ARTICLES

MAKING LEGAL: THE DREAM ACT, BIRTHRIGHT CITIZENSHIP, AND BROAD-SCALE LEGALIZATION

by
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Some of the most controversial topics in immigration and citizenship law involve granting lawful immigration status—or citizenship itself—to persons who might otherwise be in the United States unlawfully. In this Article, I examine arguments for and against three ways to confer lawful status: (1) the DREAM Act, which would grant status to many unauthorized migrants who were brought to the United States as children; (2) the Fourteenth Amendment to the Constitution, under which almost all children born on U.S. soil are U.S. citizens; and (3) broad-scale proposals to grant lawful immigration status to a substantial percentage of the current unauthorized population. I first explain how arguments both for and against the DREAM Act reflect some mix of fairness and pragmatism. Though birthright citizenship seems different from the DREAM Act, the arguments are similar. I next show that although children figure much more prominently in the DREAM Act and birthright citizenship, similar patterns of argument apply to broad-scale legalization, and the arguments in favor are just as strong. Finally, I explain that the "rule of law" is a highly malleable concept that provides no persuasive case against any of these ways to confer

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I am grateful for very helpful comments from William Funk, Roberto Gonzales, Margaret Hu, Aliza Kaplan, Stephen Manning, Lise Nelson, Nhu–Y Ngo, John Parry, Juliet Stumpf, Dan Tichenor, Laurie Trautman, and Elliott Young, and for the opportunity to present an earlier draft at the forum on New Landscapes in Legalization: An Interdisciplinary Exploration at the Lewis & Clark Law School, on October 28, 2011.

This Article is part of a book project with the working title, *Immigration Outside the Law*, which in turns expands on Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037 (2008).

lawful immigration or citizenship status. Rule of law arguments in favor of conferring status are stronger than rule of law arguments against doing so.

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I. INTRODUCTION

My goal in this Article is to examine arguments for and against various vehicles for conferring lawful immigration or citizenship status on individuals who might otherwise be in the United States unlawfully. First, I look at arguments addressing the Development, Relief, and Education for Alien Minors (DREAM) Act, which would make lawful status available to young unauthorized migrants who were brought to the United States as children, as long as they attend college or serve in the military.[1] I next examine arguments supporting and opposing the Fourteenth Amendment of the U.S. Constitution, which grants citizenship to almost all children born on U.S. soil, regardless of their parents' immigration status. Third, I explore arguments addressing broad-scale legalization proposals that would grant lawful immigration status to a substantial percentage of the current unauthorized population of the United States.[2]

It is intuitive to compare the DREAM Act and broad-scale legalization. It may seem more unusual to bring birthright citizenship into the discussion, but it is conceptually comprehensive to do so, for it also confers a type of lawful status—citizenship itself. Examining all three vehicles not only deepens analysis of each, but also sheds light on two issues—the role of children and the rule of law—that are fundamental to understanding immigration outside the law.

To focus discussion, I start with a brief sketch of *Plyler v. Doe*, a landmark 1982 U.S. Supreme Court decision. *Plyler* held that no state can limit a child's access to public elementary and secondary education based on his or her immigration status.[3] The Court struck down a Texas state statute that allowed local school districts to prevent children from attending public schools if they were not lawfully in the United States. In so holding, the Supreme Court addressed three themes that have

[1] Development, Relief, and Education for Alien Minors (DREAM) Act of 2011, S. 952, 112th Cong. (2011); H.R. 1842, 112th Cong. (2011).

[2] *See, e.g.*, Comprehensive Immigration Reform Act of 2007, S. 1639, 110th Cong. § 601 (2007).

[3] Plyler v. Doe, 457 U.S. 202 (1982).

remained pivotal in public debates over immigration outside the law. The first theme is the *complexity of unlawful presence*. For the Court, the fact that the children were in the United States unlawfully was just the start of the analysis.[4] It may be unclear whether any noncitizen is present unlawfully, and even if a noncitizen clearly lacks lawful immigration status, the government might grant her such lawful status. Moreover, even if that does not happen, an unlawfully present noncitizen might never be deported, because of government policies that amount to long-standing tolerance of a large unauthorized population in the United States.

The second *Plyler* theme is *the limited role of states and localities*. Even if the federal government may treat citizens, or noncitizens who are lawfully present, better than it treats unauthorized migrants, state and local governments might violate the U.S. Constitution by doing so, according to the Court.[5] This explains much of why the Court did not defer to the decision by the State of Texas to limit access to K-12 public education.

The third *Plyler* theme is the *need to integrate unauthorized migrants*. Citing *Brown v. Board of Education*,[6] the Court emphasized that without education, these children would be permanently disadvantaged as they came of age,[7] leading to the emergence of a permanent subcaste that is intolerable within a national constitutional culture based on equality. This view of the need to integrate unauthorized migrants—at least as applied to children—was essential to overturning the Texas statute.

Taken together, the *Plyler* approach to each of these themes reflects a certain ethos—a way of thinking not just about children who are in the United States without lawful immigration status, but more broadly about immigration outside the law. In turn, the *Plyler* themes are pivotal in thinking about vehicles for conferring lawful status, including the DREAM Act, birthright citizenship, and broad-scale legalization.[8]

II. THE DREAM ACT

Proposed federal legislation, usually called the Development, Relief, and Education for Alien Minors (DREAM) Act, would address the predicament of young persons who were brought to the United States as

[4] *See id.* at 218–19 (“This situation raises the specter of a permanent caste of undocumented resident aliens . . . .”).

[5] *See id.* at 220 (explaining that it is “difficult to conceive of a rational justification for penalizing these children for their presence within the United States”); *see also id.* at 225.

[6] 347 U.S. 483 (1954).

[7] *See Plyler*, 457 U.S. at 222–23 (quoting *Brown*, 347 U.S. at 493).

[8] On the many other implications of *Plyler* for legal and policy responses to unauthorized migration, see Motomura, *supra* note *.

children without lawful immigration status.[9] Congress has considered various versions over the past decade, all of which would allow them to become lawful permanent residents. One version passed the U.S. Senate in May 2006. In 2010, another version won the support of a majority of Senators, but not the sixty needed to allow a vote on the bill.[10]

The DREAM Act would establish several conditions for lawful status. According to the proposal as introduced in the U.S. Senate in 2011, the noncitizen individual must have been under sixteen when she arrived in the United States.[11] She must have resided in the United States continuously for the five years preceding enactment of the law.[12] She must have earned a high school diploma or the equivalent in the United States, or have been admitted to a U.S. college or university.[13] A noncitizen meeting these requirements would be eligible to be a conditional permanent resident.[14] If she is under thirty-five at the time the act passed, and attends college or serves in the U.S. military for two years, she would become a lawful permanent resident.[15]

In the summer of 2012, the Department of Homeland Security implemented a program—Deferred Action for Childhood Arrivals (DACA)—to make discretionary relief available to the vast majority of individuals who would benefit from the DREAM Act, if it were to become law.[16] They could apply for deferred action, which includes eligibility to apply for work authorization based on financial need. The eligibility rules varied somewhat from recent versions of the DREAM Act, most notably by setting a lower maximum age of 30.[17] It remains to be seen whether the rules for the deferred action program will carry over into legislative proposals.

