as significant a drain on public services as many would think. “Illegal aliens make below average use of the three major categories of social programs: health, education, and income transfer programs. It is arguable that legalized aliens would more closely approximate the average use made by legal immigrants than the higher use made by refugees.”⁹⁹ Even the cost of public education for DREAM beneficiaries has been overestimated and pales in comparison to total educational expenses. In the 1992-1993 school year, for instance, total educational expenditures by the federal, state, and local governments totaled \$226 billion. In contrast, the cost of educating immigrant youth was only \$11.5 billion.¹⁰⁰ The

⁹⁷ The purpose of the Unfunded Mandates Reform Act of 1995 was to “curb the practice of imposing unfunded Federal mandates on States and local governments... and to ensure that the Federal Government pays the costs incurred by those governments in complying with certain requirements under Federal statutes and regulations, and for other purposes. Unfunded Mandates Reform Act of 1995, Public Law 104-4, 22 March 1995, 109 Stat. 52.

⁹⁸ United States, *Amending the Illegal Immigration Reform Act of 1996*, 7-9.

⁹⁹ United States, *Impact of Illegal Immigration and Background on Legalization Programs of Other Countries*, 7.

¹⁰⁰ Wendy Schwartz, “Immigrants and their Educational Attainment: Some Facts and Findings,” *ERIC Digest*, No. 116 (November 1996): 3.

incorporation of DREAM beneficiaries into higher educational expenses by state governments is not unaffordable.

While the statistics mentioned are by no means the end-all of the economic debate over the bill– particularly given that data on undocumented immigrants is inherently uncertain– there nevertheless remains considerable information to suggest that the DREAM Act would be economically beneficial to the U.S. government in the long term by increasing tax revenues and promoting social mobility through increased income levels. Moreover, the costs associated with the bill are not enough to hamper its effectiveness or overcome the positive contributions that it would have. Granted, more efforts at federal reimbursement programs would be extremely valuable in offsetting the initial cost of providing higher education by state governments, but even without such measures, the DREAM Act would still be in the best interests of the federal government from an economic standpoint.

The Moral Debate

Any possibility of granting undocumented immigrants more benefits, services, or rights always draws heated criticism from members of the government and the general public alike. The most commonly voiced of these– that undocumented immigrants are present in the country illegally and therefore any attempt to assist them would be tantamount to rewarding those who violate U.S. law– is also perhaps the strongest and most contentious of the moral arguments against congressional bills that propose legalization.

An excellent articulation of this argument was articulated by Californian State Senator Tom McClintock who published an editorial column in numerous Californian newspapers in May 2004 that lambasted a Californian law permitting undocumented immigrants to attend Californian community colleges or state universities with the in-state tuition rate. McClintock makes several accusations against bills such as the Californian law in question. First, the law is unfair to American citizens from other states who must pay more than undocumented immigrants to attend schools in California. Second, the unfairness also applies to legally present aliens who enter the country legally to attend school and must also pay the higher rate. Third, undocumented immigrants have an obligation to obey U.S. law and should therefore enter the country legally if they are to receive benefits such as in-state tuition.¹⁰¹

William Raspberry, a columnist for the Washington Post, also challenges the notion of educating America's illegal population. His argument rests on the belief that higher education fundamentally differs from primary and secondary education. He argues:

...We make people pay for college because we think college is preparation for a better-than-average life— that higher education is an extra benefit. And if it is, is it reasonable that the citizens of a state should foot the bill for that 'extra' for people who, if the law were enforced, wouldn't even be there?¹⁰²

According to Raspberry, while it may be economically sensible to educate those undocumented immigrants in the United States, providing access to college would be rewarding lawlessness. Raspberry also criticizes the federal government's failure stop

¹⁰¹ McClintock also presents an economic argument against in-state tuition and legalization for undocumented immigrants, claiming that 7,500 undocumented immigrants receive subsidies for their education that amount to \$45 to \$65 million annually. See Thomas McClintock, "Subsidizing Illegal Immigration," *Alameda Times-Star*, 14 May 2004.

¹⁰² William Raspberry, "Education for the Undocumented," *The Washington Post*, 27 October 2003: A19.

illegal immigration into the country and the costs that subsequently fall upon the states. Requiring states to provide higher education unfairly burdens them for the consequences of the federal government's inability to curtail illegal immigration.¹⁰³

The arguments presented by McClintock and Raspberry encapsulate the central theme of the DREAM opponents: rewarding illegal immigrants is unfair. However, the specific claims of McClintock fail upon closer inspection. The number McClintock cites— 7,500 undocumented immigrants who receive state subsidized higher education— may have been wholly fabricated. McClintock refers to California's AB 540 exemptions that allow students in Californian high schools to attend Californian state universities and colleges. These exemptions apply to not just undocumented immigrants, but U.S. citizens as well. In fact, the University of California stated that of the 719 waivers they had granted in the 2002-2003, only 93 of the recipients could potentially have been an undocumented immigrant. The more realistic numbers that were predicted by the colleges themselves ranged in the hundreds not thousands, but those conjectures were also uncertain. Given the difficulty in obtaining accurate data on illegal populations, McClintock's statistics receive little concrete support. Thus, the senator's argument is premised on something just short of a blatant lie.¹⁰⁴

Raspberry's approach possesses stronger character, however. Admittedly, a disproportionate share of the costs of illegal immigration fall upon the states while most of the benefits— accrued in the form of tax revenue— goes to the federal government. "State and local government agencies, that provide the bulk of the public services utilized

¹⁰³ Ibid.

¹⁰⁴ Michael Hiltzik, "Fabricating a Statistic in the Immigration Debate," *Los Angeles Times*, 24 May 2004: C1.

by immigrants, are unduly burdened because they do not receive the tax revenues.”¹⁰⁵ In fact, in Los Angeles County, immigrants contributed \$4.3 billion in tax revenue, but of this amount, only three percent returned to Los Angeles County whereas sixty percent went to the federal government.¹⁰⁶ This disparity has been acknowledged by Congress, though an effective remedy in the form of a federal reimbursement scheme has yet to be established. Nevertheless, the lack of federal reimbursement provides insufficient reason in and of itself to justify withholding in-state tuition rates for undocumented high school graduates. Rather, granting in-state tuition highlights the urgent need for the federal government to implement effective reimbursement schemes that have been long overdue. Granted, the fiscal deficits that exist on virtually all levels of government may call into question the affordability of providing in-state tuition rates, but if immigrants really do contribute more than they cost, then the problem of funding rests not in the existence of the money itself but in the distribution of it. This problem requires government attention in solving this discrepancy, not neglect in ignoring the situation of thousands of individuals.

The accusation that the DREAM Act and similar measures to afford in-state tuition and legalization to a specific section of the undocumented population rewards individuals for violating U.S. law is misleading. The primary misconception rests in the definition of the target population itself. DREAM Act opponents often refer to the potential beneficiaries as aliens or immigrants. While the latter is perhaps slightly more

¹⁰⁵ Statement by Grace Napolitano, Chairwoman of the Assembly Select Committee on Statewide Immigration Impact of the California Legislature. See United States, House Committee on Government Operations, Subcommittee on Information, Justice, Transportation, and Agriculture, *The Impact of Federal Immigration Policy and INS Activities on Communities*, Hearings, One Hundred Third Congress, first and second sessions, 2 June and 31 August 1993, 28 March 1994, (Washington: GPO, 1995): 209.

¹⁰⁶ *Ibid*, 277.

accurate, neither fully account for the unique situation that these individuals live in. Indeed, the use of the term ‘immigrant’ in this discussion is only for simplicity and consistency. While these individuals did indeed migrate to the United States– albeit illegally whether as an EWI or overstaying their visa– the fundamental difference between them and their parents or other individuals who typically enter to seek work lies in their age. Often brought into the country as infants or small children by their parents, these individuals have little or no say in their migration to the United States. Their violation of U.S. law by entering and residing in the country illegally was not committed of their own volition. Hence, they should not be faulted for crimes their parents committed.

