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## Love Them, Love Them Not: The Reflection of Anti-Immigrant Attitudes in Undocumented Immigrant Health Care Law.

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**LOVE THEM, LOVE THEM NOT: THE REFLECTION OF ANTI-  
IMMIGRANT ATTITUDES IN UNDOCUMENTED IMMIGRANT  
HEALTH CARE LAW**

**NEDA MAHMOUDZADEH\***

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\* St. Mary’s University School of Law, Candidate for J.D., May 2008; York University, B.A., Anthropology, May 2005. I would like to thank my editors at *The Scholar* and my fellow staff-writers for editing this comment. I would also like to thank my mother and my sisters for their unwavering love and support. Finally, I would like to thank Masoud Toloue for his continuous support and kindness towards me.

*“First they came for the socialists,  
 and I did not speak out because I was not a socialist.  
 Then they came for the trade unionists,  
 and I did not speak out because I was not a trade unionist.  
 Then they came for the Jews,  
 and I did not speak out because I was not a Jew.  
 Then they came for me,  
 and there was no one left to speak for me.”*<sup>1</sup>

In the United States, the public sentiment towards immigration has shifted from “tolerance [to] ambivalence [to] outright rejection.”<sup>2</sup> Immigrants are often blamed for the high cost of social services and are easy targets for attempts to cut back on government expenditure.<sup>3</sup> At periods of low economic growth, they are blamed for taking American jobs, lowering wages, and high crime rates. They are unpopular because they are unfamiliar and because they threaten the demographic and cultural homogeneity of the society.<sup>4</sup> In today’s post-9/11 world, they are

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1. See Harold Marcuse, *Martin Niemoller’s Famous Quotation: “First They Came for the Communists,”* <http://www.history.ucsb.edu/faculty/marcuse/niem.htm> (last visited Feb. 17, 2007).

2. Gregory A. Huber & Thomas J. Espenshade, *Neo-Isolationism, Balanced-Budget Conservatism, and the Fiscal Impacts of Immigrants*, 31 INT’L MIGRATION REV. 1031, 1036 (1997) (providing the historical timeline of the American public’s attitude towards immigration and the relationship between the unemployment rate and anti-immigrant attitudes). United States and Canadian studies have shown that native “isolationist attitudes are more prevalent today than a generation ago.” *Id.* at 1037. A United States study concluded that “feelings towards immigrants are closely linked to the business cycle” and suggested that racial prejudice is stimulated by recession. *Id.* For further reading of the United States study, see BREWTON BERRY & HENRY TISCHLER, *RACE AND ETHNIC RELATIONS* (Houghton Mifflin, 4th ed. 1978) (1951). The Canadian study also suggested that public opposition to “immigration is highly correlated with unemployment rate [.]” whereas measures of ethnic intolerance (i.e. racism) exhibit a relative immunity to economic fluctuations. *Id.* For further reading of the Canadian study, see Douglas L. Palmer, *Determinants of Canadian Attitudes Toward Immigration: More than Just Racism?*, 28 CAN. J. BEHAV. SCI. 180 (1996), available at [http://www.cpa.ca/cjbsnew/1996/ful\\_palmer.html](http://www.cpa.ca/cjbsnew/1996/ful_palmer.html).

3. Gregory A. Huber & Thomas J. Espenshade, *Neo-Isolationism, Balanced-Budget Conservatism, and the Fiscal Impacts of Immigrants*, 31 INT’L MIGRATION REV. 103, 1032–33 (1997).

4. See Roger Lowenstein, *The Immigration Equation*, N.Y. TIMES, July 9, 2006, at 6 (stating that latest estimates have the number of illegal immigrants at 11.5 million). David Clard, a Professor at Berkeley, noted that “[if] Mexicans were taller and whiter, . . . [immigration] would probably be a lot easier to deal with.” *Id.* Clard argues that it is not the impact of immigration on the economy that sparks anti-immigration sentiments among natives, rather it is the social and cultural impact of immigration on communities that generates opposition. *Id.*

feared because the media and the government constantly remind us they may be a threat to national security.<sup>5</sup>

The public concern regarding immigration and its perceived social and economic consequences, together with the government's fiscally conservative agenda to balance the budget, have given rise to what some call the "fiscal impacts of immigration."<sup>6</sup> If times are bad, if there is an economic recession, or the budget does not balance, immigrants are blamed for spending too much of public resources and not giving back enough. This allows immigrants' entitlement to equal treatment, with respect to something as essential as health care, to be further reduced.

## I. INTRODUCTION

### A. *The "Problem" of Illegal Aliens*

Federal and state governments have passed specific legislation to inhibit illegal entries into the United States. Among this legislation are sections of the Welfare Reform Act and Immigration Reform Act, which limit the kinds of federally-funded health care that undocumented aliens may receive.<sup>7</sup> Despite these regulations, an estimated 700,000 to 750,000 undocumented immigrants enter the United States every year.<sup>8</sup> Federal and state governments' restrictive health care policies for undocumented immigrants are based on the assumption that availability of subsidized medical care to illegal aliens is a factor that encourages illegal immigration. The existing regulations denying medical care to undocumented immigrants serve two primary objectives: 1) to discourage and reduce illegal entries and 2) to lower the cost of health care otherwise provided to undocumented immigrants.

This comment will examine the success, or lack thereof, of the existing regulations to reduce illegal entries into the United States, and the failure

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5. The illegal immigrant is often portrayed as the present embodiment of the "danger" that threatens America, as the 9/11 attacks are in part blamed on a lack of adequate border security.

6. Gregory A. Huber & Thomas J. Espenshade, *Neo-Isolationism, Balanced-Budget Conservatism, and the Fiscal Impacts of Immigrants*, 31 INT'L MIGRATION REV. 1031, 1033 (1997).

7. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8; Pub. L. No. 104-193, 110 Stat. 2105 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (enacted as Division C of the Omnibus Consolidated Appropriations Act of (1996)).

8. Tyche Hendricks, *Border Security or Boondoggle?: A Plan for 700 Miles of Mexican Border Wall Heads for Senate*, S.F. CHRONICLE, Feb. 26, 2006, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?=/c/a/2006/02/26/MNGHIHDUQF1.DTL> (stating that, in 2005, there were an estimated 11 million undocumented immigrants in the United States).

to lower costs of health care provided to undocumented immigrants. While the severe limitation of undocumented immigrant medical care was intended to reduce illegal immigration, illegal immigration has continued to rise since 1996, the year these limitations were reinforced.<sup>9</sup>

To understand the ineffectiveness of health care regulation in reducing illegal immigration, one must look at the reasons behind such migrations. It is a well-known fact that many immigrants of this country enter illegally through the United States-Mexico border in search of jobs.<sup>10</sup> Other reasons for which undocumented immigrants enter the United States include education, uniting with their families, and avoiding political prosecution. Studies have shown that the rate of ambulatory and emergency health care usage among Latino undocumented immigrants is low compared to that of the general Latino population and people across the nation.<sup>11</sup>

Further, this comment will discuss the drawbacks of the existing system. The Welfare Reform Act states that, in the absence of state legislature to the contrary, illegal aliens are not eligible for federally-funded Medicaid.<sup>12</sup> The Federal government only reimburses hospitals for “emergency” services provided to undocumented immigrants.<sup>13</sup> Additionally, in the event that health care workers find out about the illegal status of a patient, they are free to report the patient to the United States Immigration and Naturalization Service (INS). Many undocumented immigrants avoid medical care facilities in fear of deportation. Likewise, many United States-born children of undocumented immigrants do not receive necessary medical care. The fear of prosecution, and the lack of

9. *Id.*

10. Alexander Vivero Neill, Comment, *Human Rights Don't Stop at the Border: Why Texas Should Provide Preventative Health Care for Undocumented Immigrants*, 4 SCHOLAR 405, 409 (2002); RANDY COPPS ET AL., UNDOCUMENTED IMMIGRANTS: MYTHS AND REALITY 1, (Urban Institute 2005), [http://www.urban.org/UploadedPDF/900898\\_undocumented\\_immigrant.pdf](http://www.urban.org/UploadedPDF/900898_undocumented_immigrant.pdf).

11. LEO CHAVEZ, *Health Care Use Among Undocumented Latino Immigrants: Is Free Health Care the Main Reason Why Latinos Come to the United States?*, 19 HEALTH AFF. 51, 56–58 (2000); Victor Landa, *Of Repeated Immigrant Myths Can Misperlead a Nation*, SAN ANTONIO EXPRESS-NEWS, July 24, 2006 (noting to a study that concluded in 2003, non-citizens, a portion of whom are Hispanic illegal aliens, had lower rates of emergency room visits than citizens by 17%).

12. See Seam Park, Comment, *Substantial Barriers in Illegal Immigrant Access to Publicly-funded Health Care: Reasons and Recommendations for Change*, 18 GEO. IMMIGR. L.J. 567, 573–74 (2004) (pointing out that the Welfare Reform Act has not denied illegal immigrants any form of health care, it only denied them “the right” to non-emergency care and gave states discretion in allocating health care resources to illegal aliens).

13. Thomas J. Espenshade et al., *Implications of the 1996 Welfare and Immigration Reform Acts for U.S. Immigration*, 23 POPULATION & DEV. REV. 769, 769–81, 794–95 (1997).

preventive care results in lower rates of health care use among undocumented immigrants.<sup>14</sup> This may seem to be economically advantageous for the federal and state governments, but undocumented immigrants and their children end up in emergency rooms for complications that are easily and inexpensively avoidable with preventive care.<sup>15</sup>

Next, this comment will examine recent federal and state governments' actions and proposed solutions with regard to the "problem" of illegal immigrants. Undocumented immigrants play a major role in the economic prosperity of the states in which they settle by providing local businesses with a source of cheap labor, and ultimately, higher productivity. While the government cannot afford to lose the workforce made up of 11 million undocumented immigrants who pay taxes and receive few social services, it can, nonetheless, reduce the flow of illegal immigration by reinforcing the already-existing, virtually inoperative laws punishing employers who hire undocumented immigrants.

Finally, this comment will address the "problem" of undocumented immigrants by suggesting ways to reduce illegal entries while at the same time improving the lives of those who are already an integral part of this country.