Arguments for the DREAM Act take two basic approaches, sometimes overlapping. Some arguments rely on fairness. It would also

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9 THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1144 (7th ed. 2012).

10 *Id.* at 1144–45 (summarizing proposed legislation); *see House Passes DREAM Act; Senate Tables Bill*, 87 INTERPRETER RELEASES 2334 (2010) (explaining vote in Senate).

11 Development, Relief, and Education for Alien Minors (DREAM) Act of 2011, S. 952, 112th Cong. § 3(b)(1)(B) (2011).

12 *Id.* § 3(b)(1)(A).

13 *Id.* § 3(b)(1)(E).

14 *Id.* § 3(a).

15 *Id.* § 3(b)(1)(F), 5(D).

16 *See* Memorandum from Janet Napolitano, Sec'y of Homeland Sec. to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., & John Morton, Dir. U.S. Immigration & Customs Enforcement, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

17 *Id.* at 1.

be accurate to call them moral or justice-based arguments. Other arguments are pragmatic—or consequentialist, some might say. Both types of arguments cite the complexity of unlawful presence and the need to integrate unauthorized migrants—two of the three *Plyler* themes. Indeed, the DREAM Act would open up access to lawful status for reasons that closely resemble the reasons that the U.S. Supreme Court offered in *Plyler* for safeguarding access to public elementary and secondary education.

Some fairness arguments emphasize the complexity of unlawful presence, especially the innocence of children whose parents brought them to the United States. Their parents immigrated within the framework of the federal government's long-standing tolerance of a large unauthorized population as a flexible source of labor. This represents a type of tacit agreement with unauthorized migrants—what I have called *immigration as contract*.[18] From this perspective, unauthorized migrants accepted an invitation from U.S. employers, with the acquiescence of the U.S. government, to come to the United States to work. In turn, it is especially wrong to penalize their children—who were not even parties to any such understanding—by forcing them to live in the shadows of the only society they know. The U.S. Supreme Court put it this way in *Plyler*: "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."[19] In spite of their unlawful presence, *Plyler* called them "productive and law-abiding."[20]

Other fairness arguments rely on the third *Plyler* theme by emphasizing the need to integrate this group of unauthorized migrants. They are already part of American society in many ways, typically having arrived at a young age and in the distant past. They have had little or no contact with their parents' countries of origin. From this perspective, their unlawful presence is offset by these ties in the United States. I have applied the term *immigration as affiliation* to this view that the law should recognize such ties to individuals or communities.[21] The alternative—denying them access to lawful status—would relegate them to permanent disadvantage. Especially given their innocence, this argument continues, integrating them more completely is morally essential.

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[18] *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 26–62 (2006); Hiroshi Motomura, *Who Belongs? Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 373–76 (2012).

[19] Plyler v. Doe, 457 U.S. 202, 220, 226 (1982).

[20] *Id.* at 218 n.17 (quoting *Administration's Proposals on Immigration and Refugee Policy: J. Hearing Before the Subcomm. on Immigration, Refugees, & Int'l Law of the H. Comm. on the Judiciary and the Subcomm. on Immigration & Refugee Policy of the S. Comm. on the Judiciary*, 97th Cong. 9 (1981) (statement of William French Smith, Att'y Gen. of the United States)).

[21] *See* MOTOMURA, *supra* note 18, at 80–114; Motomura, *supra* note 18, at 376–77.

Turning next to pragmatic arguments for the DREAM Act, the connection between the complexity of unlawful presence and the need to integrate unauthorized migrants plays an essential but somewhat different role. As for the complexity of unlawful presence, pragmatic arguments assume that the government has only limited control over the basic contours of immigration outside the law. Even with stiffer laws or more enforcement, unauthorized migration will be substantial, given long-standing tolerance of a large unauthorized population as a flexible source of labor. Expressing this pragmatism, *Plyler* said the schoolchildren in that case had a "permanent attachment" to the United States and were "unlikely to be displaced from our territory."[22] So, too, will the vast majority of DREAM Act beneficiaries stay in the United States, as will their children.

As for the need to integrate, pragmatic arguments emphasize that these young people are already integrated into American society in many ways. But without lawful immigration status, the argument goes, their full integration is impossible, and the United States will suffer from having a large marginalized population in its midst. In contrast, lawful status would nurture the positive contributions to society that DREAM Act beneficiaries and their children and grandchildren can make. College or military service requirements work toward this goal. Indeed, passage of the DREAM Act has been part of the strategic planning of the Department of Defense as a way to fill the ranks of an all-volunteer military.[23]

Arguments against the DREAM Act are also usefully analyzed as grounded in fairness, pragmatism, or some blend. The same two *Plyler* themes—the complexity of unlawful presence and the integration of unauthorized migrants—help to clarify. The fairness objections start with the idea that unlawful presence is not complex. These noncitizens are clearly violating federal immigration law, as did their parents. If there is an immigration contract, they broke it by breaking the law. Parents often make choices that their children have to live with. And even assuming these young people were not to blame for their arrival, nothing keeps them from leaving now. According to this argument, they have no legitimate claim to lawful status, and granting it would undermine the rule of law.

As for integration, the fairness arguments against the DREAM Act reject the notion that these noncitizens have any claim to be part of U.S. society. They are not Americans in waiting, and integrating them is not a legitimate policy goal. From this perspective, the law should not recognize any affiliation they have developed, especially because lawful status would give them access to scarce public resources. Again invoking

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[22] *Plyler*, 457 U.S. at 218 n.17.

[23] *See* OFFICE OF THE UNDER SEC'Y OF DEF. FOR PERS. & READINESS, STRATEGIC PLAN FOR FISCAL YEARS 2010–12, at 8 (2009), *available at* http://www.prim.osd.mil/Documents/FY2010-12_PR_Strategic%20Plan.pdf.

the rule of law, the argument is that unauthorized migrants should not be rewarded by letting them cut into line ahead of immigrants who play by the rules.