For people who have grown up and spent a significant number– if not the majority– of their years in the United States, the labeling of ‘alien’ is a misnomer. Not only do long-term U.S. residents, albeit undocumented, such as Perla and Jackie fall under this label, but the term ‘alien’ fails to take into account the qualities exhibited by many of these individuals. Employing the blanket term of ‘alien’ or ‘immigrant,’ ignores the degree of commitment the individuals have to their local communities and their adopted country. These are high school graduates who include valedictorians, athletes, and hundreds of talented and aspiring young men and women with a strong desire to attend college. To them, the United States is their home and they have few ties to their country of birth. Consequently, they classify as settlers as opposed to sojourners or commuters, because they have no intention of leaving the United States. Luis Herrera, who finds himself in the same situation as Perla and Jackie, says, “I consider myself an

American... This is my country; most of my life I've been living here."¹⁰⁷ Indeed, their desire to attend college and pursue future employment provides evidence that they remain committed to the country in which they were raised: the United States. This level of commitment should not be disregarded, but embraced and fostered.

Undocumented immigrants who settle permanently in the United States— as is the case with the majority of immigrant families that include children— by their very nature establish strong relationships in their local communities with other individuals and organizations. These relationships range from sending children to school to marriage to local voluntary associations or religious groups. None are without their significance, because they demonstrate the embedded nature of the long-term presence of undocumented immigrants. Simply put, they are hardly considered strangers to their communities, but rather individuals who have important social contracts with the rest of American society and their integration cannot be severed without loss on both sides. Thus, the vulnerability to exploitation that undocumented immigrants have should not be thought of as a punishment, but a burden that hinders their participation as integral members of their society.¹⁰⁸

The argument of rewarding lawbreakers finds additional refutation in the legal domain. Since the parents were the conscious violators of the law and their children were presumably not at fault, the DREAM Act would not be rewarding the violators because the relief goes to the children and not the parents. Indeed the injustice would be to deny such relief to the children simply by virtue of them following their parents to a new

¹⁰⁷ Statement by Luis Herrera in Sergio Bustos, "DREAM would open college doors," *The Tucson Citizen*, 24 October 2003, 19 March 2004
<http://www.tucsoncitizen.com/index.php?page=local&story_id=102403A1_DREAMAct>.

¹⁰⁸ Robert H. Schuck, *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship* (Boulder, Colorado: Westview Press, 1998): 46.

country. This is an argument put forth not just by pro-DREAM community, but by immigration lawyers as well.¹⁰⁹ The alternative, according to Texas State Representative Rick Noriega (D-Houston) is that “the hopes and aspirations of a young person, the chances for launching their careers, are dashed... What that means then is that we’re basically relegating [immigrant students] to become social burdens.”¹¹⁰ The United States gains nothing from promoting a class of social burdens. America is known for being the land of dreams, not their killer.

Another important aspect of the debate, family reunification, plays a significant role in the plight of potential DREAM beneficiaries. Often times these individuals come from families of mixed legal status where some members may be citizens or recently legalized and others remain undocumented. Illegal immigrant workers who receive the opportunity to legalize their status may find that they are unable to adjust the status of their family members because of limited funds and prohibitive processing fees. The situation described is a tragic case of misfortune that should not preclude a child from receiving an education.¹¹¹ America’s belief in family unification as a foundation of its contemporary immigration policy would therefore necessitate the opportunity to allow the family members of newly adjusted undocumented immigrants to legalize their status as well. There is little sense in legalizing only half a family and relegating the other into the shadows.

¹⁰⁹ The argument used was that it is unfair to fault the children for entering the country. L. Benjamin Mook, an Associate for Shook, Hardy & Bacon L.L.P. in Kansas City advocated in the case of his client Marie, who entered the country when she was five, that she should not be punished for simply being in the country illegally through no fault of her own. See “Rescuing the Children of Illegal Aliens: A Move Afoot in Congress,” *The Metropolitan Corporate Counsel*, December 2003 Northeast Edition: 46.

¹¹⁰ Castillo, A1.

¹¹¹ United States, *The Impact of Federal Immigration Policy and INS Activities on Communities*, 147.

This argument over greater access to higher education for undocumented immigrants can be construed as an equal opportunities debate that calls into question the fundamental rights that each individual possesses, regardless of legal status. Arguably, immigrants possess an inherent vulnerability as the subjects of human rights.¹¹² This vulnerability is the consequence of a state's inherent exercise of its sovereign powers in distinguishing between nationals and foreigners. The right to determine who may enter the territory of the state is fundamental to a state's sovereign integrity. Nevertheless, such a distinction inevitably creates a power differentiation between the two groups of natives and immigrants which subsequently determines social relationships between them.¹¹³ In the case of the United States, illegal immigrants possess inherent vulnerability as their social relationships with American nationals are often ones of exploitation or neglect. Even in the case of DREAM beneficiaries, many of whom were unaware of their illegal status until recently, their vulnerability still exists: ignorance is not bliss. These individuals, as children, could still be denied important civil liberties such as due process because their exercise would expose the individual's undocumented status and render them subject to deportation. As seen in the recent lawsuit filed on behalf of undocumented immigrants in Virginia, where numerous plaintiffs withdrew

¹¹² The term 'vulnerability' in this case refers to a "social condition of powerlessness ascribed to individuals with certain characteristics that are perceived to deviate from those ascribed to the prevailing definitions of a national." This vulnerability is not an inherent one, but one dependent on the location of the immigrant. Essentially, immigrants' vulnerability rests upon the human rights violations that take place in the immigrant's country of destination and their relationship with the receiving state's government and society. See Jorge Bustamante, "Immigrants' Vulnerability as Subjects of Human Rights," *International Migration Review*, 36 (Summer 2002): 340.

¹¹³ *Ibid*, 345.

after they were required to disclose their identities, the possibility of deportation inhibits the exercise of immigrant rights.¹¹⁴

The Legal Debate

In addition to the moral quandaries posed by the DREAM Act, the legal ramifications also raise important issues. The principal legal issue at stake here is the question of what rights do illegal immigrants possess. To answer this, international human rights law and domestic case law provide substantial weight to the argument that not only do undocumented immigrants possess rights, but that these rights include the right to education and equal protection.

A common argument against the provision of education and legal status to undocumented immigrants— that they do not possess rights because they reside in the country illegally— may be initially appealing to the unformed, but contains substantial flaws. The existence of immigrant rights is indisputable, as they retain their inherent and inviolable human rights as codified in various international declarations and treaties. The 1948 Universal Declaration of Human Rights contains numerous provisions that relate to the plight of undocumented immigrants within the United States. For instance, Article 7 deals with the equal protection under the law and protection from discrimination and Article 16 mentions the protection of the family as the basic group unit of society. The most relevant provision of the Declaration, however, is Article 26 which describes the

¹¹⁴ The lawsuit charged that seven public colleges in Virginia that refused to admit illegal immigrants because of their status were violating the rights of the immigrants. The case was brought to the U.S. District Court in Alexandria, Va. under Judge T.S. Ellis. There were five original plaintiffs, listed as John and Jane Doe, but Judge Ellis refused to continue the proceedings unless the plaintiffs used their real names. Three immigrants chose to drop their cases. See Nichols, A24.

right to education. The significance of the Declaration is that the rights it ascribes are not limited to citizens of a state, but to all human beings regardless of their location.¹¹⁵

However, the stipulations of the Universal Declaration are not legally binding, and the United States has not ratified the International Covenant on Economic, Social, and Cultural Rights which also endorses the right to education. Though they may not carry binding legal obligations, these international instruments remain important because they attest to the existence of the right to education. Numerous international legal scholars argue that human rights are applicable to all, with certain narrow exceptions relating to political participation. Economic and social rights, such as the right to education, should not be withheld from foreign nationals— including undocumented immigrants— because it would be contrary to the spirit of these documents. This position is advocated by Professor Oscar Schachter of Columbia University and former President of the American Society of International Law.¹¹⁶ Moreover, Schachter points out that the American axiom of no taxation without representation would apply to the case of undocumented immigrants who pay federal taxes but receive no representation. This raises an important question of whether, by definition, undocumented immigrants who pay taxes should become citizens and challenges a tenet of American society that citizens often take for granted.