## II. LEGAL BACKGROUND

### A. Regulation Affecting Undocumented Immigrants' Health Care

#### 1. The Immigration Reform Act

Just in time for the 1996 presidential election, following an effort to balance the budget, President Clinton signed into law an omnibus spending bill in September 1996.<sup>16</sup> It appropriated approximately \$400 billion in federal expenditures for the 1997 fiscal year.<sup>17</sup> The spending bill incorporated the immigration reform bill that was initially introduced separately.<sup>18</sup>

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14. Seam Park, Comment, *Substantial Barriers in Illegal Immigrant Access to Publicly-funded Health Care: Reasons and Recommendations for Change*, 18 GEO. IMMIGR. L. J. 567, 569–70 (2004).

15. *Id.* at 570.

16. Jeremy K. Sharpe, Annotation, *The Militarization of the United States.-Mexico Border, 1978-1992: Low-Intensity Conflict Doctrine Comes Home*, 29 N.Y.U. J. INT'L L. & POL. 372, 372 (1997); see Omnibus Consolidated Appropriations Act, Pub. L. No. 104–208, 110 Stat. 3009 (1997).

17. *Id.*

18. *Eleventh-Hour Agreement Folds Immigration Bill into Omnibus Spending Measure*, 73 INTERPRETER RELEASE 1281 (Sept. 30, 1996).

White House negotiators and congressional leaders reached an agreement over the weekend that virtually ensures passage of the on-again, off-again omnibus immigration reform bill (H.R. 2202). As part of that agreement, H.R. 2202, along with several

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IRIRA)<sup>19</sup> sought to substantially increase resources to prevent illegal entry across the United States-Mexico border. It provided for the hiring of an additional 1,000 Border Patrol agents over five years, authorized the construction of a fence along the border south of San Diego, and increased penalties for smuggling illegal immigrants.<sup>20</sup> Further, it gave the states' attorney generals discretion to significantly increase the number of border patrol and INS agents along the border.<sup>21</sup>

This Act also called for expanding and developing systems for tracking illegal aliens within the country. For instance, Section 632 of the Immigration Reform Law banned states from providing illegal immigrant patients with security against having their undocumented status reported to INS by medical professionals.<sup>22</sup> Further, the Act provided for the hiring of an additional 1,200 investigators for the Immigration and Naturalization Services, partly to crack down on employers hiring illegal immigrants.<sup>23</sup>

## 2. The Welfare Reform Act

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)<sup>24</sup> sought to reduce federal spending by over \$55 billion over a six year period.<sup>25</sup> It terminated the entitlement "right" of temporary support for needy families and limited federally funded pro-

other measures, has been 'folded' into a giant catchall spending measure (H.R. 4278) that would allow the 104th Congress to complete its work and adjourn. *Id.*

19. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (enacted as Division C of the Omnibus Consolidated Appropriations Act of (1996)).

20. Ryan D. Frei, Comment, Reforming U.S. Immigration Policy in an Era of Latin American Immigration: the Logic Inherent in Accommodating the Inevitable, 39 U. RICH. L. REV. 1355, 1374 (2005).

21. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

22. See Op. Tex. Att'y Gen. No. JC-0394 (2001); Thomas Gavagan Lisa Brodyaga, *Medical Care for Immigrants and Refugees*, AM. FAM. PHYSICIAN, Mar. 1, 1998, Vol. 57, No. 5 (noting that the American Academy of Family Physicians, following the passage of Proposition 187 in California, expressed its concern about the public health implications of involving health care professionals in screening illegal immigrant patients, especially with regard to infectious epidemics, tuberculosis, and prenatal care).

23. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 United States C.A. §§ 1601-1646 (2001).

24. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

25. Thomas J. Espenshade et al., *Implications of the 1996 Welfare and Immigration Reform Acts for US Immigration*, 23 POPULATION & DEV. REV. 769, 771 (1997).

grams such as food stamps, Supplemental Security Income (SSI), and Aid for Families with Dependent Children (AFDC).<sup>26</sup>

Under this legislation, undocumented immigrants are ineligible for Medicaid and other federally-funded social services,<sup>27</sup> and are only eligible for emergency medical assistance. Medicaid provides basic and emergency health care assistance to all persons who meet the need and criteria determined by states within federal guidelines.

This provision does not state a penalty for institutions that provide health care to undocumented immigrants. Nonetheless, such institutions may be sanctioned for violating a condition attached to federal funding.<sup>28</sup> An institution that provides free or discounted health care may subject itself to criminal charges for spending public money on an unauthorized purpose.<sup>29</sup> The Act also requires that all state and federal welfare agencies report any illegal immigrants who apply for benefits to the Immigration and Naturalization Service.<sup>30</sup>

### 3. The Role of States

The Welfare Reform Act gives discretion to the state legislatures to pass “affirmative” laws extending health care eligibility to undocumented immigrants.<sup>31</sup> In other words, states have the power to pass laws that allowing undocumented immigrants to receive non-emergency medical services such as prenatal care. This provision resulted in a number of controversies ranging from charges of the federal government commandeering the states’ legislative process,<sup>32</sup> to charges of violations of the

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26. See Kristalee Guerra, Comment, *The Policy and Politics of Illegal Immigration Health Care in Texas*, HOUS. J. HEALTH L. & POL’Y 113, 115 (2002) (laying out Congress’ position regarding the nexus between welfare, immigration, and United States domestic policy).

27. See generally 8 U.S.C.A. § 1612 (a)(1), (3)(2001).

28. Op. Tex. Att’y Gen. No. JC-0394 (2001).

29. *Id.*

30. See Social Security Act, 42 U.S.C.A. § 611 (1996) (“Each State to which a grant is made under section 603 of this title shall, at least 4 times annually and upon request of the Immigration and Naturalization Service, furnish the Immigration and Naturalization Service with the name and address of, and other identifying information on, any individual who the State knows is unlawfully in the United States.”).

31. See Thomas J. Espenshade et al., *Implications of the 1996 Welfare and Immigration Reform Acts for US Immigration*, 23 POPULATION & DEV. REV. 769, 772 (1997).

32. See, e.g., *State of Cal. v. United States*, 104 F.3d 1086 (9th Cir. 1997) (stating that the federal government’s conditioning of the receipt of Medicaid funds on state’s agreement to provide emergency medical care to undocumented immigrants did not constitute commandeering the state’s legislative process and therefore was not in violation of the tenth amendment).



Fourteenth Amendment Equal Protection Clause.<sup>33</sup> To this day, these provisions have survived such constitutional challenges.

In 1997, Texas extended the health care eligibility of undocumented immigrants by amending the Texas Family Code.<sup>34</sup> The law directed the Department of Protective and Regulatory Services to make available state and federal funds for child protective services to eligible children and families “without regard to the immigration status of the child or the child’s family.”<sup>35</sup>

Later, in 2001, the then Attorney General of Texas, John Cornyn, issued an opinion stating that “[n]o Texas statute adopted before or after August 22, 1996, affirmatively provides that residents of hospital districts are eligible for public benefits without regard to immigration status.”<sup>36</sup> The Attorney General’s opinion concentrated on the 1997 amendment to Texas Family Code and the amendment to Indigent Health Care and Treatment Act. The Indigent Health Care and Treatment Act indicated that hospital districts may provide free or subsidized health care to indigents whom are residents of the county.<sup>37</sup> Cornyn’s opinion stated that these Texas laws violate the relevant federal acts which allow states to provide non-emergency health care to undocumented aliens only if the states pass “affirmative” legislation to that effect. Referring to the Oxford Dictionary, the Attorney General argued that affirmative meant “by way of assertion or express declaration,”<sup>38</sup> and that the two laws did not “ex-

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33. For an argument supporting the unconstitutionality of the Welfare Reform Act, see *Fare Reform — Treatment of Legal Immigrants — Congress Authorizes States to Deny Public Benefits to Noncitizens and Excludes Legal Immigrants from Federal Aid Programs — Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Pub. L. No. 104-193, 110 Stat. 2105, 110 HARV. L. REV. 1191, 1191-96 (1997) (arguing that although Congress may directly deny public benefits to non-citizens, it cannot authorize the states to do the same). See also, *Matthews v. Diaz*, 426 U.S. 67, 79-80 (1976) (noting that the federal government can deny Medicaid coverage to legal immigrants, because Congress’ broad power over immigration and naturalization grants them authority to make rules that may distinguish between those who are citizens and those who are not, and that in determining validity of the law the Court will defer to Congress’ judgment). However, states do not have the power to make the same classifications in violation of the Equal Protection Clause unless they pass the strict scrutiny test. See e.g. *Graham v. Richardson*, 403 U.S. 365 (1971). Congress, however, “does not have the power to authorize the individual States to violate the Equal Protection Clause.” *Id.* at 382.

34. TEX. FAM. CODE ANN. § 264.004(c) (Vernon Supp. 2006).

35. Thomas Wm. Mayo, Article, *Health Care Law*, 55 SMU L. REV. 1113, 1142-43 (2002).

36. Op. Tex. Att’y Gen. No. JC-0394 (2001).

37. TEX. HEALTH & SAFETY CODE ANN. §§ 61.001-.008 (Vernon 2006).

38. Thomas Wm. Mayo, *Health Care Law*, 55 SMU L. REV. 1113, 1142-43 (2002) (“Cornyn further stated that there is no indication that the Legislature intended to provide the state or local public benefits for which undocumented aliens are ineligible under PRWORA.”).

pressly state the legislature's intent that undocumented aliens are to be eligible for certain public benefits."<sup>39</sup>

Cornyn's opinion was issued in response to debates over the provision of non-emergency medical care to undocumented residents of Harris County, Texas.<sup>40</sup> It went on to say that Texas had never passed legislation that expressly allows state or federal funds to be spent on providing health care for illegal immigrants. Therefore, no public hospital in Texas may use federal Medicaid funds to offer non-emergency medical care to undocumented immigrants.<sup>41</sup>

### III. LEGAL ANALYSIS

*Limits on alien access to social welfare programs that are contained in the 1996 welfare and immigration reform acts seem motivated not so much by a guiding philosophy of what it means to be a member of American society as by a desire to shrink the size of the federal government and to produce a balanced budget.*<sup>42</sup>

#### A. *The Political Context of the 1996 Reform Acts*

The Illegal Immigration Reform and Immigrant Responsibility Act was passed at a time when widespread national debate over illegal immigration had reached its peak. In 1996, a presidential election year, both Democrats and Republicans were trying to swing the local and regional electorate's vote in their favor.<sup>43</sup>

The welfare component of the fight against illegal immigration was first introduced in 1994 when California voters passed Proposition 187 with

39. See Op. Tex. Att'y Gen. No. JC-0394 (2001) (highlighting the confusion that ensues when trying to define the Legislature's intent).

