

Targeting Undocumented Migrants: Examining HB56 and the Challenges that

Arise

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Summary

Laws targeting undocumented migrants have long been a global issue. This report examines and dissects one law in a small part of the United States, HB 56 in Alabama, and make it a reference for examining what is currently happening throughout the world. Moreover, this report demonstrates two points: First, that while these types of laws are commonly challenged, they are often challenged on grounds other than human rights. Second, it argues that specific laws that unfairly target undocumented migrants are not concentrated to specific region in the world, rather, it is a global phenomenon. In regards to these specific laws, arguments can be made that the challenges which come from NGOs, multinational organizations, grass-roots groups, and country governments can sometimes miss the point when fighting them in court. Instead of focusing on the core issue of the rights of migrants as humans, the focus can shift to jurisdiction over immigration laws.

Introduction

Alabama is located in the south-eastern part of the United States. It has the ability to create laws which apply inside its borders thanks to the US federal system which grants certain powers to the national government and others to individual states. Many domestic issues are dealt with at the state-level while issues that affect the country as a whole are dealt with at the national level. Section 8 of the US Constitution lists the federal powers. These include drafting policy on taxes, war, and trade with foreign

countries. The individual states have the power to legislate on social policies such as public schooling (US Constitution, 1788).

The Beason-Hammon Taxpayer and Citizen Protection Act (HB 56) was a 2011 effort from the Alabama House of Representatives (one of two chambers of legislation in Alabama) led by Mickey Hammon, the Majority Leader of the House. It passed in June 2011 by a vote of 73-28. It followed the passing of 'The Support Our Law Enforcement and Safe Neighborhoods Act' (SB1070) in 2010 in Arizona which required police to determine the immigration status of anyone stopped when there is 'reasonable suspicion exists that the person is an alien who is unlawfully present in the United States ' (SB 1070, 2.2). HB 56 was called by MSNBC, a news stations in the US as 'America's harshest immigration law' (Sarlin, 2013). The rhetoric coming from the sponsors, Hammon and Beason gives an insight to their goals with HB 56.

Rhetoric concerning HB 56

Soon after HB 56 passed, Hammon was quoted as saying the legislation is intended to 'attack every aspect of an illegal immigrant's life' (The Economist, 2012). He also predicted that enforcing HB 56 will ensure 'cost savings for this state.' From this rhetoric and the full name of the law ('The Beason-Hammon Taxpayer and Citizen Protection Act') it becomes apparent that an inaccurate perception exists that undocumented migrants do not pay taxes. The Institute on Taxation and Economic Policy (ITEP), a non-

profit think tank that works specifically in local and federal tax policies, conducted a study in 2010 to look at the amount of taxes paid by undocumented migrants. ITEP found that a figure of 10.6 billion USD was collected in taxes from undocumented migrants in the form of sales tax, property tax and personal income tax in the United States. Alabama ranked 19th out of the 50 states in tax revenue with 118 million USD. To put this in perspective, the Tax Policy Center, an institution comprised of experts in the field of tax, found that the total paid in taxes by US citizens in 2010 (excluding undocumented migrants) was 2.1 trillion USD (Institute on Taxation and Economic Policy, 2013). These data show that undocumented migrants do indeed pay for public services contrary to what the sponsors of HB 56 suggest.

Rhetoric with a negative connotation aimed at undocumented migrants continues throughout HB 56. The abstract of the legislation begins by stating that it is 'relating to illegal immigration'. This leads to a question of the legality of migration. The act of migration itself is not 'illegal', instead it is the lack of documentation that makes it unlawful. Many citizens and lawmakers around the world label the issue of migrants crossing borders without the proper documentation as 'illegal immigration' and refer to the persons who engage in this act as 'illegal immigrants'. The tactic of framing someone as 'illegal' can be used among Members of Congress to politicize the issue. It is a tactic that is effective in sustaining a legal vulnerability of undocumented immigrants (de Ge-

nova, 2002, p.440). However, a more accurate term for such persons is 'undocumented migrants' (de Genova, 2002). This is because, as Bill Frelick (the Director of Human Rights Watch's Refugee Program) explains, the term 'illegal immigrant' taints the migrant as a criminal or as illegitimate for the simple reasons of irregularly crossing a border or overstaying a visa (Frelick, 2014, p.1).

According to its sponsors, HB 56 was passed because 'the state of Alabama finds that illegal immigration is causing economic hardship and lawlessness' (HB 56, 2.1). Among the many obstacles to undocumented migrants posed by HB 56, the most relevant to this Policy Report include attempts to hinder access on the levels of education, transportation, living, and working. Following the lead of Mickey Hammon, statements made from Alabama State Representative Kerry Rich continue with similar views regarding undocumented migrants. As he asserts:

The illegals in this country are ripping us off.... If we wait for the federal government to put this fire out, our house is going to burn down (Sarlin, 2013, p.1).