International human rights law provides a strong basis from which to argue that undocumented immigrants enjoy certain basic rights which include economic and social

¹¹⁵ Article 26(1) specifically states that “... Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.” Universal Declaration of Human Rights, UN General Assembly, 10 December 1948, GA Res. 217A, UN GAOP, 3rd Sess., Pt. I, Resolutions, at 71, UN Doc. A/810.

¹¹⁶ Arthur C. Helton, “Protecting the World’s Exiles: The Human Rights of Non-Citizens,” *Human Rights Quarterly*, 22.1 (February 2000): 284.

rights such as education. In the same vein, U.S. law also provides a framework that upholds the rights of undocumented immigrants, most notably through U.S. courts. Domestically, U.S. courts have historically been ambivalent on the subject of immigrant rights. For example, the Supreme Court in 1976 ruled in the case of *Mathews v. Diaz* that it was constitutional for Congress to prohibit immigrants from participating in Medicare. In the opinion delivered by Justice Stevens, the Court claimed that the government is not obliged to provide benefits to all aliens in the same fashion that it does for its citizens.

Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence.¹¹⁷

While the Court makes a practical assertion that the U.S. government should not be required to share its public benefits and welfare to aliens to the same extent that it provides its own citizens, Justice Stevens makes a crucial point in alluding to the relationship between the alien and the United States. The stronger the ties are to the United States, the stronger the alien's claims to bounty of the country are. Despite the obvious question of how to assess one's ties to the United States, the situation of DREAM beneficiaries leaves little doubt that they deserve some portion of America's bounty. Since they have grown up in the United States, developed strong ties to the country and its citizens, and express the strong desire to attend college, the relationship of the individuals with the United States is more akin to one's relationship with their

¹¹⁷ In this case, the plaintiffs who were legal residents of the United States that had lived in the country for less than five years charged that the five-year residency requirement for enrollment in the Medicare supplemental medical insurance program violated due process. See *Mathews, Secretary of Health, Education, and Welfare v. Diaz et al.*, 426 U.S. Supreme Court. 67, 1 June 1976.

homeland than one of a foreign territory. Thus, though *Mathews v. Diaz* ruled against the rights of immigrants, the court's opinion leaves open the possibility that immigrants with strong ties such as the DREAM beneficiaries may be entitled to public assistance.

In contrast, the ruling in *Aliessa v. Novello* (2001) by the New York Court of Appeals stated that the denial of Medicaid benefits based solely on their status as legal aliens violated both the United States and New York Constitutions.¹¹⁸ This refutes the claim that immigrants are beyond the protection of the Constitution and U.S. state and federal law because the Constitution contains provisions that apply to all persons within its borders, not just those present legally. The role of the courts in asserting the rights of undocumented immigrants cannot be underemphasized, as it challenges the powers of Congress to limit the rights and benefits of undocumented immigrants— a power that has historically been expansive. The recent intrusion of the judiciary into the realm of immigration, a domain that has traditionally been reserved to Congress alone, has led to the transformation of immigration law in the past few decades.

Indeed, perhaps the most recognized example of judicial intrusion into the realm of immigrant rights in recent times is the 1995 case *LULAC et al. v. Pete Wilson et al.* wherein the federal district court decided that provisions of Governor Pete Wilson's Proposition 187 was unconstitutional. Proposition 187 was an attempt to restrict undocumented immigrants in California from receiving public benefits and services by amending the State Constitution.¹¹⁹ Most notably, Section 10001.5(b) denies all public

¹¹⁸ The plaintiffs brought a class action suit claiming that Social Services Law § 122 violated article XVII, sections 1 and 3 of the New York State Constitution and the Equal Protection Clauses contained in the U.S. Constitution. The Court sided with the plaintiffs. In particular, the Court pointed out that the Fourteenth Amendment applies to “all persons” and is not limited to just citizens. See *Mohamed Aliessa, &c., et al. v. Antonia Novella, &c.*, 1 No. 73, 2001 NY Int. 59, 5 June 2001.

¹¹⁹ Proposition 187 passed with a 59% vote in 1994. For the full text, see <<http://www.americanpatrol.com/REFERENCE/prop187text.html>>.

social services to undocumented immigrants and Section 48215(a) prohibits Californian public schools from admitting undocumented children. Section 66010.8(a) specifically denies admission of undocumented immigrants into the State's higher education institutions.¹²⁰ That the district court declared portions of Proposition 187 unconstitutional is noteworthy, because it stresses that undocumented immigrants are entitled to certain rights and privileges within the United States. Granted, the scope of these claims is quite limited, but given the growing significance of education— especially higher education— and the unique circumstances of undocumented children, their scope is arguably widening.¹²¹

With the position that undocumented immigrants do indeed enjoy some degree of rights both by virtue of their humanity and by their presence within the U.S. firmly established, a more detailed discussion of precisely what rights they enjoy can be initiated. The most important case on the subject is the 1982 Supreme Court case *Plyler v. Doe* which ruled that a Texas statute prohibiting state funds to public schools that admitted undocumented immigrants and authorized schools to deny admission to undocumented children violated the Equal Protection Clause of the Fourteenth Amendment.¹²² As a result of the Court's decision which guaranteed undocumented children the right to a free education, public schools may not deny admission to

¹²⁰ Ibid.

¹²¹ The court, interestingly enough, declared that the sections of Proposition 187 that denied elementary and secondary education as well as public social services were preempted by federal law. In particular, the provisions on public education would have violated the Equal Protection clause of the Fourteenth Amendment. However, the court conceded that the provisions that barred access to higher education were permissible, but it failed to explain the significance between public elementary and secondary education versus higher education. *LULAC et al. v. Pete Wilson et al.*, 908 F.Supp. 755; C.D. Ca., 20 November 1995.

¹²² The Supreme Court ruled 5-4 that a 1975 Texas Statute § 21.013 that withheld any state funds from local school districts that provided education to children who were not legally admitted into the United States. It authorized districts to deny enrollment to these children or charge them tuition. The Court overturned the law, declaring it unconstitutional. *Plyler v. Doe*, 457 U.S. Supreme Court 202. 15 June 1982.

undocumented students in addition to other provisions.¹²³ The significance of this case is threefold: first, it asserts that the Equal Protection Clause applies to everyone within the United States regardless of legal status; second, the issue dealt with children who merit a special distinction; and third, the court in its decision recognized the considerable importance of education for the individual and society.