The pragmatic objections to the DREAM Act draw on the same two *Plyler* themes. Focusing on unlawful presence, individuals who are illegally in the United States pose a straightforward problem that the government can solve by apprehending and deporting them, or by making life for them hard enough that they will leave. Such enforcement policies in the United States are needed, this argument continues, to support border enforcement and the system for lawful admission to the United States.

As for integration, pragmatic objections emphasize that effective enforcement can minimize or eliminate any need to integrate unauthorized migrants. It is unsound to assume that any unauthorized migrants will stay indefinitely. Enforcement will be ineffective if it is assumed to be ineffective, especially if lawful status for their children creates incentives for parents to come to the United States. In contrast, tough enforcement can make deportation (including self-deportation) a pragmatic alternative to integrating children who are in the United States illegally.

Though these arguments for and against the DREAM Act deserve more discussion, which comes later in this Article, for now I make two interim observations. One is that both sides rely on sharply contrasting approaches to both the complexity of unlawful presence and the need to integrate unauthorized migrants. My other observation is that both sides argue fairness and pragmatism. The next question is how this framework might apply to other schemes that give lawful status to people who might otherwise be unauthorized migrants. I now turn to the acquisition of lawful status in the form of citizenship itself.

III. BIRTHRIGHT CITIZENSHIP

The Fourteenth Amendment to the U.S. Constitution confers birthright citizenship on the basis of *jus soli*.[24] This means that all children born on U.S. soil are citizens regardless of their parents' immigration status. This includes children whose parents are unauthorized migrants. Only the children of diplomats do not become citizens in this way.[25] This interpretation of the Citizenship Clause of the Fourteenth Amendment has stood for over a century,[26] but it has come

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[24] U.S. CONST. amend. XIV, § 1.

[25] ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 9, at 61–62.

[26] *See* United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898) (affirming that Fourteenth Amendment confers citizenship by birth within territory of United States); *see also* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 9, at 50–80 (describing *jus soli* citizenship); Garrett Epps, *The Citizenship Clause: A "Legislative History,"* 60 AM. U. L. REV. 331, 332–34 (2010). *But cf.* PETER H. SCHUCK & ROGERS M.

under recent attack from scholars who have challenged it as flawed constitutional interpretation.[27] Other critics, even if they view the constitutional rule as settled, have argued that it is bad policy.[28] Over the past several decades, Congress has considered but never approved several constitutional amendments that would withhold citizenship from children born on U.S. soil if their parents are not lawfully present.[29]

One might assume that the Fourteenth Amendment and the DREAM Act would present different sorts of issues. One confers citizenship, while the other would confer lawful immigration status. Birthright citizenship applies to children born in the United States, while the DREAM Act applies to children born outside the United States and brought into the country. On closer inspection, however, they share the same effect—to give some form of lawful status to some persons who might otherwise lack it.

This similarity becomes clear from imagining two variations on current law. One variation assumes there is no *jus soli* birthright citizenship. In such a system—which is the law in many countries around the world—children born in the United States to unauthorized parents would also lack lawful immigration status. They would become potential beneficiaries of legislation like the DREAM Act. The second variation imagines that children brought to the United States at a young age would be automatically naturalized as U.S. citizens after living in the United States for a certain number of years.[30] This second variation, if broad enough in coverage, would eliminate the need for a DREAM Act. These imaginary laws show that the DREAM Act, birthright citizenship, and

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SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 118 (1985) (arguing that the Fourteenth Amendment should be interpreted to deny citizenship to children whose parents have not been admitted as lawful permanent residents).

[27] *See, e.g.*, *Dual Citizenship, Birthright Citizenship, & the Meaning of Sovereignty: Hearing Before the Subcomm. on Immigration, Border Sec., & Claims of the H. Comm. on the Judiciary*, 109th Cong. 61 (2005) (prepared statement of John C. Eastman, Professor, Chapman University School of Law); William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221, 224 (2008); Charles Wood, *Losing Control of America's Future—The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL'Y 465, 466–68 (1999).

[28] *See* Julia Preston, *State Lawmakers Outline Plans to End Birthright Citizenship, Drawing Outcry*, N.Y. TIMES, Jan. 6, 2011, at A16 (describing bills proposed in several states to issue special birth certificates to children whose parents are in the United States without lawful immigration status).

[29] *See, e.g.*, H.R.J. Res. 46, 109th Cong. (2005) (proposing constitutional amendment denying citizenship to individuals born in U.S. if neither parent is a U.S. citizen or owes permanent allegiance to the United States); H.R.J. Res. 42, 108th Cong. (2003) (same); *see also* Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. § 2(b) (2011) (expressly limiting the meaning "subject to the jurisdiction" of the United States).

[30] A similar rule already applies to children, typically adoptees, brought to the United States by citizens or lawful permanent residents. *See* Child Citizenship Act of 2000, INA § 320, 8 U.S.C. § 1431 (2006).

other methods for conferring citizenship on children have similar practical effects. By a simple twist of fate, the fact that birthright citizenship is the law—but the DREAM Act and automatic naturalization of childhood arrivals are not—often divides children in the same family. Older siblings lack lawful immigration status, while the younger ones, born after their parents arrived, are citizens.

Reflecting this practical overlap, the typical objections to birthright citizenship and the DREAM Act take similar approaches to the same two *Plyler* themes, again with strands of fairness and pragmatism. Unlawful presence is not complex, according to this argument. When noncitizens clearly lack lawful permission to be in the United States, it undermines fairness and the rule of law to grant their children a benefit as precious as citizenship. Moreover, the argument continues, the government of the United States is based on consent among the governed, but unauthorized migrants have not been granted consent to be here. According to this immigration-as-contract view of birthright citizenship, parents who are unlawfully present should not be able to impose their children unilaterally on American society through an automatic grant of citizenship.[31] And pragmatically, effective enforcement means eliminating incentives for unauthorized migrants, which in turn requires repealing the rule that confers birthright citizenship regardless of the immigration status of a child's parents.

