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Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response

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RESTRICTIONS ON NON-CITIZENS' ACCESS TO PUBLIC BENEFITS: FLAWED PREMISE, UNNECESSARY RESPONSE

Richard A. Boswell*

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INTRODUCTION

The subject of public benefits and its intersection with immigration law has been a topic of much discussion since the enactment of the earliest immigration laws. The political debate that has become a major topic in recent elections is not at all new to American politics. Public benefits and alien eligibility have been at issue for nearly as long as there has been a discussion of border enforcement. At the center of this discussion is whether or not there really is an illegal immigration crisis, and whether or not there is widespread abuse of public benefit programs by foreigners in the United States. An additional and overarching question that punctuates

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this discussion is the degree to which important moral issues have been left out of these debates on United States immigration policy.

The recent debates and political initiatives relating to immigrant access to public benefits are part of a recurrent historical pattern in which increased attention has been focused on immigrants during periods of perceived economic downturn.¹ Political leaders unable to adequately deal with painful rising unemployment and fluctuations in the economy have often scapegoated those members of the society least able to protect themselves.² The breakup of the Soviet Union has caused major political and economic realignments, all of which have left the American body politic with an uneasy sense of what might be in store for the future. In the past, during similar difficult political and economic periods, politicians have

1. In November 1994, California voters approved a ballot initiative, Proposition 187, which would severely restrict alien access to public benefits and education. The initiative would, among other things, require state employees to enforce the federal immigration laws and determine the legal status of persons who appear before them. In the period from January through May 1995 there were six separate bills introduced in the Congress that in some way deal with alien access to public benefits. See H.R. 372, 484; 637, 1018, 1224, 104th Cong., 1st Sess. (1995); S. 269, 104th Cong., 1st Sess. (1995). In March 1995 the House of Representatives passed what was termed the Personal Responsibility Act, which severely restricts access to federal and state benefit programs by undocumented as well as permanent resident aliens. See *Personal Responsibility Act of 1995*, H.R. 4, 104th Cong., 1st Sess. §§ 400-432 (1995). It is not surprising that immigrants are blamed for the ills which befall a society as they are the most suspected and the least powerful. Professor Arthur Quinn, in his historical work on the relationship between two important political figures in the birth of California, David Broderick and William Gwin, describes the scapegoating of, among others, Australian, Chinese, Roman Catholics, Irish, and Germans, for innumerable problems of the time. See generally ARTHUR QUINN, *THE RIVALS: WILLIAM GWIN, DAVID BRODERICK, AND THE BIRTH OF CALIFORNIA* (1994). More recently, immigrants have been variously blamed for almost all of the nation's ills including crime, terrorism, disease, and unemployment. It would seem that at some point we would realize that no one group could be the cause for so many problems. See Phil Angelides, *Wilson's Aim Is Job-Saving—His Own*, L.A. TIMES, Dec. 15, 1991, at E1.

2. See generally U.S. COMM'N ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION* 7-12 (1980). It is no coincidence that Mexican immigrants were targeted with abuses soon after the end of World War II. In the period preceding the end of the war, Mexican immigrant labor was welcomed as a source of cheap labor. Similarly, it is no coincidence that farm interests were among the major opponents of employer sanctions during the debates on the Immigration Reform and Control Act of 1986. Indeed, numerous special exemptions were carved out of what was otherwise an enforcement oriented statute. See Richard A. Boswell, *The Immigration Reform Amendments of 1986: Reform or Rehash?*, 14 J. LEGIS. 23, 31-33 (1987). For example, section 302 of the Immigration Reform and Control Act of 1986 provided temporary and permanent residence to farmworkers who had spent at least ninety days performing agricultural work over a one-year period, and section 116 exempted farm owners from warrantless searches, overturning a Supreme Court decision insofar as it related to the enforcement of the INS' enforcement of the immigration laws. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

blamed immigrants.³ But immigrants were not the cause of the country's problems in the past, just as they are not the cause of the present dislocation.⁴ The real policy debate should not be about immigration and alien access to public benefits, but how an industrial superpower can make its transition to a peacetime economy.

Even the most strident advocates for restricting alien access to public benefits do not sincerely believe that the imposition of additional eligibility requirements will really remedy any of the underlying causes of the economic problems facing the country.⁵ The suggested solutions presented in the ongoing immigration debate, while attacking immigration and attempting to increase the level of hostility towards immigrants, will neither expand the economy nor increase employment opportunities. As in other periods of economic downturn and general insecurity, immigrants have taken the heat for dissatisfaction over a host of other issues. Today, immigrants are being blamed for unemployment, crime, and more generally for draining the public coffers by leeching off of governmental health and welfare programs. The current immigration debate is a symptom of general national insecurity about the future of the American economy. The debate should not be about immigration, but about the underlying causes of unemployment, why there has been a general downturn in the economy, and how these problems can be resolved.⁶

The premise of the current debate is that alien eligibility for public benefits must be restricted to keep the public well from running dry. In this paper, I will briefly explore the history of some of the public benefits

3. See Gerald P. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981). For excellent discussions on nativism in the United States and how deeply it has become rooted in our society, see Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 923 (1993); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 311-20 (1986).

4. See Amy Chance, *Long History of Economic, Racial Fears*, SACRAMENTO BEE, Mar. 20, 1994, at A23; Dan Walters, *Arms Race on Immigration*, SACRAMENTO BEE, Aug. 10, 1993, at A3; see also JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* (1989).

5. The thrust of the arguments made in favor of further restricting alien access to public benefits is that the restrictions will lessen the burden that aliens might place on the system. See, e.g., GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, STATE OF CALIFORNIA, *SHIFTING THE COSTS OF A FAILED FEDERAL POLICY: THE NET IMPACT OF ILLEGAL IMMIGRANTS IN CALIFORNIA* i (Sept. 1994). Nowhere has it been suggested that the nation's economic well-being will be improved by further restricting access to benefit programs.

6. For example, in the 1980s during the period of substantial increases in defense spending, the California economy grew at a rapid rate and immigration was hardly an issue of public concern. David Broder, *Recession Catches State in a Double Bind*, CHI. TRIB., Nov. 17, 1991, at 3; Douglas P. Shuit and Patrick J. McDonnell, *Calculating the Impact of California's Immigrants*, L.A. TIMES, Jan. 6, 1992, at A1.

programs.⁷ As I will detail, alien eligibility for public benefits is already severely restricted for both undocumented and documented aliens. Undocumented aliens are only eligible for limited emergency assistance. Newly arrived lawful permanent residents who apply for and receive benefits place their status in jeopardy. In addition, a panoply of exclusion and deportation laws either prohibit the admission of persons who are likely to become public charges or require their removal from the United States. In order to issue all but emergency benefits, states are required to verify that the person granted the benefits is entitled to receive them. Therefore, to the extent that undocumented aliens participate in benefit programs, the only explanation for their participation is that they have misrepresented their status, or the benefit worker has failed to determine the person's ineligibility.

An additional issue in the immigration/public benefits debate is the extent to which the denial of benefits to undocumented persons may either cause a greater public health problem or result in unanticipated injuries to United States citizens. Ineligible aliens most often defer medical treatment until their problems have become life threatening and thereby more costly. Moreover, there are benefits such as primary education and school food programs that protect the society at large as much as assist the individual recipients of the benefit. Allowing undocumented aliens to participate in these programs is in the long term in the interest of the general population, especially where it is likely that they will become fully legalized members of the society.

The manner in which immigration policy is discussed and defined determines the very nature of who we are as a nation. It demonstrates whether we are compassionate or punitive, and whether we are swayed by appeals to passion and prejudice, or susceptible to a more reasoned decision-making. It is only fitting then that questions involving immigration be addressed in moral terms. The current debate has brought forth draconian proposals, which attempt to limit access to benefits to all except United States citizens, irrespective of their ties or length of residence in this country. The debate itself is based on a faulty premise—that our current economic ills are caused by immigration. Even worse, the debate has reduced

7. For an excellent discussion of public benefit programs and how aliens may or may not qualify for specific programs, see JANET M. CALVO, *IMMIGRANT STATUS AND LEGAL ACCESS TO HEALTH CARE* (1993); Charles Wheeler, *Alien Eligibility for Public Benefits: Part I*, IMMIGR. BRIEFINGS, Nov. 1988.

the discussion to balancing the relative costs and benefits of immigration, and has ignored the real-life human consequences of such punitive measures.

While the political debate that became especially charged during the most recent political campaign season is not new, it has focused on a range of false issues.⁸ I believe eligibility by aliens for public benefits is one of these false issues. Upon careful scrutiny, the debate is more about the larger issue of federal compensation to the states for what some would argue is a federal obligation.⁹ Even before the 1980 census, states were very adept at assuring that all persons, including undocumented aliens within their borders, were accurately accounted for.¹⁰ With reduced federal burden-sharing and political resistance to state tax measures, the states began to fight harder for an ever dwindling share of the federal dollar.

Even when viewed from a constitutional standpoint, the political debate has revolved around the following issues: (1) whether persons born in the United States should be U.S. citizens; (2) whether states have the right to preclude undocumented persons from receiving access to a number of different public benefit programs; and (3) whether states are entitled to a greater share of the federal dollar when the federal programs which they administer are used by undocumented aliens within the state. The first issue is well settled by the Constitution. The second issue is open to different interpretations. The most definitive statement, *Graham v. Richardson*,¹¹ only resolved the matter for lawful permanent residents. The

8. By false issues, I mean that, while an issue has been part of the public posturing by political figures, careful scrutiny will reveal that there are few facts to support the positions taken. In addition, the debate as presently formulated follows a historical pattern in which the restrictionist immigration forces engage in the use of themes invoking nativism.

9. Indeed, a review of the legal theories propounded in the cases brought by the states of California and Florida reveals that federal reimbursement for what is seen as a federal obligation, rather than immigration policy, is at the heart of the debate.

10. See, e.g., *Tucker v. United States Dep't of Commerce*, 958 F.2d 1411 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992); *Carey v. Klutznick*, 653 F.2d 732 (2d Cir. 1981), cert. denied, 455 U.S. 999 (1982); *Young v. Klutznick*, 652 F.2d 617 (6th Cir. 1981), cert. denied, 455 U.S. 939 (1982); *State v. Mosbacher*, 783 F. Supp. 308 (S.D. Tex. 1992). To be sure, the very attempt at counting undocumented persons for purposes of apportionment is the subject of much controversy. See Jim Slattery & Howard Bauleke, "The Right to Govern Is Reserved to Citizens": Counting Undocumented Aliens in the Federal Census for Reapportionment Purposes, 28 WASHBURN L.J. 227 (1988). For a discussion of the range of issues encompassing this debate, see Donald T. Deyo, Comment, *To Adjust or Not to Adjust: That Is the Legal and Political Question*, 13 CHICANO-LATINO L. REV. 114 (1993).

