

5-1-2014

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Gomez, Clarissa, "Between U.S. Immigration Policy and Health Care Reform: “Deferred Action for Childhood Arrivals”" (2014). *Law School Student Scholarship*. 482.
https://scholarship.shu.edu/student_scholarship/482

The Paradox Between U.S. Immigration Policy and Health Care Reform:
“Deferred Action for Childhood Arrivals”

Clarissa Gomez

Introduction

Deferred Action for Childhood Arrivals (“DACA”), announced by the Secretary of Homeland Security on June 15, 2012, is an exercise of prosecutorial discretion, allowing for undocumented immigrants who meet certain criteria to avoid deportation for two years and obtain work authorization.¹ However, despite the grant of deferred action, undocumented persons’ legal status remains unchanged; they are still undocumented individuals, present in the United States without legal justification.² DACA does not address the legal status of undocumented immigrants who receive work permits through the deferred action program.³ The implications of this are evidence of the inconsistencies in this nation’s health and immigration reform policies. Affirmatively granting undocumented immigrants permission to stay in the United States and to apply for jobs, while still considering their presence in the United States as illegal, bars them from full participation in the health insurance system.⁴ It is this discontinuity that highlights the inconsistencies in our nation’s health and immigration reform policies. If an individual who applies for deferred action is approved, that person is also able to obtain a Social Security number and work authorization, yet cannot qualify for most health insurance programs.⁵ There are obvious implications for uninsured workers— for example, the economic costs of their

¹ USCIS, *Consideration of Deferred Action for Childhood Arrivals Process* (Sept. 14, 2012), available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD>.

² *Id.*

³ Janice Brewer, Governor of Ariz., Exec. Order 2012-06, Response to the Federal Government’s Deferred Action Program (2012), available at http://azgovernor.gov/dms/upload/EO_081512_2012-06.pdf (hereinafter “Exec. Order”).

⁴ See generally, Patient Protection and Affordable Care Act (“PPACA”), 42 U.S.C. § 18001 (2010) (law limiting access to qualified health plans to residents “lawfully present”).

⁵ *Consideration of Deferred Action*, *supra* note 1.

healthcare if they are injured or fall ill and do not have the means to cover these costs out-of-pocket.⁶ This exact situation is the likely effect of DACA, since those granted deferred action may also obtain work permits and apply for jobs; but, they will remain uninsured.⁷ Allowing “mini-DREAMers,” or DACA applicants, to work without insurance is harmful to our economy because the cost of their health care, at least in emergency situations, will be absorbed by tax dollars paid by insured workers.⁸

This Note asserts that DACA has the potential to successfully advance the goals of both immigration law and health law, but further action needs to be taken in conjunction with the implementation of this program because these two areas of law remain in conflict. In light of the asserted goals of DACA, as well as the goals of our health system, and specifically the intent of the Patient Protection and Affordable Care Act (“ACA”), there are compelling policy reasons why the government ought to go a step further and take legislative action, rather than barring mini-DREAMers from the health insurance market.⁹ This Note proposes legislative changes, suggesting that the government should provide for mini-DREAMers a way to access the health insurance exchanges and contribute to the costs of their own health care and insurance.¹⁰ This Note argues that a very specific class of undocumented individuals, who meet certain criteria, should be granted access, and that blanket access to all undocumented individuals does not make

⁶ See e.g., *infra* Part III.B (story of Angel).

⁷ See generally, Kelly Carper and Karen Beauregard, *Characteristics of Uninsured Workers: Estimates for the U.S. Civilian Noninstitutionalized Population 19-64 Years of Age, 2006*, MEDICAL EXPENDITURE PANEL SURVEY (Aug. 2009), http://meps.ahrq.gov/data_files/publications/st257/stat257.pdf.

⁸ Immigrants who qualify for deferrals are generally the same ones who would have been eligible if the Development, Relief, and Education for Alien Minors Act (“DREAM Act”) had been passed. Therefore, the DACA applicants have been nicknamed “mini-DREAMers.”

⁹ See generally, PPACA, 42 U.S.C. § 18001; Patrick J. Glen, *Health Care and the Illegal Immigrant 1*, GEO. PUBLIC L. & LEGAL THEORY (Jan. 22, 2008).

¹⁰ PPACA, 42 U.S.C. § 18001. The Act requires states to establish health insurance exchanges but undocumented individuals are explicitly excluded from all provisions of the Act.

sense.¹¹ Access to affordable health insurance can be limited to those who have been approved under the DACA program, which will preserve our nation's national security goals.¹² Such action is consistent with the DACA program, immigration law on a broader level, and the United State's health care goals.

Part I of this Note provides a foundation of the philosophies and goals behind immigration law, and describes the treatment of undocumented immigrants in light of relevant legislation, such as the Welfare Reform Act.¹³ It also describes the fundamentals of the DACA program, including its asserted goals and intent.¹⁴ Part II discusses health policy reform, and its intended goals regarding health insurance and nationwide coverage.¹⁵ It further describes the treatment of immigrants under pre-ACA policies, and the ACA's purported changes to immigration policies, as well as the implications of such changes for undocumented individuals. Finally, Part III first addresses counterarguments that might be made against taking additional legislative action. It then analyzes the interaction of the policies discussed in Parts I and II and discusses why the counterarguments are unpersuasive, positing that DACA is an appropriate vehicle to alleviate some of the burdens faced by illegal immigrants. By allowing mini-DREAMers to access the health insurance exchanges, the goals of both our immigration and health policies will be furthered. Therefore, this Note proposes legislative action to move mini-DREAMers out from the category of individuals who are barred by the ACA from accessing

¹¹ See generally, *Consideration of Deferred Action*, *supra* note 1.

¹² See discussion, *infra* Part I.A, footnotes 31-32 and accompanying text.

¹³ 8 U.S.C. § 1621 *et. seq.* (Personal Responsibility and Work Opportunity Reconciliation Act of 1996) (hereinafter "Welfare Reform Act").

¹⁴ Homeland Security Act of 2002, Pub. L. No. 107-296m 116 Stat. 2135 (establishing USCIS as the component agency within the Department of Homeland Security with responsibilities regarding immigration service functions of the federal government).

¹⁵ See generally, PPACA, 42 U.S.C. § 18001.

health insurance exchanges, and instead, become part of the classified group that is allowed access.¹⁶

I. Background on Immigration Law

Over the years, U.S. immigration law and the status of illegal immigrants has undergone many changes, such as the creation of various statutory categories for immigrants.¹⁷ The threshold classification of what category of “immigrant” an individual falls under is significant because it is determinative of what access he or she has to governmental programs, such as Medicaid and Medicare, and what kind of access he or she has to the private health insurance market, as well.¹⁸

The Personal Responsibility and Work Opportunity Act of 1996, also known as the Welfare Reform Act, is an important piece of immigration legislation that made many changes to immigration law and laid out the different classifications of immigrants.¹⁹ This Act marked a shift in immigration policy by differentiating between types of immigrants— documented and undocumented— and further differentiating between legal immigrants and naturalized citizens in regard to eligibility for health and social services.²⁰ While undocumented immigrants and other noncitizens have always had restricted access to major federal public benefits programs like Supplemental Security Income and non-emergency Medicaid, the Welfare Reform Act

¹⁶ Congress retains the ultimate power to make changes in deportable status by its own terms. *INS v. Chadha*, 42 U.S. 919, 966 (1983) (White, J., dissent). *See also*, Dep’t of Homeland Sec., *FAQ 3* (June 15, 2012), <http://www.immigrationpolicy.org/sites/default/files/docs/DHS-FAQ-6-15-2012.PDF> (“Only the Congress, acting through its legislative authority, can confer the right to permanent lawful status.”).

¹⁷ *See e.g.* Welfare Reform Act, 8 U.S.C. § 1621 *et. seq.*

¹⁸ Welfare Reform Act, 8 U.S.C. § 1621; *see also* PPACA, 42 U.S.C. § 18001; Kristof Stremikis et al., *Health Care Opinion Leaders’ Views on Vulnerable Populations in the U.S. Health System*, THE COMMONWEALTH FUND 6 (Aug. 2011),

http://www.commonwealthfund.org/~media/Files/Publications/Data%20Brief/2011/Aug/1536_Stremikis_HCOL_vulnerable_populations_data_brief.pdf; *see infra* note 68 and text.

¹⁹ Welfare Reform Act, 8 U.S.C. § 1621.

²⁰ *Id.*

introduced further restrictions.²¹ For instance, as a result of the Act, most lawfully residing immigrants were barred from receiving assistance under such federal benefits programs for at least five years.²² Consequently, there was a sharp decrease in immigrants' participation in public benefit programs, and many low-income families faced severe hardship.²³

A. *Categories of Individuals*

The Welfare Reform Act created new categories of immigrants, distinguishing between “qualified” and “not qualified” immigrants.²⁴ The “qualified” category includes legal permanent residents (“LPRs”), refugees, asylees, immigrants with withheld deportation, immigrants granted parole for at least one year, and immigrants granted conditional entry.²⁵ The qualified group may be eligible for publicly funded programs like Medicaid and may avail themselves of more options than undocumented childhood arrivals.²⁶

Undocumented immigrants are not “qualified individuals,” and thus are not permitted to purchase health insurance through the ACA’s mandated state health exchanges, even if they are able and willing to do so.²⁷ It is puzzling that mini-DREAMers are not treated as qualified, and it is questionable what the compelling governmental reason is for treating mini-DREAMers so differently from those “qualified” immigrants. On the surface, mini-DREAMers are immigrants with suspended deportation and conditional stay, yet they do not meet the full statutory

²¹ Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395ccc; Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et. seq.* (“Medicaid statute”).