The arguments for birthright citizenship generally assume that the difference between having and not having U.S. citizenship is profound. If their parents lack lawful immigration status, then without citizenship their children will likely also lack any sort of lawful status. From this starting point, these arguments mirror support for the DREAM Act in their reliance on the complexity of unlawful presence and the need to integrate immigrants. Fairness arguments emphasize that even if children (and their parents) are in the United States unlawfully, they remain innocent. They came to America in the context of widespread tolerance of unauthorized migration. Moreover, their integration is an important goal, and without citizenship, the practical and psychological barriers to their integration into society will remain insurmountable. Pragmatic arguments for birthright citizenship also parallel support for the DREAM Act, relying on the complexity of unlawful presence to predict that these children will remain in the United States indefinitely.[32]

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[31] *See, e.g.*, SCHUCK & SMITH, *supra* note 26, at 94 (arguing in the context of interpreting the Fourteenth Amendment that "[i]f mutual consent is the irreducible condition of membership in the American polity, it is difficult to defend a practice that extends birthright citizenship to the native-born children of illegal aliens").

[32] *See, e.g.*, PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION 18–19 (2008) (discussing justifications for *jus soli* birthright citizenship); David A. Martin, *Membership and Consent: Abstract or Organic?*, 11 YALE J. INT'L L. 278, 282–84, 291–94 (1985) (reviewing SCHUCK & SMITH, *supra* note 26) (noting complications associated with birthright citizenship and ascriptive citizenship rules).

With deportation improbable, conferring citizenship is essential to foster their contributions and to resist their marginalization.

IV. THE ROLE OF CHILDREN

The arguments supporting the DREAM Act and birthright citizenship share an emphasis on children. This emphasis deserves attention, because a key question is whether legal and policy debates differ when children are less central. First, children evoke the idea of innocence—sometimes also phrased as an absence of blame, guilt, or responsibility. Innocence was a big part of the rationale in *Plyler* for constitutionally guaranteed access to public elementary and secondary schools.[33] In arguments for birthright citizenship and the DREAM Act, innocence is similarly important as the basis for refusing to marginalize young people even if they are in the United States unlawfully.

Children also introduce a time dimension.[34] A basic argument for the DREAM Act is that the need to integrate young people in the future overrides their unlawful presence today. Likewise, birthright citizenship under the Fourteenth Amendment gives children the lawful status that is an important platform for their integration as they grow up in America. Both the DREAM Act and birthright citizenship give immigration and citizenship law a strong forward-looking perspective that emphasizes integration over time regardless of current immigration status.

Children also highlight the role of the family. Many families in which parents lack lawful immigration status include children who are U.S. citizens under the Fourteenth Amendment. The U.S. Census reports that 5.5 million children born in the United States have at least one unauthorized parent.[35] The DREAM Act would similarly open up lawful status to a substantial number of sons and daughters with unauthorized parents. By doing so, both the DREAM Act and birthright citizenship broaden the focus of immigration and citizenship law from the individual to the family.

This broadening is part of the integration of immigrants into American society. Children in immigrant families are typically much more likely than their parents to become integrated linguistically, socially, and in other dimensions. This is true regardless of a child's legal status, but is even more true for children who have lawful immigration status or citizenship, which allows them to serve more effectively as cultural brokers between their parents and mainstream society outside immigrant enclaves. Their brokering role often starts with translating

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[33] Plyler v. Doe, 457 U.S. 202, 230 (1982).

[34] *See* Hiroshi Motomura, *We Asked for Workers, But Families Came: Time, Law, and the Family in Immigration and Citizenship*, 14 VA. J. SOC. POL'Y & L. 103, 112–18 (2006).

[35] *See* JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 13 (2011), *available at* http://www.pewhispanic.org/files/reports/133.pdf.

between their parents and teachers, not only from English but also from the culture of the school system and American society generally. In this way, a significant implication of both birthright citizenship and the DREAM Act is allowing children to help not just themselves integrate, but their families, too.

The aspects of birthright citizenship and the DREAM Act that involve children can trigger strong objections. One is that birthright citizenship creates what some derisively call anchor babies, who can then sponsor their unauthorized parents for admission. This is a myth, since children who are citizens must be 21 years of age before they may file an immigrant petition for a parent.[36] This basic error notwithstanding, the foundation of the objection is that the involvement of children should not make a difference. Children or no children, the argument continues, the rule of law demands the denial of lawful immigration status or citizenship as a reward for illegal activity. This objection takes on more vehemence in the context of proposals to grant lawful immigration status on a broader scale.

V. BROAD-SCALE LEGALIZATION PROPOSALS

The Immigration Reform and Control Act of 1986 (IRCA) allowed about 2.7 million unauthorized migrants to become lawful permanent residents—over 80% of the estimated unauthorized population when the legislation was enacted.[37] Under IRCA's general legalization program, a noncitizen who had been in the United States unlawfully since January 1, 1982, had a period of twelve months from May 1987 to apply for temporary resident status, and then three years to become a permanent resident.[38] This second step required continuous residence in the United States. A conviction for a felony or three misdemeanors in the United States was disqualifying.[39] Applicants had to demonstrate minimal

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[36] Immigration & Nationality Act (INA) § 201(a), (b)(2)(A)(i), 8 U.S.C. § 1151(a), (b)(2)(A)(i) (2006). Indeed, the probable reason for this requirement is to bar the filing of petitions immediately after the birth of a child in the United States. Though it is possible for unauthorized parents to obtain discretionary relief from removal on the basis of hardship to their citizen children, such relief is exceptional and available only after demanding prerequisites are satisfied. *See* INA § 240A(b), 8 U.S.C. § 1229b(b).

[37] *See* RUTH ELLEN WASEM, CONG. RESEARCH SER., ALIEN LEGALIZATION AND ADJUSTMENT OF STATUS: A PRIMER 4–5 (2010), *available at* http://fpc.state.gov/documents/organization/138728.pdf [hereinafter WASEM, PRIMER]; *see also* RUTH ELLEN WASEM, CONG. RESEARCH SER., UNAUTHORIZED ALIENS RESIDING IN THE UNITED STATES: ESTIMATE SINCE 1986 1–2 (2011), *available at* http://www.fas.org/sgp/crs/misc/RL33874.pdf [hereinafter WASEM, UNAUTHORIZED]. *See generally* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of Title 8 of the United States Code).

[38] WASEM, PRIMER *supra* note 37, at 5.