11. 403 U.S. 365 (1971).

third issue, while interesting and important, is not one of immigration law or policy but revolves around notions of federalism.

I. HISTORY

The history of U.S. immigration law can be described as falling into three important periods.¹² The first period, from the nation's founding until 1875, was largely characterized by few if any federal restrictions.¹³ In the second period, from 1875 until 1952, there were increasing restrictions imposed on those coming to the United States, beginning with legislation enacted in 1875 barring the admission of convicts and prostitutes.¹⁴ The third period, which began in 1952, is commonly regarded as the beginning of contemporary immigration law.¹⁵ This period, which has been characterized as a period when immigration law was comprehensively codified, did not dramatically change from the earlier policy of restrictive migration through a regime of fixed quotas, extensive exclusion and deportation grounds. Within this third period of U.S. immigration law, there have been some modifications which have attempted to provide order to the admission of those fleeing persecution,¹⁶ to impose greater controls at the border,¹⁷ and to realign the quota system.¹⁸

12. For an excellent and informative review of the history of U.S. immigration law, see John Higham, *American Immigration Policy in Historical Perspective*, 21 *LAW & CONTEMP. PROBS.* 213 (1956). More recently, Professor Neuman dispelled the myth that the United States maintained an unrestrictive immigration policy through his discussion and analysis of the scheme of state laws which provided a more restrictive overlay to the federal statutes. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 *COLUM. L. REV.* 1833, 1846-59 (1993).

13. The major legislative enactments were more focused on so-called "dangerous" aliens. See generally Alien Act, ch. 58, 1 Stat. 570 (1798) (expired 1800); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (current version at 50 U.S.C. §§ 21-23 (1994)). While there were few federal restrictions, a number of states enacted their own immigration controls, many of which were eventually held to be unconstitutional. See Neuman, *supra* note 12, at 1841-82; see, e.g., *Chy Lung v. Freeman*, 92 U.S. 275 (1875); *Henderson v. Mayor of N.Y.*, 92 U.S. 259 (1875); *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849); cf. *Mayor of N.Y. v. Miln*, 36 U.S. (11 Pet.) 102 (1837).

14. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974).

15. See McCarran-Walter Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (current version at 8 U.S.C. §§ 1101-1524 (1994)).

16. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

17. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

18. See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

Economic bases for exclusion and deportation have been part of U.S. immigration law since the earliest enactments.¹⁹ Besides the wholesale exclusion of Chinese through the Chinese Exclusion Act,²⁰ a provision enacted in that same year barred the admission of persons likely to become public charges.²¹ An 1893 statute barred the admission of a number of groups, including those described as "paupers."²² A 1903 statute added "professional beggars" to an ever-growing list of persons who were to be excluded, and provided for the deportation of persons who became public charges within two years after their entry.²³ A 1907 statute further excluded persons suffering from physical or mental defects which might affect their ability to work gainfully.²⁴ In 1917, Congress further expanded the deportation provisions by extending from two to five years the period within which a person could be subject to deportation for becoming a public charge.²⁵ These provisions prohibiting the admission of persons unable to provide for themselves and requiring the deportation of those who had fallen into distress were incorporated into the immigration statute which was enacted in 1952.²⁶

The Immigration Reform and Control Act of 1986 restricted the opportunity to become lawful residents to undocumented persons able to show that they would not need federal assistance. It also precluded many who

19. In one Board of Immigration Appeals decision it was noted that the exclusion and deportation statutes embodying the term "public charge" had been on the statute books for over eighty years in essentially the same form. There the court cited to the following acts of Congress: Act of Mar. 3, 1891, ch. 551, §§ 2, 11, 26 Stat. 1084, 1086; Act of Aug. 3, 1882, ch. 376, 22 Stat. 214.

20. See Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943).

21. See Act of Aug. 3, 1882, ch. 376, 22 Stat. 214.

22. Act of Mar. 3, 1893, ch. 206, 27 Stat. 569 (repealed 1952).

23. Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213 (repealed 1907). The acceptance of a bond, in consideration for an alien's admission, to assure that he would not become a public charge, was incorporated into the immigration laws in the 1903 Act. Apparently, this procedure had its origins in administrative practice which preceded the 1903 statute. *Id.* at § 26, 32 Stat. at 1220. The present bond requirement, which can be found in the statute at 8 U.S.C. § 1183 (1994), has been in the law without modifications since 1903.

24. Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898 (repealed 1917).

25. Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874 (repealed 1952).

26. The basic core of present immigration law was enacted in 1952 in what is popularly known as the McCarran-Walter Act, Pub. L. No. 82-414, 66 Stat. 163 (1952). The provision as enacted in the original immigration statute provided for the deportation of a person who "within five years after entry, becomes institutionalized at public expense because of mental disease, defect, or deficiency unless the alien can show that such disease, defect, or deficiency did not exist prior to his admission to the United States." 8 U.S.C. § 1251(a)(3) (1952) (current version at 8 U.S.C. § 1251(a) (1994)). Section 1251(a)(8) provided for deportation in those cases where, "in the opinion of the Attorney General, [the person] has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry." § 1251(a)(8).

received legal status from participation in public benefit programs in the future.²⁷ The Act included a requirement that the government establish that the person had become institutionalized at public expense because of a mental disease, defect, or deficiency; however, in 1990, the Act was amended to require only that deportation occur where the person has become a public charge within five years after entry from causes not affirmatively shown to have arisen since entry.²⁸

II. EXCLUSION AND DEPORTATION OF "PUBLIC CHARGES"

Notwithstanding the symbol emblazoned on the Statue of Liberty calling for the tired, poor, huddled masses, and wretched refuse yearning to breathe free to come to America, the United States has hardly welcomed the poor of the world to its shores.²⁹ Indeed, one of the broadest forms of exclusion has been the exclusion of those likely to become public charges.³⁰ The provision is so far-reaching that there are hardly any guide-

27. See 8 U.S.C. § 1160(f) (1994); 8 C.F.R. § 245a.5(a) (1995).

28. See Immigration Act of 1990, Pub. L. No. 101-649, § 153(b), 104 Stat. 4978 (current version at 8 U.S.C. § 1251(a)(5) (1994)). Before the amendments enacted in 1990, a person could be deported if he suffered from a mental defect or condition at the time of entry which would have made him excludable or if he was excludable because he in fact was "mentally retarded," "insane," "afflicted with a psychopathic personality, or a sexual deviant." 8 U.S.C. § 1182(a)(1)-(4) (1988) (current version at 8 U.S.C. § 1182(a) (1994)). What would most commonly occur was that if the person became a public charge or became institutionalized at public expense within five years after entry, it was presumed that the condition existed at the time of entry and placed upon the alien the burden of disproving this assumption.

Under the 1952 Act, in the deportation context, the determination of who was a "public charge" was made by the Attorney General. 8 U.S.C. § 1251(a)(8) (1952) (current version at 8 U.S.C. § 1251(a)(5) (1994)). However, under earlier provisions, courts treated the finding of whether or not a person had become a "public charge" as a legal question. The 1990 Act eliminated the language in the deportation statute providing that the public charge determination was to have been in the "opinion of the Attorney General." See 8 U.S.C. § 1251(a)(5) (1994).

29. See Neuman, *supra* note 12, at 1834-35. As an interesting footnote to Emma Lazarus' poem, Professor Neuman points out that the poem was part of a fundraising drive to erect the Statue of Liberty. *Id.* at 1835 n.8 (citing JOHN HIGHAM, SEND THESE TO ME: IMMIGRANTS IN URBAN AMERICA 71-80 (rev. ed. 1984)). For a more extensive discussion of the clash between myth and reality of U.S. immigration policy, see Mark P. Gibney, *United States Immigration Policy and the "Huddled Masses" Myth*, 3 GEO. IMMIGR. L.J. 361 (1989).

30. See 8 U.S.C. § 1182(a)(4) (1994). This provision mandates the exclusion of "[a]ny alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge." *Id.* (emphasis added). As a general rule, U.S. immigration laws, while containing broad exclusion and deportation provisions, also have ameliorative "waivers" of most of the grounds of excludability and deportability. Unlike many of the other exclusion grounds, the exclusion provisions prohibiting the admission of those likely to become a public charge cannot be waived. See 1 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 5.03[4][d] (1995). For an exploration of the complex waiver provisions, see

lines that control its application to those seeking admission to this country. All that is required of INS and consular officers is that they *believe* that the person who is seeking permission to enter the United States is "likely" to become a public charge at some distant point in the future.³¹ The expansive breadth of the exclusion statute which applies to those "likely to become public charges" is surpassed only by the virtual non-reviewability of the consular officers' decisions by the judicial branch or even by the Department of State.³² The Immigration and Nationality Act further allows the INS or consular officer to require that a person who is believed

RICHARD A. BOSWELL & GILBERT P. CARRASCO, *IMMIGRATION AND NATIONALITY LAW: CASES AND MATERIALS* 579-82 (2d ed. 1992) and 2 GORDON ET AL., *supra*, § 62.

31. The provision applies both to those seeking admission as nonimmigrants as well as to immigrants. In the case of immigrants, the burden is heavier in view of the fact that they are seeking admission on a permanent basis. See U.S. DEP'T OF STATE, *FOREIGN AFFAIRS MANUAL*, reprinted in 10 GORDON ET AL., *supra* note 30, § 40.41 app. [hereinafter *FOREIGN AFFAIRS MANUAL*]. For example, someone seeking admission as a nonimmigrant student would be required to show that she has sufficient funds to pay for her education and living expenses and to return to her country without having to resort to employment. Similarly, persons seeking admission for medical treatment are required to show that they have sufficient non-governmental resources available to cover their expenses while in the United States. See *id.* In the case of immigrants, medical and physical infirmities, or even the applicant's inability to speak or read English may preclude the person's admission without first presenting suitable evidence of financial support.

The basic requirement for immigrants is that they be able to show that they have a job waiting for them which will provide sufficient resources to keep them and their family over the Income Poverty Guidelines published by the Department of Health and Human Services. The immigrant applicant will be required to prove that she has sufficient funds from one of the following sources: (1) personal funds; (2) permanent employment; or (3) financial support from family or friends. *Id.* See generally INS EXAMINATIONS HANDBOOK § 212(g) (Waivers). As Professor Nafziger has pointed out, the public charge exclusion ground is one of the most widely invoked. See James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 12 (1991); see also Leon Wildes, *Review of Visa Denials: The American Consul as 20th Century Absolute Monarch*, 26 SAN DIEGO L. REV. 887, 906 (1989).

32. 8 U.S.C. § 1182(a)(4) (1994) becomes relevant both when an applicant is initially seeking admission to the United States as well as when the person is in the United States seeking permanent resident status. See generally 8 U.S.C. § 1255 (1994) (requiring that an applicant for lawful permanent resident status not be excludable). The public charge prohibition is inapplicable to persons who are eligible for asylum or refugee status. See 8 U.S.C. § 1157(c)(3) (1994).