²² Medicaid statute, 42 U.S.C. § 1396.

²³ *Id.*; see also, Michael E. Fix & Jeffrey S. Passel, *Scope and Impact of Welfare Reform’s Immigrant Provisions*, URBAN INSTITUTE (Jan. 15, 2002), <http://www.urban.org/publications/410412.html>.

²⁴ Welfare Reform Act, 8 U.S.C. § 1621.

²⁵ *Id.*

²⁶ Claudia Schlosberg, *Immigrant Access to Health Benefits: A Resource Manual* 12-13, THE ACCESS PROJECT, http://www.accessproject.org/downloads/Immigrant_Access.pdf.

²⁷ 42 U.S.C. § 18032; see *infra* Part II.

requirements for either of the “qualified” immigrant categories.²⁸ There has been much debate over whether “undocumented” and “illegal” immigrants are one and the same, which exemplifies that the issue of classification is not just about semantics.²⁹ One’s status significantly impacts his or her treatment and qualification for benefits.³⁰

The Welfare Reform Act was passed in response to states’ hostility toward the high cost of providing services to undocumented immigrants.³¹ With respect to national policy and its relation to welfare and immigration, Congress has said that “it is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy,” and “[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.”³² The Act contains an exception, specifying that Medicaid assistance is provided for treatment of emergency medical conditions regardless of the patient’s legal status; this indicates the tension between health care reform and immigration reform.³³ Non-immigrants and undocumented immigrants are barred from receiving benefits and have no means of obtaining Medicaid, but they are eligible for public health, emergency services, and programs

²⁸ 8 U.S.C. § 1641(b)(5), (6) (A “qualified alien” whose deportation is withheld under 8 U.S.C. § 1251(b)(3) and a “qualified alien” who is granted conditional entry pursuant to 8 U.S.C. § 1153(a)(7) are generally those who cannot be returned to their country due to fear of persecution, or are in the United States due to safety concerns in his or her place of origin. Therefore, mini-DREAMers cannot be categorized into either of these “qualified” categories.).

²⁹ Michael Martin, *Which is Acceptable: ‘Undocumented’ vs. ‘Illegal’ Immigrant?*, NPR (Jan. 7, 2010), <http://www.npr.org/templates/story/story.php?storyId=122314131>.

³⁰ *Id.*; see *infra* Part III (this Note proposes that legislative action ought to be taken so to convert mini-DREAMers from being classified as “non-qualified” individuals and rather “qualified” individuals and thus be able to participate in the health insurance exchanges).

³¹ 8 U.S.C. § 1601; see e.g., BOOKS LLC, 1995 IN AMERICAN POLITICS (2011) (discussing why Congressman E. Clay Shaw, Jr., introduced the welfare reform law due to the belief that welfare was partly responsible for bringing immigrants to the United States). *But see, e.g.*, Arian Campo-Flores, *Why Americans Think (Wrongly) that Illegal Immigrants Hurt the Economy*, THE DAILY BEAST (May 13, 2010, 8:00 PM), <http://www.thedailybeast.com/newsweek/2010/05/14/why-americans-think-wrongly-that-illegal-immigrants-hurt-the-economy.html> (arguing why there are distortions in views on immigration’s costs and benefits).

³² 8 U.S.C. § 1601.

³³ 42 U.S.C. § 1395dd; see discussion of Emergency Medical Treatment and Active Labor Act (EMTALA), *infra* at note 51, and Part II.A.

that the Attorney General considers necessary for the protection of life and safety.³⁴ While the DACA program grants undocumented immigrants the ability to stay within the United States and hold eligibility for care in emergency situations, other legislation governing health care explicitly restricts undocumented immigrants' access to substantial health insurance programs.³⁵

B. USCIS Authority and Influence Over Immigrants

In acknowledging the absence of any comprehensive immigration reform, it is significant to note that the United States Citizenship and Immigration Services ("USCIS") has administrative authority to exercise prosecutorial discretion and to issue guidance and regulations for immigration policy.³⁶ Thus, although there has not been any sweeping national immigration movement, the USCIS retains power to make incremental changes for immigrants. It has done so by extending benefits or protections to certain individuals and groups, which is conceivably better than inaction.³⁷ For instance, even when relief appears unavailable based on an applicant's employment and/or family circumstances, and removal is not in the public interest, USCIS can grant deferred action.³⁸ This exercise of prosecutorial discretion "permit[s] individuals for whom relief may become available in the future to live and work in the US without fear of removal."³⁹ The recent DACA program is an example of the USCIS exercising this discretion.⁴⁰

³⁴ *E.g.* EMTALA, 42 U.S.C. § 1395dd; Welfare Reform Act, 8 U.S.C. § 1621.

³⁵ *See* 8 U.S.C. § 1621 (2006).

³⁶ *See* Policy Memorandum Draft on EB-5 Adjudications Policy (Jan. 11, 2012), *available at* http://www.uscis.gov/USCIS/Outreach/Feedback%20Opportunities/Draft%20Memorandum%20for%20Comment/EB5_memo_2ndpost_with_changes.pdf (a highly debated topic, many proposals have been made, such as the DREAM Act, which Congress first proposed in August 2001 (107th Congress (2001-2002) S.1291), but did not sign into law).

³⁷ Emily Richmond, *Word on the Beat No. 2: DACA*, THE EDUCATED REPORTER (Dec. 3, 2012), <http://www.educatedreporter.com/2012/12/word-on-beat-no-2-daca.html>.

³⁸ EB-5 Adjudications Policy, *supra* note 36.

³⁹ *Consideration of Deferred Action*, *supra* note 1.

⁴⁰ *See INS*, 42 U.S. at 966. On the other hand, the limits of USCIS' power and where Congress retains authority should be noted. ***See U.S. Const. art. 1, § 1.***

USCIS has somewhat broad discretion to act for the benefit of undocumented individuals and has various tools it can use that would potentially allow for an undocumented immigrant to apply for an adjustment of status.⁴¹ For example, USCIS has authority under the immigration laws to issue Form I-862, Notice to Appear, and to initiate removal proceedings.⁴² What USCIS cannot do without legislative action, however, is change the status of the mini-DREAMers so that they fall under the “qualified” immigrant category.⁴³

There has been quite extensive discussion about the potential impacts, including the economic impact, upon the United State’s from implementing any of the proposed immigrant-related program.⁴⁴ However, the DACA program was approved and issued without any detailed regulations or much guidance, and left out many key issues— including health care status.⁴⁵ DACA merely allows a mini-DREAMer to live in the United States, and possibly obtain a job for two years without fear of deportation.⁴⁶ President Obama acknowledges that DACA is neither the permanent solution he hoped for, nor does it fulfill what he had promised to accomplish in 2008.⁴⁷ This is an insufficient excuse for DACA leaving so many loose ends unaddressed.

C. Deferred Action Generally, and DACA Program Specifically

⁴¹ See, e.g., Policy Memorandum, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens* 1 (Nov. 7, 2011), [http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20\(Appeared%20as%20final%2011-7-11\).pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20(Appeared%20as%20final%2011-7-11).pdf).

⁴² *Id.*

⁴³ See *supra* note 28, discussing who is considered “qualified”.

⁴⁴ See Kimberly Amadeo, *Why Reform Health Care- How Health Care Reform Affects the Economy*, ABOUT.COM (Oct. 12, 2011), http://useconomy.about.com/od/fiscalpolicy/a/healthcare_reform.htm; see also Glen, *supra* note 9. But see Committee on Health Care for Underserved Women, *Health Care for Undocumented Immigrants*, ACOG COMMITTEE OPINION (Jan. 2009), <http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Health%20Care%20for%20Underserved%20Women/co425.pdf?dmc=1&ts=20130119T1833289778> (“Immigrants do not appear to use an excess of health care resources”).

⁴⁵ EB-5 Adjudications Policy, *supra* note 36.

⁴⁶ *Consideration of Deferred Action*, *supra* note 1.

⁴⁷ Television interview by Univision with Barack Obama, President, USA, at University of Miami (Sept. 20, 2012), http://abcnews.go.com/ABC_Univision/barack-obama-touts-dream-act-univision-event/story?id=17283788#.UGErXI5IjBI; see also David Koelsch, *General: Immigration Law Update: What You Need to Know Now*, 92 MI BAR JNL. 26, 26 (Jan. 2013) (“President Obama has declared comprehensive immigration reform one of the top priorities for his second term.”).