[39] Immigration and Nationality Act (INA) § 245A(a)(4)(B), 8 U.S.C. § 1255a(a)(4)(B) (2006).

understanding of English, as well as knowledge of U.S. history and civics, or they had to be enrolled in a course on these subjects.[40] A waiver of these tests was available for applicants older than sixty-five.[41] IRCA also included a second legalization program for unauthorized migrants who had worked ninety days in seasonal agriculture between May 1985 and May 1986. They could become permanent residents with three more years of agricultural work.[42]

IRCA was controversial not just for legalization, but also for its other main features—employer sanctions, provisions to address potential discrimination resulting from employer sanctions, a program to admit temporary agricultural workers, and stronger border enforcement.[43] Its legalization provisions were objectionable to many who believed that any program to grant lawful immigration status was an affront to the rule of law. Many of these critics also argued that the program invited fraudulent claims. On the other side, a different group of critics thought that IRCA legalization did not go far enough. Because it was limited to noncitizens who had already been in the United States unlawfully for almost five years, it excluded a significant number of unauthorized migrants. It also excluded family members who were ineligible for legalization on their own, typically because they arrived after the January 1982 cutoff date.[44]

In recent years, Congress has debated and rejected several legalization proposals.[45] They vary but share common elements. Like IRCA, they would make lawful immigration status available to a significant percentage of unauthorized migrants in the United States. The number who would qualify and actually apply under any given proposal has been open to speculation. The recent proposal that came closest to enactment was Senate Bill 1639, considered in 2007.[46] It would have established a new Z visa for unauthorized migrants. To qualify initially, an applicant would have to be employed and residing in the United States as of January 1 of that year.[47] She would have to pay a

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[40] *Id.* § 245A(b)(1)(D)(i).

[41] The waiver is set out in *id.* § 245A(b)(1)(D)(ii).

[42] INA § 210(a)(2)(A), 8 U.S.C. § 1160(a)(2)(A).

[43] *See* Immigration Reform and Control Act of 1986 (IRCA) §§ 101–117, 301–305, Pub. L. No. 99-603, 100 Stat 3359, 3360–84, 3411–34 (codified in scattered sections of 8 U.S.C.).

[44] Later legislation addressed this aspect of the 1986 scheme by granting temporary status until family members could become lawful permanent residents through existing immigration categories. Immigration Act of 1990 § 301, Pub. L. No. 101-649, 104 Stat. 4978, 5029–30.

[45] *See, e.g.*, Comprehensive Immigration Reform for America's Security and Prosperity (CIR ASAP) Act of 2009, H.R. 4321, 111th Cong. (2009); Agricultural Job Opportunities, Benefits, and Security (AgJOBS) Act of 2009, S. 1038, 111th Cong. (2009).

[46] S. 1639, 110th Cong. § 601 (2007).

[47] *Id.* § 601(b).

$1,000 fine and other processing fees, provide biometric data, and stay employed. A criminal record could disqualify her.[48]

Z visas would be valid for four years initially. Renewal would require applicants to demonstrate "an attempt to gain an understanding of the English language and knowledge of United States civics."[49] To use some familiar phrasings, they would have to go to the back of the line, but they ultimately would have a path to citizenship. They could become permanent residents only after everyone else who had filed an approved immigrant petition at least two years before the law's enactment. Z visa holders then could apply for permanent residence, but only from outside the United States and only after paying another $4,000 fine.[50] Only then would they start to accrue the five years as a lawful permanent resident that are generally required to become a naturalized U.S. citizen.[51]

Broad-scale legalization proposals resemble the DREAM Act, but many more unauthorized migrants would benefit. Legislation modeled on Senate Bill 1639 would presumably benefit a significant percentage of the 11 or 12 million unauthorized migrants in the United States.[52] The DREAM Act could allow well over 1 million young people to become permanent residents.[53] This is a large and significant group, but just a small fraction of the population that broad-scale legalization would reach.

In expanding discussion from the DREAM Act and birthright citizenship to broad-scale legalization, the first question is whether the same types of supporting arguments and objections apply to all three. In *Plyler v. Doe*, the U.S. Supreme Court emphasized that the children's parents had brought them to the United States.[54] Likewise, the arguments for the DREAM Act and birthright citizenship seem to apply especially to children. It may be natural to approve of birthright citizenship and to support the DREAM Act, but then to hesitate to endorse broad-scale legalization.

On a closer look, however, the arguments that support the DREAM Act and birthright citizenship apply just as strongly to broad-scale legalization. The reason is that the arguments for all three vehicles share very similar approaches to the complexity of unlawful presence and the need to integrate unauthorized migrants. But a key question probing potential differences is whether arguments for access to lawful

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[48] *See id.* § 601(d)(1)(F), (e)(4), (5)(A)–(D), (f)(3).

[49] *Id.* § 601(k)(2)(B)(ii)(I).

[50] *Id.* § 602(a)(1)(c)(v).

[51] *See* Immigration & Nationality Act (INA) § 316(a), 8 U.S.C. § 1427(a) (2006).

[52] WASEM, UNAUTHORIZED, *supra* note 37, at 4.

[53] Jeanne Batalova & Michelle Mittelstadt, *Relief from Deportation: Demographic Profile of the DREAMers Potentially Eligible Under the Deferred Action Policy*, MIGRATION POLICY INST. (Aug. 2012), http://www.migrationpolicy.org/pubs/FS24_deferredaction.pdf.

[54] Plyler v. Doe, 457 U.S. 202, 219–20 (1982).

immigration status become weaker if children are not immediately involved.

Focusing on fairness, the innocence of children makes it seem less fair to deny them access to lawful immigration status. However, the same complexity of unlawful presence and need to integrate unauthorized migrants that support lawful status for children also apply to adults. The complexity of unlawful presence is the predictable consequence of an immigration system that includes broad acquiescence in a large unauthorized population, even if enforcement is often harsh.[55] This de facto policy of maintaining a flexible workforce of unauthorized migrants reflects not only immigration enforcement patterns, but also international economic development policies.[56] With strong ties to the United States and significant contributions to the U.S. economy, fairness arguments for integrating unauthorized migrants are as strong for adults as for children.

This combined perspective on unlawful presence and integration was the conceptual basis for the reasoning in *Plyler*. To be sure, the decision's holding was limited to children and access to public elementary and secondary schools.[57] More generally, however, an essential part of the conceptual foundation of *Plyler* is that responsibility in immigration law entails more than simply making individual migrants live with the consequences of freely made choices. Citing U.S. immigration history, the Court understood that economic realities and government policies shape the apparently free choices of individuals much more profoundly than the superficial contours of the law as written.[58] From this perspective, it is unjust to marginalize rather than integrate noncitizens—adults as well as children—whose unlawful presence is much more complex than a simple distinction between legal and illegal would suggest.

From a pragmatic perspective, the complexity of unlawful presence matters because it is impractical to deport 11 million people. This impracticality reflects not only the enforcement resources that would be required, but also the economic and political costs of deporting a substantial part of the U.S. labor force. These workers make significant contributions to the U.S. economy and are highly integrated into local neighborhoods, workplaces, and communities. Though an underground economy with an exploited population is an alternative to deportation, it is much more pragmatic to use legalization to integrate unauthorized migrants and in turn to enhance their contributions to society. Pragmatism, like fairness, applies as strongly to adults as to children.

