NEW MEXICO LAW REVIEW

Volume 21
Issue 2 *Spring 1991*

Spring 1991

Public Benefits for Undocumented Aliens: State Law into the Breach Once More

Peter L. Reich

Recommended Citation
Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law into the Breach Once More*, 21 N.M. L. Rev. 219 (1991).
Available at: https://digitalrepository.unm.edu/nmlr/vol21/iss2/2

This Article is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the *New Mexico Law Review* website: www.lawschool.unm.edu/nmlr

PUBLIC BENEFITS FOR UNDOCUMENTED ALIENS: STATE LAW INTO THE BREACH ONCE MORE

PETER L. REICH*

I. INTRODUCTION

The reversal of traditional liberal and conservative positions on state legal activism is an ironic result of the last two decades' federal limitations on individual rights and entitlements.[1] In the wake of narrow judicial decisions and congressional budgetary restrictions, advocates of civil liberties and social programs have adopted the conservative tactic of "states' rights" and have begun looking to the power of state courts and legislatures.[2] So far, jurisprudence and scholarship on "the new federalism" have focused largely on dramatic questions of criminal procedure, freedom of speech, resource preservation, and privacy, while concentrating less

---

* B.A., M.A., and Ph.D., U.C.L.A.; J.D., U.C. Berkeley (Boalt Hall); Associate Professor of Law, Whittier College School of Law. The author wishes to thank Mary Ellen Gale, William Wesley Patton, Joanne B. Stern, William R. Tamayo, and David S. Welkowitz for their helpful comments on earlier drafts.

1. For a historical analysis of the evolution of liberal and conservative viewpoints with respect to states' rights, see Balkin, *Federalism and the Conservative Ideology*, 19 URB. LAW. 459 (1987). From the mid-nineteenth century through the 1970's, the federal government gradually became identified as the defender of nationally uniform individual rights against state or private sector interference, a position particularly visible in the post-Civil War constitutional amendments, the New Deal's social programs, and the civil rights era. *Id.* State legislatures were believed to be tied to vested economic interests, and state courts were considered "ineffective or oppressive forums" for the less influential. Nix, *Federalism in the Twenty-First Century—Individual Liberties in Search of a Guardian*, in FEDERALISM: THE SHIFTING BALANCE 65, 68 (J. Griffith ed. 1989). However, by the late 1970's and 1980's, the federal courts were narrowing the scope of protected civil liberties, and Congress was restricting access to certain entitlements. In 1986, United States Supreme Court Justice William Brennan noted the substantial irony that liberal "rights" proponents were now seeking expansive state judicial holdings, while the conservatives on the high court regularly upset such rulings with "a new solicitude for uniformity." Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986).

2. The most thorough analysis of the "state law revival movement," or as it is sometimes called, "the new federalism," is provided by Ronald K.L. Collins. *See, e.g.*, Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Collins, *Forward: Reliance on State Constitutions—Beyond the "New Federalism,"* 8 U. PUGET SOUND L. REV. vi (1984); Collins, Galie, & Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HASTINGS CONST. L.Q. 599 (1986). For seminal articles arguing that state judiciaries should employ expansive interpretations of state constitutions and statutes in order to protect civil liberties beyond the minimum requirements of the federal constitution, see Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1981). A thoughtful critique of the activist approach is given in Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988) (while principles of state autonomy allow state courts to exceed federal standards of protection, federalism as a concept does not necessitate the exercise of this power).

on the potential for expansion of state social services.[3] Yet few areas subject to federal cutbacks involve societal needs so immediate while being so ignored by courts and scholarly literature as public assistance to undocumented aliens.[4]

The increasing number of undocumented aliens residing in this country raises serious health and welfare issues.[5] Despite Congress' efforts at immigration control in the 1986 Immigration Reform and Control Act,[6] the flow of unlawful entrants continues unabated.[7] Because of their poor living conditions and concentration in high-risk jobs, illegals suffer from a variety of medical disorders, especially gastrointestinal, gynecological, and respiratory difficulties, and are highly unlikely to have access to

---

3. Major symposia and collections of articles on state law development have conspicuously omitted discussion of state entitlement programs. *See, e.g.*, DEVELOPMENTS IN STATE CONSTITUTIONAL LAW (B. McGraw ed. 1985); FEDERALISM: THE SHIFTING BALANCE (J. Griffith ed. 1989); POWER DIVIDED: ESSAYS ON THE THEORY AND PRACTICE OF FEDERALISM (H. Scheiber & M. Feeley eds. 1989); RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW (P. Bamberger ed. 1985); *Federalism: Allocating Responsibility Between the Federal and State Courts*, 19 GA. L. REV. 789 (1985); *Symposium on State Constitutional Jurisprudence*, 15 HASTINGS CONST. L.Q. 391 (1988); *Symposium: The Washington Constitution*, 8 U. PUGET SOUND L. REV. vi (1984). However, at least one scholar, Burt Neuborne, has suggested that state courts are well-situated to address the needs of the economic underclass by developing a jurisprudence of positive rights to public benefits. Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989). For examples of the still extremely limited body of scholarly literature treating state assistance programs in the context of "the new federalism," see Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457 (1988-89); Sard, *The Role of the Courts in Welfare Reform*, 22 CLEARINGHOUSE REV. 367 (1988).

4. I follow the definitions of immigration-related terms set out in E. BOGEN, IMMIGRATION IN NEW YORK (1987), which extrapolates from the language of 8 U.S.C. §§ 1101(a) and 1324a. Although some of these terms, especially "illegal alien," may be offensive, they are commonly employed by courts and legislatures, and are thus used in this article for purposes of clarity. An "undocumented alien" (also "illegal" and "unauthorized alien") is a foreign national who entered the United States without authorization, or whose visa has expired. A "permanent resident alien" (also "lawful permanent resident" and "green card holder") is a foreign national who is authorized to live and work permanently in the United States and eventually to apply for citizenship. An "immigrant" is any foreign national who intends to live permanently in the United States, including undocumented and all permanent resident aliens. Additional categories will be referred to in the text and notes when applicable.

5. The Immigration and Naturalization Service ("INS") currently estimates this population at 1.8 to 3.1 million, not including approximately 3 million aliens legalized since 1987 under the national amnesty program. *See* comments of Robert Warren, INS Director of Statistics, in Diamond, *IRS Doesn't Care if Filers Are Illegal Aliens*, L.A. Times, Apr. 13, 1990. For an independent confirmation of these statistics, see M. FIX & J. PASSEL, THE DOOR REMAINS OPEN: RECENT IMMIGRATION TO THE UNITED STATES AND A PRELIMINARY ANALYSIS OF THE IMMIGRATION ACT OF 1990 5 (1991). It is estimated that the 1980 Census counted 2.06 million illegals. Warren and Passel, *A Count of the Uncountable: Estimates of Undocumented Aliens Counted in the 1980 United States Census*, 24 DEMOGRAPHY 375, 380 (1987). For a discussion of methodological problems in various demographic studies, see J. SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION 279-284 (1989); Corwin, *The Numbers Game: Estimates of Illegal Aliens in the United States*, in R. HOFSTETTER, U.S. IMMIGRATION POLICY 223 (1984).