The Fourteenth Amendment requires that states may not "... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."¹²⁴ Thus, in declaring the Texas statute unconstitutional, the Supreme Court concluded that the jurisdiction of states includes undocumented immigrants and must therefore extend equal protection to them. The court stated:

Whatever his status under the immigration laws, an alien is a "person" in any ordinary sense of that term. This Court's prior cases recognizing that illegal aliens are "persons" protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, which Clauses do not include the phrase "within its jurisdiction," cannot be distinguished on the asserted ground that persons who have entered the country illegally are not "within the jurisdiction" of a State even if they are present within its boundaries and subject to its laws. Nor do the logic and history of the Fourteenth Amendment support such a construction. Instead, use of the phrase "within its jurisdiction" confirms the understanding that the Fourteenth Amendment's protection extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory.¹²⁵

By expanding the scope of "person" under the Fourteenth Amendment, the Supreme Court included a group of undetermined size and nature— undocumented immigrants—

¹²³ These include discriminating against students to determine residency status, requiring students or parents to disclose immigration status, require Social Security Numbers, make inquiries that could expose the status of the children, or engage in actions that create fear among undocumented children or their families. See Susan Morse and Frank S. Ludovina, "Responding to Undocumented Children in the Schools," *ERIC Digest*, EDO-RC-99-1 (Charleston, WV: ERIC Clearinghouse on Rural Education and Small Schools, 1999): 3-4.

¹²⁴ U.S. Const., art. XIV, § 1.

¹²⁵ *Plyler v. Doe*.

into the fold of America's national community in much the same way it did when it extended citizenship to freed slaves.¹²⁶ The recognition that undocumented immigrants are entitled to certain rights under the Constitution, while limited, remains significant because it recognizes both the humanity of the individuals in question and the inviolable rights that they possess. The ruling marks a watershed in immigrant rights, as it guarantees basic protections for undocumented immigrants and acknowledges their inclusion under the umbrella of the Constitution.

The Supreme Court also characterized undocumented children as a special class, distinct from undocumented adult immigrants. Justice Brennan in fact conceded that the while adults who enter the country illegally have the ability to comply with the law and remove themselves from the United States, the same does not hold true for the children of undocumented immigrants who enter with them. Since children have virtually no ability or choice to leave the country with or without their parents, the arguments that apply to adult undocumented immigrants do not hold the same degree of force with regards to children.¹²⁷ Thus, the Supreme Court has effectively accepted the argument that children should not be faulted for their parent's crimes. "Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."¹²⁸ This decision helps to refute the argument made against the DREAM Act that undocumented immigrants should not deserve equal access to education because they are violating the law: their lawbreaking was not of their own will.

¹²⁶ Schuck, 54.

¹²⁷ *Plyler v. Doe*.

¹²⁸ *Ibid*.

Moreover, this deference paid to undocumented children should not be determined solely on their status as minors; this same special status should apply to them even after they reach the age of eighteen and graduate from high school. In fact, their very presence merits access to education, because the government has, to a degree, acquiesced to their continued stay. “It would of course be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.”¹²⁹ Though one can argue that once these children reach adulthood, they possess the responsibility to comply with U.S. law of their own accord and should leave the country, the fact that their presence in the United States was involuntary should still afford them a more lenient sentence. Rather than urge self-deportation, the encouragement of self-legalization would allow undocumented children who have reached adulthood to comply with U.S. law in a way that still squares with the basic notions of justice that Justice Brennan alludes to. Regardless, the possibility of future deportation or legalization does not change the argument that undocumented immigrants should not be denied education while they remain in the United States.

While the right to equal protection and the significance of the status of children play fundamental roles in the Court’s decision, the role of education itself is ambiguous. Justice Brennan stated that according to the belief of the Court, “Public education is not a ‘right’ granted to individuals by the Constitution.”¹³⁰ If the Constitution does not guarantee public education as a right, then the government has no obligation to provide it.¹³¹ This assertion is naïve, however, and it reflects more the reluctance of the Court to

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Some argue that although this claim—public education is not a right—is incorrect. Given the Justice Brennan’s opinions throughout, the granting of equal protection would necessarily mean that education is

pronounce a sweeping statement on the issue of immigrant rights. Justice Brennan himself admits that while education is not a right in his opinion, it nevertheless remains critical for the well-being of the nation. To believe that something so fundamental as education, which is essential for both the country as well as the individual, can be granted or withheld so arbitrarily is a mockery of the sacredness that the United States has traditionally placed on education and the importance of intelligence and merit as the foundation of its progress. The U.S. government clearly has some obligation to provide education to its people not just as a matter of pragmatism in the development of an educated electorate, but also as part of an intrinsic duty that all people within its borders lay claim to.

Moreover, the Constitution is not the only source of U.S. law. International law, and particularly the international custom that states accept as obligatory, are also a source of U.S. law. Thus, the right to education— as enshrined in multiple international human rights documents— can be regarded as binding custom as witnessed by the virtual uniformity of states that provide it or at the very least attempt to. Given the fact that the Court itself recognizes the “importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child,”¹³² the claim that education is not a right seems absurd. The concept of rights does not limit itself to those of a civil or political nature; basic economic and social rights exist that the United States should attempt to provide.

Even if education itself is not a guaranteed right, it still remains a vital social institution for the United States as well as all societies. Education ensures the

guaranteed for all and is a fundamental right. Moreover, the prohibition of education could be viewed as racist. See Acuna, 123.

¹³² *Plyler v. Doe*.

continuation of not just democratic governance, but the country's cultural heritage as well. It also improves the economic productivity of the individual which in turn benefits the rest of the country. "In sum, education has a fundamental role in maintaining the fabric of our society."¹³³ Consequently, the denial of education to children within the United States, even if they are present illegally, constitutes a severe handicap, limiting the possibilities of social mobility and individual progress based on merit. The Court also noted that it saw no justifiable interest for the State to withhold education for undocumented immigrants and thereby perpetuate a class of illiterates and uneducated individuals. Here, there is a pragmatic argument at play, asserting that providing education to all furthers the interests of the State, because the actual presence of an individual matters more than whether or not they are present legally.

Though Justice Brennan supports equal access of undocumented children to public education, the issue of public higher education poses a greater conundrum. In contrast to primary and secondary education, individuals do not require tertiary or higher education to live comfortably nor does the denial of higher education foster illiteracy or the other grave social consequences that Justice Brennan points out. Higher education, therefore, does not possess the same qualities that make primary and secondary education so necessary in the United States. One reason for this may be that whereas primary and secondary schooling are for children who cannot be blamed for their status, higher education is available primarily to adults who can be faulted. Though the Supreme Court was silent on the issue of higher education, a rejection of the equal protection claim by adults with regards to higher education would not have been surprising.¹³⁴ Higher

¹³³ Ibid.

¹³⁴ Schuck, 55.

education is seen by some as a privilege, rather than a right.¹³⁵ Consequently, this logic would allow the government to deny higher education or equal access to it at its discretion within the framework of the Constitution.

However, keeping in mind that *Plyler v. Doe* was decided over twenty years ago, the educational landscape in the United States has shifted, and so too must the attitudes towards higher education. With the increase in the demand of high-skilled labor and the emergence of industries and services that require more than a high school diploma, a college degree plays a far more significant role than in the past. Granted, this is a long way from claiming that higher education is on the same level as primary and secondary education in terms of societal necessity, but the gap is decreasing. Given the relatively low socioeconomic status of undocumented immigrant households in general, access to higher education should be even more important because it offers the most hope for social mobility amongst undocumented immigrant families. Another important point is that the denial of access to higher education must be justified by the legitimate interests of the government. In *Plyler*, the Court determined that the State had no compelling interest to act as it did, because not only did the deprivation harm the children in question, but it did nothing to reduce the flow of illegal immigration into the State nor did it improve the quality of the education. These same arguments are applicable to higher education as well. In fact, the Court condemned the singling out of undocumented children based on the false assumption that they are less likely to remain in the country and benefit the United States as a result of their education.¹³⁶ In the case of DREAM

¹³⁵ Raspberry, A19.

¹³⁶ *Plyler v. Doe*. One suggested principle borne from *Plyler* is that “a state may not seek to discourage illegal entry by means of disincentives that may harm the children of those who, because the disincentives

beneficiaries, such is obviously not the case, since they have clearly demonstrated their intent to remain in the country and live productive lives.