Deferred Action does not confer any lawful status. While those who are approved under DACA do not necessarily have an unlawful presence, they do not have a defined lawful presence either.⁴⁸ The implications of this status in the health care context are quite clear: under the ACA, undocumented immigrants are not eligible for premium subsidies and expanded Medicaid coverage.⁴⁹ Further, undocumented immigrants cannot participate in the state health insurance exchanges.⁵⁰ Illegal immigrants are, however, entitled to receive a minimal level of health care and services in the United States, such as emergency care services, pursuant to existing federal laws.⁵¹ These limited services are not without costs. As undocumented immigrants remain unable to purchase health insurance, it is American taxpayers who inevitably absorb these costs.⁵² Mini-DREAMers are blocked from purchasing their own employer subsidized health insurance plans, and thus they must rely on what remains available to them through federal legislation and the health care safety net, resulting in a burden on both DACA applicants and Americans alike.⁵³

After DACA was approved, the White House issued a ruling to clarify that mini-DREAMers are specifically excluded from the category of those who are “lawfully present” and are therefore ineligible for federal benefits and access to the health insurance exchange markets.⁵⁴ In the decision, disclosed with little notice in August 2012, administration officials

⁴⁸USCIS, *Consideration of Deferred Action for Childhood Arrivals Process*; USCIS, *Consideration of Deferred Action- Frequently Asked Questions*. (“Unlawful presence is relevant only with respect to determining whether the inadmissibility bars for unlawful presence, set forth in the Immigration and Nationality Act at Section 212(a)(9), apply to an individual if he or she departs in the United States and subsequently seeks to re-enter.”).

⁴⁹ Stremikis, *supra* note 18.

⁵⁰ ACA § 1312(f)(3) (“Qualified Individuals and Employers; Access Limited to Citizens and Lawful Residents”).

⁵¹ *See generally* EMTALA, 42 U.S.C. § 1395dd.

⁵² *Id.*; *California v. United States*, 104 F.3d 1086 (9th Cir. 1997) (states must provide emergency medical services to illegal immigrants as a condition on receipt of Medicaid funding); *see Service Furnished to Undocumented Aliens*, CMS (Apr. 2, 2012), <http://www.cms.gov/Regulations-and-Guidance/Legislation/UndocAliens/index.html?redirect=/undocAliens>.

⁵³ *E.g.*, EMTALA, 42 U.S.C. § 1395dd .

⁵⁴ Pre-Existing Condition Insurance Plan Program, 77 FED. REG. 169 (Aug. 30, 2012), <http://www.gpo.gov/fdsys/pkg/FR-2012-08-30/html/2012-21519.htm>.

said they viewed the immigration initiative and health coverage as separate matters.⁵⁵ Even if the deferred-deportation policy was never intended to confer eligibility for federal health benefits, this restriction on any health coverage is clearly “shortsighted, reactionary and bad public policy.”⁵⁶ Before the Centers for Medicare and Medicaid Services (“CMS”) conclusively determined that these individuals are excluded from eligibility, it accepted comments until the end of October of 2012.⁵⁷ Various groups advocated for more people to speak out and comment against such a determination, but the amendment since passed.⁵⁸

II. Background on Health Policy and Reform

While there is difficulty in analyzing the United State’s health policy and stated goals, in general there is always movement toward greater access, lowered costs, and essentially healthier individuals.⁵⁹ Some argue that greater coverage is necessary in order to reach these ends, given that uninsured people are less likely to receive medical care, more likely to die younger, and more likely to be in poor health.⁶⁰ Furthermore, people with a routine source of care have better health outcomes, fewer disparities, and lower costs.⁶¹

Health care spending has risen, and “[United State’s] health care costs have grown by at least two percent more than the nation’s overall Gross Domestic Product” over the last 30 years,

⁵⁵ *Id.*

⁵⁶ Robert Pear, *Limits Placed on Immigrants in Health Care Law*, NYTIMES (Sept. 17, 2012), http://www.nytimes.com/2012/09/18/health/policy/limits-placed-on-immigrants-in-health-care-law.html?pagewanted=all&_r=0.

⁵⁷ See, e.g., Natalie Patrick-Knox, *Last Chance to Submit Comments on DACA Exclusion from Affordable Care Act* (Oct. 25, 2012), <http://www.jwj.org/blog/last-chance-submit-comments-daca-exclusion-affordable-care-act>. If approved, Section 152.2 will be amended by adding paragraph 8 to the definition of “lawfully present” to read as follows: “Lawfully present means— (8) Exception. An individual with deferred action under the Department of Homeland Security’s deferred action for childhood arrivals process, as described in the Secretary of Homeland Security’s June 15, 2012, memorandum, shall not be considered to be lawfully present with respect to any of the above categories in paragraphs (1) through (7) of this definition.” 45 C.F.R. § 152.2(8).

⁵⁸ *Post-* October 2012 note, see 45 C.F.R. § 152.2(8).

⁵⁹ See e.g., 42 U.S.C. § 300u.

⁶⁰ *Access to Health Services*, HEALTHYPEOPLE.GOV (last updated Sept. 6, 2012), <http://www.healthypeople.gov/2020/topicsobjectives2020/overview.aspx?topicid=1>.

⁶¹ *Id.* A “usual source” such as a primary care provider (PCP), provides preventive services.

while there has not been sufficient corresponding access to benefits.⁶² Although the United States is the world leader in health care spending, according to the Organization for Economic Cooperation and Development, it “trails most westernized systems in patient satisfaction, preventive health care and population-based mortality and morbidity results. And, as is widely known, more than 46 million Americans lack basic health insurance; 25 million more are underinsured.”⁶³ While so many Americans are uninsured or underinsured, there are many non-Americans, such as undocumented immigrants, residing in the United States without insurance because they are restricted from accessing the health insurance market.⁶⁴ There is an international body of law that recognizes a moral or ethical obligation to provide health services to anybody, regardless of his or her legal status or right to be present.⁶⁵ Further, some of the central goals of the latest health care legislation passed are to extend affordable health insurance to a majority of the uninsured, to reduce costs, and to ensure quality care.⁶⁶ These facts coupled together demonstrate why mini-DREAMers ought to be granted access to the affordable health insurance market and state exchanges; it goes against public policy, as well as many of the United State’s goals, to bar them from access.

A. *Current Federal Health Statutes*

⁶² Paul Keckley, *Reducing Costs while Improving the U.S. Health Care System: The Health Care Reform Pyramid*, DELOITTE (Jan. 2009), http://www.deloitte.com/view/en_US/us/Insights/centers/center-for-health-solutions/25091ec6f6001210VgnVCM100000ba42f00aRCRD.htm.

⁶³ *OECD Health Data 2012*, OECD, http://www.oecd.org/unitedstates/HealthSpendingInUSA_HealthData2012.pdf; *Id.*

⁶⁴ Keckley, *supra* note 62; *see also*, Roy Spece Jr., *Constitutional Attacks Against the Patient Protection and Affordable Care Act’s “Mandating” that Certain Individuals and Employers Purchase Insurance While Restricting Purchase by Undocumented Immigrants and Women Seeking Abortion Coverage*, 38 N. KY. L. REV. 489 (2011); Stremikis, *supra* note 18, at 2 (“mission to promote better access to improved quality, and greater efficiency across the U.S. health care system”).

⁶⁵ Glen, *supra* note 9, at 57 (“there is something fundamentally fair and ethical about requiring employers, who take advantage of illegal immigrant, labor, to provide health coverage to their employees”); *see Report of the Special Rapporteur, infra* at note 105.

⁶⁶ PPACA, 42 U.S.C. § 18001; Spece Jr., *supra* note 64 at 493.

While undocumented immigrants are barred from using federally funded health care programs, federal laws do offer them some health care benefits. Congress enacted the Emergency Medical Treatment and Active Labor Act (“EMTALA”) in 1986 as a response to “patient dumping,” a practice wherein hospitals refuse to admit patients who they believed were under-insured or uninsured.⁶⁷ Under EMTALA, Medicare-participating hospitals that offer emergency services are required to provide a medical screening examination when a request is made for examination or treatment for an emergency medical condition, regardless of the patient’s ability to pay.⁶⁸ If the hospital determines that an emergency condition exists, the hospital is then required to provide stabilizing treatment.⁶⁹

Another option for noncitizens, whose requirements are much narrower, is Emergency Medicaid coverage, available if they fit a Medicaid-eligible category and meet state income and residency requirements.⁷⁰ Additionally, the individual must be so acutely ill that the failure to receive medical attention would place his or her health in serious jeopardy.⁷¹

These programs exist as part of the health care safety-net system in place for undocumented immigrants, which relies heavily on funding from government sources.⁷² These health care centers are located in medically underserved communities and offer primary care services to people who often have difficulty accessing medical care, such as immigrants and other vulnerable populations.⁷³ However, because the ACA will dramatically reduce the number

⁶⁷ See generally, H.R. REP. NO. 241, 99th Cong., 1st Sess., pt. 1, at 27 (1985); see also *Summers v. Baptist Med. Center Arkadelphia*, 91 F.3d 1132, 1136-37 (8th Cir. 1996) (en banc).

⁶⁸ EMTALA, 42 U.S.C. § 1395dd.

⁶⁹ *Id.*

⁷⁰ Michelle Kline, *Nat’l Immig. Policy and Access to Health Care*, HEALTH AND PUBLIC POLICY COMMITTEE OF THE AM. COLLEGE OF PHYSICIANS 11 (2011),

http://www.acponline.org/advocacy/where_we_stand/policy/natl_immigration.pdf. A Medicaid-eligible category includes children, pregnant women, families with dependent children, elderly or disabled individuals.

⁷¹ *Id.*

⁷² *Id.* at 10.