Although not the subject of this discussion, the non-reviewability of consular officer decisions has been the subject of much debate for at least half a century. 1 GORDON ET AL., *supra* note 30, § 3.01; WHOM WE SHALL WELCOME, REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION 131 (1953); Harry N. Rosenfield, *Necessary Administrative Reforms in Immigration and Nationality Act of 1952*, 27 FORDHAM L. REV. 145, 176-79 (1958).

The only review available to a visa applicant is the Department of State's advisory opinion, which is a wholly non-binding legal opinion. The advisory opinion instructs the U.S. Consul on the state of the applicable law, and the Consul remains free to apply the law as she believes to be correct.

likely to become a public charge post a bond or cash deposit with the government.³³

In addition to precluding the admission of would-be immigrants, public charge exclusion can be used against lawful permanent residents returning to the United States. Under the well-established "reentry" doctrine, a permanent resident who might no longer be deportable because five years have passed since her original entry, could later be found excludable.³⁴ Under the reentry doctrine, a permanent resident who makes a voluntary "departure" in a "manner which [could] be regarded as meaningfully interruptive of [her] permanent residence" is treated as an applicant for admission to the United States and therefore subject to the exclusion laws.³⁵

33. The money posted as bond may be returned when the person dies, permanently departs the United States, becomes a U.S. citizen, or the district director determines that the person is no longer likely to become a public charge. 8 C.F.R. § 103.6(c)(1) (1995). Public charge bonds may be treated as "breached" if the alien accepts any form of public assistance. See *In re Viado*, 19 I. & N. Dec. 252 (1985) (breaching of bond did not require a demand for repayment where person received Supplemental Security Income); 8 C.F.R. § 103.6(e). 8 U.S.C. § 1183 (1994) provides the general statutory guidance on these bonds and states:

An alien excludable under paragraph (4) of section 1182(a) of this title may, if otherwise admissible, be admitted in the discretion of the Attorney General upon the giving of a suitable and proper bond or undertaking approved by the Attorney General, in such amount and containing such conditions as he may prescribe, to the United States, and to all States, territories, counties, towns; municipalities, and districts thereof holding the United States and all States, territories, counties, towns, municipalities, and districts thereof harmless against such alien becoming a public charge. Such bond or undertaking shall terminate upon the permanent departure from the United States, the naturalization, or the death of such alien, and any sums or other security held to secure performance thereof, except to the extent forfeited for violation of the terms thereof, shall be returned to the person by whom furnished, or to his legal representatives. Suit may be brought thereon in the name and by the proper law officers of the United States for the use of the United States, or of any State, territory, district, county, town, or municipality in which such alien becomes a public charge, irrespective of whether a demand for payment of public expenses has been made.

34. See *Zurbrick v. Woodhead*, 90 F.2d 991 (6th Cir. 1937); *Canciamilla v. Haff*, 64 F.2d 875 (9th Cir. 1933). The Immigration and Nationality Act includes an all-encompassing provision which provides for the deportation of persons who were excludable at the time of their last entry. See generally 3 GORDON ET AL., *supra* note 30, § 71.04[1].

35. See 3 GORDON ET AL., *supra* note 30. Instructive in the analysis of a "meaningful" departure are considerations such as the length of the absence, whether it was consistent with immigration policy or whether travel documents were necessary for the trip. *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963).

All aliens, including lawful permanent residents, may have their right to re-admission into the United States adjudicated in an exclusion rather than a deportation hearing. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 28 (1982); *Ali v. Reno*, 22 F.3d 442 (2d Cir. 1994). While all persons may be subject to exclusion when seeking admission, a returning lawful permanent resident is entitled to heightened safeguards such as the burden of proof being placed on the government and the right to notice and notice of charges because of her lawful permanent resident status. *Fleuti*, 374 U.S. at 460. While the right to notice is generally available to most persons in exclusion proceedings under the statute, the import of *Fleuti*, however, is that

An additional consideration in this analysis is that there is a certain amount of fluidity in the concept of lawful permanent residency. For example, while a person might carry the documentation evidencing lawful permanent residence, in actuality she could be subject to exclusion or deportation as someone who has lost or abandoned her status.³⁶

It has been said that the deportation provisions are only few in number; however, in actuality there are more than one thousand different grounds upon which a foreigner might be removed from the United States.³⁷ The deportation provisions, working in tandem with the exclusion provisions, allow the government to force the removal of persons who have become a public charge within five years of their admission for reasons which existed prior to their original admission.³⁸ The only persons who have even a minimal amount of protection from later removal or exclusion

such protections may be constitutionally mandated. See *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953). In *In re Huang*, 19 I. & N. Dec. 749, 754 (1988), the Board of Immigration Appeals stated that the burden of proof rests on the Service to establish excludability of lawful permanent residents. Therefore, while a returning lawful permanent resident will have more rights than a nonresident at the border, she may still be excluded as one likely to become a public charge. *United States ex rel. Polymeris v. Trudell*, 284 U.S. 279 (1932); *Dabone v. Karn*, 763 F.2d 593, 595 (3d Cir. 1985) (excluded because of an earlier conviction in U.S. for possession of marijuana); *De Bilbao-Bastida v. INS*, 409 F.2d 820 (9th Cir.) (exclusion of permanent resident for lacking the proper reentry documents), *cert. dismissed*, 396 U.S. 802 (1969); *Holz v. Del Guercio*, 259 F.2d 84 (9th Cir. 1958); *Estrada-Ojeda v. Del Guercio*, 252 F.2d 904 (9th Cir. 1958) (excludable at entry for likelihood of becoming public charge); *Del Castillo v. Carr*, 100 F.2d 338 (9th Cir. 1938); *Lidonnici v. Davis*, 16 F.2d 532 (D.C. Cir. 1926), *cert. denied*, 274 U.S. 744 (1927). Moreover, even if a permanent resident has a reentry permit, he is not assured readmission into the United States.

36. This could happen where the person has become a permanent resident but makes frequent trips out of the country for business or pleasure and continues to maintain ties outside of the country. *Alvarez v. District Director*, 539 F.2d 1220, 1224 (9th Cir. 1976) (lawful permanent resident returning to the United States excluded for failure to maintain sufficient ties in the United States), *cert. denied*, 430 U.S. 918 (1977); *In re Kane*, 15 I. & N. Dec. 258 (1975); 2 GORDON ET AL., *supra* note 30, § 35.02[2][c]; Gary Endelman, *You Can Go Home Again: How to Prevent Abandonment of Lawful Permanent Resident Status*, IMMIGRATION BRIEFINGS, No. 91-4 (April 1991); see also *Angeles v. District Director*, 729 F. Supp. 479 (D. Md. 1990).

37. JACK WASSERMAN, *IMMIGRATION LAW AND PRACTICE* 215-32 (3d ed. 1979).

38. See 8 U.S.C. § 1251(a)(5) (1994) ("Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable."). The deportation statute is more limited than the exclusion provision in that it does not require the deportation of persons who have become indigent more than five years after they entered the United States. As in all deportation matters, the initial burden of proof rests on the government to prove the alleged facts by clear, convincing, and unequivocal evidence. See *Woodby v. INS*, 385 U.S. 276 (1966). However, where the government has made out a *prima facie* case, and the respondent possesses knowledge of the facts, the burden shifts to the respondent to rebut the allegations. *In re Vivas*, 16 I. & N. Dec. 68, 70 (1977).

for "becoming poor" are lawful permanent residents of more than seven years who are returning to the United States.³⁹

The meaning of the term "public charge," which triggers the application of the exclusion and deportation provisions, is not precisely defined either by the statute or decisions.⁴⁰ The Board of Immigration Appeals attempted to clarify the meaning of "public charge" as used in the immigration statute when it held that the acceptance of services provided by a state to its residents, for which no specific charges are made, does not in and of itself make the alien a public charge and therefore subject to removal.⁴¹ One rule of thumb used by the Department of State is that programs which are supplementary in nature, such as providing training, services, or food to enhance the standard of living, as opposed to providing direct support, do not constitute the type of assistance which would result in a characterization of its recipients as potential public charges.⁴² What is clear, how-

39. 8 U.S.C. § 1182(c) (1994) provides a broad discretionary waiver of grounds of excludability for persons who have been permanent residents for a period of at least seven years. This waiver has been held as also being available to persons in deportation proceedings where there is a comparable exclusion ground. See *Francis v. I.N.S.*, 532 F.2d 268 (2d Cir. 1976); *In re Salmon*, 16 I.& N. Dec. 734 (1978). Therefore, a long-term permanent resident could apply for a waiver on the grounds of deportability or excludability should she become a public charge and be subjected to proceedings. In any event, following the analysis of the Supreme Court's decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), and the Board of Immigration Appeals decision in *In re Kane*, 15 I. & N. Dec. 258 (1975), the burden of proof is on the INS officer to show that a returning lawful permanent resident should be prohibited from entering the country.

40. There are a number of possible reasons for this lack of definition. First, the term "public charge" appears in both the exclusion and deportation statutes. In exclusion cases, the applicant is generally outside the United States, and there is no substantial constitutional protection or judicial review. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). In deportation cases, there is more rigorous review, and the Constitution has some relevance to the statute's application. *Woodby*, 385 U.S. 276; *Wong Yang Sung v. McGrath*, 339 U.S. 33, modified, 339 U.S. 908 (1950). This has resulted in distinct differences in the nature of judicial review. Second, in the exclusion context the term is concerned with the likelihood of a future event, whereas in deportation cases one is determining the actual receipt of public funds. Third, the term "public charge," which was written into the statute over a hundred years ago, has had different meanings over this entire period of time.

41. *In re B*, 3 I. & N. Dec. 323 (1948).

Similarly with respect to an alien child who attends public school, or alien child who takes advantage of the free-lunch program offered by schools. We could go on *ad infinitum* setting forth the countless municipal and State services which are provided to all residents, alien and citizen alike, without specific charge of the municipality or the State and which are paid out of the general tax fund. The fact that the State or the municipality pays for the services accepted by the alien is not, then, by itself, the test of whether the alien has become a public charge.

Id. at 324-25 (footnote omitted).