Hence, since undocumented immigrants do indeed enjoy rights under the Fourteenth Amendment, the denial of equal access to higher education can only be justified if their status as undocumented immigrants classifies as different circumstances that would afford different treatment between legal residents and citizens. State legislatures have the ability to determine who is different and the same in this respect. This means that by eliminating the ability for states to determine residency status for the purpose of in-state tuition, IIRIRA is subverting the ability of states to determine the classifications by which the Equal Protection Clause may be applied. In other words, the DREAM Act is merely restoring to States the ability to classify aliens and other persons under the Fourteenth Amendment for the purposes of in-state tuition fees.

In sum, while admittedly the judiciary has not gone so far as to declare higher education within the same vein as elementary and secondary education as guaranteed for all those within the borders of the United States, many of the arguments articulated in *Plyler* still hold great relevance. First, the denial of education furthers no interest of either the states or the federal government, since analysis has shown that the economic contributions of the potential DREAM beneficiaries will generally offset the costs of their education. Second, the government has no reason to discourage undocumented immigrants from attending public colleges and universities as a method of curbing the flow of illegal immigrants into the country. Even the Supreme Court rejects the

are ineffective, decide to enter anyway.” This would mean effectively bar any negative state action against the children of illegal immigrants. See Schuck, 56.

argument that denying benefits is an effective way of stemming the flow.¹³⁷ Moreover, with the growing importance placed on higher education as a result of the changes to the U.S. economy over the past decades, the perception of higher education is not as it once was. Though clearly not a necessity, its increasing significance in American society and economy can no longer be denied.

The Political Debate

Efforts to pursue immigration reform have undoubtedly suffered numerous political setbacks that allow the flow of undocumented immigrants into the United States to persist. While ways of reducing the flow of undocumented immigrants are beyond the scope of this discussion— and the DREAM Act as well— the issue of what to do with preexisting undocumented immigrants in the United States falls squarely within the focus of this study. Thus, while the DREAM Act does not attempt to correct the problems at the border, its attempt to address the situation within American communities has generated much controversy. This is largely in part because “[illegal immigrants] attract more political attention and generate more political passion than any other group of noncitizens.”¹³⁸ Consequently, the Act must overcome the many negative perceptions that accompany any attempt at undocumented immigrant relief. There are three key political criticisms that can be directed at the DREAM Act and other forms of earned adjustment legislation: (1) legalization would encourage more illegal immigration; (2)

¹³⁷ Brennan says, “Thus, even making the doubtful assumption that the net impact of illegal aliens on the economy of the State is negative, we think it clear that ‘[c]harging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration,’ at least when compared with the alternative of prohibiting the employment of illegal aliens.” *Plyler v. Doe*.

¹³⁸ Levine et al., 132.

legalization would adversely affect the perception of U.S. law; and (3) the general American electorate does not support granting relief to undocumented immigrants.

First, critics of the DREAM Act allege that the bill would act as an incentive for future illegal immigration, despite its narrow focus and relatively small target population.

Senator Jeff Sessions summarized this point aptly:

The conclusion by the majority that retroactive benefits are not an incentive for future illegal immigration is not correct. If the DREAM Act becomes law, we will openly state to the world that it is the policy of the United States to continue our cycle of rewarding people who break our immigration laws with eventual legal status and even citizenship. People will rightly conclude that they can come here illegally and wait for the next amnesty.¹³⁹

However, Sessions premises his conclusion on the belief that DREAM beneficiaries enter the United States of their own volition. This is an obvious flaw in his argument, because the DREAM Act only confers legalization upon those long-term resident immigrants who entered as children. Consequently, Sessions would then mistakenly conclude that there are thousands of children outside of the United States who are waiting for their chance to enter illegally and take advantage of some future amnesty akin to the DREAM Act. Nothing could be further from the truth. The majority of DREAM individuals enter the country with their families who seek employment. Virtually none of them enter for the promise of an American education, let alone for a college degree. The implausibility of this concept has even been recognized by the Supreme Court in *Plyler*: "...few if any illegal immigrants come to this country... in order to avail themselves of a free

¹³⁹ Statement by Senator Jeff Sessions in United States, *Amending the Illegal Immigration Reform Act of 1996*, 13.

education.”¹⁴⁰ Clearly then, Sessions makes the mistake of assuming that children could and would take advantage of this so-called reward for illegal immigration.

The concern that legalization encourages further illegal immigration is quite exaggerated and the alternative, deportation, is wholly unrealistic. For the DREAM Act, its specificity and its one-time nature— similarly circumstanced individuals cannot benefit from the Act in future— means that “because of the residency and age requirements... there is no incentive to enter the United States illegally in the future.”¹⁴¹ Legalization, outside the small confines of the DREAM Act, also does not pose as grave a threat as some politicians would suggest. Indeed, the primary incentive for illegal immigration has been and still is employment. “Quite literally, since every study suggests that illegal immigrants come here for jobs, if employers followed the law, there would be no jobs for undocumented persons— period.”¹⁴² Illegal immigration is a structural dilemma, a consequence of various factors including wage differentials between the United States and poorer countries, family reunification, and international labor networks. Legalization will not have any significant impact on illegal immigration flows as long as these structural factors persist, but the fact that illegal immigration has no foreseeable solution in the near future does not justify the denial of relief to deserving individuals.

Second, Sessions’ other accusation, that the DREAM Act’s status adjustment provision would erode the perception of U.S. law, though rather vague, is not unique. Providing legalization for illegal immigrants clouds the intent of the U.S. to deport individuals who illegally enter. This, according to Sessions, is “...a confusing and contradictory message, a message that cannot be the basis for the sound immigration

¹⁴⁰ *Plyler v. Doe*.

¹⁴¹ United States, *Amending the Illegal Immigration Reform Act of 1996*, 2.

¹⁴² United States, *The Impact of Federal Immigration Policy and INS Activities on Communities*, 212.

policy of a mature nation.”¹⁴³ This same proposition has been put forward against virtually every legalization bill in Congress, be it amnesty or earned adjustment.¹⁴⁴ However, there has yet to be found any significant evidence that would support this hypothesis. In fact, how does one tell that the erosion of U.S. law is actually occurring? To this, the supporters of this argument have yet to answer. Moreover, a viable alternative to legalization simply does not exist. To expect that the United States government has the capacity– or even the willingness– to find and deport the entire illegal population residing within its borders is naïve and unfeasible. No one would disagree with the fact that federal and state agencies, particularly the U.S. Border Patrol, lack the funds, coordination, and commitment to stop the flow of illegal immigration and to deport those already present. Legalization, therefore, is a pragmatic method of addressing a problem that cannot be fixed through law enforcement alone. Again, this relates to the structural nature of illegal immigration and the fact that settled stocks of undocumented immigrants have established deep-rooted ties to their communities that deportation would inevitably destroy.

Consequently, the argument over the perception of U.S. law is moot. While legalization of undocumented immigrants may– and this is in no way proven to be the case– weaken domestic law by showing that the U.S. is incapable or unwilling to enforce it, “No responsible policy maker suggested that illegal aliens should be rounded up and

¹⁴³ United States, *Amending the Illegal Immigration Reform Act of 1996*, 13.

¹⁴⁴ For example, Chairman Byrd of the Committee on Appropriations said in hearing that “...if whole immigrant communities in the United States are here by flouting the law, what will be their long-term attitude toward compliance with the laws in general in this country?” Byrd advances the idea that legalization would not be an effective solution. Rather, greater enforcement of U.S. law through summary judgments, deportations, exclusionary powers are needed. See United States, *Increasing Costs of Illegal Immigration*, 14.

deported as they were in the 1950s.”¹⁴⁵ Thus, to keep a whole population of people perpetually beyond the umbrella of law, allowing them to be subject to exploitation, abuse, and vulnerable to poverty, crime, and arrest would be just as damaging to the perception of U.S. law. However, rather than insisting on a utopian aspiration of the total elimination of undocumented immigrants through deportation and heightened law enforcement, legalization offers a realistic option, albeit a compromise of sorts.