Rich's quote is interesting in the sense that the term 'illegal immigrants' has now been shortened to 'illegals'. This must be taken into account as the change in terminology of the word, 'illegal' shifted from an adjective, in 'illegal immigrants' to a noun, in 'illegals'. This shift, although subtle, moves the subject from a person who is assumed as doing something illegal, to their just being 'illegal'.

Some in the community did not support this labeling nor HB 56 in general. The religious community complained that the law criminalized providing aid to undocumented migrants, a service regularly performed by churches to help the needy (Sarlin, 2013, p.1). HB 56 is also believed to have had an effect on church attendance of undocumented migrants. Scott Douglas, the executive director of Greater Birmingham Ministries realized fewer and fewer Spanish-speaking people were attending the services out of fear of police presence. 'They were going to change Bible school into border patrol' he said. (Sarlin, 2013, p.1).

However, fear used in the rhetoric of policymakers to encourage self-deportation also exists globally. In 2013 in the United Kingdom, vans circulated around London with billboards which read 'go home or face arrest'. These vans also contained a statistic of how many arrests were made during the week in the area where the van was circulating (Travis, 2013 p.1). Meanwhile, to curb undocumented migrate in Singapore those residing without the proper documents face a fine, six months in prison and three cane lashings (Singapore Immigration and Checkpoints Authority, 2004). Employers who hire unauthorized migrants face fines of 6,000 Singaporean Dollars which converts to around 3,500 Euros (Singapore Immigration and Checkpoints Authority, 2004). In their work, scholars, Virginie Guiraudon and Gallya Lahav also find instances of punishment

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for undocumented migrants in Belgium, Canada, Denmark, Finland, France, Germany, Italy, the Netherlands, Sweden, and the United Kingdom (2000, p.184).

Specific laws targeting education

This section first examines a historic US court case which set precedent for future legislation regarding education. Next, it compares the content of HB 56 focusing on education and relates it to other examples in Europe. Finally, the section reviews an alternate, national-level proposal which provides a pathway for undocumented migrants to gain citizenship.

In the 1982 *Plyer v. Doe* case, the state of Texas implemented a law in which tuition would be charged to the parents of the undocumented school children. Some schools were charging as much as 1,000 USD per school year for each undocumented student (Olivas, 2010). However, a US federal judge ruled this law unconstitutional and in specific violation of the US Constitution Fourteenth Amendment¹, which argues, '....nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws' (Olivas, 2010). It was ruled that all children have basic human rights, which include the right to go to school from kindergarten through high school.

¹The Fourteenth Amendment forbids states from denying any person 'life, liberty, or property without due process of law or to deny to any person within its jurisdiction the equal protection of the law' (US Governing Printing Office, 1992, pp.30-31)

Although content of HB 56 does not challenge the right to attend school, it does put students' families at risk if they do so. This law makes schools obligated to determine if the student is the child of a person not lawfully present in the United States (HB 56, 28.1-4). This tally is to be done annually and submitted to the state education board. Hypothetically, this means that a child born in the US who is automatically a US citizen through *jus soli*², can be tallied if under suspicion from school officials. The tactic of keeping tallies of suspected students can also be found in Italy where it is encouraged under the legislation, Legge n. 94/2009 (Komada, 2011, p.460). In 2006 in France, another version of monitoring occurred as police were sent to schools to keep a check on undocumented students and families (Bicocchi and Levoy, 2013, p.27).

Contrary to these types of measures, the United States has proposed a bill at the federal level which aids undocumented migrants in many ways. The Development, Relief and Education for Alien Minors Act, or The DREAM Act is a 2001 bi-partisan proposal by the US Congress that would allow undocumented students to attend colleges and universities as well as receive tuition costs from individual states (Lopez, p.1). To qualify, undocumented students must meet certain requirements, which include, being 'of a good moral character (meaning no criminal record), living in the US for five years, graduating from high school, having applied and been accepted to a college or univer-

²*jus soli* is 'a rule of common law under which the place of a person's birth determines citizenship' (US Department of Foreign Affairs, 2012, p.1).

sity (Lopez, pp.1-2). Another major change that The DREAM Act would enact involves undocumented students who would be eligible to start the process of naturalization after successfully completing two years at a college or university or completing two years in the military (Lopez, p.2). The DREAM Act would provide a direction to become documented to those who meet the requirements, a direction that is unavailable in today's legislation.