42. See FOREIGN AFFAIRS MANUAL, *supra* note 31. The Foreign Affairs Manual notes that the receipt of benefits such as Aid to Families with Dependent Children and "old age assistance" render the recipient inadmissible.

ever, is that in order for a deportation order to be sustained the following three elements must be satisfied: (1) the state or other governing body must impose a charge for the services rendered to the alien; (2) the state or governing body must make a demand for payment of the charges upon the respondent; and (3) there must be a failure to pay for the charges.⁴³ Therefore, it seems that an important consideration in whether or not a person can be deported is whether or not the person was eligible for the benefits he or she received.⁴⁴

III. FEDERAL BENEFIT PROGRAMS

There are more than seventy different federal programs which provide either cash or noncash aid for low income persons.⁴⁵ These programs were first enacted at the time of the Great Depression, a period of worldwide economic havoc in which the very foundations of democratic capitalism were being tested. While it is not the purpose of this discussion to explore all of the federal assistance programs, I will briefly explore some of the major federal benefit programs and discuss their eligibility requirements.

Before examining the various benefit programs it is important to distinguish between need-based assistance programs such as Medicaid and Supplemental Security Income (SSI), and insurance-like programs such as workers compensation, unemployment compensation, and social security. A third category of programs are those whose primary purpose is to fulfill another larger federal objective, such as the food stamp program, and "Women Infants and Children" (WIC).⁴⁶

The more traditional forms of welfare or relief programs, consisting of direct monetary payments to the destitute, needy, blind or disabled who are unable to support themselves, do fall within the provisions of INA 212(a)(4). Examples include Aid for Dependent Children (AFDC) and Old Age Assistance, despite the fact that these programs are "supplementary" in the sense that the amount of assistance provided varies according to the recipient's other income.

Id.

43. See *In re Kowalski*, 10 I. & N. Dec. 159 (1963); *In re B*, 3 I. & N. Dec. 323, 326 (1948).

44. The removal of the language requiring that a person be institutionalized and the preservation of the term "public charge," when coupled with the three prerequisites cited by the BIA in *In re B*, might be sufficient to support a deportation where the alien is being charged with receiving benefits to which he was not legally entitled.

45. See *Cash and Noncash Benefits for Persons with Limited Income: Eligibility Rules, Recipient and Expenditure Data, FY 1990-92* (Congressional Research Service Report 93-832 EPW).

46. For example, one of the main objectives of the food stamp program is to strengthen the agricultural economy and improve levels of nutrition among low income households. See 7 U.S.C. § 2011 (1994) (preamble of Food Stamp Act); see also FOREIGN AFFAIRS MANUAL, *supra* note 31. The WIC program is designed to reduce the number of low birth-weight babies.

Critical to any understanding of public benefit programs is the term "permanently residing in the United States under color of law" (PRUCOL),⁴⁷ a term which refers to aliens actually living in the United States without any formal immigration status who may be eligible to receive benefits.⁴⁸ Characterization as PRUCOL requires that the person is in the United States with the INS's tacit, if not explicit, permission to remain.⁴⁹ PRUCOL is relevant to analyzing alien eligibility for the following programs: Aid to Families with Dependent Children (AFDC), Medicaid, Unemployment Compensation, and Supplemental Security Income (SSI). Because PRUCOL is not clearly defined in either the benefit statutes or in the immigration laws, alien eligibility for these benefit programs is difficult to determine.⁵⁰ Persons who are generally regarded as PRUCOL are persons admitted as refugees or granted asylum, aliens paroled into the United States, those granted suspension of deportation, applicants for registry, and Cuban-Haitian entrants. Others who are sometimes considered to be PRUCOL are persons granted extended or indefinite voluntary departure, beneficiaries of approved immediate relative petitions, those for whom adjustment of status may be pending, persons under deferred action status, and those with priority dates within sixty days of being current.⁵¹

47. Apparently, the color of law language was adopted in 1972 for the SSI program, in 1973 for AFDC and Medicaid, and in 1976 for the unemployment compensation insurance program. For an excellent review of the historical basis for the "color of law" language in the various public benefit programs, see Robert Rubin, *Walking a Gray Line: The "Color of Law" Test Governing Noncitizen Eligibility for Public Benefits*, 24 SAN DIEGO L. REV. 411, 413-21 (1987).

48. For an excellent discussion of PRUCOL, see Janet M. Calvo, *Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs*, 16 N.Y.U. REV. L. & SOC. CHANGE 395 (1988); Sharon F. Carton, *The PRUCOL Proviso in Public Benefits Law: Alien Eligibility for Public Benefits*, 14 NOVA L. REV. 1033 (1990); Rubin, *supra* note 47.

49. See *Holley v. Lavine*, 553 F.2d 845 (2d Cir. 1977), *cert. denied*, 435 U.S. 947 (1978).

50. PRUCOL as applied to SSI cases appears in 42 U.S.C. § 1382c(a)(1)(B) (Supp. V 1993), for AFDC at 42 U.S.C. § 602(a)(33) (1988) and 45 C.F.R. § 233.50 (1995), for unemployment insurance in 26 U.S.C. § 3304(a)(14)(A) (1988 & Supp. V 1993), and for Medicaid in 42 C.F.R. § 435.402 (1994) and the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9046, 100 Stat. 1874, (amending 42 U.S.C. § 1396(b)).

51. See Wheeler, *supra* note 7, § 11.2A. Given the ambiguity of PRUCOL, the group of persons who arguably fall within its ambit will expand under amendments recently enacted by Congress to the adjustment of status provisions which allow persons who entered the United States illegally to remain in the United States and become lawful permanent residents. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1995, Pub. L. No. 103-317, 108 Stat. 1724 (1994) (adding 8 U.S.C. § 1255(i) (1994)).

A. Aid to Families with Dependent Children (AFDC)

Aid to Families with Dependent Children (AFDC) is a federal program established in 1935 which gives funds to states to provide financial assistance, rehabilitation and other services to needy dependent children and parents or relatives with whom the children are living. The stated goal of AFDC is to strengthen the family and enable the parents or relatives caring for the child to attain self-support and independence.⁵² The intended beneficiaries of the AFDC program are children whose parent(s) are either absent from the home or are disabled or unemployed. In order to be eligible, a dependent child and all in his or her "assistance unit" must be either U.S. citizens, lawful permanent residents, or PRUCOL.⁵³ Amendments enacted in 1986 preclude Special Agricultural Workers (SAW) and other legalized persons from receiving AFDC for five years after they have been accorded their legal status.⁵⁴ While the precise meaning of PRUCOL as applied to AFDC cases is not entirely clear, it seems that deportable persons who are present and allowed to remain in the United States with the knowledge of the INS may be eligible to receive benefits under PRUCOL.⁵⁵

52. Act of Aug. 14, 1935, ch. 531, § 401, 49 Stat. 620, 627. The present statute is codified at 42 U.S.C. § 606(a) (1988).

53. 42 U.S.C. § 602(a)(33) (1988). The meaning of the term "assistance unit" should be clarified. Under the statute, the benefits of AFDC are only for children who are U.S. citizens, permanent residents, or PRUCOL. However, this does not preclude an ineligible parent from applying for benefits on behalf of his eligible children. The needs of the ineligible aliens would not be counted in the award; however, their income would be calculated in determining the needs of the eligible person. See 45 C.F.R. §§ 206.10(a)(1)(vii)(B), 233.20(a)(3)(vi)(B) (1995).

54. See 8 U.S.C. §§ 1160(f), (g) (1994); see also 8 U.S.C. § 1255a(h)(1)(A) (1994); 42 U.S.C. § 602(f) (1988). Persons legalized under the amnesty program were precluded from most public benefit programs, while persons qualifying under the SAW program were not so restricted.

55. This argument was made successfully in *Holley v. Lavine*, 553 F.2d 845 (2d Cir. 1977), cert. denied, 435 U.S. 947 (1978). However, in *Holley*, the applicant was a Canadian citizen who had been married to a U.S. citizen, became deportable, and had a letter from the INS that it would not deport her while her six U.S. citizen children remained in her care. See also *Berger v. Heckler*, 771 F.2d 1556 (2d Cir. 1985); *Gillar v. Employment Div.*, 717 P.2d 131 (Or. 1986); *Antillon v. Department of Employment Sec.*, 688 P.2d 455 (Utah 1984).

In *Sudomir v. McMahon*, 767 F.2d 1456 (9th Cir. 1985), the Ninth Circuit held that three asylum applicants who had been residing temporarily until a decision was made on their applications were not permanently residing under color of law. *Id.* at 1462. The federal Department of Health and Human Services has since adopted the *Sudomir* rationale nationally.

B. Food Stamps

The food stamp program was enacted both to assure that individuals in low income households receive adequate nutrition and to strengthen the agricultural economy.⁵⁶ This program enables certain low income individuals to purchase more food and thereby improve their diets. The program is administered through state welfare and social service agencies under regulations promulgated by the Federal Department of Agriculture. The states are required to follow federal guidelines in determining eligibility. In order to be eligible, a household income must not be greater than 130% of the federal Poverty Income Guidelines, and the head of household must register for and accept any suitable employment.⁵⁷ Recipients of food stamps must be either U.S. citizens, lawful permanent residents, registry applicants, refugees, asylees, persons granted withholding of deportation, or parolees.⁵⁸

C. Supplemental Security Income (SSI)

The Supplemental Security Income (SSI) program is a federally funded, need-based cash assistance program for low income persons who are over the age of sixty-five or are blind or disabled.⁵⁹ Like AFDC, SSI was established in 1935.⁶⁰ Unlike AFDC, SSI is operated directly by the federal government. Blindness is defined as vision in one eye which is not better than 20/200 with corrective lenses.⁶¹ Disability is broadly defined as a physical or mental impairment such that there is no work which the person could perform for a period of twelve continuous months. In addition to these requirements, the person's income must be at or below a set level.⁶² In order to receive benefits, a person must either be a U.S. citizen, a lawful permanent resident or PRUCOL, and may not be outside the country for

56. See Food Stamp Act, 7 U.S.C. § 2011 (1994); see also FOREIGN AFFAIRS MANUAL, *supra* note 31.

57. The head of household is required to register either at the food stamp office or the local job service office.

58. Food Stamp regulations do not refer to PRUCOL, but explicitly define those eligible for the benefit and therefore are more restrictive.

59. See 42 U.S.C. §§ 1381-1383 (1988 & Supp. V 1993).

60. Act of Aug. 14, 1935, ch. 531, § 1601, amended by Act of Oct. 30, 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1465.

61. 42 U.S.C. § 1382(c)(a)(3) (1988).