Finally, critics of the DREAM Act also point to public opinion which allegedly opposes the granting of legalization to undocumented immigrants. Most Americans, including legal immigrant populations themselves, favor the restriction of immigration and improved border security.¹⁴⁶ Indeed, few if any would contend to support illegal immigration as it is a clear violation of federal law. As a result, public opinion is not surprisingly torn on the issue of legalization, with numerous groups advocating the legalization of undocumented populations and others vehemently against it. Nevertheless, the opposition to immigration— and subsequently towards the legalization of undocumented immigrants— results more from ignorance than any informed rationale. Citizens of democracies such as the United States often remain blissfully ignorant of the intricacies of immigration because the costs of acquiring the information act as a deterrent to obtaining them. Given the inherent inaccuracies of data on illegal immigration and the tendency of public officials and private individuals to distort available data, the barriers to information that exist results in poorly informed opinions

¹⁴⁵ Suro, 56.

¹⁴⁶ This negative perception of immigrants appears to be largely nonpartisan and more dependent on the level of education and economic class. Uneducated and unskilled individuals are the least likely to support immigration than well-educated and wealthy individuals. An interesting side-note worth investigating is that the latter groups more often tend to live in more ethnically homogenous areas than the former group, who often live in close proximity to newly arrived immigrants. For a more detailed discussion, see Gimpel, 34-35.

regarding immigration.¹⁴⁷ This helps to explain why legalization is met with so much skepticism, even though it is arguably the most pragmatic solution to deal with the stocks of undocumented immigrants already present within the country.

That ignorance remains the principal barrier to an informed public opinion lends some hope to attaining more widespread public support for the DREAM Act and earned adjustment legislation. Assuming that hostility towards legalization— typically characterized as “rewarding” essentially criminal behavior— stems from ignorance rather than xenophobia or nativist sentiments, public opinion is therefore malleable and should not present a permanent obstacle to earned adjustment legislation. Indeed, the majority of Americans are probably pragmatic restrictionists regarding the issue of immigration. They may see immigration as conflicting with their goals and values on issues such as the environment or cultural cohesion, but these conflicts are not inherent and can be resolved.¹⁴⁸ Thus, with the adequate dissemination of information and proper education, public opinion can crystallize in support of earned legalization as the pragmatic approach to reducing the number of undocumented immigrants within the United States.

¹⁴⁷ Immigration, arguably, should be an issue that provokes strong, well-informed opinions. However, the ambiguity of data, and the constraints on the discourse over immigration are barriers to information. Interestingly enough, a more informed public would likely to be more opposed to immigration than supportive. On the issue of legalization at the very least, this conclusion is debatable. See Gary P. Freeman, “Modes of Immigration Politics in Liberal Democratic States,” *International Migration Review*, 29.4 (Winter 1995): 883.

¹⁴⁸ In contrast, xenophobia and nativism create inherent opposition towards immigration, but is not a significant force in public opinion. Pragmatic restrictionists are open to information and can be persuaded to change their views, whereas the others cannot. See Schuck, 8.

IV. EARNED ADJUSTMENT AS THE MODEL FOR U.S. IMMIGRATION REFORM

With the bipartisan support of 47 senators, the DREAM Act only waits to be voted on by the Senate. Unfortunately, the bill has stalled in the Senate for over a year. Yet, even if it is brought to a vote in the near future, it lacks enough supporters to guarantee its passage. The American public should not pass up this opportunity to reform the current unenforceable immigration system and aid their fellow neighbors. As long-term residents of the United States, DREAM beneficiaries are integral to the communities in which they live and study. Simply put, the U.S. government and the American people as a whole need to focus on the issue of immigration reform and the situation of the millions of undocumented immigrants present within the country— of whom many, if not most, have permanently settled within U.S. borders. As mentioned, there are economic, moral, legal, and political reasons for approaching immigration reform with the sense of fairness and the recognition of the intrinsic worth of the individuals in question that earned adjustment legislation such as the DREAM Act can provide.

Ultimately, with the option of mass deportation all but out of the question, the only viable alternative to reduce the stocks of undocumented immigrants in the United States is through some form of status adjustment: blanket amnesties, guest-worker programs, and earned adjustment programs. So far, the benefits and advantages of the latter have been explained specifically with regards to the DREAM Act. The DREAM Act is an example of the potential effectiveness of earned adjustment programs in general. Employing the DREAM Act as an example serves two purposes: first, it helps to advocate its passage in Congress; and second, it helps to illustrate specific advantages that the bill and the concept of earned adjustment has. The goal of the discussion on the

DREAM Act therefore has not been to show that only undocumented high school graduates should be the sole beneficiaries of earned adjustment, but instead to show the impact of earned adjustment on a specific population. Given that the majority of undocumented immigrants enter the country seeking employment— not as children— the possibility of earned adjustment for working adults should also be entertained. Indeed, Senator Brownback of Kansas concurs in this conclusion, having stated the following: “We need an earned regularization for undocumented people who work, pay taxes, contribute to their communities, and seek American citizenship.”¹⁴⁹ Clearly then, earned adjustment has the potential to provide comprehensive and fair reform to U.S. immigration policy that benefits both the United States and the undocumented immigrants that the programs target.

The question remaining therefore is whether earned adjustment programs provide a superior solution to immigration reform than the alternatives of amnesties and guest-worker programs. In comparing earned adjustment with amnesties, the obvious frame of reference would be the 1986 IRCA amnesty. In addition to the host of problems associated with the amnesty, including visa backlogs and the inability of the government to get all qualified undocumented immigrants to register,¹⁵⁰ public perception of the amnesty was inherently negative. Blanket amnesties are seen as the equivalent of a free ticket: rewarding essentially illegal behavior without any associated cost or responsibilities. Not surprisingly, amnesties have the tendency to induce anti-immigrant

¹⁴⁹ Statement by Senator Brownback. See United States, *U.S. Mexico Migration Discussions: A Historic Opportunity*, 9.

¹⁵⁰ The INS estimated that only about 60 percent of the illegal population at the time applied for amnesty, partially due to the 1982 cut-off date but also because some were simply unwilling to do so. Also the established social and labor networks consequently facilitated the future flows of more undocumented immigrants into the country, allowing the undocumented population to renew itself. See Suro, 38.

backlash and hostility which can often affect legal immigrants as well.¹⁵¹ Therefore, blanket amnesties simply do not present a politically viable option for reducing stocks of undocumented immigrants in the country for two main reasons: they lack support among voters and they are largely ineffective.