⁷³ *Id.*

of uninsured patients, many safety-net providers are concerned that their financing will be negatively affected.⁷⁴

The problem with the programs available to undocumented immigrants is that they do not allow the individual to seek preventive care and are only available when the individual already faces a medical emergency.⁷⁵ In many instances, the hospital, or other taxpayers, are left shouldering the burden of the cost since the patient has no insurance.⁷⁶ Medicaid is the largest single revenue source for safety-net providers; the ACA provides that “[b]oth Medicaid and Medicaid disproportionate share hospital (“DSH”) payments— designed to offset some of the cost of providing care to low-income patients without insurance— are scheduled to be reduced in 2014.”⁷⁷ Thus, it is clear these safety-net providers, and consequently the individuals who rely on them, will be affected once the ACA is fully implemented.⁷⁸

The United States Department of Health and Human Services (“HHS”) is the nation’s principal agency charged with protecting the health of all Americans.⁷⁹ The department’s mission is to enhance Americans’ health and wellbeing.⁸⁰ Its eleven operating divisions perform tasks and services including research, public health, food and drug safety, and health insurance.⁸¹ In the Strategic Plan for the Fiscal Years 2010-2015, HHS addresses the needs of *Americans*, and gears its objectives toward making coverage more secure and more accessible to uninsured

⁷⁴ *The Impact of the Affordable Care Act on the Safety Net*, ACADEMY HEALTH (Apr. 2011), http://www.academyhealth.org/files/FileDownloads/AHPolicybrief_Safetynet.pdf.

⁷⁵ See, e.g., Marshall Fitz, *Time to Legalize our 11 Million Undocumented Immigrants*, CENTER FOR AMERICAN PROGRESS (Nov. 14, 2012), <http://www.americanprogress.org/issues/immigration/report/2012/11/14/44885/time-to-legalize-our-11-million-undocumented-immigrants>.

⁷⁶ Office of the Assistant Sec’y for Planning and Evaluation, *The Value of Health Insurance: Few of the Uninsured Have Adequate Resources to Pay Potential Hospital Bills*, US DEPT. OF HHS (May 2011), <http://aspe.hhs.gov/health/reports/2011/ValueofInsurance/rb.pdf>.

⁷⁷ Stremikis, *supra* note 18 at 2.

⁷⁸ *The Impact of the Affordable Care Act on the Safety Net*, *supra* note 74.

⁷⁹ See U.S. Dept. of HHS, <http://www.hhs.gov/about/index.html>.

⁸⁰ *Id.*

⁸¹ *Id.*; see also U.S. DEPT. OF HHS, STRATEGIC PLAN FISCAL YEARS 2010-2015 at 10, available at <http://www.hhs.gov/secretary/about/priorities/strategicplan2010-2015.pdf>.

individuals.⁸² It is arguably an issue over semantics, but the distinction is an important one and supports mini-DREAMers, who are once again pushed into the marginal area and exist in a state of limbo. They may not be considered Americans, but they are certainly individuals whose presence in the United States has been authorized, if only to the extent that deportation proceedings will not be enforced against them. They remain unable to access even the most basic needs regarding health care and health insurance.

B. Effects of the Affordable Care Act: Before and After Comparison Regarding Undocumented Individuals

Under the ACA, states must implement health insurance exchanges that pool together millions of individuals and small businesses and their employees to increase purchasing power and competition in the insurance market.⁸³ This increased purchasing power and competition is expected, in turn, to make premiums more affordable.⁸⁴ The ACA purports to provide expanded access to insurance coverage and to make care more accessible for vulnerable populations that are currently uninsured.⁸⁵ Congress had additional goals in mind when mandating exchanges: promoting efficiency, avoiding adverse selection, and increasing transparency and public accountability.⁸⁶ However, to the detriment of these goals, the DACA program fails to incorporate a mechanism for mini-DREAMers to access the health insurance exchanges; it actually serves the opposite effect of adverse selection. Congress envisioned exchanges to ensure “those who buy through the Exchange are a broad mix of the healthy and the less healthy.”⁸⁷

⁸² STRATEGIC PLAN, *supra* note 81 at 10, 19 (Showing how the two terms have actually been used somewhat interchangeably, and in light of this is the dilemma that mini-DREAMers certainly qualify as uninsured individuals, yet cannot be regarded as Americans since they lack legal status. This issue highlights the state of limbo mini-DREAMers occupy.) (emphasis added).

⁸³ *Id.* at 19.

⁸⁴ *Id.*

⁸⁵ *Id.* at 31.

⁸⁶ *Initial Guidance to States on Exchanges*, U.S. DEPT. OF HHS (last accessed Feb. 9, 2013), <http://www.healthcare.gov/law/resources/regulations/guidance-to-states-on-exchanges.html>.

⁸⁷ *Id.*

Instead, even if the state offers insurance outside of the exchange market, there is a divide between those who are covered by exchanges and those who are not, since undocumented individuals will only be able to obtain insurance outside of the exchange market— if the state even offers such a market at all.⁸⁸

Currently, illegal immigrants may buy individual health insurance policies from private health insurance companies.⁸⁹ However, the plans available to them are limited.⁹⁰ Typically, individual private health insurance policies are written precisely for the individual and are the most expensive option to obtaining health insurance since the policy does not share costs with a group of people.⁹¹ As a result, a majority of illegal immigrants do not have insurance, since the costs for private individuals who purchase plans that have not been subsidized by federal dollars are high.⁹² These high costs not only prevent illegal immigrants from obtaining insurance, but are also a contributing factor to the number of uninsured Americans who are lower-income, and provide a justification for the ACA provisions that offer premium subsidies for private insurance to families earning up to four times the poverty level.⁹³

Although the ACA mandates that each state create a health exchange, states are still free to continue markets outside of the exchange— theoretically, the undocumented individuals may access those markets.⁹⁴ In fact, “[a]s states have adopted exchange legislation, they have tended

⁸⁸ See, e.g., *Can Illegal Immigrants Buy Health Insurance?*, PERSONALHEALTHINSURANCE.COM (Jan. 22, 2012), <http://www.personalhealthinsurance.com/can-illegal-immigrants-buy-health-insurance>.

⁸⁹ *Id.*.

⁹⁰ *Id.*

⁹¹ *Id.* ACA, through the mandated state health exchanges, seeks to reform insurance offerings so it is more affordable and accessible for all individuals.

⁹² E.g., Congressional Budget Office, *Updated Estimates for the Insurance Coverage Provisions of the Affordable Care Act 12* (March 2012), <http://www.cbo.gov/sites/default/files/cbofiles/attachments/03-13-Coverage%20Estimates.pdf> (federal subsidies for each person subsidized is \$5,300 a year by 2017 and is expected to increase by 2022).

⁹³ PPACA, 42 U.S.C. § 18001 (2010); Stremikis, *supra* note 18, at 3. Many of these families are part of the uninsured population because private insurance costs are high.

⁹⁴ 42 U.S.C. § 18041. If a state chooses not to create its own exchange, then it will default to a federally facilitated exchange.

to allow existing individual and small group markets to continue to exist outside of the exchanges.”⁹⁵ However, whether these options outside of the exchanges are affordable, their variation by state and the requirements they place on purchasers offer further concern about their viability as options to undocumented immigrants.⁹⁶ Therefore, while undocumented individuals are not yet explicitly banned from purchasing all unsubsidized private health insurance plans, they are oftentimes left with virtually no opportunity or economic means to purchase any plan. The ACA excludes undocumented immigrants from purchasing coverage in the exchanges, leaving them able to purchase coverage only outside of these exchanges through the open market.⁹⁷ In the open market, undocumented immigrants will likely have limited options and remain unable to afford expensive insurance coverage.⁹⁸

C. Restrictions on Undocumented Individuals’ Access to Health Insurance Exchanges Run Afoul of our Nation’s Health Policies and Goals

The government’s involvement in the health care market is more extensive than it is in any other market.⁹⁹ The government plays a large role as a *health insurer*, providing insurance to the poor, the elderly, and the disabled.¹⁰⁰ The government is also involved in health care on the *regulatory* side and has expressed “that everyone should have the right to at least basic medical care.”¹⁰¹ This is not reflected by reality. To the contrary, “[u]nder the new health care reform

⁹⁵ John Jacobi, *Health Insurance Exchanges: Governance Issues for New Jersey* 13, SETON HALL LAW CENTER FOR HEALTH & PHARMACEUTICAL LAW & POLICY (Sept. 2011), <http://www.cshp.rutgers.edu/Downloads/9020.pdf>.

⁹⁶ See generally Nat’l Conf. of State Legislatures, *State Actions to Address Health Insurance Exchanges* (Jan. 4, 2013), <http://www.ncsl.org/issues-research/health/state-actions-to-implement-the-health-benefit-exch.aspx> (showing the various approaches taken by the states regarding health insurance exchanges and their compliance with ACA).

⁹⁷ Kline, *supra* note 70, at 6.