Advocates who work for passage of both the DREAM Act and broad-scale legalization have had to make tough choices in lobbying strategy. At

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[55] *See* MOTOMURA, *supra* note 18, at 129–30; Motomura, *supra* note *, at 2049–53.

[56] *See* MOTOMURA, *supra* note 18, at 185; Motomura, *supra* note *, at 2053.

[57] *Plyler*, 457 U.S. at 230.

[58] *Id.* at 218 n.17.

times in the past decade when broad-scale legalization seemed politically attainable, the similarity between arguments for the DREAM Act and for broad-scale legalization made it tempting to reach for broad-scale legalization rather that settle for the DREAM Act. But when the political winds shift and broad-scale legalization becomes less politically realistic, especially with greater partisan polarization and without a filibuster-proof Democratic majority in the Senate, the DREAM Act becomes the focus of advocacy.

At such moments of political strategizing, the similarities between legalization arguments for children and for adults tend to get lost in the rhetoric. The temptation is strong—perhaps irresistible—to emphasize the innocence of children brought to the United States at a young age. And the temptation is equally strong to cite the many examples of young people who have excelled academically, many of them winning admission to selective colleges and universities. To be sure, high school valedictorians are more appealing in the political arena than students who struggle to make it through high school or perhaps drop out. And arguments for the DREAM Act and allowing children to get lawful immigration status may appeal to a broader audience than arguments for legalization on a broader scale. It is understandable that those who lobby for the DREAM Act emphasize "good," model immigrants that the legislation would benefit. Viewed more fundamentally, however, the fairness and pragmatic arguments apply to all children, not just the honor students, and they apply to adults as well.

VI. THE RULE OF LAW

The objections to any sort of mechanism—including the DREAM Act, birthright citizenship, and broad-scale legalization—that confers lawful immigration or citizenship status on people deserve serious consideration. One basic objection is that no alleged de facto immigration policy to tolerate or encourage unauthorized migration has ever existed. From an immigration-as-contract perspective, any contract is the law itself and immigration law violators have broken both the law and contract. Put another way, the shortcomings of enforcement are not a legitimate source of expectations by unauthorized migrants, nor do any shortcomings impose limits on the U.S. government's policy options. Indeed, calling this a de facto policy seems to admit that this has never actually been official policy.

From this skeptical point of view, the relevance of any such de facto policy is unclear, even assuming it once existed. The strong turn toward enforcement in the 1996 amendments to the Immigration and Nationality Act[59] reflected a deliberate effort to change policy in ways that undercut any claims based on weaker, pre-1996 enforcement patterns.

[59] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.).

Even if de facto government policy in past eras invited immigration outside the law, this view asserts that history generates no moral or legal obligations or justified expectations to continue.

I have explained how objections to the DREAM Act, birthright citizenship, and broad-scale legalization view unlawful presence and integration of unauthorized migrants in ways that contrast sharply with the approaches to these themes in *Plyler* that their supporters generally adopt. As to unlawful presence, the argument is that any noncitizen without lawful status is an illegal alien, plain and simple. And there is no obligation or policy reason to foster or even to tolerate the integration of unauthorized migrants. This reasoning leads logically to forceful objections to any form of amnesty.

One related argument is that any access to lawful status for unauthorized migrants or their children will inevitably encourage more immigration outside the law. The reason is that any form of legalization will buoy hopes of similar legalization in the future, adding an incentive to come to the United States illegally now. There are different ways to think about this argument. To be sure, adopting any legalization program will make another legalization seem more likely than if Congress enacted no such program at all. But this does not mean that any greater likelihood of future legalization will increase the number of unauthorized migrants who come to the United States or the size of the unauthorized population.

Most unauthorized migrants come to America because they can find work that pays so much better than any at home that it is worth considerable risk and sacrifice to get here.[60] Though the promise of future lawful status might matter, the immediate risks and rewards of an illegal border crossing are far more influential in personal decisionmaking. Any future legalization is remote, and many unauthorized migrants have no plan or expectation to stay permanently. If they knew that they could only remain in the United States for a few years with much better pay than they can get in their home countries, chances are they would still come.

At the same time, the fear that legalization could create an incentive—or at least eliminate a disincentive—for unauthorized migration has roots that are too deep to be quickly dismissed by citing the reasons that people migrate. The central objection runs deeper—that granting access to lawful status effectively *endorses* lawbreaking, even if it does not necessarily *cause* lawbreaking. The endorsement itself is objectionable, no matter what its practical effect may be. Endorsements

[60] *See* Joseph H. Carens, *The Case For Amnesty: Time Erodes the State's Right to Deport*, BOS. REV., May–June 2009, at 7, 10 (observing that most unauthorized migrants come in order to work, believing they can evade immigration authorities, and that "[i]n the absence of evidence to the contrary, it is plausible to suppose that such a long-term consideration as possible regularization years down the road would have little impact").

and symbols matter in the making and implementation of laws and policies, and in determining how much public support they have. The phrase that captures what is at stake is the *rule of law*. From this perspective, any form of legalization is wrong, because it amounts to refusal to enforce immigration laws.

In evaluating this argument, the challenge is giving content to the idea of the rule of law. In debating legalization—and unauthorized migration generally—both sides invoke this phrase frequently, but with different meanings.[61] In what follows, I examine four examples that show how interpretations of the rule of law can vary widely, depending on whether a decisionmaker embraces the *Plyler* themes of the complexity of unlawful presence and the need to integrate unauthorized migrants, or rejects them.

The first example involves discretionary relief. One form of such relief, known as cancellation of removal, can grant lawful permanent resident status to individual unauthorized migrants. In 1996, Congress restricted the availability of cancellation for individuals who are unlawfully present.[62] Whether this change is consistent with the rule of law depends on whether cancellation is normal or extraordinary. If the rule of law demands enforcement against unauthorized migrants, then limits seem appropriate because cancellation is an extraordinary act of grace, and should remain so. But if decisions are already governed by a legal rules that reflect threshold eligibility rules, hardship requirements, and other standards that can be applied consistently to produce fair results, it may undermine the rule of law to limit the availability of cancellation of removal.