6. For a description of specific provisions, see *infra* text accompanying notes 43-45.

7. K. CRANE, B. ASCH, J. HEILBRUNN, & D. CULLINANE, THE EFFECT OF EMPLOYER SANCTIONS ON THE FLOW OF UNDOCUMENTED IMMIGRANTS TO THE UNITED STATES 73-74 (1990); Behar, *The Price of Freedom: Immigration Laws are Fueling a Lucrative Black Market in Human Cargo*, TIME, May 14, 1990; *Illegal Border Crossings Rise After 3-Year Fall*, Los Angeles Times, Apr. 22, 1990; *1986 Amnesty Law is Seen as Failing to Slow Alien Tide*, N.Y. Times, Jun. 18, 1989; Center for U.S.-Mexican Studies, U.C. San Diego, Presentation to the Ninth Annual Briefing Session for Journalists 6 (June 22, 1989).

health insurance.[8] They also experience the common problems of poverty, such as cash shortages, substandard housing, and malnutrition.[9] Unauthorized aliens often forego both necessary medical care and other public assistance because they fear INS detection or falling into heavy debt to cover expenses.[10]

In the face of all these difficulties, Congress and the courts have limited eligibility for many federal medical and welfare benefits to aliens possessing lawful status. Four major programs, Medicaid, Aid to Families with Dependent Children, Supplemental Security Income, and Unemployment Insurance, restrict alien access to permanent residents and persons "permanently residing in the United States under color of law."[11] Two federal benefits, Medicare and Social Security, require recipients to have credited wages to a valid Social Security account (unavailable to illegals after 1974),[12] and two others, financed housing and food stamps, limit eligibility to specific classes of lawful aliens.[13]

Despite the federal restrictions, few courts have examined the state law possibilities for assisting undocumenteds,[14] and "the new federalism"

---

8. On the health status of undocumenteds, as well as of immigrants generally, see Chavez, Cornelius & Jones, *Mexican Immigrants and the Utilization of U.S. Health Services: The Case of San Diego*, 21 Soc. Sci. Med. 93, 97 (1985) [hereinafter Chavez & Cornelius]; Drake, *Immigrants' Rights to Health Care*, 20 Clearinghouse Rev. 498, 500-503 (1986). On their lack of health insurance, either because of cost or not having employee benefits, see Drake, *supra*, at 503-04.

9. *See* W. Cornelius, L. Chavez & J. Castro, Mexican Immigrants and Southern California: A Summary of Current Knowledge 26 (1982) [hereinafter Cornelius & Chavez]; W. Cornelius, R. Mines, L. Chavez, & J. Castro, Mexican Immigrants in the San Francisco Bay Area: A Summary of Current Knowledge 20 (1982) [hereinafter Cornelius & Mines]; Kelley, *El Mosco*, L.A. Times, Mar. 18, 1990, (magazine), at 11, 13.

10. *See* Conard, *Health Care for Indigent Illegal Aliens: Whose Responsibility?*, 8 U.C. Davis L. Rev. 107, 108 (1975); Cornelius & Chavez, *supra* note 9, at 61, 65; Cornelius & Mines, *supra* note 9, at 47-48, 52.

11. *See* 42 U.S.C. §§ 1396b(v), 602(a)(33), 1382c(a)(1)(B) (Supp. 1991) (it should be noted that Medicaid coverage for emergency care is excepted from the restriction); 26 U.S.C. § 3304(a)(14)(A) (1989). For a specific discussion of the limitations on these and other federal programs, see *infra* part III, section B. "Permanently residing in the United States under color of law," or "PRUCOL" is not defined in federal statutes or regulations, but it is construed by federal agencies to include at least refugees, asylees, conditional entrants, parolees, aliens whose deportation has been suspended, Cuban-Haitian entrants, and applicants for registry. National Immigration Law Center, Immigrants' Rights Manual 11-4 (1990). Although federal courts have extended PRUCOL in the AFDC context to include visa overstays, see Holley v. Lavine, 533 F.2d 845 (2d Cir. 1977), *cert. denied*, 435 U.S. 947 (1978), and for SSI purposes to include aliens known to the INS but whose departure the agency does not contemplate enforcing, see Berger v. Secretary of HEW, 771 F.2d 1556 (2d Cir. 1985), the language clearly excludes undocumenteds. For analysis of the origins and various constructions of the PRUCOL concept, see Calvo, *Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs*, 16 N.Y.U. Rev. L. & Soc. Change 395, 411-21 (1987-88); Carton, *The PRUCOL Proviso in Public Benefits Law: Alien Eligibility for Public Benefits*, 14 Nova L.J. 1033 (1990); Rubin, *Walking a Gray Line: The "Color of Law" Test Governing Noncitizen Eligibility for Public Benefits*, 24 San Diego L. Rev. 411 (1987); National Immigration Law Center, *supra* at 11-4 to 11-14, 11-22 to 11-25.

12. Concerning Medicare, see 42 U.S.C.A. § 1395c (Supp. 1991); 42 C.F.R. §§ 406.10, 406.11, 406.12 (1990). Concerning Social Security, see 42 U.S.C. §§ 401, 405c(2)(B)(i) (1983); 20 C.F.R. §§ 422.104, 422.107 (1991). Medicare applicants not eligible for Social Security may "buy in" to the Medicare program through premium payments, but only if they are citizens or are lawful permanent residents who have lived in the United States at least five years. 42 U.S.C. §§ 1395i-2(a)(3), 1395(o)(2) (1983); 42 C.F.R. §§ 406.20(b), 407.10(a)(iii) (1990). These Medicare restrictions were upheld by the United States Supreme Court in Mathews v. Diaz, 426 U.S. 67, 83 (1976).

13. *See* 42 U.S.C.A. § 1436(a) (Supp. 1991); 7 C.F.R. § 273.4 (1991).

14. *See infra* part III.

scholarship ignores illegal alien issues entirely.[15] The existing literature on aliens' access to public benefits focuses on the federal programs, only briefly mentioning the potential of state entitlements.[16]

This article proposes that state law can address many unmet needs of unauthorized aliens, a theory in line with current expansive trends in state jurisprudence. First, the federal immigration power does not preempt states from providing their own benefits to illegals. Second, broad state constitutional and statutory language can be read to include undocumenteds in medical and public assistance programs. Finally, such aid should be made available as a matter of public policy on general welfare, economic, and humanitarian grounds. Thus, state law can help fill the breach left by federal cutbacks and address one of the most pressing contemporary social issues.