⁹⁸ *Id.*

⁹⁹ David M. Cutler, *Public Policy for Health Care* 1, BURCH CENTER WORKING PAPER SERIES (Mar. 1996), available at <http://elsa.berkeley.edu/~burch/13health.pdf>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 4.

law, undocumented immigrants are ineligible for financial assistance and Medicaid coverage.”¹⁰² The ACA restrictively defines “applicable individual” to exclude “an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.”¹⁰³ This shows the discrepancies between how the current restrictions on undocumented individuals are in reality very detrimental to our nation’s health policy goals. Despite these laws and the fact that they are meant to ease the financial burden on the states, undocumented individuals without health insurance or access to the market will continue to economically burden the nation.¹⁰⁴

In addition to the ethical and professional obligations of health care professionals to care for the sick, there exists a universal right to the enjoyment of the highest attainable standard of physical and mental health.¹⁰⁵ The Report of the Special Rapporteur regarding the promotion and protection of human rights examines the failure in various nations to recognize the right to the highest attainable standard of health.¹⁰⁶ If such a right exists and is among the goals of the United Nations, it is inconsistent and insufficient for the United States, as a member, to grant mini-DREAMers permission to stay in the country yet deny them access to health insurance, which is essentially the equivalent of denying them the right to the highest attainable standard of health within the United States.¹⁰⁷

By explicitly banning undocumented immigrants from the health insurance market, Congress has, pursuant to its plenary power and inherent sovereignty over international affairs

¹⁰² Mary Mahon, *After Health Reform, Safety Net Providers Still Play Crucial System Role, Experts Say*, COMMONWEALTH FUND (Aug. 8, 2011), <http://www.commonwealthfund.org/News/News-Releases/2011/Aug/Safety-Net-Providers-Still-Play-Crucial-Health-System-Role.aspx>.

¹⁰³ 26 U.S.C. § 5000A(d)(3).

¹⁰⁴ 8 U.S.C. § 1621 (2006).

¹⁰⁵ Kline, *supra* note 70, at 2; Kofi Annan, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UNITED NATIONS GENERAL ASSEMBLY (Sept. 13, 2006), available at http://www.who.int/medicines/areas/human_rights/A61_338.pdf.

¹⁰⁶ *Report of the Special Rapporteur, supra* note 105.

¹⁰⁷ *Id.*

and national security, effectively determined that such individuals are outside of the American community.¹⁰⁸ Some argue that the ban serves the governmental interest of deterring illegal immigration or their continued presence in the United States.¹⁰⁹ However, even though the federal government has exclusive authority over the regulation of immigration and possesses full authority to take actions that further the interests concerning national security and international affairs, mini-DREAMers do not implicate the purposes behind the exclusion.¹¹⁰ The mini-DREAMers have been granted stay within the American community, yet they are treated as outside of the community and banned from any access.¹¹¹ Skepticism exists about what governmental interest is furthered by preventing people from paying out-of-pocket for health insurance coverage when they are able and willing.¹¹² If mini-DREAMers are permitted to purchase health insurance, what governmental interest, if any, would be jeopardized, and to what extent?

D. Conflict between DACA, ACA, and Other Health Statutes

To a large extent, conflict exists between DACA and the ACA, as well as other American health statutes and policies. Ann Morse, program director at the National Conference on State Legislature's Immigrant Policy Project, stated, “[d]reamers’ are stuck in a legal ‘limbo’ with the deferred action permits. They cannot be deported, but they are not on a path to citizenship and are only granted the right to work for two years. ‘It is a pause button until Congress acts.’”¹¹³

¹⁰⁸ 42 U.S.C. § 18001 et. seq.

¹⁰⁹ See, e.g., Andre Roman, *Wait a Second. Why Shouldn't We Insure Illegals?*, THE DAILY BEAST (Sept. 13, 2009), <http://www.thedailybeast.com/newsweek/2009/09/13/wait-a-second-why-shouldn-t-we-insure-illegals.html> (“Given that illegal immigrants have, by definition, broken our laws, it make sense that large numbers of upstanding citizens oppose any measure that would encourage more foreigners to sneak into America or make their lives easier once they’re here.”).

¹¹⁰ Spece Jr., *supra* note 64, at 531.

¹¹¹ *Id.*

¹¹² Kline, *supra* note 70, at 1.

¹¹³ Amy Bingham, *For ‘Dreamers’ the Wait is Just Beginning*, ABC NEWS (Aug. 16, 2012), <http://abcnews.go.com/Politics/OTUS/dreamers-wait-beginning/story?id=17022135>.

Additionally, federal health officials have said, “[i]llegal immigrants who receive temporary reprieves from deportation will not be eligible for Medicaid benefits.”¹¹⁴ In response, Arizona Governor Jan Brewer issued an executive order telling state agencies to deny all public benefits to young undocumented immigrants who receive deferred action.¹¹⁵ This order raises the question of what degree of discretion the individual states have in determining undocumented immigrants’ access to health insurance.¹¹⁶

It arguably poses very little risk to include DACA individuals within the American health insurance market and exchanges. They comprise a small percentage of the illegal immigrant population in the United States and it is unlikely that a huge percentage of those individuals have health statuses that would require much expenditure.¹¹⁷ Further, “[t]he inevitable effect of including more healthy individuals to share the risk of medical costs may be further multiplied when the class to be included is illegal immigrants, as studies indicate that medical expenditures for recent immigrants are less than half that for citizens, and recent immigrants have significantly lower medical service utilization.”¹¹⁸ Allowing undocumented immigrants to purchase coverage and obtain early intervention to the extent that transmittable diseases, expensive, late or

¹¹⁴ Exec. Order 2012-06, *supra* note 3.

¹¹⁵ *Id.* Governor Brewer’s authority is limited and she does not have the ability to make eligible or ineligible certain individuals from federal funds since federal legislation governs. *Compare e.g.*, Welfare Reform Act, 8 U.S.C. § 1622 (state authority to limit eligibility of qualified aliens for State public benefits) *with* Medicaid Statute, 42 U.S.C. § 1396c (Secretary has ultimate authority over determination whether a State plan complies and can limit payments to such States that are not in compliance).

¹¹⁶ *Id.* (“State agencies that provide public benefits . . . shall . . . initiate operational, policy, rule and statutory changes necessary to prevent Deferred Action recipients from obtaining eligibility beyond those available to any person regardless of lawful status, for any taxpayer-funded public benefits and state identification . . .”).

¹¹⁷ No studies have been found regarding the health status of undocumented immigrants between the age of 16 and 31—and therefore possibly eligible to apply for deferred action—in comparison to the overall health of the illegal population. *See* Green Mountain Care Board, *Report Regarding the Cost of Health Services Provided to Undocumented Immigrants* 8, Gen. Assemb. of the State of VT (Jan. 24, 2013), <http://www.leg.state.vt.us/reports/2013ExternalReports/286249.pdf> (“Accurately estimating the total number of undocumented immigrants . . . is not a simple task. While undocumented immigrants live in every state, they are highly concentrated in just a few states, and the Department of Homeland Security keeps little data specific to states with comparatively small immigrant populations.”).

¹¹⁸ Glen, *supra* note 9, at 39 (quoting Leighton Ku, *Health Insurance Coverage and Medical Expenditures of Immigrants and Native-Born Citizens in the United States*, 99 AM. J. PUB. HEALTH 1322, 1324 (2009)).

emergency care is an issue, will benefit all members of the community.¹¹⁹ “Illegal immigrants are a healthy segment of the population that would consume a comparatively small amount of expenditures. This reality is to every insured’s benefit.”¹²⁰

Allowing mini-DREAMers to participate in the health insurance market would further several governmental interests as well as immigration and health policies, and keeping them out is completely contrary to what HHS Secretary Kathleen Sebelius has proclaimed:

First, we’re investing in kids. Everyone says “kids are the future” but if we don’t invest in their health care, in their developing brains, and their families, then this country will be less creative, less competitive, and our people will be less secure.¹²¹

Ironically, these sentiments and the DACA program do not mesh.

Studies have shown that annual per capita expenses for health care were 86 percent lower for uninsured immigrant children than for uninsured U.S.-born children, but that emergency department expenditures were more than three times as high.¹²² Lacking a primary care provider and access to preventive care, these groups of people are more likely to visit emergency rooms.¹²³ The ACA does not alleviate this problem.

Lack of insurance coverage is a significant barrier to accessing health services. It leads to unmet health needs, delays in receiving appropriate care, inability to get preventive services, and

¹¹⁹ Spece Jr., *supra* note 64, at 536.

¹²⁰ Glen, *supra* note 9, at 39.

¹²¹ Kathleen Sebelius, American Public Human Services Association National Spring Conference, Washington, DC (Mar. 29, 2010), <http://www.hhs.gov/secretary/about/speeches/sp20100329.html>.

¹²² Mohanty et. al., *Health Care Expenditures of Immigrants in the United States: A Nationally Representative Analysis*, 95(8) AM J PUBLIC HEALTH 1431, 1431-8 (2005).