62. These income levels are calculated annually by the Federal Department of Health and Human Services and published in what are referred to as the Poverty Income Guidelines. See, e.g., 45 C.F.R. §§ 1061.51, .70, app. B (1995).

more than one month.⁶³ SSI regulations define PRUCOL as persons who have been granted the following immigration benefits: asylum or refugee status, parole, stays of deportation, suspension of deportation, deferred action, withholding of deportation, or indefinite periods of voluntary departure.⁶⁴ Persons who are eligible for SSI are also eligible for Medicaid benefits.⁶⁵

D. Medicaid

Medicaid, which was instituted in 1935, provides medical care to the needy through a program jointly funded by the federal and state governments.⁶⁶ The assistance comes not in the form of payment to the individual, but as a reimbursement to the health care provider. The federal government sets minimum requirements in the form of eligibility, services and protection for the beneficiaries of the program as a condition to its participation. While financial eligibility requirements vary from state to state, persons eligible for AFDC or SSI are automatically eligible for Medicaid.⁶⁷ Until 1986, the Medicaid statute did not deal with the question of alien eligibility. As the result of a federal district court decision holding that Medicaid regulations were promulgated without statutory authority,⁶⁸ Congress enacted legislation limiting participation in Medicaid to U.S. citizens, lawful permanent residents and PRUCOL aliens.⁶⁹ The 1986 Medicaid legislation provides further that all aliens, irrespective of their status, are eligible for emergency care under the Medicaid program, as long

63. 42 U.S.C. § 1382c(a) (1988 & Supp. V 1993); 20 C.F.R. § 41.214 (1994).

64. 20 C.F.R. § 416.1618 (1994). These regulations were promulgated following a consent decree entered in *Berger v. Heckler*, 771 F.2d 1556 (2d Cir. 1985). The important element in the PRUCOL criteria adopted by the agency is that the aliens must be residing in the United States with the knowledge of the INS and the INS does not contemplate their removal. *Id.* at 1576. The fact that a person has merely applied for one of the many immigration benefits does not make her PRUCOL.

65. 42 U.S.C. § 1396a(10)(A)(i) (1988 & Supp. V 1993).

66. See Act of Aug. 14, 1935, ch. 531, § 1901; 42 U.S.C. § 1396 (1988).

67. See *supra* note 65 and accompanying text.

68. See *Lewis v. Gross*, 663 F. Supp. 1164 (E.D.N.Y. 1986), *aff'd sub. nom. Lewis v. Grinker*, 965 F.2d 1206 (2d Cir. 1992). In the Second Circuit's decision on appeal in *Lewis*, the court also held that Congress did not intend to preclude Medicaid prenatal care services to undocumented women who would be giving birth to U.S. citizen children. 965 F.2d at 1208. In another decision by the Ninth Circuit, the court disagreed with the conclusion reached in *Lewis*, holding that undocumented persons were only eligible for emergency care. See *Coye v. United States Dep't of Health and Human Servs.*, 973 F.2d 786, 789 (9th Cir. 1992).

69. Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9406(a), 100 Stat. 1874, 2057 amending 42 U.S.C. § 1396(b) (1982); see also *supra* note 62.

as they meet the other requirements of the program.⁷⁰ Under the statute, emergencies are defined as medical conditions with acute symptoms that place the patient's health in serious jeopardy, could result in serious impairment to bodily functions, or cause serious dysfunction of any bodily organ or part.⁷¹

E. Unemployment Compensation Insurance

Unemployment compensation insurance is a joint federal-state program designed to provide unemployed persons with temporary relief while in between jobs.⁷² Federal and state funds are used primarily to administer a trust fund into which all employers contribute according to tax formulas which vary from state to state. Eligibility is not based on an individual's income, but on her earning record before becoming unemployed. As in many federal-state programs, federal law establishes the minimum requirements for unemployment programs, including eligibility.⁷³ Only U.S. citizens, lawful permanent residents, PRUCOL aliens, commuter aliens, non-immigrants with work visas, and persons with INS-issued work authorizations, with the exception of H-2, F, J, M, and Q aliens, are eligible.⁷⁴ The Immigration Reform and Control Act of 1986 created significant changes which further restrict alien access to unemployment compensation insurance.⁷⁵

IV. RESTRICTIONS ON ACCESS TO BENEFITS

It was not until approximately 1972 that Congress began to enact restrictions on access to benefit programs based on either immigration or

70. This should be distinguished from the common law duties which may arise when a patient is brought to a hospital in an emergency or when a hospital embarks on providing a patient with medical care. See Jeffrey E. Fine, *Opening the Closed Doors: The Duty of Hospitals to Treat Emergency Patients*, 24 WASH. U. J. URB. & CONTEMP. L. 123 (1983); see also RESTATEMENT (SECOND) OF TORTS § 323 (1965).

71. 42 U.S.C. § 1396b(v)(3) (1988). Under the statute, emergency labor and delivery are covered, while prenatal care does not seem to be. See also Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, § 411(k), 102 Stat. 683.

72. 42 U.S.C. §§ 501-504 (1988); Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 (1988 & Supp. V 1993).

73. 26 U.S.C. § 3304 (1988 & Supp. V 1993).

74. 26 U.S.C. §§ 3306(c)(1)(B), (19) (Supp. V 1993).

75. The Immigration Reform and Control Act's prohibition of an employer from hiring a person without work authorization, the unemployment statute's requirement that aliens have work authorization, and a further requirement that the person be "able and available" precludes eligibility of undocumented persons. *Joseph v. Alabama*, 600 So. 2d 298 (Ala. Civ. App. 1992).

citizenship status.⁷⁶ While it can generally be said that prior to 1971 Congress had not prohibited state governments from limiting access to public benefits based on alienage, Congress had imposed its own alien access restrictions even before 1956.⁷⁷ For example, social security benefits had previously been restricted during periods when an alien was outside the United States.⁷⁸ Additional exclusion provisions precluded aliens from receiving benefits if they were not lawful permanent residents or if they were permanent residents and convicted of a variety of crimes.⁷⁹ Another provision, enacted in 1954, provides that persons who are deported from the United States are ineligible to receive social security old age benefits even when they have paid into the program.⁸⁰ In 1965 the Social Security Act was amended to require that in order to be eligible, an alien must have been lawfully admitted to permanent residence and have resided continuously in the United States for at least five years immediately before

76. See ALIEN ELIGIBILITY REQUIREMENTS FOR MAJOR FEDERAL ASSISTANCE PROGRAMS 4 (Congressional Research Service Report No. 93-1046A, 1993).

77. In 1954 the Social Security Act was amended to preclude deported aliens from receiving any benefits. See 42 U.S.C. § 402(n) (1988 & Supp. V 1993). In addition, the determination of the prior deportation, providing the basis to deny benefits is not subject to collateral attack. See *Marcello v. Bowen*, 803 F.2d 851, 857 (5th Cir. 1986). The constitutionality of this restriction on the receipt of benefits has been upheld. *Flemming v. Nestor*, 363 U.S. 603 (1960).

78. See Social Security Amendments of 1956, Pub. L. No. 84-880, § 118, 70 Stat. 807, 835-36 (amending Section 202(t) of the Social Security Act). The 1956 amendments provided that social security benefits were to be suspended for aliens who were outside of the United States, unless they were nationals of a country that would make payments to U.S. citizens who left the foreign country to reside in this country. S. REP. NO. 2133, 84th Cong., 2d Sess. (1956), reprinted in 1956 U.S.C.C.A.N. 3877, 3879. Under this provision, benefit payments would be cut off after three months. Benefits for U.S. citizens who live outside the country are not affected upon their establishment of residence. As stated in the legislative history, this provision was enacted because Congress was "concerned by the fact that some aliens have come to this country, served in covered employment for a short period, and have then returned to their native countries to live off their old-age and survivors benefits for the rest of their lives." *Id.* at 3878 (emphasis added).

While it might be entirely reasonable to assume that some aliens might possibly come to the United States with the primary purpose of receiving benefits, the legislative history does not reflect that there was empirical support for the assertion. In addition to the prohibition against certain aliens receiving benefits after departure from the United States, naturalized citizens who established residence outside the United States within one year of their naturalization were subject to denaturalization. See 8 U.S.C. § 1451(d) (1988) (repealed 1994).

79. See Social Security Amendments of 1965, Pub. L. No. 89-97, § 104, 79 Stat. 286, 334-35 (1965). The crimes precluding receipt of benefits were espionage, censorship, sabotage, treason, sedition, and subversive activities and violations of sections 4, 112 and 113 of the Internal Security Act of 1950. See also S. REP. NO. 404, 89th Cong., 1st Sess. (1965), reprinted in 1965 U.S.C.C.A.N. 1943, 2109.

80. See 42 U.S.C. § 402(n) (1988 & Supp. V 1993). This provision, which is quite broad and encompasses persons removed under most of the grounds of deportation, was held to be constitutional in *Flemming v. Nestor*, 363 U.S. 603 (1960).

applying for benefits.⁸¹ Six years later in *Graham v. Richardson*,⁸² the Supreme Court held that state-imposed restrictions on alien access to public benefits were unconstitutional because they violated the Fourteenth Amendment's Equal Protection Clause and encroached on Congress's exclusive power to regulate immigration.⁸³

Perhaps the most dramatic development in this area of the law was language inserted into the benefit statutes which provided that aliens "permanently residing in the United States under color of law" would also be eligible for some of the programs. This language, commonly referred to as "PRUCOL," has been the source of much litigation.⁸⁴ Later, in *Mathews v. Diaz*,⁸⁵ the Court held that it was proper for Congress to enact residency requirements on aliens as a condition for their receipt of federal benefits. In *Mathews* the statute in question required an alien to be a lawful permanent resident for at least five years in order to receive benefits under Medicare Supplementary Insurance. In the following year, the Court struck down a state statute which denied higher education assistance to permanent residents who were not intending to become citizens.⁸⁶ These cases may be reconciled as standing for the proposition that while it might be improper for states to interfere with alien access to public benefits, the

81. These amendments specifically affected parts A and B of the medicare program. See Social Security Amendments of 1965, Pub. L. No. 89-97, § 1836, 79 Stat. 304; see also H.R. CONF. REP. NO. 682, 89th Cong., 1st Sess. 1965, reprinted in 1965 U.S.C.C.A.N. 2228, 2233-34.

82. 403 U.S. 365 (1971).

83. *Id.* at 382. In *Graham*, the State of Arizona imposed a fifteen-year residency requirement on beneficiaries of various benefits programs. The applicant had been a lawful permanent resident and had resided in the United States continuously since 1956 before she became disabled. In the consolidated case involving the state of Pennsylvania, the petitioner had lived in the United States since 1965 and had been denied benefits based on her alienage. In the third case in the *Graham* litigation, Beryl Jervis, a citizen of Panama and a lawful permanent resident who came to the United States in 1968, became ill two years later, and applied for benefits in Pennsylvania. Ms. Jervis was denied benefits based solely on her alienage.

In the Pennsylvania case, the state provided benefits only to U.S. citizens. In the Arizona case, the state required aliens to have lived in the state for at least fifteen years. *Graham*, 403 U.S. at 371. The Court held that the restrictions imposed by the states of Pennsylvania and Arizona violated the Equal Protection Clause of the Fourteenth Amendment and ruled that the states' restrictions encroached on "federal-state relations." *Id.* at 377 (citing *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948)); *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941). Interestingly, the Court also rejected Arizona's assertion that its fifteen-year residency requirement had been authorized by Congress when it passed the Social Security Act of 1935. *Graham*, 403 U.S. at 382-83.