A second example is the process for reviewing an order that a noncitizen is to be removed from the United States. The side that loses in immigration court may appeal to the Board of Immigration Appeals (BIA), a fifteen-member administrative review body within the U.S. Department of Justice. If the BIA decides for the noncitizen, the DHS can ask the Attorney General for further review. If the BIA rules for the government, noncitizens who wish to appeal must do so in federal court.[63]

In 1996, Congress enacted several provisions to limit the jurisdiction of federal courts to review immigration removal orders. Some restrictions were based on the type of case or the type of noncitizen involved.[64] One

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[61] *See generally* Hiroshi Motomura, *The Rule of Law in Immigration Law*, 15 TULSA J. COMP. & INT'L L. 139 (2008).

[62] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304, 110 Stat. 3009-546, 3009-587 to -597 (codified in scattered sections of 8 U.S.C.); ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 9, at 755–73 (summarizing cancellation of removal requirements, including 1996 amendments).

[63] *See* Immigration and Nationality Act (INA) § 242(a)(1), 8 U.S.C. § 1252(a)(1) (2006).

[64] *See id.* § 242(a)(2).

provision severely limited court review of removal orders based on criminal convictions.[65] The same 1996 law also generally eliminated court review of immigration decisions that are committed to government discretion.[66] Another section required noncitizens to wait for a final decision before they could go to federal court to argue that an immigration judge had made errors.[67] Yet other restrictions made it hard to challenge widespread or systemic government practices, forcing appeals to proceed individually.[68]

Does it serve the rule of law to streamline court review, or to expand it? If unlawful presence is easy to determine and the consequences are largely automatic, then it may be more consistent with the rule of law to narrow the availability and scope of court review by focusing narrowly on a single case at a time and limiting class actions. Broader inquiry may produce unjustified delay and expense.[69] From this perspective, anything more than minimal review undermines the rule of law. If, however, unlawful presence is complex, the rule of law demands that courts go beyond determinations of unlawful presence and ask if government officials exercised enforcement discretion consistent with legal standards. Moreover, any rule limiting inquiry to individual removal orders in isolation keeps courts from seeing systemic problems.[70]

As a third example, consider whether a prior ruling that a noncitizen is unlawfully present is binding today, or instead is open to re-evaluation. A leading recent case raising this question involved Humberto Fernandez-Vargas, a citizen of Mexico.[71] Fernandez first came unlawfully to the United States in the 1970s and settled in Utah. He was deported for immigration violations but reentered several times, most recently in 1982. He then lived in the United States, started his own trucking business, and in 1989 had a son with U.S. citizenship. In 2001, Fernandez married his son's mother, also a U.S. citizen. The federal government eventually caught Fernandez in 2003 and tried to reinstate the old deportation order.[72]

In 1996, Congress amended the Immigration and Nationality Act to allow the government to reinstate prior removal orders against any noncitizen who has reentered the country unlawfully after being ordered

[65] *Id.* § 242(a)(2)(C).

[66] *Id.* § 242(a)(2)(B).

[67] *See id.* § 242(d).

[68] *See id.* § 242(b)(9).

[69] *See generally* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 9, at 1307–12 (discussing limitations on class action litigation under the INA); Hiroshi Motomura, *Judicial Review in Immigration Cases After* AADC*: Lessons from Civil Procedure*, 14 GEO. IMMIGR. L.J. 385 (2000) (discussing judicial review of immigration decisions).

[70] INA § 242(b)(9).

[71] Fernandez-Vargas v. Gonzales, 548 U.S. 30, 35 (2006).

[72] *Id.* at 35–36.

removed.[73] The government need not ask an immigration judge to issue a second order that a noncitizen be removed from the United States.[74] When the government tried to apply this new law to Fernandez, the complication was that he had reentered unlawfully in 1982, long before the new law took effect in 1997. Should the new law apply to him?

No, argued Fernandez, because immigration statutes cannot be applied retroactively unless Congress clearly so provides—which it had not done.[75] Fernandez contended that it would be retroactive—and therefore not allowed—to reinstate his old deportation order by applying the 1997 statute to his 1982 reentry. The Supreme Court rejected this argument.[76] Writing for the majority, Justice Souter reasoned that by unlawfully reentering and remaining, Fernandez's violations continued up to his arrest in 2003.[77] Reinstating his deportation order was not retroactive. It simply applied the statute, effective as of 1997, to his time in the United States up to 2003.[78] This decision reflects the view that Fernandez's deportation order and unlawful re-entry in 1982 established a clear foundation for any consequences that Congress might later attach. In rule of law terms, nothing that occurred between 1982 and 2003 should be allowed to alter or undermine the original finding of unlawful presence.

In contrast, Justice Stevens' dissent explained that unlawful reentry could be offset by the community ties that Fernandez developed while living in Utah for over twenty years.[79] The unsurprising fact that the government had not enforced the prior deportation order against Fernandez became more significant than the order itself.[80] Arguing that the statute would be impermissibly retroactive if it used Fernandez's unlawful reentry in 1982 to reinstate his old deportation order, Stevens rejected the view that a prior order is binding in the same way that a

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[73] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 305(a)(3), 110 Stat. 3009-546, 3009-599 (codified at 8 U.S.C. § 1231(a)(5) (2006)); *see also* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 9, at 1212–16 (discussing reinstatement of removal).

[74] If the noncitizen expresses a fear of returning to the country designated in the prior removal order, the case will be referred to an asylum officer for a decision whether removal must be withheld under INA § 241. *See* 8 C.F.R. § 241.8(e) (2008).

[75] *See* INS v. St. Cyr, 533 U.S. 289, 316 (2001) (citing Landgraf v. USI Film Products, 511 U.S. 244, 265–66 (1994)).

[76] *Fernandez-Vargas*, 548 U.S. at 33 ("[T]he statute applies to those who entered before IIRIRA and does not retroactively affect any right of, or impose any burden on, the continuing violator of the INA . . . .").

[77] *Id.* at 46.

[78] *Id.* at 42–44.

[79] *Id.* at 47 (Stevens, J., dissenting).

[80] Noting that federal immigration law allows for discretionary relief despite unlawful presence, Stevens wrote: "At the time of his entry, and for the next 15 years, it inured to [Fernandez-Vargas's] benefit for him to remain in the United States continuously, to build a business, and to start a family." *Id.* at 51.

finding in a prior civil lawsuit might be binding on the parties.[81] In rule of law terms, courts should not blindly follow past determinations. Instead, later reassessments may justify discretionary relief to recognize equities arising in the meantime.