¹²³ Renee Gindi et. al., *Emergency Room Use Among Adults Aged 18-64: Early Release of Estimates from the National Health Interview Survey, January-June 2011* 1, CDC (May 2011), http://www.cdc.gov/nchs/data/nhis/earlyrelease/emergency_room_use_january-june_2011.pdf (lack of access to other providers accounts for why 79.7% of adults visited the emergency room); *Cover Michigan Survey 2011* 1, CENTER FOR HEALTHCARE RESEARCH & TRANSFORMATION, <http://www.chrt.org/assets/cover-michigan/CHRT-Cover-Michigan-Survey-2011.pdf> (“emergency departments and urgent care facilities were also more likely to be the ‘usual location of care’ for the uninsured”).

otherwise preventable hospitalization.¹²⁴ The ACA seeks to address these inadequacies. With these goals driving the purpose of the ACA, it is clear that granting mini-DREAMers access to the health insurance market is sensible and would further these goals. Yet, under the current statutory scheme, federal laws prevent undocumented immigrants from receiving preventive services. One of the only means left available to them is emergency care, which tends to be more expensive and crippling to our national economy than if these barriers to their access were removed, and which could have been avoided if the individuals had been able to obtain preventive care.¹²⁵ Having a large segment of the population stay outside of the “system definitely works against the goals of the Affordable Care Act, one of which is to get to the most cost effective place we could be in our health care system.”¹²⁶

If a particular state does not opt to provide health insurance options outside of the exchanges, the only programs that remain available for undocumented immigrants are those that provide care when patients are in a state of emergency, are at their sickest and when the cost of treatment is at its highest.¹²⁷ In consideration of such financial implications, ensuring that undocumented immigrants are able to access preventive care will minimize development of diseases and ease the burden borne by hospitals.¹²⁸ DACA is an appropriate vehicle to get this process started.

There is strong support from opinion leaders for “policies that would guarantee access to preventive, primary, and acute care for undocumented immigrants. Only 17 percent of

¹²⁴ *Access to Health Services*, *supra* note 60.

¹²⁵ Nathan Bernier, *How Will the Affordable Care Act Affect Illegal Immigrants*, KUHf HOUSTON PUBLIC RADIO (July 5, 2012), <http://app1.kuhf.org/articles/1341526931-How-Will-the-Affordable-Care-Act-Affect-Illegal-Immigrants.html>.

¹²⁶ *Id.* (quoting Anne Dunkelberg) (internal quotations omitted).

¹²⁷ Kline, *supra* note 70, at 12.

¹²⁸ *Id.*

respondents oppose or strongly oppose such policies.”¹²⁹ 70 percent of leaders surveyed support policies that would “guarantee access to care for undocumented immigrants who are currently ineligible for premium subsidies and expanded Medicaid coverage under reform.”¹³⁰ While the ACA may be a major step forward toward the nation’s goal of reducing disparities in health and health care for vulnerable populations, and the DACA program is likewise at least some movement toward immigration reform, one can see how this conflict raises important issues regarding immigration and health care policy.¹³¹

E. State Efforts to Address the Restriction on Undocumented Individuals from Accessing Health Coverage

In America, there exists a “patchwork ‘system’ of safety-net providers, including public and not-for-profit hospitals, federally qualified community health centers (“FQHCs”), and migrant health centers.”¹³² These providers, accessible to undocumented immigrants, include not-for-profit organizations funded by the Federal Health Resources and Services Administration. Providers offer comprehensive primary care to vulnerable populations regardless of ability to pay, insurance status, or immigration status.¹³³

Restricting immigrants from accessing adequate health insurance coverage both increases the health care costs for those who participate in the health insurance market and poses a potential risk to public health at large.¹³⁴ There are a multitude of adverse effects from allowing qualified DACA applicants to stay and work in the United States without any corresponding

¹²⁹ Stremikis, *supra* note 18, at 6.

¹³⁰ *Id.* at 2.

¹³¹ Mahon, *supra* note 102.

¹³² Michael K. Gusmano, *Undocumented Immigrants in the United States: U.S. Health Policy and Access to Care*, THE HASTINGS CENTER (Oct. 3, 2012), <http://www.undocumentedpatients.org/issuebrief/health-policy-and-access-to-care>.

¹³³ *Id.*

¹³⁴ Am. Nurses Ass’n Issue Brief, *Nursing Beyond Borders: Access to Health Care for Documented and Undocumented Immigrants Living in the US*, <http://nursingworld.org/MainMenuCategories/Policy-Advocacy/Positions-and-Resolutions/Issue-Briefs/Access-to-care-for-immigrants.pdf> (hereinafter “ANA Issue Brief”).

grant of health insurance access. Socioeconomic factors indicate that immigrants, both documented and undocumented, are at greater risk for poor health, in part because they do not have access to preventive care.¹³⁵ On the other hand, the interests of the American public may potentially be best served if approved DACA applicants are allowed to participate in the national health care market, because doing so would allow them to share in the costs.

Moreover, there are strong policy reasons for extending coverage to this specific group.¹³⁶

Accessibility of affordable health insurance is essential to broaden the cost-sharing of health care across a wider distribution of people and to diminish the burden of disease for a vulnerable, underserved population. Limiting immigrants from adequate health care coverage . . . similarly increases the health care costs and possible public health risks.¹³⁷

Those eligible for DACA are generally not part of the pool of individuals who are at a greater risk of poor health; however, their health will deteriorate over time due to factors like poor and inadequate access to health care and limited access to medical services and public health programs in order to receive preventive care.¹³⁸ Allowing them to participate in the health insurance market may potentially resolve these issues.

An additional layer to this paradox is the fact that immigration policy has been left to the federal government, whereas health care has traditionally been regulated by the individual states. However, in both areas, the federal and state governments maintain a certain degree of control in lawmaking and regulating. Health and immigration policies are necessarily entwined and involve complex interplay between federal and state regulations. For example, the ACA is a federal law that requires each state to either design its own exchange meeting certain base requirements or

¹³⁵ *Id.*

¹³⁶ Glen, *supra* note 9, at 1.

¹³⁷ ANA Issue Brief, *supra* note 134, at 2.

¹³⁸ *Can Illegal Immigrants Buy Health Insurance?*, *supra* note 88.

default to the federal exchange.¹³⁹ “[T]he Affordable Care Act empowers states to take the lead in implementing and enforcing many of the new reforms, *if they so choose*.”¹⁴⁰ Also, various states offer medical assistance programs for immigrants, which is permissible because each state has flexibility regarding what state-funded health care programs they offer.¹⁴¹ California, for instance, offers limited health insurance coverage to illegal immigrants, subject to certain other restrictions.¹⁴² New York City Health and Hospitals Corporation President Alan Aviles issued a community letter to immigrant New Yorkers that explicitly stated that “[u]ndocumented immigrants can get medical care in New York with no fear.”¹⁴³ New York is among the more immigrant-friendly states and acknowledges that the ACA may create some barriers to coverage for immigrants. New York also provides policy choices that can have positive implications for immigrant insurance eligibility and access to care.¹⁴⁴ Individual states have started taking immigration reform action into their own hands— due in part to the federal government’s lack of action or inadequacy of action. However, while states have discretion to fashion their own rules regarding health insurance access, the ACA explicitly bans undocumented immigrants from the health insurance exchanges in state-funded programs.¹⁴⁵

States that are more supportive of undocumented individuals have used the DACA program as a way to grant such qualified individuals even more opportunities to succeed in the

¹³⁹ 42 U.S.C. § 18041.

¹⁴⁰ Letter from Kathleen Sebelius to Governor Gregoire, Commissioner Cline, and Senator Moore (Nov. 18, 2010), available at <http://cciio.cms.gov/Archive/Technical-Implementation-Letters/exchange-guidance-cover-letter.pdf> (emphasis added).

¹⁴¹ See e.g., Tanya Broder and Jonathan Blazer, *Overview of Immigrant Eligibility for Federal Programs*, NAT’L IMMIGRATION LAW CTR., revised Oct. 2011, <http://www.nilc.org/overview-immeligfedprograms.html>.

¹⁴² *Can Illegal Immigrants Buy Health Insurance*, *supra* note 88.

¹⁴³ Alan Aviles and Fatima Shama, *An Open Letter to Immigrant New Yorkers* 8, NYC HHC (2011), <http://www.nyc.gov/html/hhc/downloads/pdf/open-letter-english-2011.pdf>.

¹⁴⁴ New York Immigration Coalition, *Maximizing Health Care Reform for New York’s Immigrants* 1, NYS HEALTH FOUNDATION (Feb. 2013).

¹⁴⁵ PPACA, 42 U.S.C. § 18001.

United States.¹⁴⁶ On the other hand, some states take a stricter stance on illegal immigrants—Arizona Governor Jan Brewer signed an order on August 15, 2012, the same day that the federal government began accepting applicants for deferred action, saying “the program ‘does not confer upon them any lawful or authorized status and does not entitle them to any additional benefits.’”¹⁴⁷ As a result, although undocumented immigrants are not eligible for federal health programs because federal requirements for eligibility include being a legal U.S. citizen, there are ways that states can offer undocumented immigrants basic health insurance coverage.¹⁴⁸ States are able to take a certain level of action on their own by using their own funds. However, with such a large national program like DACA implemented on the federal level, it makes sense for further action to be taken not just on the individual state-by-state basis. A federal law would ensure that mini-DREAMers are afforded the full ability to purchase health insurance, regardless of which state they are located.¹⁴⁹

III. The Need for Legislative Action

It is true that options may remain for undocumented individuals to purchase health insurance coverage in the open market and outside of the mandated state health insurance

¹⁴⁶ *E.g.*, Illinois General Assembly, Bill SB0957, available at <http://www.ilga.gov/legislation/fulltext.asp?DocName=09700SB0957enr&GA=97&SessionId=84&DocTypeId=SB&LegID=&DocNum=957&GAID=11&Session=> (authorizing the Secretary of State to issue temporary driver’s licenses to certain individuals including mini-DREAMers). Other states that have similarly approved such bills that authorize the state to issue temporary visitor driver’s licenses, including Washington and New Mexico. Joanne von Alroth, *Illinois Allows Driving Licenses for Illegal Immigrants*, REUTERS (Jan. 8, 2013), <http://www.reuters.com/article/2013/01/08/us-usa-immigration-illinois-idUSBRE9070XN20130108>.