II. FEDERAL PREEMPTION OF STATE ASSISTANCE TO UNDOCUMENTED ALIENS

The threshold question for any analysis of state action relating to aliens is whether such action is preempted by the federal immigration power. Federal government power over immigration and aliens' rights has traditionally been held to be plenary, being considered inherent in national sovereignty.[17] This broad jurisdictional mandate has resulted in the United States Supreme Court overturning much state regulation of immigration.[18] But, significantly, not every state law regarding aliens interferes with the federal sphere.[19] Thus, while the Supreme Court has struck down statutes requiring all aliens to register with state authorities[20] and discriminating against lawfully admitted aliens as to alienage-neutral benefits,[21] states may bar aliens from certain types of public employment having a political function.[22] No decision has precluded the *granting* of state public assistance to immigrants, lawful or undocumented, nor would such preemption be justified.

The Supreme Court has generally divided preemption analysis into three categories:[23] express, implied, and conflict preemption. *Express* preemption

---

15. *See supra* notes 1-3.

16. *See* Calvo, *supra* note 11, at 427; Carton, *supra* note 11, at 1051-1052; Drake, *supra* note 8, at 509; Rubin, *supra* note 11, at 421; NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-41 to 11-43. One writer dismisses the possibility of state assistance to illegals because of the "lack of an enforceable duty against the state." Conard, *supra* note 10, at 123.

17. Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893); *see also* discussion in T. ALEINIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY 5-35 (1985).

18. Graham v. Richardson, 403 U.S. 365, 377-78 (1970); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948); Hines v. Davidowitz, 312 U.S. 52, 58 (1941).

19. Cabell v. Chavez-Salido, 454 U.S. 432, 438-40 (1982); Ampach v. Norwick, 441 U.S. 68, 75-89 (1979); De Canas v. Bica, 424 U.S. 351, 355-56 (1976).

20. *Hines*, 312 U.S. at 58.

21. *Graham*, 403 U.S. at 377-78 (alien could not be denied state welfare benefits); *Takahashi*, 334 U.S. at 419 (alien could not be denied fishing license).

22. *Cabell*, 454 U.S. at 438-40 (alien could not serve as probation officer); *Ampach*, 441 U.S. at 75-80 (alien could not teach in public school).

23. My categories follow those discussed in L. TRIBE, AMERICAN CONSTITUTIONAL LAW 481 n.

takes place when Congress explicitly declares its intention to preclude state regulation in a particular area.[24] Congress may *impliedly* preempt by "occupying the field," or so comprehensively legislating in the area at issue that intent to exercise exclusive control can be inferred.[25] Finally, regardless of congressional intent, if a given state law either conflicts directly with federal law or discourages the achievement of federal objectives, *conflict* preemption may apply.[26] All three preemption tests have been used to analyze state laws relating to immigration, but no one approach has been consistently applied.

Current American immigration law is largely a composite of the 1952 Immigration and Nationality Act ("INA"), which regulates admission, deportation, and citizenship,[27] and the 1986 Immigration Reform and Control Act ("IRCA"), which sanctions employers of illegals, prohibits job discrimination based on citizenship status, and legalizes the status of certain individuals.[28] In analyzing the preemptive reach of these statutes, this article first treats the pre-1986 INA, under which most of the relevant case law arose, and then analyses IRCA, which, by significantly broadening the INA's scope, has raised new issues regarding the preemption of state benefits. Neither the traditional INA nor IRCA should preempt state-funded entitlements for the undocumented.

Interpreting the INA, the United States Supreme Court and lower tribunals have never held all state regulation of immigration-related matters to be preempted.[29] Under any of the three preemption categories, the statute should not bar public aid to illegal aliens.

---

14 (2d ed. 1988). Neat categorization has been criticized as difficult to apply and not reflective of the Supreme Court's often eclectic approach in actual cases, but most commentators find at least three or four types of preemption. *See* Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 70-71 (1988).

24. L. TRIBE, *supra* note 23, at 481 n.14. For example, see Jones v. Rath Packing Co., 430 U.S. 519, 536-37 (1977) (state labeling requirement expressly preempted by federal law forbidding any "labeling, packaging, or ingredient requirements in addition to, or different than" those made under the federal statute).

25. L. TRIBE, *supra* note 23, at 481 n.14. For example, see Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 296 (1971) (state wrongful discharge actions requiring interpretation of union security clause impliedly preempted by pervasiveness of federal regulation as to such clauses).

26. L. TRIBE, *supra* note 23, at 481 n.14. For an example of direct conflict, see Southland Corp. v. Keating, 465 U.S. 1 (1984) (state statute nullifying contractual arbitration clauses held preempted by federal legislation withdrawing state power to require judicial resolution of disputes that contracting parties had agreed to arbitrate). For an example of interference with federal objectives, see Nash v. Florida Indus. Comm'n, 389 U.S. 235, 239 (1967) (state unemployment compensation law denying benefits to applicants who had filed NLRB charges interfered with federal goal of protecting workers' organizing rights).

27. Immigration and Nationality Act, ch. 323, §§ 101-407, 66 Stat. 166 (1952) (current version at 8 U.S.C.A. §§ 1101-1525 (West Supp. 1991)). The recent Immigration Act of 1990, signed into law on November 20, 1990, amends the INA as to admission quotas, exclusion grounds, and miscellaneous other provisions, but does not address public benefits. Immigration Act of 1990, Pub. L. No. 101-649, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 4978.

28. Pub. L. No. 99-603, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3359 (codified at 8 U.S.C. §§ 1101-1557).

29. For a discussion of the preemption doctrine as applied to the INA, *see* Benke, *The Doctrine of Preemption and the Illegal Alien: A Case for State Regulation and a Uniform Preemption Theory*,

The express preemption test requires a clear statement of Congress' preclusive intent, and in one rare application of this standard to the immigration area, the Supreme Court upheld a California law penalizing the employers of undocumented workers.[30] The Court found no explicit congressional intent in the INA to limit state regulation of employment and noted that not "every state enactment which in any way deals with aliens is a regulation of immigration. . . ."[31] No case has yet applied the express standard to state provision of benefits, but there is no statement prohibiting such assistance in the INA's language or legislative history.[32]

State laws have most often been struck down when the implied preemption test has been applied to discrimination against aliens whom the Immigration and Naturalization Service ("INS") has allowed to remain in the United States. The courts have considered permission to reside anywhere in the country to be part of the INA's admission and deportation scheme, impliedly precluding most additional state burdens on admitted aliens. In *Hines v. Davidowitz*, the INS system of registering lawful aliens was held to occupy the field of such registration, preempting a parallel state requirement.[33] Similarly, the federal admission of an alien was held to invalidate a state's denial of welfare benefits to such a person.[34] Nor can a state deny in-state status for college tuition purposes to a lawful, albeit nonimmigrant, alien.[35] Even discrimination against undocumented children as to public education has been held preempted, for such children enjoy an "inchoate right to remain until they are actually deported."[36]

While state burdens on aliens are usually held preempted under the "implied intent" test, there is no suggestion in the cases that state benefits would encroach upon the federal sphere. Nor, arguably, should public entitlements be preempted even if provided to undocumented aliens, for granting them assistance bears no relation to the INA scheme. In fact, in the only reported decision applying preemption analysis to the furnishing of state benefits to illegals, the New Mexico Court of Appeals held that

---

13 SAN DIEGO L. REV. 166 (1975); Note, *Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1415-18 (1983). These writers have treated INA preemption as unique, not finding any useful models for analysis in other areas of law.