40. See Alexander Vivero Neill, Comment, *Human Rights Don't Stop at the Border: Why Texas Should Provide Preventative Health Care for Undocumented Immigrants*, 4 SCHOLAR 405, 406 (2002) (describing the historical roots of undocumented immigration and preventative healthcare).

41. See Thomas Wm. Mayo, Article, *Health Care Law*, 55 SMU L. REV. 1113, 1142-43 (2002) (demonstrating that no Texas law has been enacted to provide public funds for the healthcare of undocumented aliens).

42. Gregory A. Huber & Thomas J. Espenshade, *Neo-Isolationism, Balanced-Budget Conservatism, and the Fiscal Impacts of Immigrants*, 31 INT'L MIGRATION REV. 1031, 1031 (1997) (pointing to Congress's targeting of immigrants in its attempt to balance the budget).

43. See Dorothee Schneider, "I Know All About Emma Lazarus": *Nationalism and Its Contradictions in Congressional Rhetoric of Immigration Restriction*, 13 CULTURAL ANTHROPOLOGY 82, 82 (1998) ("The 1996 debate that led to the passage of the Illegal Reform and Immigration Responsibility Act reflected the specific circumstances of that year . . .").

fifty-nine percent of the vote.<sup>44</sup> Proposition 187 sought to prevent illegal aliens in the United States from receiving state-funded education, welfare benefits, and health care services in State of California.<sup>45</sup> A November 1994 *Los Angeles Times* exit poll showed that, in response to the question: “which issues were most important to you in deciding how you would vote today[,]” thirty-nine percent of all voters surveyed selected “illegal immigration.”<sup>46</sup>

Later, a district court judge overruled major portions of Proposition 187 on grounds of preemption.<sup>47</sup> The court held that state governments were without power to limit the rights of those immigrants deemed qualified for health care and public benefits under PRWORA.<sup>48</sup>

## B. *Current State of Illegal Immigrant Health Care*

### 1. What Is Available?

Federal law requires hospitals to provide emergency care to all critically ill or injured patients who meet the need criteria, regardless of their immigration status. Section 1396b(v)(3) of The Emergency Medical Treatment and Active Labor Act (EMTALA) provides:

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44. See Enrico A. Marcelli & David M. Heer, *The Unauthorized Mexican Immigrant Population and Welfare in Los Angeles County: A Comparative Statistical Analysis*, 41 Soc. PERSP. 279, 280 (establishing that in the 1990's, illegal immigration from Mexico was one of the biggest political issues in California).

45. See *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1300 (9th Cir. 1997) (“[S]ections 5 and 6 [of Proposition 187] preclude illegal aliens from receiving public social services or publicly funded health care; and sections 7 and 8 exclude illegal aliens from public elementary, secondary, and post-secondary schools in the State.”).

46. See Enrico A. Marcelli & David M. Heer, *The Unauthorized Mexican Immigrant Population and Welfare in Los Angeles County: A Comparative Statistical Analysis*, 41 Soc. PERSP. 279, 280 (discussing the results of an exit poll showing illegal immigration as a top concern among those polled after voting in the election that included Proposition 187).

47. See *League of United Latin Am. Citizens v. Wilson*, 997 F.Supp. 1244, 1261 (C.D. Cal. 1997) (holding that the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) preempted portions of Proposition 187 because it required denial of social benefits and health services to certain non-citizen aliens that are qualified for such benefits under PRWORA).

48. See *Aliessa v. Novello*, 754 N.E.2d 1085, 1093 n.12 (N.Y. 2001) (holding unconstitutional a New York state statute that denied Medicaid funds to certain legal and “qualified” residents); see also Marjorie A. Shields, Annotation, *Validity, Construction, and Application of State Statutes Limiting or Barring Public Health Care to Indigent Aliens*, 113 A.L.R. 5th 95, 101 (2003) (noting that by enacting PRWORA, which demanded denial of federal, state, and local health care, welfare and post-secondary education grants to aliens who were not “qualified” – i.e. illegal aliens or immigrants living and working in the United States for fewer than ten years, Congress took away the states’ power to regulate allocation of public benefits to those immigrants who were deemed qualified under PRWORA).

“emergency medical condition” means a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including extreme pain) such that the absence of immediate medical attention could reasonably be expected to result in 1) placing the patient’s health in serious jeopardy, 2) serious impairment to bodily functions, or 3) serious dysfunction of any bodily organ or part.<sup>49</sup>

The EMTALA requires every emergency room doctor to treat any person who enters with an emergency.<sup>50</sup> These emergency conditions may include cardiac arrest, herniated lumbar disc, drug or alcohol overdose, gunshot wound, automobile trauma or other communicable disease, mental problem, or personality disorder.<sup>51</sup> However, deciding whether a patient is suffering from an emergency condition is, to a great degree, a discretionary call to be made initially by medical staff and subsequently by reviewing courts. This creates much concern for physicians and hospitals. They must make such calls keeping in mind that all their expenses may go unpaid at an administrative agency’s or a judge’s discretion. For instance, a North Carolina court recently held that an undocumented immigrant’s acute lymphocytic leukemia was not an “emergency medical condition[.]”<sup>52</sup> Therefore, the state was not obligated to provide Medi-

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49. The Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1396b(v)(3).

50. Madeleine Perner Cosman, *Illegal Aliens and American Medicine*, 10 J. AM. PHYSICIANS & SURGEONS 6, 6 (2005).

51. Madeleine Perner Cosman, *Illegal Aliens and American Medicine*, 10 J. AM. PHYSICIANS & SURGEONS 6, 6 (2005).

52. *See Diaz v. Div. of Soc. Serv. & Div. of Med. Assistance*, 628 S.E.2d 1, 5 (N.C. 2006) (stating that alien’s acute leukemia did not constitute emergency because at the time the alien was admitted to the hospital and during treatments his condition was stable). The court stated that even though the alien would have eventually regressed into a state of an “emergency medical condition” had he not received treatment, this was not a factor in determining an emergency medical condition. *Id. Accord Dominguez v. Super. Ct.*, 276 Cal. Rptr. 564 (Cal. Ct. App. 1990) (holding that a bone marrow transplant for an illegal alien whose leukemia was in remission did not constitute “emergency” treatment, notwithstanding the physician’s declaration that if alien patient had not been treated his cancer cells would have multiplied and resulted in death in two to three years). *Contra Szewczyk v. Dep. of Soc. Serv.*, 881 A.2d 259, 270 (Conn. 2005) (“[Social Security Act] entitling hospitals to Medicaid reimbursement for treating “emergency medical condition” of undocumented alien does not focus solely on the condition of the patient at one instant in time, but instead, takes a forward looking view, asking whether the absence of immediate medical attention could reasonably be expected to result in one of the three adverse consequences listed in the statute; statute thus considers both the patient’s current condition as presently manifested by acute symptoms, and how that current condition may affect the health of the patient in the days to come.”). *See generally Scottsdale Healthcare, Inc. v. Ariz. Health Care Cost Containment Sys. Admin.*, 45 P.3d 688 (Ariz. Ct. App. 1 2002) (holding that a hospital was only entitled to government funding for services provided to a

caid reimbursement to the hospital for chemotherapy treatments provided to the undocumented immigrant.

## 2. Arguments Against Providing Health Care to Illegal Aliens

### a. The Burden on the Hospitals

Hospitals are required to provide emergency medical care to all persons regardless of their immigration status in order to qualify for Medicaid funding. The Census Bureau data shows that thirty-two percent of Hispanics, twenty percent of African Americans, and eleven percent of non-Hispanic whites are uninsured.<sup>53</sup> The percentage of uninsured, non-citizen Hispanics is fifty-five percent. Because undocumented immigrants tend to be poor and lack private or employment insurance, they are more likely to use emergency rooms as their principal source of medical care.<sup>54</sup> It has been estimated that hospitals are collectively spending about \$2 billion a year in unpaid medical expenses to treat undocumented immigrants.<sup>55</sup> Between 1993 and 2003, sixty California hospitals were forced to close, and many scaled back their services, due to outstanding bills for services rendered.<sup>56</sup>

Hospitals receive federal funds to stabilize the patients that enter the emergency rooms. But, cases in which patients require extensive medical care after stabilization are especially problematic. Illegal immigrants, often uninsured and ineligible for Medicaid, cannot afford such treatments, and no state medical center will accept them without insurance of Medicaid coverage. Hospitals end up caring for, and absorbing the expenses for indigent undocumented immigrant patients until they find a way to discharge them.<sup>57</sup> In doing so, some hospitals go as far as flying or

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partially quadriplegic illegal alien in the acute care unit and not those services provided after the patient was transferred to the rehabilitation unit).

53. Robert Pear, *United States Is Linking Status of Aliens to Hospital Aid*, N.Y. TIMES, Aug. 10, 2004, at A1.

54. Dana Canedy, *Hospitals Feeling Strain From Illegal Immigrants*, N.Y. TIMES, Aug. 22, 2002, at 116.

55. *Id.*

56. Madeleine Perner Cosman, *Illegal Aliens and American Medicine*, 10 J. AM. PHYSICIANS & SURGEONS 6, 6 (2005) (suggesting that one of the country's best emergency medical response organizations, Los Angeles County Trauma Care Network, was mostly dismantled as a result of EMTALA and the burden illegal immigrants place on it).