¹⁴⁷ Emily Deruy, *DREAMers in Arizona Won’t Qualify for Medicaid*, ABC (Aug. 30, 2012), available at http://abcnews.go.com/ABC_Univision/dreamers-arizona-qualify-medicaid/story?id=17253928#.UGErRo5IjBI.

¹⁴⁸ *Can Illegal Immigrants Buy Health Insurance?*, *supra* note 88.

¹⁴⁹ *See e.g.*, Green Mountain Care Board, *Report*, *supra* note 117, at 8 (“[F]ederal law forbids state or local governments from prohibiting or restricting communications to and from the federal government regarding the immigration status of any individual. Federal law does, however, not generally require states to provide immigration violation information to the federal government that is collected in the administration of state-funded public benefit programs.”).

exchanges.¹⁵⁰ However, if a state chooses not to offer any coverage outside of its exchange market, then the undocumented individual is completely banned from contributing to his or her own insurance coverage even if he or she has cash in hand, is able and willing, and is ready to purchase. In order to serve the principles of fairness and justice, and to further both immigration and health policy, as well as to provide for better uniformity among the states, the federal government should take legislative action so that mini-DREAMers can participate in the health insurance exchange market and have the opportunity to purchase insurance coverage.

This Note has pointed out how Congress retains the ultimate authority to change the status of an undocumented individual.¹⁵¹ Therefore, there is no action that can be taken at the administrative level, such as by USCIS, which would allow for mini-DREAMers to obtain access to the health insurance exchanges. Instead, other available alternatives, such as statutory amendments, must be considered. First, the ACA can be amended and provide for an exception so that mini-DREAMers, although “undocumented” and “not qualified,” can participate in the exchanges. Additionally, the Welfare Reform Act can be amended, insofar as it distinguishes between qualified and non-qualified aliens, and to create a new category within “qualified” aliens, specifically for mini-DREAMers. This way, mini-DREAMers will be able to overcome the ACA’s prohibition on undocumented individuals participating in the health exchanges, and move out of the “not qualified” classification and into the “qualified” category.

A. Potential Arguments Against Taking Further Legislative Action

¹⁵⁰ *E.g.*, *Health Insurance Exchange Study*, MINN. DEPT. OF HEALTH, Feb. 2008, at 10, available at <http://www.health.state.mn.us/divs/hpsc/hep/publications/legislative/exchangestudy.pdf>. (Minnesota is cognizant that “[i]n considering the issues related to sales inside vs. outside of the exchange, the most important issue is that if a health insurance product is sold both inside and outside of the exchange, its price should be identical in both places.” However, states’ policy recommendations will vary due to the varying factors each state must consider in what would be best for that particular state, and how they will ultimately implement the exchanges.).

¹⁵¹ *Supra* note 16.

Although DACA does not address the health care aspect for undocumented individuals who receive work permits, there exist various arguments in support of the program, even with its restrictions and shortcomings. However, none of these arguments provide a rational basis for DACA as it stands. For example, one might argue that the mini-DREAMers have not been granted any access to the health insurance market because of the economic effects it would have on our nation. However, this argument is unavailing because the program is available only to a very specific and narrowly defined group of undocumented individuals, not to the whole class of undocumented people present in the United States.

A grant of deferred action does not confer any immigration status, nor does it convey or imply any waivers of inadmissibility that may exist. Likewise, deferred action cannot be used to establish eligibility for any immigration benefit that requires maintenance of lawful status ... While it is theoretically possible to grant deferred action to an unrestricted number of unlawfully present individuals, doing so would likely be controversial, not to mention expensive.¹⁵²

In DACA, Congress is not offering to grant deferred action to an “unrestricted number” of undocumented immigrants. Rather, to be approved, an applicant must meet many specific requirements such as age, education, continuous presence in the United States, and the absence of a criminal record.¹⁵³ Therefore, DACA is only available to a very specific group of people and is limited in its scope. Further, there are DACA filing fee requirements, which help offset the government’s costs for implementing the program.¹⁵⁴

One reason given for excluding undocumented immigrants from health insurance exchanges is concern that it could encourage illegal immigration.¹⁵⁵ However, this justification is not applicable to those seeking deferred action through DACA. As mentioned above, they must

¹⁵² Policy Memorandum Draft on EB-5 Adjudications Policy, *supra* note 36.

¹⁵³ *Consideration of Deferred Action for Childhood Arrivals Process*, *supra* note 1.

¹⁵⁴ *Id.*

¹⁵⁵ Bernier, *supra* note 125,

meet requirements, which include continuous presence and residence in the United States from June 15, 2007 to the present.¹⁵⁶

Another purported argument in support of DACA and against taking further legislative action is that DACA is designed to ensure that governmental resources for the removal of individuals are focused on high priority cases because resources are limited.¹⁵⁷ Deferred action, a term that has no statutory definition and is only described in federal regulations, is primarily a device that serves “administrative convenience to the government which gives some cases lower priority.”¹⁵⁸ Facially, the intent to provide mini-DREAMers a chance to succeed is merely a secondary goal and beneficial effect of DACA. When viewed under this argument, one may assert that nothing in the United States Constitution entitles individuals with no status to public benefits, which further disincentives offering health insurance to mini-DREAMers.¹⁵⁹ The grant of deferred action is not intended to be a permanent move.¹⁶⁰ Perhaps Congress has not come up with a legitimate justification to provide mini-DREAMers with a more direct route of obtaining lawful permanent presence, and so for now, they are subject to the same registration procedures as any other undocumented immigrant seeking lawful status.¹⁶¹

Furthermore, some have claimed that the reason for the Obama administration’s failure to implement a more forceful program is because DACA is a “politically-motivated way to pick up

¹⁵⁶ *Consideration of Deferred Action for Childhood Arrivals Process*, *supra* note 1.

¹⁵⁷ Letter from Cindy Mann, Director, U.S. Dep’t of Health & Human Servs., to the State Health Official and Medicaid Director (Aug. 28, 2012), *available at* <http://amjlaw.files.wordpress.com/2012/08/letter.pdf>.

¹⁵⁸ 8 C.F.R. § 27a.12(c)(14); *see also*, *Protecting the Homeland Tool Kit for Prosecutors*, U.S. Dep’t of Homeland Security (Apr. 2011), *available at* <http://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf>.

¹⁵⁹ Patrick J. Glen, *Health Care and the Illegal Immigrant*, 23 HEALTH MATRIX: J. OF L.-MED. 197, 217 (Jan. 22, 2013) (“The Court found nothing irrational in Congress dictating that an alien’s access to public benefits in the United States should depend upon the nature and duration of his presence in the country.”).

¹⁶⁰ *Consideration of Deferred Action for Childhood Arrivals Process*, *supra* note 1. The corollary to this is that the discretion may be extended indefinitely.

¹⁶¹ 8 C.F.R. § 101.4.

Latino votes in November.”¹⁶² Those who disapprove of the administration’s lack of genuine intent to promote the wellbeing of undocumented immigrants may even align themselves to the more extreme views advanced by scholar Rhonda Magee. Magee relates the situation of mini-DREAMers to that of our nation’s history of human rights abuses.¹⁶³ Magee suggests parallels between enslaved African Americans and those whom she considers to be their present day counterparts, undocumented immigrants.¹⁶⁴ Magee further argues that the nation has set up a variety of structures that facilitate subordination of undocumented immigrants and that certain segments of society benefit from their presence; in this sense, DACA can be seen as merely a part of the series of immigration and economic policies that actually encourage the presence of this exploitable caste of workers.¹⁶⁵ This argument is extreme, yet is mentioned here as a means of emphasizing how there is a great divide among individual sentiments in regards to immigration policy and what should be done.

Alongside these arguments, the debate surrounding immigration reform is ongoing. In taking action and passing DACA, President Obama had to make a determination, after taking into consideration all the conflicting views on immigration, of what balanced action he believed would best serve the interests of all.¹⁶⁶ Regardless, inclusion of mini-DREAMers in the health

¹⁶² Bingham, *supra* note 113 (In response to this accusation, Obama stated that he was ahead with the Latino vote even before the passage of DACA. Post-election, there are no longer fears that DACA will be discontinued, and several states have been taking further action.); *e.g.*, S.B. 0957, 97th Gen. Assemb., Reg. Sess.(Ill. 2012), *available at* <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=957&GAID=11&DocTypeID=SB&SessionID=84&GA=97> (amending the Illinois Vehicle Code and making change in a section concerning persons that are not to be granted a license or permit; this would allow illegal immigrants to get temporary driver’s licenses); *see also* Rachel Estabrook, *Obama’s Election Victory Spurs Young Immigrants to Seek Temporary Legal Status*, PENINSULA PRESS (Dec. 6, 2012), *available at* <http://peninsulapress.com/2012/12/06/obamas-election-victory-spurs-young-immigrants-to-look-for-temporary-legal-status>.