In contrast to blanket amnesties which impose little or no obligations upon recipients, earned adjustment requires the recipient to achieve a degree of accomplishment that benefits the society. De facto residence or even employment do not on their own qualify an individual to receive an adjustment of status. While legalization is a clear imperative to bring undocumented immigrants out of the shadows, legalization should not be a free ride. Instead, by imposing requirements for status adjustment, the government recognizes the valuable resource that undocumented immigrants represent to the country. Hence, while the United States must be firm in its stance against illegal immigration, it must also display the flexibility and pragmatism to acknowledge the need to legalize settled populations of undocumented immigrants in order for them to contribute more to American society. While blanket amnesties would be a seemingly unfair reward for violators of immigration law, earned adjustment is a compromise of sorts that requires the recipient to show his or her commitment to staying in the United States and being a full participant in its economy and society. Hence, earned adjustment does not convey the same appeal to would-be undocumented immigrants that amnesties traditionally do, because it does not encourage future flows of illegal immigration in the

¹⁵¹ See statement by Senator Mark Hatfield in United States, *Increasing Costs of Illegal Immigration*, 14.

hope of easy amnesties: legalization under earned adjustment programs requires hard-work.¹⁵²

Guest-worker programs offer a different approach to legalization, stressing the temporary nature of the immigrant's stay in the United States. History has documented numerous guest-worker programs that the country has undertaken such as the *Braceros* program and the SAW provisions of the 1986 IRCA, all with varying degrees of effectiveness. The most recent guest-worker proposal was put forth by President George W. Bush in 2004. His program would allow willing workers either already present in the United States illegally or currently outside the borders with the intent to enter to match themselves with a willing employer in order to meet the demand for labor that American businesses require. Immigrants would receive legal status to work in the United States for three years after a one-time registration fee. While the duration of the permit is renewable, President Bush has stressed that the program should not be linked to opportunities for permanent residency or citizenship. In fact, the proposal specifically rejects amnesty or any form of permanent legalization, emphasizing that immigrants should return to the countries of origin and that the United States will provide incentives for them to do so.¹⁵³

Uncertainty remains as to how effective the President's proposal would be, given the past caveats of guest-worker programs. The differences between his proposal and

¹⁵² Another disincentive for future illegal immigration is the one-time nature of many of these bills: they will not apply to future individuals who meet the criteria. While arguably individuals could enter the United States in the future hoping that a similar bill will pass that would grant them legalization, the number of undocumented immigrants that actually enter the United States for the primary purpose of taking advantage of legalization programs is comparatively small to those seeking employment or family unification. See United States, *Amending the Illegal Immigration Reform Act of 1996*, 2.

¹⁵³ For a more detailed description of President Bush's guest-worker program, see Office of the Press Secretary, "Fact Sheet: Fair and Secure Immigration Reform," *The White House*, 7 January 2004, 18 March 2005 <<http://www.whitehouse.gov/news/releases/2004/01/20040107-1.html>>.

those of the past also remain unclear, but nevertheless, the approach the administration has taken with regards to immigration reform has been a path well tread. First, that the administration only addresses temporary legalization, with no additional avenue for permanent residency or citizenship, shows a naïve perspective that fails to account for the basic dynamics of undocumented populations. Here, the American example augments the experience of many countries, particularly in Europe, whereby the intentions of guest-worker programs never come to fruition. Essentially, the presence of guest-workers no longer remains temporary, but becomes a permanent fixture of a country's economy and society. Moreover, the entry of workers' families often leads to participation in education, welfare, and local politics. The reliance of businesses on guest-workers for labor makes it difficult for these workers to be sent back to their home countries.¹⁵⁴ The expectation of the Bush administration that guest-workers will return home after their permits expire is naïve, because not only do they often form permanent social and economic ties in the United States, but employers are simply unwilling to let them go. Consequently, one of the administration's principal tenets in its immigration reform proposal does not square with the reality of the guest-worker situation.

Compared to guest-worker programs, earned adjustment programs have no such naïve aspirations. Indeed, they recognize the varied nature of undocumented populations and their commitments to living in the United States— something that guest-worker programs fail to address. Since many undocumented immigrants are settlers, any attempt to classify their stay as temporary does a disservice to them and expects the unrealistic: that settled workers and their families will leave voluntarily. Any legalization program,

¹⁵⁴ For a more detailed account of the guest-worker experience, see Yasemin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago Press, 1994): 2.

therefore, needs to recognize the differing nature of undocumented immigrants and pay respect to their degree of commitment to reside in the United States. Earned adjustment accomplishes this; guest-worker programs that do not incorporate avenues towards permanent residency and citizenship do not.

Second, other flaws with the Bush administration's guest-worker program also abound. The most obvious perhaps is that it only applies to individuals seeking employment. The proposal contains no provision to legalize children, unemployed spouses, or other deserving individuals. While admittedly the majority of illegal immigration is employment based, family unification also represents a significant portion of illegal immigrant flows into the United States in addition to it being a cornerstone of U.S. immigration policy. Thus, the administration's legalization proposal does nothing for non-working undocumented immigrants and ignores the reality that undocumented immigrant workers have family members, many of whom also deserve relief. Earned adjustment programs do not suffer from this flaw, because the criteria for adjustment can be tailored to specific populations, be they children or adults. Indeed, the need to accommodate non-working undocumented immigrants such as children or spouses has not gone unheard. Senator Kennedy, during discussions on U.S.-Mexico migration, stated that "... a temporary worker program cannot stand alone; it must be developed in conjunction with earned legalization and family unity priorities."¹⁵⁵ As such, for President Bush to truly offer comprehensive immigration reform that would address the entirety of the undocumented population in the United States, other forms of legalization must be employed because guest-worker programs are inherently insufficient.

¹⁵⁵ Statement by Senator Kennedy in United States, *U.S.-Mexico Migration Discussions: A Historic Opportunity*, 5.

Third, President Bush has not elaborated on specifically how his proposal differs from those in the past, particularly with regards to worker's rights. Typically, guest-workers face a host of problems that have not been specific to any particular program: low pay, denial of benefits, and the misclassification of their employment status. Moreover, guest-worker programs almost invariably bind the worker to the employer, because without employment the worker can be subject to deportation for violating his or her immigration requirements. This allows employers leverage over guest-workers that enables them to disregard many labor and employment standards that the government established to protect guest-workers from exploitation and abuse. By centering the program on the relationship between the worker and a particular employer, the Bush administration falls victim to the same problems that have plagued previous programs. For the administration's proposal to be even minimally effective, the government must vigorously enforce labor laws and standards on wages and working conditions, particularly employer sanctions. Such enforcement, had it been pursued since IRCA's passage in 1986, might have reduced illegal immigration to a measurable, even significant, extent. In addition, the proposal must allow workers the right to change employers, the right to unionize, and allow them to keep their families intact.¹⁵⁶ In contrast, earned adjustment affords workers greater protections as permanent residency allows them to seek other employment without the fear of deportation.

An excellent method of comparing the Bush proposal to earned adjustment programs would be to contrast it with the AgJOBS Act of 2005, a bill specifically opposed by the administration. The AgJOBS Act has two main provisions: first, it contains a two-step earned adjustment process that would allow certain undocumented

¹⁵⁶ See Ibid, 42.

immigrant farm workers to adjust their status first to conditional permanent resident then later to permanent resident after working for three to six years. The second provision calls for the revision of the H-2A programs that deals with seasonal workers, granting more rights, making it more affordable, and improving standards for those visa holders.¹⁵⁷ Whereas AgJOBS provides a way for settled undocumented immigrants to pursue permanent residency, Bush's proposal contains no such element. This has been a major criticism of the Bush proposal, because on its own it cannot provide effective and comprehensive immigration reform: it requires other forms of legalization to supplement it. Many public interest groups have already clamored for the administration to address the flaws in status quo guest-worker programs and to incorporate the needed elements—including earned adjustment—that would make these programs a success.¹⁵⁸ Whether or not the Bush administration chooses to heed these calls remains another question entirely.

While guest-worker programs may indeed offer a useful path for legalizing certain undocumented sojourners and commuters, the limitations that these programs have necessitate another form of legalization to accompany it. Earned adjustment programs differ from amnesties and guest-worker programs not just in their form, but in their disposition as well, emphasizing both achievement and a path to permanent residency. Hence, unlike guest-worker programs, they are comprehensive and adjustable: they are sufficient on their own as a tool for immigration reform. Beneficiaries of earned adjustment programs are expected to contribute and succeed in U.S. society, preventing them from being dependent on public benefits and a drain on fiscal resources. Thus, the

¹⁵⁷ See the Congressional Record of the AgJOBS Act of 2005, S. 1645.