A fourth and final example involves the right to effective counsel in immigration court. Because no court has recognized a general constitutional rule that noncitizens in removal proceedings must be provided a lawyer at no cost,[82] the most contentious issue in recent years has not been whether a lawyer must be provided, but what happens when a noncitizen's lawyer does a bad job.[83] In 2009, questions about a right to effective counsel in removal proceedings came to a head in *Matter of Compean*,[84] which prompted the rare intervention of two Attorneys General of the United States, one of whom reversed his predecessor.[85]

The case grew out of separate removal proceedings involving three noncitizens.[86] After losing in immigration court, each tried to have his case reopened, arguing that his attorney had been ineffective by not presenting highly relevant evidence or by not filing an appellate brief.[87] In the last months of the George W. Bush presidency, Attorney General Michael Mukasey exercised his review authority over all three cases.[88] He ruled that because there is no constitutional right to counsel in removal proceedings, the Constitution does not guarantee that any available counsel will provide "effective assistance."[89] In the fifth month of the Obama administration, Attorney General Eric Holder vacated his predecessor's decision, repudiating Mukasey's statement that there is no

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[81] *Id.* at 51–52.

[82] A 1975 federal court of appeals decision found free counsel to be constitutionally required if needed for "[f]undamental fairness." Aguilera-Enriquez v. INS, 516 F.2d 565, 569 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976). However, no reported decision has used this or any similar test to decide that counsel should actually be appointed. Reflecting this reading of the Constitution, federal statutes and regulations provide that noncitizens in removal proceedings have a right to counsel, but not at the government's expense. Immigration & Nationality Act (INA) § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2006).

[83] This question is momentous for any noncitizen facing potential deportation, including permanent residents who may have become deportable for a variety of reasons, such as being convicted of a crime. *See, e.g.*, INA § 237(a)(2), 8 U.S.C. § 1227(a)(2). In addition, unauthorized migrants in removal proceedings may be eligible for discretionary relief. *See, e.g.*, INA § 240A(b), 8 U.S.C. § 1229b(b). For them, the contours of any right to effective counsel can make a big difference.

[84] *In re* Compean (*Compean I*), 24 I. & N. Dec. 710 (Att'y Gen. 2009).

[85] *See In re* Compean (*Compean II*), 25 I. & N. Dec. 1, 2–3 (Att'y Gen. 2009) (reversing Attorney General Mukasey's order in *Compean I*).

[86] *Compean I*, 24 I. & N. Dec. at 714–16.

[87] *Id.* at 715–16.

[88] Under the regulations governing the Board of Immigration Appeals within the Department of Justice, the Attorney General may choose to review a BIA decision. *See* 8 C.F.R. § 1003.1(h)(1)(i) (2012).

[89] *Compean I*, 24 I. & N. Dec. at 714.

constitutional right to effective assistance of counsel in removal proceedings.[90]

If many unauthorized migrants are allowed to stay in the United States through cancellation of removal and other forms of discretionary relief, then a noncitizen's unlawful presence is just the beginning of the analysis, not its end. In rule of law terms, decisions about discretionary relief are governed by standards that make it possible to decide if decisions are wrong. In turn, the rule of law would seem to require a right to effective assistance of counsel. In contrast, assume that discretionary relief is an act of grace that is not susceptible to correction after comparing each situation to the facts, reasoning, and outcome in prior cases. Then it would be much harder to argue that the rule of law demands a right to effective counsel. As with judicial review, an attorney's persistence would seem dilatory rather than a serious claim of right.

These examples show how malleable the idea of the rule of law can be. The rhetoric surrounding the concept of the rule of law can spark a productive discussion, but it rarely guides that discussion to a convincing conclusion. Its substance depends on how an observer assesses the two *Plyler* themes of complexity of unlawful presence and the integration of unauthorized migrants. For some, the urge is powerful to see the rule of law as absolute, and to start and end arguments with the epithet *illegal*. From this point of view, unlawful presence is clear and straightforward, not complex, so it serves the rule of law to enforce immigration law quickly and efficiently and to reject any need to integrate unauthorized migrants. Moreover, *legalization* seems like a bad euphemism, and the word *amnesty* seems more accurate for any scheme that grants lawful status to immigration law violators or their children, even if proponents respond to the amnesty label by adding fines, and procedural hurdles.[91] This perspective also leads logically to efforts to prosecute and punish immigration violations as crimes.[92]

Both U.S. immigration history and the current state of immigration law and policy suggest, however, that unlawful presence is complex and that immigration law is not just a matter of enforcing a simple line between legal and illegal,[93] and moreover that unauthorized migrants have persuasive claims to integration. This context should drive analysis of the four situations that I have just described. Limits on cancellation of removal undermine the rule of law, because cancellation is the law's way of rationally recognizing and assessing the need to integrate long-term unauthorized migrants. Though they lack lawful status, their unlawful

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[90] *Compean II*, 25 I. & N. Dec. at 2–3.

[91] *See, e.g.*, 153 CONG. REC. 15,046–47 (2007) (statement of Sen. Coburn).

[92] *See* Immigration and Nationality Act (INA) §§ 274A, 274C(e), 8 U.S.C. §§ 1324a, 1324c(e) (2006) (criminalizing harboring or preparing false documents for illegal aliens); 18 U.S.C. § 1546(a) (2006) (criminalizing fraud of visas, permits, and other immigration status documentation).

[93] *See* Motomura, *Immigration Outside the Law, supra* note *, at 2047–55.

presence is not so simple. Even if border inspectors or other government officials once exercised discretion by whim, relief today is governed by standards that generate but also evaluate expectations of relief based on prior case law. Threshold eligibility rules, hardship requirements, and other standards can be applied consistently.[94] Similarly, the rule of law demands a robust system of court review, the opportunity to re-examine prior findings, and a constitutional protection against ineffective assistance of counsel so that immigration decisions can be consistent with legal standards and build up a coherent, guiding body of law over time.

In the same way, history and the current state of immigration law suggest that there is not much of real substance to "rule of law" objections to the DREAM Act, birthright citizenship, and broad-scale legalization. In addition, history supplies precedents for schemes that provide lawful immigration or citizenship status to some persons who might otherwise lack it. Here the key fact is that legalization schemes have been frequent and commonplace in U.S. immigration law.[95] This suggests that the meaning of the rule of law in the legalization context is to be found in assessing whether specific situations and proposals are appropriate for granting lawful immigration or citizenship status, not in categorically opposing programs that would do so.

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[94] *See* INA § 240A, 8 U.S.C. § 1229b (2006) (enacting requirements for cancellation of removal).

[95] *See* Hiroshi Motomura, *What is "Comprehensive Immigration Reform?" Taking the Long View*, 63 ARK. L. REV. 225, 235–38 (2010).