¹⁶³ Spece, Jr., *supra* note 64, at 538.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 538-9.

¹⁶⁶ *See e.g.*, Stacy Teicher Khadaroo & Amanda Paulson, *Obama’s New Program for Young Illegal Immigrants: How is it Going?*, CHRISTIAN SCIENCE MONITOR (Oct. 9, 2012) (“The debate shows once again how divided Congress has been on immigration issues.”); *Obama’s Leaked Immigration Bill Applies Pressure on Congress*, FOX

insurance market is a much more productive and effective way to advance both our nation's immigration and health policies.

B. Addressing the Health Care and Immigration Paradox by Amending Current Statutes

One individual's story serves to further demonstrate the tenuous situation many immigrants are placed **is due** to current laws. Angel is an illegal immigrant in the United States whose situation is exemplary of the health care paradox that many other undocumented immigrants face.¹⁶⁷ He has a medical necessity for a kidney transplant, which would cost \$100,000 and restore him to normal life.¹⁶⁸ The alternative to the transplant is to continue dialysis for the rest of his life, at a cost of \$75,000 a year.¹⁶⁹ Due to the "maze of conflicting laws, private insurance conundrums and ethic quandaries, the national impasse between health care and immigration policies," so long as he does not have proper immigration documents, he cannot get a transplant.¹⁷⁰ In New York, Angel's outpatient dialysis is considered an emergency measure and although illegal immigrants are excluded from Medicare coverage, pursuant to federal law, the federal government may reimburse hospitals for providing emergency care regardless of a patient's immigration status.¹⁷¹ Angel's situation elucidates the paradox between health policy and immigration status— ultimately it is American tax dollars that will be paying for his dialysis, at a cost of \$475,000 per year— because even if he is willing to pay for the transplant and to find his own health insurance to cover the costs of the necessary treatment for

NEWS LATINO (Feb. 17, 2013), *available at* <http://latino.foxnews.com/latino/politics/2013/02/17/obama-immigration-leaked-usa-today-marco-rubio-report-bill-would-set-8-year-path-to-residency> (describing how a bipartisan group of senators agreed on the general outline of an immigration plan, while many others criticized its flaws).

¹⁶⁷ Nina Bernstein, *For Illegal Immigrant, Line Is Drawn at Transplant*, N.Y. TIMES (Dec. 20, 2011), *available at* <http://www.nytimes.com/2011/12/21/nyregion/illegal-immigrants-transplant-cheaper-over-life-isnt-covered.html?pagewanted=all>.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

his illness, under the newly enacted ACA he is banned from participating in the health insurance market.¹⁷²

There are more than 10 million undocumented immigrants in the United States, all of whom are virtually untouched by the Affordable Care Act and foreclosed from accessing health insurance.¹⁷³ Of these 10 million, an estimated 1.7 million are eligible for DACA.¹⁷⁴ Under federal law, those same people are entitled to receive emergency health care even if they cannot afford it.¹⁷⁵ The irony lies in the fact that many immigrants sitting in the waiting room of medical clinics have expressed that they would rather be able to buy coverage through health insurance exchanges, which go into effect in 2014, than have to rely on emergency services.¹⁷⁶ However, they do not have this option because ACA, as it is currently written, excludes undocumented immigrants from participating in the exchanges.

The time for Congress to take action on immigration reform is now, and there has been much talk about Congress engaging in “momentous debate on immigration.”¹⁷⁷ In light of Angel’s situation and the arguments and issues discussed throughout this Note, it is reasonable and logical to include mini-DREAMers within our health insurance system. As has been proposed, a practical and efficient way to go about this is for Congress to take legislative action and amend the existing statutory framework defining a “qualified” alien, and create a new category allowing the mini-DREAMers to fall under this classification. The scope of the President’s power is not unlimited, and so it would take acts of Congress for the necessary

¹⁷² 42 U.S.C. § 18081 (2010).

¹⁷³ Bernier, *supra* note 125.

¹⁷⁴ Miriam Jordan, *Young Immigrants Pause on ‘Deferred Action’ Offer*, WALL STREET JOURNAL, Sept. 10, 2012, at A6.

¹⁷⁵ Bernier, *supra* note 125; *see also* EMTALA, 42 U.S.C. § 1395dd.

¹⁷⁶ Bernier, *supra* note 125.

¹⁷⁷ *See generally* Bob Goodlatte, *Immigration Reform Not to Be Rushed*, THE HILL’S CONGRESS BLOG (Feb. 25, 2013), <http://thehill.com/blogs/congress-blog/homeland-security/284795-immigration-reform-not-to-be-rushed->

changes to be made.¹⁷⁸ Specifically, Congress can add language within the Welfare Reform Act to the effect that “those granted discretionary deferred action for more than one year are not considered ‘undocumented individuals’ and are eligible for federally funded health programs.”¹⁷⁹ In this way, individuals who are DACA-approved would also be granted full access to the health insurance market.

Another option would be for Congress to add that same language to the federal Medicaid statute, as well as the ACA. Specifically, the provision within the Medicaid regulations regarding eligibility allowing for “[t]hose granted discretionary deferred action for more than one year are eligible for federally funded health programs.”¹⁸⁰ An Amendment to the ACA would also need to be made and allow for the same, so the two statutes would be consistent.¹⁸¹ Such minor change(s) and one-line additions would further both immigration and health reform policies.

Conclusion

DACA has generally been received with praise.¹⁸² Of course, it has also been subject to many criticisms.¹⁸³ USCIS has issued further guidance regarding DACA.¹⁸⁴ However, its failure to address at the outset a major issue like health care has serious consequences on undocumented

¹⁷⁸ See generally memorandum from Jeanne Butterfield, former Exec. Dir. of the American Immigration Lawyers Ass’n, et al., *Executive Branch Authority Regarding Implementation of Immigrations Law and Policies*, (April 29, 2011), available at http://americasvoiceonline.org/blog/legal_memo_shows_obamas_hands_arent_tied_on_immigration_he_has_power_to_pro.

¹⁷⁹ This can be added to 8 U.S.C. § 1641(b) (2008), as the eighth listed definition for what the terms “qualified alien” means.

¹⁸⁰ This would be added to 42 C.F.R. § 435.406(a)(2) (2012), as a third point.

¹⁸¹ This text would be added to section 1411 of the ACA, discussing determination of eligibility for Exchange participation.

¹⁸² Cecilia Munoz, *Deferred Action Process for Certain Young People: Smart and Sensible Immigration Policy*, WHITE HOUSE BLOG (June 15, 2012, 3:07 PM), <http://www.whitehouse.gov/blog/2012/06/15/deferred-action-process-certain-young-people-smart-and-sensible-immigration-policy>.

¹⁸³ See, e.g., John Yoo & Robert Delahunty, *The Obama Administration, the Dream Act and the Take Care Clause* (U. of St. Thomas Legal Studies Research Paper No. 12-27, 2012).

¹⁸⁴ See, e.g., *Consideration of Deferred Action*, *supra* note 1. Additionally, USCIS plans on issuing further guidance (for example, mini-DREAMers will be able to “request consideration for a two-year extension of deferred action through a process to be detailed in the future”).

immigrants. The effects of this oversight extend beyond the individual to the entire community.¹⁸⁵ The work mini-DREAMers can receive under the program opens many doors that have been previously shut. They can obtain valid Social Security numbers and apply for jobs. They can obtain professional certificates and financial aid for college. They can even acquire driver's licenses depending on the laws of the state in which they reside.¹⁸⁶ Yet unlike the DREAM Act, DACA suspends deportations but does not confer any legal status or open any future path to citizenship.¹⁸⁷ This has a devastating effect on undocumented immigrants' access to health services.

Undocumented immigrants granted two-year reprieves from deportation through the Obama administration's deferred action program ought to be allowed access to health insurance exchanges, and such a measure would not be too expansive or impractical. This Note has argued that mini-DREAMers ought to at least be allowed the option to purchase from the state health insurance exchanges. However, this will require legislative action because the ACA completely blocks non-qualified individuals, such as undocumented immigrants, from participating in the health exchanges. Undocumented immigrants, and especially mini-DREAMers, who are affirmatively granted permission by the federal government to remain in the United States, will stay in the United States and make up a part of this nation's society, which entails contributing to all aspects of the nation's economy, health, and wellbeing. It makes sense to require them, just like everybody else, to maintain health insurance policies. Even if Congress chooses not to lift

¹⁸⁵ Jeffrey T. Kullgren, *Restrictions on Undocumented Immigrants' Access to Health Services: The Public Health Implications of Welfare Reform*, AM. J. PUBLIC HEALTH 93:10 1630 (Oct. 2003).

¹⁸⁶ See e.g., Alroth, *Illinois Allows Driving Licenses*, *supra* note 146.

¹⁸⁷ 111th Cong. S.3992 (2010); Julia Preston, *Young Immigrants, in America Illegally, Line up for Reprieve*, N.Y. TIMES (Aug. 13, 2012), <http://www.nytimes.com/2012/08/14/us/young-immigrants-poised-for-deportation-deferral-program.html?pagewanted=all>.

the restrictions on undocumented immigrants' access to services, compelling policy reasons justify why it ought to permit mini-DREAMers to enter the health insurance market.¹⁸⁸

¹⁸⁸ Kullgren, *supra* note 185, at 1633.