30. De Canas v. Bica, 424 U.S. 351 (1976).

31. *Id.* at 355-57.

32. For a legislative history of the INA, see H.R. REP. No. 1365, 82nd Cong., 2d Sess., accompanying H.R. REP. No. 5678, *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1677-78; S. REP. No. 748, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 3328.

33. *Hines*, 312 U.S. at 58.

34. *Graham*, 403 U.S. at 377-78.

35. Toll v. Moreno, 458 U.S. 1, 17 (1982).

36. Plyler v. Doe, 457 U.S. 202, 226 (1982). In *Plyler*, the Supreme Court struck down a Texas statute denying illegal alien children access to free public schools. The holding turned on an equal protection argument that the children were a discrete (rather than suspect) class not responsible for their disabling status, and thus were entitled to at least intermediate scrutiny. *Id.* at 220-23. Preemption was a threshold, though not a central, issue in the case. For a discussion of the relationship of preemption to equal protection analysis in the immigration context, see Note, *supra* note 29, at 1415-18, 1447-52.

state nonemergency medical care for the undocumented was permissible.[37] Because the program at issue was wholly state-funded and involved no cooperation with the federal government, such assistance was not a matter of immigration control.[38]

Under the third test, the "conflict" theory, preemption is rare because it is unusual for a state enactment to facially contradict federal legislation. On the few occasions when the conflict test has been applied in the immigration area, courts have found state statutes to be congruent with the INA and thus not preempted.[39] Because the INA does not bar state benefits to aliens, such assistance to illegals could not directly conflict with federal law.

Conflict preemption may also occur when state action has the effect of discouraging conduct that federal action specifically seeks to encourage.[40] But even under the "indirect conflict" version of the test, state benefits for undocumenteds would hardly encourage the illegal migration prohibited by the INA. As numerous social science studies have shown, and as the United States Supreme Court acknowledged in *Plyler v. Doe*, undocumented aliens are not attracted to this country for its public benefits, but rather for its employment opportunities.[41]

Therefore, under any of the three preemption categories, the pre-1986 INA should not be viewed as precluding state benefits for illegal aliens. Decisions applying the express, implied, and conflict standards have not uniformly preempted state regulation of immigration-related matters, and no court has preempted the providing of entitlements to the undocumented. In fact, one uncontradicted state opinion has held explicitly that state-funded medical care for illegals is not preempted.[42]

With the 1986 IRCA reforms, Congress revamped the INA, expanding its scope and thereby raising new preemption possibilities. The added provisions include civil and criminal penalties for employers of the undocumented ("employer sanctions"), protection against employment discrimination based on citizenship status, and lawful status for illegals residing in the country since before 1982.[43] Under the latter "amnesty"

---

37. Perez v. Health and Social Servs., 91 N.M. 334, 573 P.2d 689 (Ct. App. 1977), *cert. denied*, 91 N.M. 491, 576 P.2d 297 (1978).

38. *Id.* at 337, 573 P.2d at 692.

39. *See* Gonzales v. Peoria, 722 F.2d 468, 474 (9th Cir. 1983) (declining to preempt state enforcement of INA criminal provisions because state and federal enforcement have "identical purposes").

40. L. TRIBE, *supra* note 23, at 482-83.

41. *Plyler*, 457 U.S. at 228; COMMISSION FOR THE STUDY OF INTERNATIONAL MIGRATION AND COOPERATIVE ECONOMIC DEVELOPMENT, UNAUTHORIZED MIGRATION: AN ECONOMIC DEVELOPMENT RESPONSE 13, 107 (1990) [hereinafter COMMISSION FOR THE STUDY OF INTERNATIONAL MIGRATION]; ECONOMIC REPORT OF THE PRESIDENT 233 (1986) [hereinafter ECONOMIC REPORT]; SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, FINAL REPORT 36 (1981) [hereinafter SELECT COMMISSION]. For a more detailed discussion of the economics of illegal immigration, see *infra* text accompanying notes 187-89.

42. *Perez*, 91 N.M. at 334, 573 P.2d at 689.

43. Pub. L. No. 99-603, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3359 (codified at 8 U.S.C.A. §§ 1101-1557). For analysis of IRCA's purpose of limiting illegal migration, see Calavita, *The Contradictions of Immigration Lawmaking: The Immigration Reform & Control Act of 1986*,

program, newly legalized aliens are disqualified from receiving benefits from federal or joint federal-state assistance programs for five years following their attainment of lawful status.[44] In a further passage, the statute provides that during the same five-year period, states or localities "may" also disqualify such aliens from receiving financial or medical assistance.[45] Notwithstanding this clause, no court has held IRCA to preempt state-funded benefits to amnesty aliens or undocumenteds, nor, arguably, should any of the three standards require preemption.

Under the express preemption test, nothing in IRCA's language or legislative history explicitly precludes state aid to illegals. The statute's one preemption provision specifically prohibits state or local laws imposing civil or criminal penalties on employers of unauthorized aliens.[46] This passage's legislative history emphasizes its narrow scope, with the House Judiciary Committee Report noting that states may still revoke the business licenses of employers found to have violated IRCA.[47] The new statute thus expressly preempts only state and local employer sanctions and not assistance to the undocumented.

Using the implied preemption test, state benefits do not concern the newly-prohibited employment of illegals any more than they have encroached upon the admission and deportation sphere traditionally regulated by the INA. A claim may be advanced that the clause permitting states to deny legalized aliens aid implies that states *should* do so to be consistent with the federal five-year cutoff.[48] The natural extension of such an argument would be that states should also deny assistance to undocumenteds, whose equities are certainly weaker than those of "amnesty" aliens. But the passage's language is clearly discretionary, and there is nothing in IRCA's legislative history indicating congressional intent to create a comprehensive benefit-cutoff scheme at both federal and state levels.[49] Therefore, IRCA should not be read to occupy a new federal field impliedly preempting state assistance to illegals.