84. The PRUCOL provisions first appeared in the Social Security Amendments of 1972, Pub. L. No. 92-603, § 1614(a)(1)(B)(ii), 86 Stat. 1329, 1471. For an excellent review of the legislative history of various PRUCOL provisions, see Calvo, *supra* note 48.

85. 426 U.S. 67, 82-83 (1976).

86. *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977).

courts will be more likely to allow the federal government to enact restrictions. The federal government is constitutionally empowered to regulate immigration. Therefore, the court will accept Congress's argument of a compelling interest to restrict access.⁸⁷

In 1980, Congress enacted additional restrictive alien-access provisions in a variety of public benefit programs. These restrictions were a response to the perception that many immigrants were taking advantage of public benefit programs even though they had managed to overcome the public charge exclusion ground and gain admission to the United States. These provisions created a sponsorship "deeming period,"⁸⁸ in which the income of a sponsor who submitted an affidavit of support on behalf of the alien would be "deemed" as part of the alien's income.⁸⁹ The common result of "deeming" is that the alien becomes ineligible for the benefit. The deeming period lasts for a specified number of years following a person's admission to lawful permanent residency and varies from program to program. The period for AFDC⁹⁰ is three years, and three to five years for SSI⁹¹ and food stamps.⁹²

In 1986, Congress statutorily institutionalized a program known as SAVE (System for Alien Verification of Eligibility), which was designed to prevent undocumented aliens from gaining access to a number of benefit

87. A corollary to this argument is that it is clear that Congress has the plenary power to make the recipients of the benefits deportable or excludable even if they are permanent residents. We know this because setting the grounds of deportability and excludability have thus far been viewed as falling within Congress's plenary power. This being the case, if Congress can make an alien deportable for receiving the benefit, it can restrict outright the person's access to the benefit. This argument would be less convincing if Congress's prohibition were permanent, such that the acceptance of public benefits would render even a long term permanent resident excludable or deportable. Obviously, the latter restriction would be less defensible on rational grounds.

88. See Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 504, 94 Stat. 441, 471 (codified as amended at 42 U.S.C. § 421 (1988 & Supp. V 1993)); see also Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 97 Stat. 357; 45 C.F.R. §§ 233.50-.52, as amended by 47 Fed. Reg. 5648-86 (1982).

Deeming of income, while relatively new in the allocation of benefits for aliens, has been utilized in benefits law since at least 1972. Gill Deford, *The Medicaid Deeming Procedure: The Intolerable Financial Burden on the Non-Institutionalized Spouse*, 10 CLEARINGHOUSE REV. 12 (1976). Deeming has been found to be constitutional. See *Schweiker v. Gray Panthers*, 453 U.S. 34, 43-44 (1981).

89. The consular officers require sponsors to sign a written acknowledgement that they have been informed of the deeming provisions.

90. 42 U.S.C. § 615(a) (1988). This provision does not apply where the applicant is a dependent child, and the sponsor or the sponsor's spouse is the parent of the child.

91. 42 U.S.C. § 1382j (1988 & Supp. V 1993).

92. 7 U.S.C. § 2014(i) (1994).

programs.⁹³ Under SAVE, states and other entities which play a role in the delivery of these programs are required to verify, through INS computer records, the immigration status and eligibility of aliens for benefits.⁹⁴ More recently, as part of the so-called "Contract with America," the House of Representatives passed the Personal Responsibility Act which would go much further by completely withholding benefits from everyone but citizens.⁹⁵

While the eligibility criteria might permit certain groups to receive some public benefits, in many of these cases the immigration statutes themselves act as a deterrent, if not a bar, to a person's acceptance of benefits. A person's acceptance of these benefits, even in the case of a permanent resident, could lead to the person's characterization as a public charge and cause the person to be removed or excluded for participating in any of these programs. In the vast majority of cases, lawful permanent residency is a condition of eligibility. In even the most liberal of the benefit programs, PRUCOL is a condition of eligibility.

Where PRUCOL provisions have been written into benefit requirements, they are supportable on public policy grounds. Persons who fall within the PRUCOL definition were those admitted into the United States as either conditional entrants, parolees or those otherwise allowed to remain in the United States into the indefinite future.⁹⁶ Those falling within the definition of "conditional entrants" or "parole" status were people admitted under then-existing statutory provisions available to those fleeing persecution.⁹⁷ Others who were allowed to remain in the United States for an extended period of time encompass a broad range of immigration categories under a variety of conditions. Some of these would become

93. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 121, 100 Stat. 3384 (1986). The implementation by INS of this program is described in 52 Fed. Reg. 33,882 (1987). The affected programs were AFDC, Medicaid, unemployment compensation, food stamps, housing, and a variety of educational assistance programs.

94. States may obtain a waiver of the SAVE requirements if they can establish that participation in the system is not cost effective or that they have an alternative system to verify the applicant's alien status. See JANET M. CALVO, IMMIGRANT STATUS AND LEGAL ACCESS TO HEALTH CARE 74 (1993). Proof of the applicant's U.S. citizenship establishes a presumption of compliance with SAVE. The procedure also requires the state to verify the applicant's status with the INS.

95. H.R. 1214, 104th Cong., 1st Sess. (1995).

96. See Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329, 1471.

97. It was not until 1980 that Congress enacted legislation providing for the orderly admission of persons fleeing persecution. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

lawful permanent residents and others would not be deported.⁹⁸ The basic status characteristic shared by all of these people is that in all likelihood they will be allowed to remain in the United States into the indefinite future. The policy justification for allowing PRUCOL aliens to participate in public benefit programs is that while they are not citizens or permanent residents, they are in this country to stay. Children born to PRUCOL aliens are citizens of the United States, and notwithstanding their parent's PRUCOL status, they should be encouraged to become contributing members of society. To treat PRUCOL aliens as full-fledged outsiders will only perpetuate an inferior third-class status. Such ill-treatment does not serve the long-term policy goal of public assistance programs, which is to encourage self-sufficiency while providing a safety net for those facing a crisis.⁹⁹

V. DISCUSSION

As can be seen from the previous discussion, since the earliest immigration enactments, Congress has enacted statutes restricting the admission of persons it believed were likely to be unable to provide for themselves. Since the enactment of the first public benefit programs, Congress has imposed a wide range of restrictions on alien access. For example, eligibility standards for programs such as unemployment compensation, food stamps, and child nutrition require that the applicant be either a U.S. citizen, permanent resident, or PRUCOL. A non-permanent resident who manages to participate in one of these programs runs the risk of being forever barred from permanent resident status. Furthermore, a permanent resident who secures benefits through fraud could either be deported or excluded.¹⁰⁰ Even if a person obtains the benefits without fraud, participation

98. Under a variety of provisions of the INA, many persons may remain in the United States for extended periods even though they are neither citizens, residents, nor nonimmigrants. See BOSWELL & CARRASCO, *supra* note 30, at 551-61 (describing relief from deportation in the form of temporary protected status, deferred action and voluntary departure); see also 8 U.S.C. §§ 1254(a), (e) (1994); Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42 (1976).

99. Judith M. Gueron, *Welfare and Poverty: The Elements of Reform*, 11 YALE L. & POL'Y REV. 113 (1993).

100. An ineligible person could obtain public benefits only by using fraudulent documents, verbally misrepresenting his status, or through the negligence of the agency administering the benefits. The use of fraudulent documents is *arguably* prohibited under 8 U.S.C. § 1324c(a)(2) (1994), and a person may be both deportable and excludable for the violation. See 8 U.S.C. §§ 1182(a)(6)(F), 1251(a)(3)(c) (1994). While the statute does not provide for a waiver, a waiver may be available in cases involving long-term permanent residents or persons who are the immediate family of U.S. citizens or permanent residents. See Memorandum from James A.

in the program could cause the undocumented person's later disqualification from permanent residence based on the public charge provisions of the INA.¹⁰¹

While there are a few federal benefit programs, such as Women Infants and Children (WIC)¹⁰² or Hill-Burton medical care,¹⁰³ which have no alien status restrictions,¹⁰⁴ more recently-enacted immigration provisions have further closed the door. For example, many of those who qualified under the immigration amnesty in 1986 have been precluded from accepting any federal financial assistance for a minimum of five years.¹⁰⁵ These

Puleo, Acting Executive Associate Commissioner for Operations, INS (March 26, 1993), 71 INTERPRETER RELEASES 226-27 (1994).

The term "arguably" is used in reference to 8 U.S.C. § 1324c, because while the provision was enacted to prevent document fraud in relation to compliance with employer sanctions, the statute could be interpreted broadly as referring to document fraud relating to compliance with any other provisions of the Act. Possession of an alien registration card or proof of citizenship is used in complying with other provisions of the Immigration and Nationality Act. 8 U.S.C. § 1324c(a) (1994) provides as follows:

It is unlawful for any person or entity knowingly—

- (1) to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of this chapter,
- (2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this chapter,
- (3) to use or attempt to use or to provide or attempt to provide any document lawfully issued to a person other than the possessor (including a deceased individual) for the purpose of satisfying a requirement of this chapter, or
- (4) to accept or receive or to provide any document lawfully issued to a person other than the possessor (including a deceased individual) for the purpose of complying with section 1324a(b) of this title.

It should also be noted that section 307(h)(8) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Act of Dec. 12, 1991, Pub. L. No. 102-232, 105 Stat. 1733, 1756, may have eliminated 8 U.S.C. § 1251(a)(21), one of the two deportation provisions for fraudulent documents.

101. See 2 GORDON ET AL., *supra* note 30, § 52.08[3]. At the same time, an alien who receives public benefits could encounter extensive questioning when she seeks admission as an immigrant or adjustment of status to lawful permanent resident. Moreover, since benefits such as adjustment of status to lawful permanent resident status are discretionary, participation in the benefit program could render the person ineligible.

102. The WIC program is designed to prevent birth-related medical problems in infants and to improve the nutrition and health of pregnant women. 42 U.S.C. § 1786 (1988 & Supp. V 1993).

103. Many hospitals receive "Hill-Burton" low-interest federal loans for purposes of expanding or rehabilitating their facilities. In exchange for these loans, the hospitals are required to provide a certain percentage of free or reduced-rate medical services. 42 U.S.C. § 291a(e) (1994).

104. For eligibility requirements of the Hill-Burton program, see 42 C.F.R. § 291c(e). For eligibility requirements of the WIC program, see 7 C.F.R. § 248.6.