Penalizing undocumented migrants and those who aid them

In regards to transportation, living and working, HB 56 creates difficulties for undocumented migrants as it does with education. HB 56 prohibits transporting illegal immigrants, meaning even taxis can refuse to service people that they believe may be in the state illegally (HB 56, 13.4). HB 56 also prohibits landlords from renting property to 'unauthorized aliens' and finds employers to be 'discriminatory' to refuse or terminate employment of a 'legal citizen' while an already existing employee is an 'unauthorized alien' (HB 56, 17.1).

The penalty on landlords who rent to undocumented migrants can be found elsewhere around the world. Guiraudon and Lahav find that similar employer penalties also exist in Belgium, Canada, Denmark, France, Germany, the Netherlands, Sweden and the UK (2000, p.184). In Singapore, the lodging of undocumented migrants is fined by a six-month to two-year imprisonment along with a fine of up to 3,500 Euros (Singapore

Immigration and Checkpoint Authority, 2013). Similarly, in 2010, Zambia passed legislation, which states that a person 'shall not knowingly aid, abet, assist, enable or in any manner help an illegal immigrant' (Zambia Immigration and Deportation Act, 46.1). Failure to abide by this section results in liability and a possible fine and imprisonment of 2-5 years upon conviction. (Immigration and Deportation Act, 46.2). A more severe penalty can be found in France where the penalty for aiding the entry, housing, or the circulation of an undocumented migrant is punishable by 5 years in prison as well as a 30,000 Euro fine (Aide à l'entrée et au séjour irréguliers, 2009, Chapitre II)³. In Italy, a 2009 legislation made undocumented migration a crime with a fine of 10,000 Euros and allows for the detainment of undocumented migrants for up to six months before repatriation (Woodward, 2009, p.1). Italy's Interior Minister at the time, Roberto Maroni, justified the passing of this law by stating, 'We want to tell citizens that the government is acting to guarantee their security' (Woodward, 2009, p.1). Both Maroni in Italy and Hammon and Rich in Alabama portray their legislation that targets the undocumented population as laws that protect the citizens.

³ For more information on this legislation, visit <http://www.legifrance.gouv.fr/affichCode.do?idSectionTA=LEGISCTA000006147789&cidTexte=LEGITEXT000006070158&dateTexte=20090408>

Freedom in an international context

Undocumented migrants have rights that derive from international documents and agreements. This section will discuss how conflict can arise when relating laws such as HB 56 with the goals of these international agreements. The first focus is the 1966 International Covenant on Civil and Political Rights (ICCPR). Then this section analyzes parts of the 1966 International Convention of the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW). To conclude, the bodies of the Organization of American States (OAS) are examined to provide examples of discord between HB 56 and the mission of the OAS.

The ICCPR provides a list of civil rights that all persons hold, regardless of country or status. The Preamble highlights the:

...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world

and recognizes

...that these rights derive from the inherent dignity of the human person (International Covenant on Civil and Political Rights, 1966).

Because of continued obstacles put in their way when pursuing simple human rights like the rights to an education and to attain a job, undocumented migrants have neither political liberty or freedom.

The OAS, a multi-national organization of which the US is a member, has positioned itself actively against HB 56. The OAS is an organization that includes the membership of 35 countries on the American continent⁴. According to OAS Secretary General José Miguel Insulza, HB 56 seeks, 'to artificially suppress natural processes and exacerbate feelings of discrimination and xenophobia towards immigrants' (OAS Press Release, 2011). The two main autonomous organs of the OAS are the Inter-American Commission on Human Rights (IACHR) and the Inter American Court of Human Rights (hereafter I/A Court). The main mission of the IACHR is 'to promote and protect human rights in the American hemisphere' (Buergenthal, pp.231-235). The I/A Court has contentious jurisdiction⁵, holding that non-discrimination and the right of equality are norms of *jus*

⁴ The member states of the OAS include: Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominca, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, The Bahamas, Trinidad and Tobago, United States, Uruguay, and Venezuela

⁵ jurisdiction to decide disputes when one state is charged of violating the human rights guaranteed by the convention

*cogens*⁶, making them applicable to all residents regardless of immigration status (Opeskin et al, 2012, p.160).

Legal challenges to HB 56

HB 56 has seen many direct challenges to its current form from grass-roots groups within Alabama. This section first highlights the grass-roots and NGO challenges to HB 56 by looking at the Alabama Coalition for Immigration Justice (ACIJ) and the American Civil Liberties Union (ACLU). Next, the OAS and US Government efforts will be discussed. The section concludes by looking at the shifts in rhetoric and support by some of these organizations.

Although founded in 2006, the ACIJ was pushed to lobby and raise awareness after the passing of HB 56 in 2011. According to the ACIJ website⁷, the group's work focuses on seven main points which include the building of alliances with minority communities and elected officials in Alabama as well as encouraging participation in elections and advocating for just policies. This grass-roots campaign is helped through donations and by word-of-mouth to highlight injustices and ways for victims to seek help.