---

11 L. & POL'Y 17 (1989); Schuck, *Immigration Law and Policy in the 1990's*, 7 YALE L. & POL'Y REV. 1, 13 (1989). For discussion of specific provisions and their legislative history, see Note, *The Simpson-Rodino Act Analyzed, Parts I-III*, 63 INTERPRETER RELEASES 991, 1021, 1049 (1986).

44. 8 U.S.C.A. § 1255a(h)(1)(A) (Supp. 1991). At least one circuit has held that this disqualification does not apply to federally funded legal services. California Rural Legal Assistance v. Legal Servs. Corp., 917 F.2d 1171 (9th Cir. 1990).

45. 8 U.S.C.A. § 1255a(h)(1)(B) (Supp. 1991). For a more detailed discussion of the potential preemptive effect of this clause, see *infra* text accompanying notes 48-49.

46. 8 U.S.C.A. § 1324a(h)(2) (Supp. 1991). The provision's complete text is as follows: "(2)Preemption. - The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."

47. H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 58 (1986); *see also* S. REP. No. 132, 99th Cong., 1st Sess., at 37 (1985).

48. 8 U.S.C.A. § 1255a(h)(1)(B) (Supp. 1991). The provision's text is as follows: "(B) a State or political subdivision therein may . . . provide that the alien is not eligible for the programs of financial assistance or for medical assistance . . . furnished under the law of that State or political subdivision."

49. For a discussion of IRCA benefits disqualification arguing, at least as to legalized aliens, that states are not required to be consistent with the federal cutoff, see Neuman, *Equal Protection, Preemption, and Benefits Disqualification*, 2 IMMIGR. & NATIONALITY L. 570 (1987).

Finally, applying the conflict test, because IRCA does not prohibit state benefits, aid to the undocumented would not create a contradiction between federal and state law. Even under the "indirect conflict" version of this standard, state assistance would not encourage the illegal employment barred by IRCA any more than such aid has contributed to unauthorized immigration. As discussed above, all available empirical data shows that undocumenteds are not drawn to the United States by the prospect of receiving public benefits.[50] Thus, no IRCA provision would conflict, either directly or indirectly, with state assistance to illegal aliens.

Neither the INA nor its 1986 amendment by IRCA should preempt state-funded benefits for the undocumented. Such assistance is not expressly preempted by the statutes or their legislative history, it is not impliedly precluded by any occupation of the entitlement field, and there would be no conflict between federal and state law. In fact, at least one state court has explicitly held that the INA does not preempt wholly state-funded programs. IRCA has not broadened the INA's preemptive scope except in the narrowly circumscribed employer sanctions area. Without federal preemption blocking state assistance, the question next arises whether undocumented aliens are entitled to benefits under state law.

III. STATE LAW ENTITLEMENTS AVAILABLE TO UNDOCUMENTED ALIENS

Many state constitutions and welfare statutes either mandate or authorize medical care and other public assistance for the indigent.[51] Given illegal aliens' severe health and poverty problems,[52] many of these provisions could be applied to make undocumenteds eligible as "residents" for state-funded programs. This section discusses the potential of constitutional language, medical and general assistance statutes, and workers' compensation statutes as means of addressing illegals' unmet needs at the state level.[53] Such provisions could constitute, in Justice Brennan's

---

50. *See supra* note 41 and accompanying text.

51. For a comprehensive, state-by-state survey of constitutional and statutory indigent entitlement language, see NATIONAL HEALTH LAW PROGRAM, MANUAL ON STATE AND LOCAL GOVERNMENT RESPONSIBILITIES TO PROVIDE MEDICAL CARE FOR INDIGENTS (1985 and Supp. 1989).

52. *See* Introduction, *supra*.

53. This article does not cover education, which, although a crucial public service, is already considered available to undocumenteds at primary and secondary levels as a result of the equal protection analysis of Plyler v. Doe, 457 U.S. 202, 226 (1982). At least one state court has extended the *Plyler* approach to higher education, relying on a state constitution's equal protection clause to hold illegals eligible for in-state tuition status at public universities. Leticia "A" v. Board of Regents, No. 588-982-4 (Cal. App. Dep't Super. Ct. 1985). However, this decision was recently overruled. Regents of Univ. of Cal. v. Superior Ct., 225 Cal. App. 3d 972, 276 Cal. Rptr. 197 (1990). For a discussion of state equal protection provisions, the judicial interpretation of which generally follows federal equal protection analysis, see Williams, *Equality and State Constitutional Law*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 71 (B. McGraw ed. 1985). The benefits discussed herein have not yet been guaranteed to undocumented aliens through equal protection jurisprudence, thus necessitating recourse to state law entitlement language.

words, the "independent protective force of state law"[54] that undocumenteds require in the face of federal benefit cutbacks.

A. State Constitutional Provisions

State constitutions that recognize a governmental duty to aid "indigents" or "the needy" provide a potentially valuable but as yet untapped source of entitlements for undocumented aliens.[55] Fifteen states have constitutions that either mandate or authorize public assistance.[56] Two of these explicitly require the state to furnish poor relief (New York and North Carolina), three require the legislature to appropriate funds for this purpose (Alaska, Michigan, and Wyoming), and two impose a duty on counties to support their own needy inhabitants (Alabama and Kansas).[57] The eight remaining constitutions authorize, but do not require, the state or its counties to supply aid (Arkansas, California, Georgia, Hawaii, Mississippi, Montana, South Carolina, and Texas).[58] Significantly, none of these constitutions limits the furnishing of benefits to lawful residents of the state or county.[59]

---

54. Brennan, *supra* note 2, at 491. It should be noted that illegals have long had standing to sue civily in state courts. *See* Peterson v. Neme, 222 Va. 477, 481, 281 S.E.2d 869, 871 (1981) and cases cited therein. But, in the absence of applicable entitlement statutes, such standing merely allows occasional compensation for individual personal injury rather than providing a broader solution to undocumenteds' medical and poverty dilemmas.

55. The construction of state constitutions as granting broader protection than the federal constitution has been called by Justice Brennan "the most important development in constitutional jurisprudence of our times." NAT'L L.J. Sept. 29, 1986, at S-1; *see also supra* note 2. However, other than in the education area, where one state trial court derived its state equal protection analysis from *Plyler's* federal equal protection approach, see *Leticia "A," supra* note 53, state constitutional protection has not been invoked to grant public benefits to the undocumented.

56. NATIONAL HEALTH LAW PROGRAM, *supra* note 51, at 7, 52-60.

57. *See* respectively, ALA. CONST. art. IV; ALASKA CONST. art. VII, §§ 4, 5; KAN. CONST. art. VII, § 4; MICH. CONST. art. IV, § 5; N.Y. CONST. art. XVII, § 1; N.C. CONST. art. IX, § 4; WYO. CONST. art. VII, § 20. Typical of these "mandatory" constitutional provisions is that of New York: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." N.Y. CONST. art. XVII, § 1.