57. See Dana Canedy, *Hospitals Feeling Strain From Illegal Immigrants*, N.Y. TIMES, Aug. 22, 2002, at 116 (reporting that "hospitals insist that they are not turning away critically injured people, but they are becoming more aggressive in seeking ways to release them") Some hospitals go as far as seeking court permits to discharge uninsured patients. *Id.*

driving the patients to their countries of origin.<sup>58</sup> Further, the existence of untreated immigrants poses a significant risk to the public health. “According to the federal Centers for Disease Control and Prevention, [in 1993] fifty–three percent of the 14,871 national cases” of tuberculosis were detected among the foreign-born population.<sup>59</sup>

In 2003, the Senate Finance Committee approved a bill that allocated \$1 billion over five years to hospital services rendered to illegal aliens. The largest allocations in the 2005 fiscal year went to California, which received \$70.8 million; Texas, \$46 million; Arizona, \$45 million; New York, \$12.3 million; Illinois, \$10.3 million; Florida, \$8.7 million; and New Mexico, \$5.1 million.<sup>60</sup>

b. “Anchor Babies”

Annually, between 300,000 and 350,000 children born to illegal immigrants qualify for citizenship under the Fourteenth Amendment of the United States Constitution:<sup>61</sup> “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside.”<sup>62</sup> Survey results show that “1.7% of the total population and 2.6% of the Latino population” in the United States had a childrearing-related hospitalization in 1997. Rates among undocumented immigrants in the survey sites were higher; from 3.4% in Fresno to 4.6% in El Paso.<sup>63</sup> In 1994, almost half of all married undocumented Latinos had a child who was a United States citizen.<sup>64</sup>

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58. *Id.* (noting that a hospital flew an illegal immigrant, who had stayed in the hospital for seventeen months, to his relatives and a doctor who had agreed to accept him in Jamaica, while being accompanied by a hospital nurse).

59. Robert Pear, *United States Is Linking Status of Aliens to Hospital Aid*, N.Y. TIMES, Aug. 10, 2004, at A1 (discussing the diseases that are most prevalent within the illegal immigrant communities).

60. *Id.* at A11 (identifying which states were given federal aid to relieve the economic burden that illegal immigrants place on local hospitals).

61. Madeleine Pelner Cosman, *Illegal Aliens and American Medicine*, 10 J. AM. PHYSICIANS & SURGEONS 6, 7 (2005) (explaining the incentive behind illegal immigrants giving birth within the United States).

62. U.S. CONST. AMEND. XIV, § 1.

63. Marc L. Berk et al., *Health Care Use Among Undocumented Latino Immigrants: Is Free Health Care the Main Reason Why Latinos Come to the United States?*, 19 HEALTH AFF. 51, 57 (2000) (emphasizing that undocumented immigrant birth rates are higher in certain cities).

64. Madeleine Pelner Cosman, *Illegal Aliens and American Medicine*, 10 J. AM. PHYSICIANS & SURGEONS 6, 7 (2005) (discussing the fact that many immigrant families have children that are American citizens).

Motivated by hopes of attaining eventual permanent residency, illegal aliens tend to have high rates of childbirth within the United States.<sup>65</sup> Children born to illegal aliens, as citizens, instantly qualify for welfare benefits including Medicaid, Supplemental Security Income (SSI), and Disability Income. In 1995, approximately \$1.1 billion in food stamps and Aid for Families with Dependent Children (AFDC) was distributed to households containing at least one parent with illegal immigrant status for the benefit of their citizen child. Eighty-five percent of these households were located in one of four states: California, Texas, Arizona and New York. The study also indicated that illegal immigrants received SSI and Housing and Urban Development (HUD) benefits for their citizen children, however, the available data was not sufficient to generate an estimated amount.<sup>66</sup>

### 3. Adverse Effects of Limiting Health Care to Illegal Immigrants

Excluding undocumented immigrants from receiving government-funded health care services is unlikely to reduce the level of immigration and very likely to affect the well-being of the children who are United States citizens living in immigrant households. United States-born children from immigrant families are less likely to receive available health care due to their parent's illegal status.<sup>67</sup> This will have long-term, adverse effects on the health of United States citizens, a result contrary to state and federal objectives.<sup>68</sup>

In addition, providing undocumented immigrants with preventive care makes economic sense. As mentioned earlier, undocumented immigrants are more likely to use the emergency rooms as their principal source of routine and critical medical care due to their ineligibility for Medicaid and preventive care. As a result, undocumented immigrants and their

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65. Marc L. Berk et al., *Health Care Use Among Undocumented Latino Immigrants: Is Free Health Care the Main Reason Why Latinos Come to the United States?*, 19 HEALTH AFF. 51, 57 (2000) (comparing undocumented worker birth rates with citizen birth rates).

66. UNITED STATES GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEE, ILLEGAL ALIENS: EXTENT OF WELFARE BENEFITS RECEIVED ON BEHALF OF UNITED STATES CITIZEN CHILDREN, 1 at 3 (1997), available at <http://www.gao.gov/archive/1998/he98030.pdf> (discussing the federal benefits that the children of undocumented parents enjoy when they attain citizenship).

67. See, e.g., Leo R. Chavez et al., *Undocumented Latin American Immigrants and United States Health Services: An Approach to a Political Economy of Utilization*, 6 MED. ANTHROPOLOGY Q. 6, 7 (1992) (mentioning the case of Sandra Navarrete, the child of an undocumented Mexican couple who died of chicken pox because her parents did not seek medical care until it was too late).

68. Marc L. Berk et al., *Health Care Use Among Undocumented Latino Immigrants: Is Free Health Care the Main Reason Why Latinos Come to the United States ?*, 19 HEALTH AFF. 51, 57 (2000).

children end up in emergency rooms for complications that are easily and inexpensively preventable.

Finally, it is suspected that undocumented immigrant health care costs the state and federal governments nearly the same amount of money it would cost to provide undocumented immigrants with Medicaid coverage. Undocumented immigrants access health care not only through emergency rooms, but also through free medical care provided to the needy by charitable, religious, or healthcare organizations. For example, there are mobile clinics set up in air-conditioned trailers traveling along the United States-Mexico border in which medical staff perform routine medical check-ups and immunization without inquiring about the immigration status of their patients.<sup>69</sup> For example, of Texas Health Science Center has three such mobile clinics, the latest of which was purchased last year for \$238,000.<sup>70</sup> The new clinic replaced an old one which boasted 30,000 patient visits over eleven years,<sup>71</sup> and the numbers are constantly growing. Only last year, the University of Texas Health Science Center at Houston mobile clinic provided routine care to over 4,552 patients, and immunization to over 2,287 patients.<sup>72</sup> Mobile clinics provide health care primarily to uninsured individuals in border cities.<sup>73</sup> They are often operated by registered nurses that are connected to University of Texas physicians through telemedicine devices, which allow doctors who are miles away to give patients prescriptions. There are also other supporting staff and rotation medical students assisting the patients in the mobile clinics.<sup>74</sup> By providing routine and inexpensive procedures

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69. Robert Davis, *Health Care, Without Question*, USA TODAY, Sept. 6, 2001, available at <http://www.usatoday.com/news/health/2001-09-06-mobile-health-care-usat.htm>.

70. The University of Texas Health Science Center at Houston, UT Health Science Center at Houston Unveils New Mobile Clinic Designed to Serve Hidalgo and Cameron County Patients, <http://www.uthouston.edu/Media/newsreleases/nr2006/mobileclinic.html> (last visited Feb. 17, 2007).

71. *Id.*

72. The University of Texas Health Science Center at Houston, THE UTHSC-H MEDICAL MOBILE CLINIC, [http://www.uth.tmc.edu/ceo/mobile\\_medical.htm](http://www.uth.tmc.edu/ceo/mobile_medical.htm) (last visited Feb. 17, 2007).

73. See The University of Texas Health Science Center at Houston, UT Health Science Center at Houston Unveils New Mobile Clinic Designed to Serve Hidalgo and Cameron County Patients, <http://www.uthouston.edu/Media/newsreleases/nr2006/mobileclinic.html> (last visited Feb. 17, 2007) (referring to the United States Census Bureau's findings that one out of every three residents of the cities of Laredo, Brownsville, and El Paso are uninsured).

74. See The University of Texas Health Science Center at Houston, THE UTHSC-H MEDICAL MOBILE CLINIC, [HTTP://WWW.UTH.TMC.EDU/CEO/MOBILE\\_MEDICAL.HTM](http://www.uth.tmc.edu/ceo/mobile_medical.htm) (LAST VISITED FEB. 17, 2007).

Fourth year medical students from UTHSC-H have one-month clinical rotations on the mobile clinic. In addition, third year medical students from UTHSC-San Antonio



such as glucose, cholesterol, anemia, blood pressure and HIV screenings, and by identifying and educating at-risk patients, these clinics reduce, though on a small-scale, the use of costly emergency room procedures.<sup>75</sup> Other universities in cities with high illegal immigrant populations have adopted similar mobile clinic projects.<sup>76</sup>

#### 4. Limiting Health Care as a Disincentive to Illegal Immigration

It is a well-established fact that undocumented immigrants migrate to the United States for jobs.<sup>77</sup> Better health care is not a factor encouraging such migrations. Survey results from El Paso, Houston, Fresno, and Los Angeles show that 0.0%, 0.0%, 0.4% and 0.6% of the participants, respectively, selected health care as a reason for migration.<sup>78</sup> Generally, ambulatory health care use among undocumented Latinos is low compared to that of all Latinos and all persons nationally, and their rates of hospitalization are comparable with the exception of hospitalization for childbirth.<sup>79</sup> Other studies also show that even legal Latino immigrants are less likely to use available health care than the general population.<sup>80</sup> The reasons for underutilization of medical care among Hispanic immigrants are “financial, educational, cultural, and language barriers that affect their health status, early diagnosis, and adequate care.”<sup>81</sup> These findings reaffirm the idea that access to free health care plays little role in encouraging illegal immigration into the United States. It also highlights

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have had clinical rotations on the mobile clinic. Over 30 UT-Pan American nursing students per year and over 30 UT-Pan American physician assistant students have clinical experiences on the mobile clinic. *Id.*

75. *See id.* (“The mobile clinic services keep patients out of critical situations such as the hospital’s emergency room”).

76. *See, e.g.,* UCLA Mobile Clinic, <http://www.mcp.ucla.edu> (last visited Feb. 17, 2007) (discussing the UCLA Mobile Clinic Project).