¹⁵⁸ Latino communities have especially advocated that any new guest-worker program be significantly different from those in the past for the same reasons aforementioned. The key changes they call for are full labor protections, family unity, and a path to citizenship. Michele I. Waslin, "The President's Plan Doesn't Address the Root Causes and Problems of Illegal Immigration," *Hispanic*, 17.7/8 (Jul./Aug. 2004): 103.

government achieves both the legalization of large segments of the undocumented population while allowing these people to better the U.S. as a whole. With reference to the DREAM Act, higher education for the beneficiaries of the Act benefits the immigrants and their families as well as the government and country. Seemingly, this win-win scenario appears highly alluring and clearly superior to the alternatives of amnesty and guest-worker programs.

However, earned adjustment is not a quick-fix to the immigration problems that face the United States. Indeed, for the programs to be effective, they must be tailored to specific populations using different sets of eligibility criteria. This inevitably raises the question of what criteria should be used to qualify adjustment: “[h]ow to find a system of credits, or if you will, of rewards or points through which people can earn legal permanent status? What is it that we are going to reward?”¹⁵⁹ Aside from the basic criteria— duration of stay, paying taxes, no criminal offenses— what constitutes as having ‘earned’ legalization remains undefined. In the case of the DREAM Act, the obtaining of a post-secondary degree or service in the armed forces allows an individual to adjust their status. In the AgJOBS Act, the length of stay in the United States coupled with continuous employment in agriculture is the standard established. The differences between the two emphasize the flexibility of the programs and their inherent advantage in being able to accommodate all sections of the undocumented population without resorting to blanket amnesties.

Earned adjustment programs are not without their caveats, unfortunately. The benefits reaped from legalized immigrants are often long-term: tax revenues are accrued

¹⁵⁹ Statement by Demetrios Papdemetriou, Co-Director of the Migration Policy Institute, Washington DC in United States, *U.S. Mexico Migration Discussions: A Historic Opportunity*, 12.

over a whole lifetime, for example. This means that the costs of legalization are comparatively more concentrated than the benefits over time. Since some beneficiaries of whatever earned adjustment program will inevitably qualify for public benefits such as food stamps or Medicaid, the costs of legalization— at least in the short term— merit attention. In particular, the disproportionate burden placed on state and local budgets due to greater education and health care spending should be addressed through a larger and more efficient federal reimbursement scheme that would allow states to provide the necessary services for legalized immigrants to take advantage of the opportunities offered to them.

Immigration reform is, of course, a two-headed demon for one must tackle not just the stocks of undocumented immigrants already present in the United States, but one must also deter or stop the flows of undocumented immigrants across the border. Legalizing undocumented populations is futile if more immigrants continue to slip past the borders. The United States needs to supplement its legalization schemes with improved border control, both at the border itself and through better notification techniques to identify and locate visa over-stayers. As a truly effective form of employer sanctions remains politically elusive,¹⁶⁰ legalization needs to receive both the funding from the federal government to offset its immediate costs as well as the necessary efforts to prevent the stocks of undocumented immigrants from rising. Reducing the flows of illegal immigration is not the focus of this discussion, as the discussion on earned adjustment means that stocks of undocumented immigrants are the principal focus of study. Nevertheless, while earned adjustment may be the appropriate method for

¹⁶⁰ The most effective way to ensure compliance with employer sanctions would be to institute a national ID system: an anathema to the majority of the American public. See Suro, 39.

legalization, it is only one half of the equation. Ultimately, earned adjustment programs have significant advantages over either amnesties or guest-worker programs in reducing stocks of undocumented immigrants. Moreover, the approach they take to legalization is one that is pragmatic, fair, and beneficial.

CONCLUSION: A NEW HOPE FOR IMMIGRATION REFORM

The U.S. government should pursue a policy of immigration reform that utilizes earned adjustment to reduce the stocks of undocumented immigrants in the country. Legalization is necessary to preserve the institutional health of the United States and respect for its laws. The United States as a whole also stands to gain from legalization both economically and through fostering a stronger immigrant community that does not have to fear deportation. While a more effective system of controlling the flow of illegal immigration must be established, particularly through more effective employer sanctions, the United States should not commit the mistake of allowing a tough stance on illegal immigration to harm the best interests of the nation. “America’s immigration policy must also be sufficiently flexible so that our firm stance against illegal immigration does not undermine our other national interests.”¹⁶¹ Dealing with existing stocks of undocumented immigrants calls for pragmatism as much as firmness; while deportation should remain the consequence for violating U.S. immigration law, the status of long-term residents of the United States, though illegally present, should be approached with a degree of sympathy and understanding of their situation. Though legalization may appear to be a concession to undocumented immigrants who have violated U.S. law, it

¹⁶¹ United States, *Amending the Illegal Immigration Reform Act of 1996*, 2.

nevertheless remains a better alternative to deportation: an alternative that is more fair and beneficial.

Nevertheless, legalization cannot be a free ride or else it would encourage future flows of illegal immigration and damage the perception of the government's ability to enforce its own laws. Earned adjustment programs, as shown, allow the U.S. government to legalize significant stocks of undocumented immigrants without encouraging future flows and inciting the criticism that legalization is rewarding criminals.¹⁶² Undocumented immigrants who enter the United States in search of employment or to reunite their families are not criminals: they are the unfortunate consequence of the structural factors that perpetuate illegal immigration. Earned adjustment balances the competing priorities of legalizing stocks of undocumented immigrants and discouraging future illegal immigration by requiring a degree of achievement from every beneficiary that contributes to American society. In doing so, it also displays the needed ability to adapt to different groups and circumstances by tailoring the conditions attached to permanent residency. The potential for earned adjustment to reduce stocks of undocumented immigrants in a way that does not compromise the national interest of the United States is therefore greater than either blanket amnesties or guest-worker programs.

The DREAM Act clearly illustrates the hope that earned adjustment programs offer. The plight of undocumented immigrant minors cannot be ignored, for education remains the cornerstone of society. Allowing them to attend college and gain permanent residency is not a reward of criminal behavior but rather for outstanding achievement.

¹⁶² Raul Yzaguirre, President of the National Council of La Raza, argues that "it is a pernicious use of language to call somebody who is trying to find a job and trying to feed his family and trying to act in the best traditions of America a criminal. But if it is criminal, then we are all criminals in the sense that we are all benefiting from that criminality." See United States, *U.S.-Mexico Migration Discussions: A Historic Opportunity*, 46.

One must not forget the socioeconomic status of the majority of undocumented immigrants: the opportunity to attend college should not be taken for granted. The DREAM Act offers hope to both undocumented immigrants and the United States as a whole, because it sets the example for effective immigration reform that is fair, compassionate, and beneficial to all. Therefore, advocating the passage of the Act is done not just for the sake of the beneficiaries themselves but also for the of the American public and the need to adopt an immigration policy that looks at current stocks of undocumented immigrants as an opportunity instead of a burden.

Undoubtedly, some questions still remain. In contrast to amnesties and guest-worker programs which the United States has had decades of experience with, earned adjustment is comparatively new. The long term effects of earned adjustment programs on the legalized immigrants and on public opinion cannot be assessed at this point in time because data simply is unavailable. Nevertheless, the ability for earned adjustment programs to tailor themselves to specific populations and specific requirements holds promise for future improvements. The government should still adopt earned adjustment as the backbone of their legalization program, despite the lack of data regarding its effects, because history has shown that the alternatives have been ineffective. The Bush administration would do well to reconsider its support for a guest-worker program in lieu of permanent legalization through earned adjustment programs. Supporting the DREAM Act and similar earned adjustment bills in Congress would be the first step in promoting a pragmatic immigration policy that is both effective and fair.

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