58. *See* ARK. CONST. art. XIX, §§ 16, 20; CAL. CONST. art. XVI, § 11; GA. CONST. art. IX, § 5; HAW. CONST. art. IX, § 3; MISS. CONST. art. IV, § 86; MONT. CONST. art. XII, § 3; S.C. CONST. art. XII, § 1; TEX. CONST. art. XII, § 26. An example of these "discretionary" provisions is that of California:

> The legislature, or the people by initiative, shall have power to . . . provide for the administration of the relief of hardship and destitution, whether resulting from unemployment or from other causes, either directly by the State or through the counties of the State, and to grant such aid to the counties therefore, or make such provisions for reimbursement of the counties by the State, as the Legislature deems proper.

CAL. CONST. art. XVI, § 11.

59. It should be noted that this constitutional language must be read in conjunction with applicable entitlement legislation. The coupling of a discretionary constitutional clause with a welfare statute confining aid to lawful residents could result in a restriction of benefits. For example, while California's constitution authorizes assistance to the indigent, see *supra* note 58, its county relief statute limits such aid to "lawful residents." CAL. WELF. & INST. CODE § 17000 (West 1980). As discussed *infra* text accompanying notes 109-112, California courts are split as to whether illegal aliens are entitled to public benefits.

On the other hand, when a constitution mandates assistance to a broad category of recipients,

Although no court has yet granted benefits to undocumenteds based on any of these constitutional provisions, two recent New York cases illustrate how this result might be accomplished. In *Tucker v. Toia*, the New York Court of Appeals held that a statute denying home relief (general assistance funded fifty percent by the state and fifty percent by localities) to emancipated minors who had not obtained final dispositions in support proceedings violated the state constitution's affirmative duty to aid the needy.[60] The three applicants concerned had been unable to procure final dispositions because, through no fault of their own, they could not locate missing parents.[61] The court concluded that the statute denied benefits to admittedly needy individuals "on the basis of criteria having nothing to do with need" and thus contravened the constitution's mandate.[62]

Under the same constitutional provision, a trial court in *Minino v. Perales* invalidated the New York City Social Services Department's policy of deeming the income of a resident alien's sponsoring employer to be that of the alien for purposes of calculating home relief.[63] The court held that enforcing such a policy against an alien otherwise qualified for relief, regardless of whether the sponsor's resources were in fact available and even when the sponsor refused to provide financial information, arbitrarily violated the constitutional requirement.[64] As the court stated in an earlier proceeding in the same case, the state could "not refuse to aid those whom it has classified as needy."[65] The Social Services Department was thus permanently enjoined from denying assistance based on this "income deeming" policy.[66] Thus, in both *Tucker* and *Minino*, a state constitution's mandate to support the needy was held to preclude the denial of public benefits to qualified applicants on any basis other than need.

Following this line of reasoning, an affirmative constitutional obligation to support the poor could be applied to cover undocumented aliens. Any statute limiting public assistance to "lawful residents" arguably denies aid to the needy "on the basis of criteria having nothing to do with

---

but a relief statute attempts to impose additional restrictions, the latter may arguably be unconstitutional. For example, prior to 1989, Montana's constitution broadly required that the state legislature "shall provide" assistance and services to "those inhabitants who . . . may have need for the aid of society," MONT. CONST. art. XII, § 3, while its general relief statute explicitly excluded "[a]liens found to be illegally within the United States." MONT. CODE ANN. § 53-3-201(3) (1991). When the constitution was amended, effective 1989, to change the language "shall provide" to "*may* provide" (emphasis added), the constitution became discretionary, resolving the contradiction in favor of the limiting statute. For a discussion of state constitutional supremacy, see R. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 78-92, 218-224 (1988).

60. 43 N.Y.2d 1, 371 N.E.2d 449 (1977).
61. *Id.* at 6-7, 371 N.E.2d at 450-51.
62. *Id.* at 9, 371 N.E.2d at 452-53.
63. Minino v. Perales, No. 44488/82, Judgment and Order (N.Y. Sup. Ct. Sept. 28, 1989).
64. *Id.* at 2-3.
65. *Id.*
66. *Id.* at 3.

need" (immigration status) and thus violates a constitution similar to that of the State of New York.[67] Certainly a mandatory constitutional provision would also be sufficient to invalidate the mere administrative policy of a state or local agency denying benefits to illegals who are otherwise qualified.[68] Even those constitutions which simply authorize the state or its counties to provide indigent aid could be viewed as enunciating social service goals inconsistent with restrictive agency action.[69]

The protection of undocumented aliens under state constitutions is still circumscribed by the fact that relatively few states have adopted "duty to aid" provisions. Of the fifteen constitutions containing such language, only seven create an affirmative obligation on the part of the state or its counties, and discretionary clauses can always be undercut if the legislature chooses to limit a statutory entitlement to lawful residents.[70] For otherwise qualified illegal immigrants in the relevant states, however, constitutional provisions may provide a means of requiring state and local agencies to furnish needed assistance.[71]

B. Statutory Provisions

In the vast majority of states, undocumenteds are dependent upon broad statutory definitions of "residence" for their entitlement to government largesse.[72] All fifty states have "public welfare" laws that either mandate or authorize some form of medical and financial assistance to indigent persons who reside in the state or in any of its counties.[73] State

---

67. *See Tucker*, 43 N.Y.2d at 9, 371 N.E.2d at 452. For the seven constitutions containing a mandatory duty to aid the needy, see *supra* note 57.

68. For a comparative analysis of another situation analogous to the plight of illegal aliens to which a mandatory clause might apply, see Note, *A Right to Shelter for the Homeless in New York State*, 61 N.Y.U. L. REV. 272 (1986).

69. For the eight constitutions giving discretion to the state or its counties to aid the needy, see *supra* note 58.

70. *See supra* note 57.

71. The possibility of amending constitutions to add mandatory language should not be discounted. Some states' charters have been relatively easy to amend; *e.g.*, that of California, amended more than 500 times. Turner and Brinkman, *The Constitution of First Resort*, 9 CAL. LAW. 51, 52 (1989). Amendment is arguably a more democratic, pluralistic process than the extratextual judicial interpretations of constitutions that have accompanied the recent resort to state law as a source of rights. *See* Note, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CALIF. L. REV. 1473 (1987). Of course, there are obvious political constraints on the amendment process, particularly in an era of public unwillingness to expand entitlements. *See* Handler, *supra* note 3, at 466.