77. *See* Marc L. Berk et al., *Health Care Use Among Undocumented Latino Immigrants: Is Free Health Care the Main Reason Why Latinos Come to the United States?*, 19 HEALTH AFF. 51, 57 (2000).

78. *Id.* at 56–8

79. *Id.* at 57.

80. *See, e.g.,* Pedro L. Delgado et al., *Depression and Access to Treatment Among United States Hispanics: Review of the Literature and Recommendations for Policy and Research*, 4 FOCUS 38, (2006) (mentioning the unique barriers that affect access to mental health care among *United States* Hispanics). United States Hispanics utilize mental health care untimely and at lower rates. *Id.*; Leo R. Chavez et al., *Beliefs Matter: Cultural Beliefs and the Use of Cervical Cancer-Screening Tests*, 103 AM. ANTHROPOLOGIST 1114, 1126 (2001) (showing that Latina immigrants’ health-seeking behavior with regard to pap exams is influenced by their cultural beliefs and by structural factors such as medical insurance, language, acculturation, and education).

81. Ximena Urrutia-Rojas et al., *Disparities in Access to Health Care and Health Status Between Documented and Undocumented Mexican Immigrants in North Texas*, 4 HISPANIC HEALTH CARE INT’L 5, 5 (2006).

the importance of educating and encouraging Latino immigrants, legal or otherwise, to utilize preventative care in order to protect the long-term interests of states' residents and health care systems.

The goals of the 1996 welfare and immigration reform acts were to 1) discourage illegal entries into the country,<sup>82</sup> and 2) prevent illegal immigrants from receiving what Congress determined was millions of dollars in federal and state benefits and social services. At the same time there were less visible, but nevertheless strong, interest groups in Congress working worked to ensure that the United States remains competitive in the expanding of global markets by way of permeable borders and relatively low wages.<sup>83</sup> The 1996 welfare and immigration reforms emerged to reconcile diverging national and transnational interests by substantially reducing the government services available to undocumented immigrants, while making little substantive changes to the regulation of illegal immigration. A clear example of this is the reluctance of Congress to adopt tighter control for employers with regard to employment of illegal immigrants.<sup>84</sup> In fact, in 2004, there were only three notices of intentions to fine for hiring unauthorized foreign employees issued.<sup>85</sup>

Despite the fact that less than half of all illegal entrants to the United States entered the country illegally by crossing southern borders, the congressional resolution concentrated heavily on border fortification measures and on reducing the cost of containing undesired immigrants.<sup>86</sup>

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82. 8 United States C. § 1601(2)(B) (2000) (“[I]t continues to be the immigration policy of the United States that . . . the availability of public benefits not constitute an incentive for immigration to the United States ”); see also MICHAEL E. FIX & JEFFREY S. PASSEL, *THE SCOPE AND IMPACT OF WELFARE REFORM’S IMMIGRANT PROVISIONS* at 3 (The Urban Inst. 2002), available at [http://www.urban.org/UploadedPDF/410412\\_discussion02-03.pdf](http://www.urban.org/UploadedPDF/410412_discussion02-03.pdf) (“[A]t the time of welfare reform’s passage, some researchers contended that the availability of public benefits was increasingly influencing immigrants’ migration decisions . . . ”).

83. Dorothee Schneider, “*I Know All About Emma Lazarus*”: *Nationalism and Its Contradictions in Congressional Rhetoric of Immigration Restriction*, 13 *CULTURAL ANTHROPOLOGY* 82, 82 (1998) (describing the influence of global economic competition and free markets on the immigration debate).

84. See *id.* at 87 (1998) (noting the failure of Congress to enact restrictions on employers of illegal aliens). To read a congressional debate on the issue of illegal immigration, e.g., *How Illegal Immigration Impacts Constituencies: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the Comm. on the Judiciary H. Rep., 109th Cong., 1st Sess. (2005)*, available at <http://judiciary.house.gov/media/pdfs/printers/109th/24507.pdf>.

85. Jeffrey L. Ehrenpreis, Note, *Controlling Our Borders Through Enhanced Employer Sanctions*, 79 *S. CAL. L. REV.* 1203, 1208 (2006) (describing the lack of enforcement of the Immigration Reform and Control Act of 1986).

86. Dorothee Schneider, “*I Know All About Emma Lazarus*”: *Nationalism and Its Contradictions in Congressional Rhetoric of Immigration Restriction*, 13 *CULTURAL AN-*

While the Illegal Immigration Reform Act almost doubled the resources available for border patrol and Immigration and Naturalization Service agents, proposals for employment verification, labor certifications, and forge-proof Social Security cards were voted down.<sup>87</sup> It is, therefore, not surprising that since 1996, the number of illegal immigrants in the United States has more than doubled.<sup>88</sup>

Recently, an Arizona court held that an illegal immigrant was ineligible for worker's compensation benefits.<sup>89</sup> The court reasoned that an illegal immigrant is not an "employee" under Arizona employment law.<sup>90</sup> This means, if a work-related injury leaves an illegal immigrant paralyzed, he is ineligible for any disability benefits.<sup>91</sup> Once again, it seems that the law, in this case Arizona Revised Statutes § 23-901(6)(b), in a rather cynical way, "does not focus on whether the *employer* is legally permitted to hire the immigrant, but whether the *immigrant* is legally permitted to work for hire."<sup>92</sup> The resulting shield from liability arguably provides employers incentives for hiring illegal immigrants.

The 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) did not effectively reduce illegal immigration. It was ultimately designed in response to voter concerns to increase the quality of legal and illegal immigrants.<sup>93</sup> Ironically, the 1996 immigration

THROPOLOGY 82, 93 (1998) (noting that Congressional action concerning illegal immigration focused mostly on border reinforcement).

87. *See id.* (noting that Congress, while seemingly concerned with combating illegal immigration, failed to enact certain measures that could curtail illegal immigration).

88. Compare Roger Lowenstein, *The Immigration Equation*, N.Y. TIMES, July 9, 2006, at 36 (estimating that illegal immigrants numbered 11.5 million in 2006), with Dana Canedy, *Hospitals Feeling Strain From Illegal Immigrants*, N.Y. TIMES, Aug. 22, 2002, at 116 (stating that there were 5 million illegal immigrants in the United States in 1996).

89. *Gamez v. Indus. Comm'n of Arizona*, 141 P.3d 794, 794 (Ariz. Ct. App. 2006) (affirming an administrative law judge's ruling that plaintiff had no permanent injury and was medically stationary, thus disqualifying him from receiving worker's compensation benefits).

90. *Id.* at 796 (referring to ARIZ. REV. STAT. § 23-901(6)(b)). The relevant section of the Act defines "employee" as:

Every person in the service of any employer subject to this chapter, including aliens and minors legally or illegally permitted to work for hire, but not including a person whose employment is both: (i) [c]asual, [and] (ii) [n]ot in the usual course of the trade, business or occupation of the employer. *Id.* at 797-98.

91. For additional reading see Jason Schumann, Note, *Working in the Shadows: Illegal Aliens' Entitlement to State Workers' Compensation*, 89 IOWA L. REV. 709, 732-37 (2004) (stating that providing employment compensation coverage to illegal immigrants is "in harmony with federal immigration policy as expressed in the United States Supreme Court's decisions regarding federal labor laws").

92. *Gamez v. Indus. Comm'n of Arizona*, 141 P.3d 794, 802 (Ariz. App. Div. 1, 2006).

93. MICHAEL E. FIX & JEFFREY S. PASSEL, THE SCOPE AND IMPACT OF WELFARE REFORM'S IMMIGRANT PROVISIONS, URBAN INST. 3, (2002), available at <http://>

acts and welfare reform acts had more of a deterring effect on *legal* rather than *illegal* immigration.<sup>94</sup> The acts make legal immigrants, refugees, and asylum-seekers ineligible for food stamps and Supplemental Security Income (SSI), unless they have worked and paid taxes in the United States for at least ten years.<sup>95</sup> A comprehensive study of the impact of the 1996 reform acts, conducted by the Urban Institute, shows that the public benefit usage among legal immigrants substantially declined from 1996 to 1999. Fulfillment of PRWORA's premise that "[s]elf-sufficiency has been a basic principle of United States immigration law . . ." <sup>96</sup> meant that, in 1999, half of immigrant families in the United States lived in poverty.<sup>97</sup>

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[www.urban.org/UploadedPDF/410412\\_discussion02-03.pdf](http://www.urban.org/UploadedPDF/410412_discussion02-03.pdf) (referring to the so-called "welfare magnet" that was perceived by the public to attract immigrants with lower education and income and higher likelihood of using benefits). In the 1970's and 1980's there was a shift in the source countries of immigrants. While in the 1960's 46% of immigrants arrived from Europe, in the 1980's, only 13% of immigrants were from European countries. *Id.* Robert J. LaLonde & Robert H. Topel, *Immigrants in the American Labor Market: Quality, Assimilation and Distributional Effects*, 81 AM. ECON. REV. 297, 297 (1991). Non-European legal or illegal immigrants tend to have lower marketable skills and lower wages than their European counterparts; however they tend to assimilate more rapidly than immigrant groups who start with higher initial wages. *Id.* See also George Borjas, *Assimilation, Changes in Cohort Quality and the Earnings of Immigrants*, 3 J. LAB. ECON. 463, 463-65 (1985). In the long-run (approximately 10 years), these immigrants are found to reach the same earning potential as natives within their ethnic groups, thereby offsetting the initial earning disadvantage. Robert J. LaLonde & Robert H. Topel, *Immigrants in the American Labor Market: Quality, Assimilation and Distributional Effects*, 81 AM. ECON. REV. 297, 298-300 (1991). This suggests that the so-called "decline in immigrant quality" will not have a serious long-term impact on the United States labor market. *Id.* at 301-02. See also Gregory A. Huber & Thomas J. Espenshade, *Neo-Isolationism, Balanced-Budget Conservatism, and the Fiscal Impacts of Immigrants*, 31 INT'L MIGRATION REV. 1031 (1997) (stating that the isolationist and anti-immigrant attitude of native Americans in recent decades is directly related to unemployment rate and other economic factors that together with government's fiscal conservatism has led to what the author calls a "fiscal politics of immigration").