⁶ *jus cogens* are norms of international law, referring to certain fundamental and overriding principles of international law

⁷ More information on ACIJ can be found here: <http://www.acij.net/about-us/what-we-do/>

Another major opponent to the law is the American Civil Liberties Union of Alabama (ACLU). Describing itself as 'freedom's watchdog' ACLU takes center stage in affairs dealing with immigration, mainly against measures taken that unfairly single out immigrants (ACLU, 2014). Their mission statement reveals that their work revolves around the rights of immigrants and combating discrimination against minorities. In dealing with HB 56, ACLU filed a lawsuit against the measure, citing it as unconstitutionally subjecting Alabamans to unlawful search and seizure, in violation of the Fourth Amendment of the US Constitution⁸ (Hispanic Interest Coalition of Alabama v. Bentley, 2013).

The third main actor which attempts to challenge this law's main goals is the US federal government. Lawsuits by the US Justice Department blocked the requirement of schools to ask students about legal status only weeks after the law went into effect (Sarlin, 2013). The US Justice department, stated that:

...various provisions of HB 56 conflict with federal immigration law and undermine the federal government's careful balance of immigration enforcement priorities and objectives (Department of Justice, 2011).

The Justice department continued, stressing that the:

⁸ The Fourth Amendment of the US Constitution gives a right to the people to be secure in their houses and protect them from unreasonable searches and seizures (US Government Printing Office, 1992, p.26)

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...federal government values state assistance and cooperation with respect to immigration enforcement, a state cannot set its own immigration policy, much less pass laws that conflict with federal enforcement of the immigration laws' (Department of Justice, 2011).

The US Attorney General Eric Holder stated that this 'makes clear that setting immigration policy and enforcing immigration laws is a national responsibility' which affirms that it is not one of individual states (Department of Justice, 2011). The Department of Homeland Security Secretary Janet Napolitano continued:

Legislation like this diverts critical law enforcement resources from the most serious threats to public safety and undermines the vital trust between local jurisdictions and the communities they serve' (Department of Justice, 2011).

These arguments made by the Department of Justice do not take into account the human rights concerns that HB 56 raises. Instead, the focus is put on jurisdiction and the diversion of law enforcement from serious threats.

The OAS Secretary General has given his support to the actions taken by the US Federal Government even though the challenge is not based on protecting human rights. He stated that he 'applauded the steps taken by the federal government of the United States to take this ruling to the Supreme Court' (OAS Press Release, 2011). This can be seen as a missed opportunity by the OAS Secretary General to argue in favor of protecting human rights instead approving the US Government's challenge which is based on jurisdiction. Likewise, the ACLU also supported the US Government challenge. This

shows that the importance is put in successfully blocking HB 56 rather than blocking it for reasons based on human rights.

The US Judicial System has agreed with the US Federal Government and many components of HB 56 have been blocked, including sections dealing with the criminalization of driving an unauthorized migrant and requiring schools to verify the status of children (Wang, 2013, p.1). However, arguing on the basis of jurisdiction means that human rights violations remain in aspects of the law. This Policy Report has demonstrated how undocumented migration can be criminalized and can carry extreme secondary penalties. Although HB 56 has been defeated in some senses, other laws in other parts of the US and other countries will continue to rise.

Conclusion and recommendations

Globally, legislation is passed which include 'winners' and 'losers'. Migration legislation has often resulted in undocumented migrants being 'losers'. Legislation from several countries and several regions of the world have been examined to show how undocumented migrants can be put under pressure to leave. This report has argued that the importance of human rights is missing from the challenges these types of legislations.

To raise awareness on this issue, this report recommends that:

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- Laws penalizing undocumented migrants need to be challenged on the basis of human rights rather than jurisdiction of immigration law.
- When states are party to human rights agreements, this needs to be genuinely reflected through domestic legislations for all of the territory. These agreements should not be forgotten or put to the side when trying to create legislation to deal with issues such as undocumented migration
- The rhetoric relating to undocumented migration needs to be carefully chosen in order to avoid the creation of an 'us versus them' feeling among the general population.
- A policy be developed where instruments like those in The DREAM Act are pursued to give undocumented migrants the chance to become documented through actions that benefit their country of residence.

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Abbreviations

ACIJ	Alabama Coalition for Immigrant Justice
ACLU	American Civil Liberties Union
The DREAM Act	The Development, Relief, and Education for Alien Minors Act (2001)
I/A Court	Inter-American Court of Human Rights
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights (1966)
ICRMW	International Convention of the Protection for the Rights of All Migrant Workers and Members of their Families (1990)
ITEP	Institute on Taxation and Economic Policy
OAS	Organization of American States