105. See 8 C.F.R. § 245a.5(a) (1995). The list of prohibited programs is quite extensive and even covers the receipt of legal aid services. 8 C.F.R. § 245a.5(c) (1995). Based on a class action filed in California, a court has enjoined the prohibition of legal services to Special Agricultural

restrictions are contradictory in effect because while the acceptance of some specified benefits would not render the applicant ineligible for temporary residence, the applicant could later be found ineligible for permanent residence, for receipt of these same benefits.¹⁰⁶

In addition to the restrictions on alien access to a number of public benefit programs, each of the programs carries with it rigorous verification requirements on the agencies responsible for its administration. For example, the SSI and AFDC programs require that the agency verify the immigration status of the applicant prior to distributing benefits.¹⁰⁷ While neither SSI nor AFDC imposes an affirmative duty to notify the immigration authorities, the food stamp program does require such notification.¹⁰⁸

Even though Congress has taken steps to place additional restrictions on alien access to public benefits, those programs allowing access are already quite limited. One of the only exceptions in which non-lawful permanent residents are eligible for public health care is in a medical emergency.¹⁰⁹ Medical emergencies are defined narrowly and require that severe and debilitating medical conditions exist. It is evident from the statutory language that Congress contemplated that the decision as to whether a condition is sufficiently severe to constitute an emergency is a medical

Workers. See *California Rural Legal Assistance, Inc. v. Legal Serv. Corp.*, 727 F. Supp. 553 (N.D. Cal. 1989), *aff'd*, 917 F.2d 1171 (9th Cir. 1990).

There are certain inconsistencies between the regulations which preclude a wide range of benefits and a distinction drawn between public cash assistance and in-kind assistance. 8 U.S.C. § 1255a (1994) states that an alien is typically not eligible for the following:

- (i) any program of financial assistance furnished under Federal law (whether through grant, loan, guarantee, or otherwise) on the basis of financial need, as such programs are identified by the Attorney General in consultation with other appropriate heads of the various departments and agencies of Government (but in any event including the program of aid to families with dependent children under part A of title IV of the Social Security Act) [42 U.S.C. 601 *et seq.*],
- (ii) medical assistance under a State plan approved under title XIX of the Social Security Act [42 U.S.C. 1390 *et seq.*], and
- (iii) assistance under the Food Stamp Act of 1977 [7 U.S.C. 2011 *et seq.*]

§ 1255a(h)(1)(A).

106. The confusion was caused by the fact that when the implementing regulations were first proposed, they provided that the public charge provisions could not be waived. See 52 Fed. Reg. 8752, 8758 (1987). When the final rules were enacted, they allowed the waiver of the public charge provisions for applicants for temporary residency. See 8 C.F.R. § 245a.2(k)(3) (1995); see also *id.* § 245a.3(g)(3)(ii) (1995).

107. For verification requirements of the SSI program, see 20 C.F.R. §§ 416.1618(c), (d) (1994). For the requirements for verification of the AFDC program, see 42 U.S.C. § 1320b-7(d)(1)(A) (1988).

108. 7 U.S.C. § 2020(e)(17) (1994); 7 C.F.R. § 273.4(e)(1) (1995).

109. See 42 U.S.C. § 1396b(v)(3) (1988).

decision.¹¹⁰ Moreover, Congress provided the states with a mechanism for reimbursement when undocumented persons are provided with emergency medical care.¹¹¹ The obvious purpose of the provision permitting emergency medical care is to avoid unnecessary suffering and to avoid increased medical costs which could result from failure to treat. One can easily imagine a situation in which an undocumented person who is in need of emergency care is denied medical attention and later returns with a more severe problem causing both protracted suffering and extended treatment.¹¹² Indeed, it is all too common that undocumented individuals avoid medical and other care for fear of discovery and then are brought in for attention when the condition has deteriorated significantly.

The political debate on alien access to public benefits has been replete with stories of aliens who take advantage of one or more forms of public benefits soon after their arrival, or who accumulate large medical bills for exotic medical treatment under the guise of emergency care.¹¹³ A related perception is that in the last two decades, first-generation immigrants have been more likely to receive public benefits than native-born U.S. citizens.¹¹⁴ This is in sharp contrast to earlier data on the situation of recent immigrants. These perceptions of abuse and dependency are based on skimpy data or are mere projections into the future, and hardly constitute the basis of a sound policy. As one commentator noted, "Much of what we believe we know [about the cost of the undocumented and health care] is

110. While the statute clearly provides that medical assistance not be provided other than to permanent residents or persons who are PRUCOL, it also provides three qualifications in defining emergency conditions: acute symptoms where the withholding of attention would place the "patient's health in serious jeopardy," seriously "impair bodily functions," or cause "serious dysfunction of a bodily organ or part." 42 U.S.C. § 1396b(v)(3).

111. See 42 U.S.C. § 1396b(v)(2) (Supp. V 1993).

112. Indeed, emergent medical practice focuses extensively on preventive care and early intervention, thereby avoiding further costs to the overall system. Josephine Gittler, *Controlling Resurgent Tuberculosis: Public Health Agencies, Public Policy and the Law*, 19 J. HEALTH POL. & L. 107, 117-21 (1994); Matthew T. McKenna et al., *The Epidemiology of Tuberculosis Among Foreign-Born Persons in the United States*, 332 NEW ENG. J. MED. 1071, 1076 (1995); Tal Ann Ziv & Bernard Lo, *Denial of Care to Illegal Immigrants*, 332 NEW ENG. J. MED. 1095, 1096 (1995).

113. See, e.g., Irene Wielawski, *Foreign Visitors Put Strain on State's Medical System: Many Improperly Obtain Taxpayer-Financed Care but Officials Say They Cannot Legally Refuse Treatment*, L.A. TIMES, Sept. 1, 1993, at A1; Irene Wielawski, *Health Systems in Bind on Care for Illegal Immigrants: Federal Law Requires Treatment but Funds for State and Country Are Scarce*, L.A. TIMES, Aug. 31, 1993, at A1.

114. See James Aley, *Immigrants and Welfare*, FORTUNE, Nov. 28, 1994, at 27 (referring to report by George Borjas of the University of California at San Diego). According to the report, Professor Borjas attributed this "new" trend to the significantly larger numbers of refugees admitted since the early 1970s. Borjas noted that almost fifty percent of Cambodian and Laotian immigrants, many of whom had immigrated as refugees, had received public assistance, while less than five percent of Nigerians and Indians had received such assistance.

unfortunately based on observation and inference, rather than systematic research."¹¹⁵ The available information is tentative in nature and with contradictory conclusions.¹¹⁶ Upon more careful observation, the question of whether immigrants or refugees are more likely to accept public benefits is still an open one. I believe, however, that focusing the debate on whether immigrants are more or less likely to apply for public benefits misses a more important question in the formulation of a sound policy. Our discussion should be about who we are as a people and how we wish to be perceived by the other members of the world community. A necessary part of the immigration policy question is to face the moral question of how it is that we should treat the foreigner within our own country and how we wish that we should be treated when we are in another country.

While few would argue that there is no immigration problem, the extent of the problem has been exaggerated. Policy-makers seem to have forgotten their gross over-estimation of the number of undocumented persons in the United States. For example, prior to the legalization programs enacted under the 1986 amendments, the INS estimated that there were between 3.6 and 4.8 million eligible persons.¹¹⁷ In reality, the number was significantly lower.¹¹⁸ The National Academy of Science has severely criticized the methods used to count undocumented aliens in the United States.¹¹⁹ More recently the General Accounting Office, while noting improvements in the statistical methods used in counting the undocument-

115. Sana Loue, *Access to Health Care and the Undocumented Alien*, 13 J. LEGAL MED. 271, 275 (1992).

116. GEORGE J. BORJAS, *FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY* 43-44, 150-59 (1990); REBECCA L. CLARK ET AL., *FISCAL IMPACTS OF UNDOCUMENTED ALIENS: SELECTED ESTIMATES FOR SEVEN STATES* 17-25 (1994); JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* 105-28 (1989).

117. See *Immigration Control and Legalization Amendments: Hearings on H.R. 3080 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 45-47 (1985) (statement of Alan C. Nelson, Commissioner of the INS). Earlier reports by the INS indicated even less reliable numbers as being between four and six million. See *Immigration Statistics: Hearing Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 99th Cong., 1st Sess. 26, 31 (1985) (statement of John Nahan, Dir. Office of Plans and Analysis, INS); see also NATIONAL RESEARCH COUNCIL, *IMMIGRATION STATISTICS: A STORY OF NEGLECT* 87-88 (D. Levine et al. 1985).

118. One study revealed that at the time of the 1980 census, the undocumented population in the United States was approximately two million. See Jeffrey S. Passel & Karen A. Woodrow, *Geographic Distribution of Undocumented Immigrants: Estimates of Undocumented Aliens Counted in the 1980 Census by State*, 18 INT'L MIGRATION REV. 642, 651 (1984). While some of the distortion in the numbers might be attributable to the difficulties which many applicants faced in applying for the amnesty program, the significant difference in the estimates highlights the flaws in the original estimates.

119. See NATIONAL RESEARCH COUNCIL, *supra* note 117.

ed, continued to express doubts regarding the reliability of the underlying data.¹²⁰ Some of the computation methods, such as the use of border apprehensions as an indicator of migration flow, have obvious flaws.¹²¹ Reliance on the number of illegal entries is questionable because the INS has no idea how many of those persons who entered actually remain in the United States.¹²² Data regarding the number of persons who entered legally, but became undocumented by their failure to depart or maintain their status, is equally unreliable. One of the questions that naturally arises is the reliability of studies pointing to the nation's increased reliance on public benefits by aliens in the United States.¹²³ In addition, the studies rely heavily on one source, which was preliminary in nature.¹²⁴

The crucial fact that public benefits are not broadly available to aliens has not been highlighted in the debate on alien access, nor has the existence of mechanisms that restrict the use of benefit programs by non-citizens. Legislating additional restrictions on alien access to public benefits is unnecessary and misguided. An important objective of the past nine years of immigration legislation has been to curb illegal immigration and facilitate the removal of persons illegally present in the United States. During this same period, public benefit programs have been progressively

120. See UNITED STATES GEN. ACCOUNTING OFFICE, *ILLEGAL ALIENS: DESPITE DATA LIMITATIONS, CURRENT METHODS PROVIDE BETTER POPULATION ESTIMATES* 14 (1993) (Report to the Chairman, Information, Justice, Transportation and Agriculture Subcommittee, Committee on Government Operations of the U.S. House of Representatives).

121. The same criticism was made of the statistical methodology in an earlier case in which the State of Texas sued the federal government over the applicability of the Voting Rights Act of 1965 based on census figures of the number of documented and undocumented aliens. See *Briscoe v. Levi*, 535 F.2d 1259, 1268, 1269 (D.C. Cir. 1976), *vacated sub nom.*, *Briscoe v. Bell*, 432 U.S. 404 (1977).

122. *Immigration Statistics: Hearing Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 99th Cong., 1st Sess. 41, 44-53 (1985) (statement of Jeffrey S. Passel, U.S. Dept. of Commerce, Bureau of the Census).