94. Thomas J. Espenshade et al., *Implications of 1996 Welfare and Immigration Reform Acts for U.S. Immigration*, 23 POPULATION & DEV. REV. 769, 770 (1997).

95. Title IV denies new legal immigrants federal means-tested benefits for five years. See Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, § 403(a), 110 Stat. 2105, 2265 (1996). After five years, those new immigrants who have sponsors should include the income of their sponsors if they wish to apply for federal means-tested benefits. See *id.* § 421. This requirement continues until the immigrant becomes a citizen or has worked and paid taxes in the United States for at least ten years. See *id.*

96. 8 United States C. § 1601(1) (1996) (self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes).

97. MICHAEL E. FIX & JEFFREY S. PASSEL, *THE SCOPE AND IMPACT OF WELFARE REFORM'S IMMIGRANT PROVISIONS*, URBAN INST. 2 (2002) available at [http://www.urban.org/UploadedPDF/410412\\_discussion02-03.pdf](http://www.urban.org/UploadedPDF/410412_discussion02-03.pdf) (stating that between 1996 and 1999, Temporary Assistance for Needy Families (TANF) benefits, food stamps, SSI, and

By 1999, low-income legal immigrants with children had lower usage rates of Temporary Assistance for Needy Families (TANF) and food stamps than other low-income citizens.<sup>98</sup> Medicaid usage rates, however, remained similar between citizens and legal immigrants.<sup>99</sup>

Accurate, comprehensive, statistical data on undocumented immigrants and their costs and benefits to the society are sparse and inadequate. This is due in part to the difficulty of distinguishing between legal and illegal immigrants in administrative and census records.<sup>100</sup> For this reason, and as a result of methodological differences in studies that have been conducted, it is difficult to reach any definitive conclusions with respect to the overall fiscal impact of illegal immigration on the United States economy.<sup>101</sup>

Contrary to popular belief, undocumented immigrants actually contribute to the United States Treasury by paying Social Security and federal income taxes withheld from their paychecks (using false Social Security Numbers).<sup>102</sup> Every year, the Social Security Administration receives substantial amounts of W-2 earning reports with false or incorrect Social Security Numbers, worth billions of dollars.<sup>103</sup> Since 2000, unclaimed Social Security tax revenue and Medicaid taxes paid by undocumented immigrants respectively generated about \$7 billion and \$1.5 billion.<sup>104</sup> A substantial portion of this revenue may belong to illegal immigrants who

Medicaid usage among non-citizens declined by sixty, forty-eight, thirty-two, and fifteen percent, respectively).

98. *Id.* at 1–2 (reporting how welfare reform “set out a comprehensive scheme for determining immigrant eligibility for a wide range of social benefits that are provided by governments at all levels”).

99. *Id.* at 2 (suggesting that this may be the result of policies providing health insurance coverage to children of immigrants).

100. Gregory A. Huber & Thomas J. Espenshade, *Neo-Isolationism, Balanced-Budget Conservatism, and the Fiscal Impacts of Immigrants*, 31 INT’L MIGRATION REV. 1031, 1032 (1997) (noting that economists have not been overly concerned with tracking the impact that immigrants have on the American economy).

101. *See id.* (naming some of the methodological and conceptual differences among the studies completed on the fiscal impact of immigration that make it difficult to come to a conclusive answer for that question).

102. Roger Lowenstein, *The Immigration Equation*, N.Y. TIMES, July 9, 2006, at 6 (indicating that because undocumented immigrants tend to be poor, they contribute less than the average worker). This article explains that the average income of undocumented immigrants are vastly lower than average income of other immigrants and of native-born persons: native-born workers: \$45,400; all immigrants: \$37,000; Mexican immigrants: \$22,300. *Id.*

103. Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security With Billions*, N.Y. TIMES, April 5, 2005, at A1 (expounding on the conundrum of illegal immigrants paying into a system from which they will never receive benefits).

104. *Id.*

are unable to claim their Social Security funds.<sup>105</sup> Undocumented immigrants also support local school districts by paying real estate taxes through home ownership or as renters.<sup>106</sup> This is the case, even while it is estimated that only three percent of immigrants receive food stamps.<sup>107</sup>

Experts generally admit that illegal immigration has a mixed economic impact.<sup>108</sup> While “employers, middle-class consumers, and some native workers” may benefit from it, other low-income workers, “whose jobs are taken or whose wages are lowered,” suffer from it.<sup>109</sup> Some economic theorists, however, argue that most of the wage and job losses are “sustained by previous immigrants because immigrants compete most directly with one another.”<sup>110</sup>

Some researchers maintain that “when all levels of government [are] considered together, immigrants generate significantly more in taxes paid than they cost in services received.”<sup>111</sup> It has been estimated that immigrants increase local and state taxes by an insignificant amount in most states, but by \$1,100 per household per year in the State of California,<sup>112</sup> which is home to the highest population of legal and undocumented immigrants.<sup>113</sup> Illegal immigrants may be a burden on hospitals and jails; however, it should be noted that poor legal residents, as well as those who

105. *Id.*

106. Roger Lowenstein, *The Immigration Equation*, N.Y. TIMES, July 9, 2006, at 6, (differentiating between immigrants’ indirect impact as renters and direct impact as homeowners on local school districts).

107. *Id.* (dismissing ignorant beliefs that illegal immigrants take advantage of public services).

108. *Immigrants: The Problems They Pose to United States and the Contributions They Make Are Explored*, 14 FAM. PLANNING PERSP. 329, 330 (1982).

109. *Id.* (adding that experts continue to disagree over illegal immigration’s impact on the United States economy).

110. Roger Lowenstein, *The Immigration Equation*, N.Y. TIMES, July 9, 2006, § 6, at 36 (explaining that immigrant workers act as complements, rather than substitutes, to native skilled workers, producing net gains in demand and wages for native skilled workers).

111. Gregory A. Huber & Thomas J. Espenshade, *Neo-Isolationism, Balance-Budget Conservatism, and the Fiscal Impacts of Immigrants*, 31 INT’L MIGRATION REV. 1031, 1033 (1997) (stating that immigrants seem to be a fiscal asset at the federal level and a fiscal burden at the local level, while at the state level their contributions more or less offset their cost to the state).

112. Roger Lowenstein, *The Immigration Equation*, N.Y. TIMES, July 9, 2006, at 6, (stipulating that undocumented workers do bear some costs on society).

113. MICHAEL HOEFER ET AL., DEP’T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2005, 6–7 (2006) (showing that California, with an estimated 2.8 million unauthorized immigrant population, has the highest population of illegal immigrants in the United States). Texas follows California as the state with the second highest population of unauthorized immigrants: an estimated 1.4 million. *Id.*

are native born, also impose a burden on public benefits and health care.<sup>114</sup>

Finally, one can argue that the arrival of low-skilled illegal immigrants from developing countries, works to balance the labor force in a country that accepts millions of highly-skilled legal immigrants and non-immigrant visa holders every year, some of which come from the same developing countries.<sup>115</sup> Every time an immigrant enters the United States workforce, the country gains a working, producing, and consuming member without having invested any money in raising, educating, or caring for that individual.

### C. *Recent Developments*

Solutions to the problem of illegal immigration include fencing off those who may want to enter illegally and deporting those who already have; designing a seasonal worker scheme that would regulate border crossing and employment aspects of those aliens desiring employment in the United States; and/or assisting the development of the Mexican labor market so that Mexicans, who make up the majority of illegal immigrants in the United States, no longer need to leave Mexico in search of jobs.

For at least the past two decades, the House and Senate have been grappling with immigration bills that adopted one or more of the above solutions. In 1986, the amnesty program of the Immigration Reform and Control Act (IRCA), signed into law by President Reagan, granted legal status to three million people who resided in the United States illegally.<sup>116</sup> The Act made it unlawful to, and imposed sanctions for, knowingly hiring undocumented aliens.<sup>117</sup> It provided for the legalization of those undocumented aliens who were present in the United States for at

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114. Roger Lowenstein, *The Immigration Equation*, N.Y. TIMES, July 9, 2006, at 6.

115. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, NON-IMMIGRANT ADMISSIONS (I-94 ONLY) BY REGION AND COUNTRY OF CITIZENSHIP: FISCAL YEARS 1996 TO 2005, <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Table27.xls> (illustrating that between 2000 and 2005, each year, over four million Mexican nationals were legally admitted into the United States holding I-94 arrival-departure records, held by non-citizen aliens living in the United States for work or study).

116. David Bacon, *Is A New Bracero Program In Our Future?*, Z MAGAZINE ONLINE, Vol. 16, Number 10 (October 2003), available at <http://zmagsite.zmag.org/Oct2003/bacon1003.html>.

117. See, Immigration Reform and Control Act of 1986, Pub. L. No. 99- 603, 100 Stat. 3359, Sec. 301 (1986) Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, Sec. 210 (a) (1986) (“[T]he term ‘seasonal agricultural services’ means the performance of field work related to planting, cultural practices, cultivating, growing and harvesting of fruits and vegetables of every kind and other perishable commodities, as defined in regulations by the Secretary of Agriculture.”).

least four years prior to the effective date of 1986.<sup>118</sup> The law also allowed for the legalization of seasonal agricultural workers under the (Special Agricultural Worker Program of the IRCA) who had been working in the United States in certain agricultural occupations for at least ninety days over a twelve-month period “ending on May 1, 1986.”<sup>119</sup> The Act “split the temporary worker category into H-2A and H-2B workers, distinguishing agricultural H-2A workers from other temporary workers.”<sup>120</sup> Studies show that the number of individuals attempting to cross the United States-Mexico border illegally declined immediately following the enactment of the 1986 Immigration Reform and Control Act, but illegal immigration eventually “returned to normal levels” and the amnesty program “did not change long-term patterns of illegal immigration from Mexico.”<sup>121</sup>

In 1994, the Clinton administration executed “Operation Gatekeeper,” a method of “control through deterrence” that included building fences and militarizing portions of the United States Mexico border that were easy to cross.<sup>122</sup> Since then, illegal crossings and drug smuggling rates have dropped in urban areas, which suggest “that fortifying walls and reinforcing them with cameras, buried motion detectors and a doubling of Border Patrol personnel” may have been successful.<sup>123</sup> But actually, they have only shifted the entry points to more remote and treacherous ter-

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118. Immigration Reform and Control Act of 1986, Pub. L. No. 99– 603, 100 Stat. 3359, Sec. 301 (1986) Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, Sec. 210 (a) (1986) (“[T]he term ‘seasonal agricultural services’ means the performance of field work related to planting, cultural practices, cultivating, growing and harvesting of fruits and vegetables of every kind and other perishable commodities, as defined in regulations by the Secretary of Agriculture.”).

119. Immigration Reform and Control Act of 1986, Pub. L. No. 99– 603, 100 Stat. 3359, Sec. 301 (1986) Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, (1986) (“[T]he term ‘seasonal agricultural services’ means the performance of field work related to planting, cultural practices, cultivating, growing and harvesting of fruits and vegetables of every kind and other perishable commodities, as defined in regulations by the Secretary of Agriculture.”).

120. Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historical Perspectives on the AGJOBS Bill of 2003*, 42 HARV. J. ON LEGIS. 417, 433 (2005).

121. Pia M. Orrenius & Madeline Zavodny, Working Paper, *Do Amnesty Programs Encourage Illegal Immigration? Evidence from the Immigration Reform and Control Act (IRCA)*, 12 FED. RES. BANK OF ATLANTA (2001), available at <http://www.frbatlanta.org/frbatlanta/filelegacydocs/wp0119.pdf> (examining whether allowing illegal immigrants to legalize their status actually contributes to additional illegal immigration, while focusing on the effects of IRCA).

122. Bill Hing, *The Moral Choice in Immigration Policy*, JURIST (April 2006), <http://jurist.law.pitt.edu/forumy/2006/04/moral-choice-in-immigration-policy.php> (noting that the number of apprehensions and entries did not decrease at all during this time).

123. Tyche Hendricks, *Border Security or Boondoggle?: A Plan for 700 Miles of Mexican Border Wall Heads for Senate*, S.F. CHRONICLE, Feb. 26, 2006, at A1.



rain, such as the deserts and mountains.<sup>124</sup> As a result, deaths due to dehydration and sunstroke in the summer or hypothermia in the winter have grown eight-fold in the past decade.<sup>125</sup>

### 1. Immigration Debate of March 2006

In 2006, the immigration debate again swept political circles as political parties strived to gain consensus with their constituency in anticipation of the November 2006 House and Senate elections. The National Conference of State Legislatures indicated that in 2006 more than five-hundred bills were filed, most attempting to get tough on illegal immigration, and thirty-three states enacted new immigration laws.<sup>126</sup>

The immigration debate gave rise to House Bill 4437(H.B. 4437), The Border Protection, Anti-terrorism, and Illegal Immigration Control Act of 2005.<sup>127</sup> This bill implements strict enforcement measures in an effort to reduce illegal immigration.

The bill's provisions make illegal immigration a felony and allow the federal government to take custody of undocumented immigrants thereby ending the practice of "catch and release."<sup>128</sup> It also makes the harboring of an undocumented immigrant a felony, punishable by up to three years in jail.<sup>129</sup> The latter provision jeopardizes the position of many charitable and health care organizations that provide shelter, food, health care and other types of assistance to undocumented immigrants. H.B. 4437 also provides for the construction of a 700-mile wall along the

124. Bill Hing, *The Moral Choice in Immigration Policy*, JURIST (April 2006), available at <http://jurist.law.pitt.edu/forumy/2006/04/moral-choice-in-immigration-policy.php>.

125. Tyche Hendricks, *Border Security or Boondoggle?: A Plan for 700 Miles of Mexican Border Wall Heads for Senate – Its Future Is Not Assured*, S.F. CHRONICLE, Feb. 26, 2006, at A1 (referring to the fact that "[t]ypical migration routes have shifted to more remote and treacherous regions").

126. Patrick McGee, *Some in House Vow Tough Immigration Bills*, FORT WORTH STAR-TELEGRAM, Oct. 14, 2006, at B6 (stating that Texas Republicans proposed to file bills to deny illegal immigrants in-state tuitions fees, prenatal, care and citizenship for their United States born children).

127. See generally LIBR. OF CONG., THOMAS, <http://thomas.loc.gov/cgi-fbin/query/z?d109:h.r.04437> (last visited Feb. 17, 2007).

128. Jeffrey L. Ehrenpreis, Note, *Controlling Our Borders Through Enhanced Employer Sanctions*, 79 S. CAL. L. REV. 1203, 1208 (2006).

129. *Id.*

Civil penalties for each offense of employing unauthorized aliens range from \$275 to \$2200 per alien for a first offense, \$2200 to \$5500 per alien for a second offense, and \$3300 to \$11,000 per alien for three or more offenses. Criminal penalties can be invoked if there is a pattern and practice of violations, resulting in a penalty of up to \$3000 and six months in jail. *Id.*

2000-mile United States-Mexico border.<sup>130</sup> Previous attempts to build fences between the United States-Mexico border have not been successful. Even though Congress has previously allowed for the construction of a steel-mesh barrier notwithstanding any environmental consequences, the 14-mile fence along the San Diego-Mexico border has been under construction since 1996, and has not been completed due to environmental restrictions.<sup>131</sup>

Another provision of H.B. 4437 deals with amnesty programs. It allows undocumented immigrants who have no criminal record to stay in the United States for up to six years upon payment of a \$1,000 fee.<sup>132</sup> Also, if the immigrants pay their taxes and do not violate any laws then they may apply for permanent residency without being required to leave the country.<sup>133</sup> Opponents of the amnesty provisions say that it is unfair to immigrants who wait for years to come to the United States legally. They argue that illegal immigrants violate the law and should not be rewarded. Other opponents argue that “the Senate Judiciary Committee’s approach would create a permanent subclass of workers by keeping them in the United States as exploited non-citizens.”<sup>134</sup> The bill, sponsored by James Sensenbrenner in the House of Representatives, passed overwhelmingly on December 16, 2005 by a vote of 260 to 159.<sup>135</sup> H.B. 4437 did not pass in the Senate and is cleared from the books of the latest Congressional Session.<sup>136</sup>

Another provision of H.B. 4437 proposes to create a seasonal guest worker program. The seasonal guest worker program proposal aims to create an alien subclass that, with proper documentation, can reside legally in the country for work and must leave after a certain number of years. It is similar to other forms of work visas available to non-citizen aliens who come to work in the United States from abroad. The objective of this program is to reconcile the plight of the American agriculture industry and other industries dependant upon the undocumented Latino labor force.

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130. Francis Gabor & John B. Rosenquest, *The Unsettled Status of Economic Refugees from the American and International Legal Perspectives: A Proposal for Recognition Under Existing International Law*, 41 TEX. INT’L L.J. 275, n.90 (2006).

131. See Tyche Hendricks, *Border Security or Boondoggle?: A Plan for 700 Miles of Mexican Border Wall Heads for Senate – Its Future Is Not Assured*, S.F. CHRONICLE, Feb. 26, 2006, at A1.

132. See Bruce Moyer, *Immigration Debate Divides Congress and the Country*, 53 FED. LAWYER 8, 8 (2006).

133. See *id.*

134. See *id.*

135. See generally *id.*

136. See generally *id.*

History shows that temporary guest worker programs are unsuccessful. In Europe, similar programs created large communities of permanent residents who proved difficult to repatriate.<sup>137</sup> The 1986 Immigration Reform and Control Act (IRCA) succeeded only temporarily in reducing the number of undocumented immigrants crossing the Mexico—United States border.<sup>138</sup> Further, the Special Agricultural Worker Program, which was part of the IRCA and provided amnesty, temporary legal resident status, and work authorization to farmworkers in perishable-crop agriculture, created incentive for hundreds of thousands of additional illegal immigrants to enter the United States in search of legal permanent residency.”<sup>139</sup>

It is also suggested that one of the reasons for the failure of guest worker programs to reduce illegal immigration is that guest workers and illegal immigrants tend to come from mutually exclusive classes of society. Guest worker programs “are likely to attract [workers] for whom the cost of migrating is relatively high” for the source country (the country from which the guest worker emigrates).<sup>140</sup> Illegal immigration generally has the opposite effect in that those workers who cost the least for the source country are commonly more willing to illegally cross the borders. The source countries therefore do not have an incentive to cooperate with the host country’s guest worker program or anti-illegal immigration schemes and the populations of both legal temporary workers and illegal immigrants soar in the host country.<sup>141</sup> Inducing the source country to participate in illegal border crossing prevention is essential to controlling illegal immigration in the host country.<sup>142</sup>

In the United States-Mexico case, two proposals have been presented: 1) a program under which the United States would directly compensate

137. See Tory Cronin, Comment, *The Wrong Solution: An Examination of President Bush’s Proposed Temporary Worker Program*, 7 SCHOLAR 183, 196–97 (2005) (explaining how the temporary guest worker program in West Germany led to permanent Turkish settlements and discrimination against the Turkish population by Germans who had to compete with guest workers for jobs).

138. Thomas J. Espenshade et al., *Implications of the 1996 Welfare and Immigration Reform Acts for US Immigration*, 23 POP. & DEV. REVIEW 769, 769–81, 794–95 (1997).

139. *Id.* at 769–70.

140. MOHAMMAD AMIN & AADITYA MATTOO, CAN GUEST WORKER SCHEMES REDUCE ILLEGAL MIGRATION?, at 4, [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2006/01/24/000016406\\_20060124163357/Rendered/PDF/wps3828.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2006/01/24/000016406_20060124163357/Rendered/PDF/wps3828.pdf).

141. *Id.* at 3–4.