123. Most of the surveys seem to lump together citizens, permanent residents, amnestied aliens, and undocumented persons. See, e.g., DONALD HUDDLE, *THE NET COSTS OF IMMIGRATION TO CALIFORNIA* (1993).

124. For example, the study on costs to the State of California relied on data collected by George Borjas. See HUDDLE, *supra* note 123, at 7 (citing GEORGE BORJAS, *FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE AMERICAN ECONOMY* (1990)). Professor Borjas notes that much more research is needed before drawing too many conclusions from the data. See George J. Borjas & Stephen J. Trejo, *Immigrant Participation in the Welfare System*, 44 *INDUS. & LAB. REL. REV.* 195, 196 (1991) ("Despite the critical importance of this issue for policy purposes, little is currently known about immigrant participation in transfer programs, and especially about how this participation has changed over time. . . . The availability of two cross-sections allows us to separately identify cohort and assimilation effects, and this approach yields a more meaningful description of the patterns of immigrant welfare reciprocity than has been provided by previous research.").

curtailed even for those eligible to receive them. Aliens receiving benefits may be deported, and those perceived as likely to need benefits are subject to exclusion. Those who manage to obtain the benefits do so either because they qualify due to an emergency or because they have illegally misrepresented their status. In the latter case where the individual has obtained benefits through cunning or bureaucratic error, the remedy is not further restriction of eligibility. The incidence of tax fraud, for example, can be remedied by either increasing enforcement measures or improving compliance, rather than by changing the general tax laws. Energy and resources would be better focused on improving enforcement mechanisms, rather than creating additional restrictions on the receipt of benefits.

VI. CONTRADICTIONS IN POLICY

While not without controversy, one important feature of this country's immigration policy has been to encourage the assimilation of immigrants into society. This assimilation is assisted through the policy of supporting the admission of immigrants with significant family ties in the United States.¹²⁵ This has enabled new immigrants to develop a social network upon which they might rely during the difficult times when they arrive and are establishing themselves in their new homes. Throughout the long history of immigrant and refugee admissions, family and community sponsorship has worked reasonably well.¹²⁶ Arguably, these family-based immigrants are more likely to be cared for by other family members or through their community networks and are better able to find employment in difficult times than their counterparts who are admitted based upon ties to a U.S. employer.¹²⁷

125. For example, not more than 480,000 of the immigrants admitted in a given year gain their status based upon their relationship with a lawful permanent resident or citizen. 8 U.S.C. § 1151(c)(1)(B) (1994). Even though approximately 140,000 immigrants are admitted based upon their employment, a substantial number of these visas are issued to the immediate family of the primary beneficiary. *Id.* § 1151(d)(1)(A). Brae Canlen, *A Breakdown of U.S. Immigration Numbers Reveals a Policy with No Rules and Many Exceptions*, CAL. LAW., Aug. 1994, at 50, 51. In addition, while refugee admissions are determined on the basis of nationality and degrees of persecution and ties to the United States, many of the refugees admitted are the family members of the primary refugee. All of these persons are said to be admitted under the rubric of a policy which favors family unification.

126. The term "refugee admissions" is used to describe people who were fleeing persecution, even when foreigners were not necessarily admitted as refugees.

127. The increased emphasis on the admission of skilled workers has been predicated in part on the assumption that these workers will use fewer resources than their unskilled counterparts. See BORJAS, *supra* note 124. An immigration policy based on these assumptions is classist and inhumane in that it reduces the value of an individual's contribution to society to a mathemati-

An immigration policy rooted in family unification serves the dual purpose of facilitating assimilation as well as serving a laudable moral objective. The 1986 Immigration Act, along with serving other enforcement objectives, represented a shift from family unification toward further limitations on the rights of less-skilled immigrants. For example, while permanent residency could be accorded to persons coming to work in the United States upon an employer's showing that there were insufficient U.S. workers willing to engage in certain jobs, only temporary status is accorded to migrant farmworkers.¹²⁸ The Immigration Act of 1990 represented a further policy shift away from family unification and toward employment-based immigration.¹²⁹ These policy changes, which are posited in terms of serving the national interest, lack any unifying moral component. The policy of according less-skilled immigrants temporary status based on their specific employment, while granting permanent status and job mobility to more-skilled workers, is exploitative.¹³⁰

The expansion of the employment-based immigration policy was intended to facilitate the immigration of higher skilled workers in order to maintain the country's competitive edge over other industrial nations. The provisions relating to the importation of lesser-skilled foreign workers were specifically designed to satisfy the need for agricultural workers to pick crops.¹³¹ While the overwhelming majority of immigrants have substantial family ties, the increased emphasis on employment-based migration

cal calculation.

128. While the statute did provide a temporary amnesty with favorable provisions for agricultural workers, the more permanent of the provisions accorded only temporary visas for agricultural workers and restricted them to work in the fields. Their non-agricultural counterparts, on the other hand, would receive a temporary status that could eventually be converted to lawful permanent residency, allowing those people to move freely from occupation to occupation.

129. Congress's enactment of the Immigration Act of 1990 also represented a shift in the allocation of employment-based immigrant visa numbers by limiting the number of unskilled workers to 10,000 persons per year and increasing the numbers for those with more skills. See generally 8 U.S.C. § 1153(b) (1994). Prior to the 1990 Amendments, ten percent or 29,000 of the visas were allocated for skilled and unskilled workers who were not members of the professions or "persons of exceptional ability in the sciences and arts." See 8 U.S.C. §§ 1153(a)(3), (6) (1988). The expansion of employment-based visas could be described as something of a "shell game" in which the total number of legal immigrants was not increased in a dramatic way, given that the original quotas had been set in 1921. Under the scheme set forth in the 1990 Act, employment-based immigration increased to approximately 140,000. Family-based immigration was modified by limiting the number of visas issued to 480,000 less the number issued to immediate relatives of United States citizens. See 8 U.S.C. § 1151(c)(1)(B) (1994).

130. Surely, an employee admitted only on a temporary visa who encounters problems with her employer will not be in a position to redress any grievances. Such an employee will also not be able to improve the quality of her life through advancement in her work, as she does not have the freedom to change jobs.

131. H.R. REP. No. 682, 99th Cong., 2d Sess. 79-88 (1986); Boswell, *supra* note 2, at 32.

represents a trend which works at cross-purposes with the assimilation model.

The shift in policy toward a greater emphasis on employment-based immigration is described as one which better serves business interests. This view is misguided because it assumes that the skills deficit which has been identified by U.S. business can be remedied by immigration policy. To the contrary, the primary benefits of increased employment-based immigration are short term¹³² because employment-based visas are issued in response to the labor needs of specific employers, as opposed to responding to larger regional or national labor demands. Although the changes made by the 1990 Act were not so dramatic as to cause a significant increase in the number of employment-based immigrants, the Act's passage represented a policy shift. Family values were, and continue to be, less important than business interests. Immigration policy is based more upon a crass analysis of costs and benefits than upon values such as justice, fairness, and compassion.

CONCLUSION

Since the beginning of time, human beings have for a variety of reasons chosen to migrate. Sometimes the decision to migrate is made hastily or involuntarily because of war, political strife, or serious calamity.¹³³ In other situations, the decision to move may be in search of work or to join family members.¹³⁴ Whatever the reasons for human migration, United States policy must be based upon a full appreciation of the complex forces motivating migration and the consequences of the policy choices.¹³⁵

132. Immigrant rights advocates would probably also argue that whatever way that the overall numbers might be increased would be a positive change in immigration policy.

133. For example, political events in which the United States has been directly involved, such as those in Cuba, Vietnam, Ethiopia, El Salvador, Guatemala, Nicaragua, and Chile, have caused a significant number of people to migrate to this country.

134. Another force of migration is proximity. For example, historically the country which has provided the largest number of immigrants to the United States has been Canada. Some are naturally drawn due to geographical proximity (Mexico, Canada, and the Central American countries) and others by war or economic upheaval. Clearly, migration forces are complex and each individual case has its own peculiar reasons.

135. For example, in addition to having internal impacts, our policies influence overseas political events. See, e.g., Sherrie L. Baver, *Including Migration in the Development Calculus: The Dominican Republic and Other Caribbean Countries*, 30 *LATIN AM. RES. REV.* 191 (1995). When the United States was considering the renewal of the extended voluntary departure program for El Salvadorans, then-Salvadoran-President Duarte requested its extension due to the effect that a change of policy would have on the resolution of the civil war.

It has not been shown that alien access to public benefits is a pervasive problem. The United States has already erected significant barriers not only to migration but to the benefits available to those who have legally immigrated. Eligible individuals may be adjudicated "public charges" and deported or excluded for receiving benefits. Individuals who are ineligible for benefits, but nonetheless attempt to obtain them, run the risk of being identified and placed into either exclusion or deportation proceedings. This is a more than adequate disincentive. Sound public policy reasons caution against the imposition of additional restrictions on alien access to public benefits. It can even be argued that the current restrictions are against good public policy. For instance, limiting undocumented persons to emergency medical care places all persons in the community at risk. Where the individual carries a communicable disease, the public health of all persons is placed at risk. Moreover, delay in receiving needed medical attention only increases the likelihood that the person will fall into distress and need more costly emergency medical treatment.¹³⁶

It was H.L. Mencken who said that "[f]or every complex problem, there's an answer that's clear, simple and wrong." The debate on alien access to public benefits, like all debates involving immigration, has become so emotionally charged that rational discussion is nearly impossible. Proposals to limit alien access to public benefits by disqualifying lawful permanent residents are both simplistic and wrong. The proposals are wrong because they will neither reduce illegal immigration in an appreciable way nor meaningfully deal with the federal deficit. Furthermore, the proposals will have the unintended effect of costing the treasury even more money in the long run and endangering the safety and health of United States citizens. More importantly the proposals are wrong because they are immoral, punitive, and inhumane.

The forces of migration are tremendously powerful. The United States can impact migration by addressing root causes that effect people to migrate, rather than by punitive measures against people who have legally immigrated. The public, in this time of political and economic insecurity, may be satisfied in the short-term with the perception that Congress is protecting its interests by restricting alien access to public benefits. Howev-

Another important issue is the effect that U.S. policy might have on United States citizens overseas. For example, what kind of treatment might be visited on United States citizens living or travelling in other countries should this country impose some of the more severe restrictions which have been considered?

136. Similar arguments can be made for providing undocumented children with the same basic primary and secondary education as is provided citizens and permanent residents.

er, in the long-term, it will become apparent that these measures do not address the root causes. Furthermore, the social and public health problems which are likely to result will ultimately have to be addressed. Hopefully, at some point there will be a realization that limitations on access to public benefits will improve neither the economy nor the nation's economic position in the world. When that point comes, the policymakers will have to answer for their failure to address the real sources of the problems facing the country.