142. *Id.* at 2–4 (pointing to the Binational Study on Migration (1997) which was conducted jointly by the Mexican and United States governments). This study highlighted the need for a joint effort by the United States and Mexico to solve the problem of illegal immigration in the United States. *Id.* at 2. There is evidence suggesting that Mexico’s cooperation can play a crucial role in this regard. *Id.*

Mexico or provide other incentives for Mexico's efforts to prevent illegal border crossing, and 2) an expanded guest worker scheme between the host and source countries for which the host country compensates the government of source country.<sup>143</sup>

## 2. Comprehensive Immigration Reform Act of 2006

In April 2006, in the aftermath of the pro-immigration rallies, and at a time when the immigration debates mostly revolved around toughening immigration policies and fencing the southern border, Senator Arlen Specter called for a comprehensive immigration solution.<sup>144</sup> He introduced an immigration bill that took into consideration 1) an amnesty program that gives undocumented immigrants, who have lived in the United States for five years or more, an option to become legal residents after paying a fine; 2) a guest worker program which allows temporary seasonal workers to enter the country with "blue cards," work for six years, and then leave the country for one year before they can come back again; 3) a border fencing program for 370 miles as opposed to the original 700-mile proposal; and 4) enforcing immigration laws by fining employees who hire undocumented workers.<sup>145</sup>

It was estimated that this scheme would cost \$45 per American over the 2007-2011 period.<sup>146</sup> This bill did not pass in April, but a few months later, a similar proposal became law.<sup>147</sup>

In October 2006, President Bush's border fortification proposal was finally realized in the Secure Fence Act of 2006.<sup>148</sup> This Act amended §102(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (codified under 8 U.S.C.A. § 1183) by replacing the term "near San Diego" to a description of several stretches of land along the United States-Mexico border spanning a total of 700 miles.<sup>149</sup> At least

143. *Id.* at 3. Rosenbaum, for instance, "'argues that a new guest worker program should be structured as bilateral between the United States and Mexico' and in exchange for a new guest worker (GW) treaty the United States should demand 'a substantially expanded Mexican role in discouraging undocumented emigration.'" *Id.*

144. COUNCIL ON FOREIGN RELATIONS, COMPREHENSIVE IMMIGRATION REFORM ACT OF 2006, [http://www.cfr.org/publication/10808/comprehensive\\_reform\\_act\\_of\\_2006.html](http://www.cfr.org/publication/10808/comprehensive_reform_act_of_2006.html).

145. *Id.*

146. *Id.*

147. *See id.* (stating that at the end of each session, those bills that are not signed into law will be cleared from the books).

148. *See generally* Secure Fence Act of 2006, Pub. L. No. 109-367 120 Stat. 2638 (2006); *see also* Tyche Hendricks, *Border Security or Boondoggle?: A Plan for 700 miles of Mexican Border Wall Heads for Senate*, S.F. CHRONICLE, Feb. 26, 2006, at A1.

149. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638, 2639 Sec. 3 (2006). It must be noted here that the San Diego wall which has been under construction for the

two layers of reinforced fencing as well as additional physical barriers, lighting, cameras, sensors and roads are to be built on this land.<sup>150</sup> The Act instructs the Secretary of Homeland Security to begin operational control of the land no later than 18 months from the date of enactment of the Act.<sup>151</sup>

#### D. *Suggestions*

The problem of illegal immigration does not end by fortifying the United States' southern borders.<sup>152</sup> There are an estimated 11 million undocumented immigrants currently living in the United States.<sup>153</sup> It is likely that a majority of these immigrants will eventually become United States citizens, either through government sponsored amnesty programs, or through individual immigrant's efforts to gain legal status. Until then, it is in the best interest of the states and the country as a whole to make sure these individuals have a right to physical and mental healthcare.

The fact that current healthcare policies have not been successful in deterring illegal entries, coupled with the increasing strain on healthcare institutions providing free emergency services, presents the need to re-think current immigrant healthcare policies. Providing prenatal and preventative care to undocumented immigrants relieves emergency care facilities and has positive long-term effects that are in line with state and federal interests of protecting future citizens. Healthcare workers should not be distracted from providing medical care by having to act as immigration officials. Charitable and non-federal organizations should be allowed to provide non-emergency medical care to undocumented aliens. Amnesty programs should allow undocumented immigrants of all ages and physical ability that have lived in the United States for a certain period of time and have no prior criminal record to establish a legal status in this country and benefit from social services available to all legal residents of their prospective states.

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past ten years, has not yet been completed; See Tyche Hendricks, *Border security or boondoggle?: A Plan for 700 Miles of Mexican Border Wall Heads for Senate*, S.F. CHRONICLE, Feb. 26, 2006, at A1.

150. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 Sec. 2 (2006) (providing deadlines for completion of each task). For example, the barrier construction along the Laredo, Texas and Mexico border must be completed by December 31, 2008. *Id.*

151. *Id.*

152. See, e.g., The White House, Comprehensive Immigration Reform, <http://www.whitehouse.gov/infocus/immigration> (referring to the same propositions as the Comprehensive Immigration Reform Bill in describing what needs to be accomplished in order to solve the illegal immigration issue in the United States).

153. See Tyche Hendricks, *Border Security or Boondoggle?: A Plan for 700 Miles of Mexican Border Wall Heads for Senate - Its Future Is Not Assured*, S.F. CHRONICLE, Feb. 26, 2006, at A1.

The question remains, however, as to what the United States should do to stop illegal immigration and to properly identify and control the illegal immigrants that are already living in the United States? It happens that the most plausible answer is also the one that is most humane and economically sound. To stop immigrants from coming to and settling in the United States illegally, we must provide incentives for them to stay in their country of origin. For example, if the United States helps to stabilize Mexico's government and improve Mexico's economy by creating jobs through NAFTA labor agreements, which ensure that workers are paid relatively fair wages and receive reasonable benefits, it is likely that the ever-increasing immigrant population will come to a halt.<sup>154</sup> A flourishing economy for Mexico, as for any other country, will mean a better education system, better roads and transportation systems, better health-care, a better standard of living, a larger middle-class and a skilled and educated workforce. Moreover, the United States must work closely with countries like Mexico to fight illegal migration and to create guest worker programs that treat immigrant workers fairly.

Considering the great economical disparity existing between the United States and the rest of the countries in the western hemisphere, it is unreasonable to expect that the issue of illegal immigration be solved any other way.

#### IV. CONCLUSION

Every year, hundreds of thousands of individuals enter the United States without proper documentation. A great portion of these individuals enter the country by crossing the United States-Mexico border. These individuals cross into the United States to find jobs and provide a better life for their families. Today, borders have become permeable and the economy of one country can directly affect the economy of its trade partners.<sup>155</sup> Movement of people across borders is only a natural consequence of ever-increasing cultural and economic globalization. While several pull factors exist which make immigration a desirable choice for Mexicans and other immigrants;— unemployment, poverty, governmental instability, corruption and lack of proper education in the countries of origin— it is clear that free healthcare and welfare services in the United States are not such factors.

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154. Interview with Reynaldo Valencia, Professor, St. Mary's University School of Law, in San Antonio, Tex. (Nov. 18, 2006).

155. M. Angeles Villarreal, *United States-Mexico Economic Relations: Trends, Issues and Implications*, CONG. RESEARCH SERV. 3 (LIBR. OF CONG. 2005) (noting that about ninety percent of Mexico's export goes to the United States and about sixty percent of Mexico's import comes from the United States).

It is not surprising or unreasonable for people to endanger their lives and the lives of their families to escape an unpromising life, especially when so many opportunities lie so few miles away.<sup>156</sup> Why are illegal immigrants so hated in the American public for following what, one may argue, is a noble human instinct?<sup>157</sup>

Currently, there are certain concerns within the United States that fly in the face of such “illegal” immigrations. National security calls for tighter borders. For national security purposes, it is crucial to keep count of all non-citizens that enter or are within the United States border. However, further isolation and criminalization of those who live in this country illegally will certainly not help the process of identifying them. Another solution, fencing in the United States, has failed to be realized for the past ten years, and is unlikely to materialize in the face of the reality of a globalizing world.

Another concern that the United States must grapple with is the rising cost of health care in an age of baby-boomer aging and retirement. As this comment shows, denial of health care to undocumented immigrants will not stop the flow of illegal immigration into the United States as it is not a decisive factor in causing the same. Taking into account the prices of emergency room care provided to illegal immigrants, either at escalated stages of disease processes or, for routine check-ups, and the free health care provided to them by health and charitable organizations, it seems that the cost of health care provided to immigrants balances out the cost saved by denying them subsidized health care.

Another reality that seems to concern some United States citizens is that illegal immigrants, out of necessity (necessity created by their invisibility and lack of status), will take jobs at low wages and leave the unskilled American worker unemployed. Most illegal immigrants find jobs in farm, service or production industries. Studies show that illegal immigrants often compete for jobs with other illegal immigrants. The fact that the unemployment rate in the United States has decreased since 1996,<sup>158</sup> while the illegal immigrant population more than doubled and millions of highly skilled legal immigrants have been absorbed by the workforce, indicates that illegal immigrants do not negatively affect job availability in

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156. *Id.* (stating that Mexico’s GDP is only 6% of the United States’s GDP); James Dwyer, *Illegal Immigrants, Health Care and Social Responsibility*, HASTINGS CENTER REP., Jan.-Feb. 2004, at 34, 35.

157. James Dwyer, *Illegal Immigrants, Health Care and Social Responsibility*, HASTINGS CENTER REP., Jan.-Feb. 2004, at 34, 35.

158. UNITED STATES DEP. OF LABOR, EMPLOYMENT STATUS OF THE CIVILIAN NON-INSTITUTIONAL POPULATION: 1940 TO DATE, <http://www.bls.gov/cps/cpsaat1.pdf> (last visited Feb. 28, 2007) (demonstrating that the unemployment rate has dropped from 5.4% in 1996 to 5.1% in 2005).

the American workforce. In fact, new immigrants help improve the economy of the United States and that of the states in which they reside as tax payers, consumers of goods and services, and entrepreneurs.

At last, the “problem” of illegal immigration will not be resolved unless the United States persuades Mexico and other Latin American countries to effectively participate in border surveillance and law enforcement. A guest worker program with the Mexican government as a partner, as well as attempts to build a strong and stable Mexican economy through mutually beneficial treaties, are likely to make Mexico a more desirable place to live, and therefore reduce the flow of undocumented immigrants to the United States. Meanwhile, it is contrary for the United States of America, which holds itself to incredibly high standards of humanity and morality, to allow the health of a certain group of people, who live within its borders, to deteriorate, at times irreversibly, simply because they are foreign and indigent.