72. "Residence" is defined in Black's Law Dictionary as "living in a particular locality," as distinguished from "domicile," which means "living in that locality with intent to make it a fixed and permanent home." BLACK'S LAW DICTIONARY 1176 (5th ed. 1979). Residence is clearly the broader category, not requiring intent to remain or permanent status. Illegal aliens' failure to "reside" in a jurisdiction is generally the rationale used by public agencies to deny them benefits, although some needy undocumenteds may also have trouble qualifying as "indigents" because either they cannot provide financial documentation, or they fear that if they do so their illegal status will be discovered. Chavez, *Mexican Immigration and Health Care: A Political Economy Perspective*, 45 HUM. ORG. 344, 349 (1986).

73. NATIONAL HEALTH LAW PROGRAM, *supra* note 51, at 52-60. Typical of mandatory statutes is the Illinois act requiring counties to provide health care delivery systems and stating that "adequate health care is a fundamental right of the people of the State of Illinois." ILL. ANN. STAT. ch. 34,

benefit programs generally provide services not offered by the federal government, such as nonemergency medical care and short-term financial support, or supplement specific federal programs.[74] Only three states—California, Montana, and Utah—qualify their welfare statutes with a "lawful residence" limitation on eligibility.[75] Under the statutes without this restriction, and arguably even under those so limited, undocumenteds may be entitled to health care and other public benefits.

There is precedent outside the undocumented alien context for a broad interpretation of statutory residence requirements. State courts have considered homeless persons to be "residents" eligible for public assistance despite their lack of an address or the means to maintain a permanent abode.[76] For voter registration purposes, the homeless have been held to "reside" in public parks and other non-traditional habitations.[77] College students have been allowed to vote in matters affecting the localities of

---

§ 5011 (Smith-Hurd Supp. 1989). The Illinois General Assistance statute establishes that "[f]inancial aid in meeting basic maintenance requirements for a livelihood compatible with health and well-being, plus any necessary treatment, care and supplies required because of illness or disability, shall be given under this Article to or in behalf of persons who meet the eligibility conditions. . . ." ILL. ANN. STAT. ch. 23, § 6-1. (Smith-Hurd 1988).

Similarly, Texas legislation requires that either public hospitals or the counties "shall provide health care assistance," depending on whether the individual resides within or outside a public hospital's service area. TEX. CIV. STAT. §§ 61.022, 61.052 (Vernon 1989). Counties are also "required to provide for the support of paupers . . . residents of their county, who are unable to support themselves." TEX. REV. CIV. STAT. art. 2351, § 11 (Vernon 1971).

An example of a "discretionary" statute is Colorado's Reform Act for the Provision of Health Care for the Medically Indigent, which provides, *inter alia*:

> The state has insufficient resources to pay for all medical services for persons who are indigent and must therefore allocate available resources in a manner which will provide treatment of those conditions constituting the most serious threats to the health of such medically indigent persons, as well as increase access to primary medical care . . . .

COLO. REV. STAT. § 26-15-102 (1989).

The legislation further states that "medically indigent persons are not entitled to receive medical services . . . as a matter of right." *Id.* Colorado's general assistance law is also discretionary, allowing that "[e]ach county may provide temporary general assistance to the poor who reside in the county or to transients." COLO. REV. STAT. § 30-17-102 (1986). It should be noted that discretionary language may be judicially interpreted as mandatory, as has been the case with the Arizona law granting county boards of supervisors "sole and exclusive authority to provide for the hospitalization and medical care of the indigent sick in the county." ARIZ. REV. STAT. ANN. § 11-291(A) (1990). Both the United States Supreme Court and the Arizona Supreme Court have held that, under this statute, county governments are charged with the "mandatory duty" of providing necessary hospital care for their indigent sick. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 252 (1974); Hernandez v. Yuma, 91 Ariz. 35, 36, 369 P.2d 271, 272 (1962).

74. NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-41. Some state programs augment a federal benefit's amount (as with state SSI supplements), expand eligibility to additional recipient categories (as with state AFDC), or provide a greater range of services (as with state Medicaid). *Id.*

75. CAL. WELF. & INST. CODE § 17000 (West 1980); MONT. CODE ANN. § 53-3-201(3) (1989); UTAH CODE ANN. § 17-5-55 (1987). As will be discussed *infra*, the California and Utah legislation only requires aid recipients to be lawful *county* residents, and this language arguably does not exclude illegal aliens.

76. Nelson v. San Diego County Bd. of Supervisors, 190 Cal. App. 3d 25, 235 Cal. Rptr. 305 (1987); Hodge v. Ginsberg, 303 S.E.2d 245 (W. Va. 1983).

77. Collier v. Menzel, 176 Cal. App. 3d 24, 221 Cal. Rptr. 110 (1985); *In re* Applications for Voter Registration of Willie R. Jenkins, D.C. Bd. of Elections and Ethics, June 7, 1984; *see also* Ah Tye, *Voting Rights of Homeless Residents*, 20 CLEARINGHOUSE REV. 227 (1986).

their educational institutions, notwithstanding their having family homes elsewhere.[78] Such examples of expansive judicial construction serve as helpful models for including undocumenteds within the ambit of welfare statutes' residency language.

1. Health Care

As discussed above, the illegal alien population suffers from a variety of severe health disorders, while its members are also highly unlikely to have access to medical insurance.[79] Furthermore, undocumented individuals often forego needed health care because they fear detection or heavy expenses.[80] In the face of such problems, Congress and the courts have restricted eligibility for federal medical benefits to lawful aliens.

Medicaid, the basic federal-state program providing medical care to qualifying low-income persons,[81] is subject to "permanently residing under color of law" ("PRUCOL") restrictions by statute and by Health and Human Services regulation.[82] Although Congress stated in 1986 legislation that PRUCOL was not applicable to Medicaid coverage for emergency care,[83] and states may have some latitude to define "emergency" expansively,[84] undocumenteds are still clearly ineligible for most nonemergency services. The other major federal medical aid program, Medicare, which provides health insurance for the elderly and disabled,[85] requires

78. Paulson v. Forest City Community School Dist., 238 N.W.2d 344 (Iowa 1976); Hershkoff v. Board of Registrars of Voters, 366 Mass. 570, 321 N.E.2d 656 (1974).

79. *See supra* text accompanying note 8.

80. *See supra* text accompanying note 10.

81. 42 U.S.C.A. §§ 1396-1396f (1988). Medicaid assistance takes the form of reimbursement to medical service providers. NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-12 .

82. 42 U.S.C.A. § 1396b(v) (Supp. 1991); 42 C.F.R. § 435.406 (1990). Benefits are limited to citizens, lawful permanent residents, and aliens "permanently residing in the United States under color of law," which language, although the subject of varying interpretations, certainly excludes undocumented aliens. On PRUCOL restrictions generally, see discussion *supra* note 11. On PRUCOL in the Medicaid context, see Calvo, *supra* note 11, at 418-20; Rubin, *supra* note 11, at 419-20; NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-7 to 11-14.

83. Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9406, 100 Stat. 1874, 2057-58 (1986) (codified as amended at 42 U.S.C.A. § 1396b(v) (Supp. 1991) [hereinafter OBRA 86]). The statute defines "emergency medical condition" as "a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in-(A) placing the patient's health in serious jeopardy, (B) serious impairment to bodily functions, or (C) serious dysfunction of any bodily organ or part." 42 U.S.C.A. § 1396b(v)(3) (Supp. 1991).

84. In the wake of OBRA 86, *supra* note 83, two states, Washington and Illinois, defined "emergency" for Medicaid eligibility purposes to include pregnancy-related benefits. WASH. ADMIN. CODE ch. 388-100, § 005 (1987); Illinois Department of Public Aid, Policy Memorandum, Pregnant Women and Children Under Age One, effective July 1, 1988 (June 22, 1988). The Washington statute explicitly requires that reimbursement for pregnancy services come only from state Medicaid funds. WASH. ADMIN. CODE ch. 388-100, § 005 (1987). The Illinois policy, by committing federal as well as state funds to an expanded definition of "emergency" services, has arguably exceeded the scope of the Medicaid statute. *See* Stowe, *Undocumented Aliens and Emergency Care*, 22 CLEARINGHOUSE REV. 619 (1988).

85. 42 U.S.C.A. §§ 1395-1395zz (Supp. 1991). Medicare assistance takes the form of hospitalization insurance (Part A) and supplemental insurance covering physicians' treatment and other services (Part B). The program is voluntary and is funded in part by participants' premiums. Eligibility is not based on financial need but on meeting age or disability definitional requirements. NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-14 to 11-15.

a recipient either to have credited wages to a valid social security account (unavailable to illegals after 1974) or to "buy-in" through premium payments—an option only available to citizens and to lawful permanent residents who have lived in the United States at least five years.[86] In *Matthews v. Diaz*, the United States Supreme Court upheld these Medicare restrictions as being within Congress' plenary immigration power to make distinctions among classes of aliens based on the character and length of their residency.[87] Thus, with the exception of Medicaid emergency care and, arguably, Hill-Burton loans to hospitals agreeing to aid certain needy "persons" in their localities,[88] federal medical assistance is largely foreclosed to the undocumented.

The federal restrictions leave indigent illegal aliens without the nonemergency and preventive medical care routinely provided to other poor, elderly, and disabled residents, and which is crucial in preserving the health of the general population.[89] Moreover, low income undocumenteds not meeting the stringent Medicaid financial requirements are not even eligible for emergency care. State programs available to "residents" can potentially address these needs by providing nonemergency care for reduced fees, cash to pay medical bills, and wholly or partially funded care for catastrophic illnesses and conditions of public concern.[90] Emergency assistance is often available to low income individuals ineligible for Medicaid, such as single adults without dependents.[91] Based upon the few cases which have been litigated, it can be argued that these programs should cover the largely unserved illegal alien population under state health and welfare statutes.

---

86. 42 U.S.C.A. §§ 1395c (Supp. 1991), 1395i-2(a)(3), 1395o(2) (1983); 42 C.F.R. §§ 406.10, 406.11, 406.12, 406.20(b)(2)(ii), 407.10(a)(iii) (1990). The social security account and lawful permanent resident restrictions apply to both Parts A and B. Because it was not until 1974 that alien receipt of social security numbers was restricted to lawful permanent residents with INS work authorization, aged or disabled aliens receiving numbers prior to that date should be Medicare eligible regardless of immigration status. 42 U.S.C.A. § 405(c)(2)(B)(i) (1983); 20 C.F.R. §§ 422.104, 422.107 (1991); *see also* Drake, *supra* note 8, at 504-05; NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-14 to 11-15.

87. Matthews v. Diaz, 426 U.S. 67, 83 (1976).

88. Hill-Burton funds are federal low-interest loans provided to hospitals, clinics and other medical facilities for expansion or rehabilitation, in exchange for which the facility provides a percentage of its services free or at low cost. 42 U.S.C.A. § 291-291o (1991); 42 C.F.R. §§ 53, 124 (1990). Services must be extended to all "persons" meeting certain income and family size criteria who reside in the hospital's service area. 42 U.S.C.A. § 291c(e) (1991); 42 C.F.R. § 124.505 (1990). According to a recent notice issued by the United States Department of Health and Human Services ("HHS"), aliens' eligibility for services must be determined by the same criteria used for American citizens, with the sole qualification that alien recipients must have resided in this country for three months. HHS Program Policy Notice #89-5 (1989). Thus, participating hospitals arguably must serve qualifying illegals as "persons." State or local government agencies can monitor hospital compliance with Hill-Burton obligations to ensure the required provision of uncompensated care. NATIONAL HEALTH LAW PROGRAM, *supra* note 51, at 36.

89. *See* Chavez & Cornelius, *supra* note 8, at 99. Undocumenteds are often reluctant or unable to seek non-emergency and preventive care, which is particularly important during pregnancy.

90. NATIONAL HEALTH LAW PROGRAM, *supra* note 51, at 8-10; NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-42 to 11-43.

91. NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-42.

Several isolated but significant cases demonstrate how "residence" language in state statutes can be defined broadly to provide undocumenteds access to health care programs. Applying New Mexico's Special Medical Needs Act,[92] the New Mexico Court of Appeals in *Perez v. Health and Social Services*[93] invalidated an unwritten agency policy of denying non-emergency care to illegal aliens because they were not statutorily eligible as state "residents." The court held that undocumented aliens could establish state residence as defined in the Health and Social Services Agency's own regulations: they were physically present and had demonstrated an intent to remain in the state.[94] As noted above, this court also found that because the assistance program at issue was wholly state-funded, INA did not preempt such aid as a matter of immigration control.[95]

Similarly, an Arizona statute authorizing counties to provide hospitalization and medical care to indigent county "residents," which is framed in discretionary language but has been judicially construed as mandatory,[96] has been used to overturn a county regulation making illegal aliens ineligible for this aid.[97] In *St. Joseph's Hospital v. Maricopa County*,[98] the Arizona Supreme Court required a county to reimburse a private hospital for rendering emergency care to needy undocumenteds. The court reasoned that had the legislature wished to qualify the term "resident" with "legal," "it could have supplied the missing adjective itself."[99] Furthermore, the regulatory limitation ran counter to state law precedent barring hospitals from denying emergency care "to any person without valid cause."[100]

In the most recent published opinion granting illegals access to state health assistance, *Intermountain Health Care v. Board of Commissioners of Blaine County*,[101] the Idaho Supreme Court used a mandatory medical indigency statute[102] to reverse a county decision to deny benefits to a

92. N.M. STAT. ANN. §§ 27-4-1 to -5 (1978). The Act provides in pertinent part that "[a] person is eligible for medical care" if he is aged, blind, disabled, not eligible for other assistance, has a serious medical condition which will as a reasonable medical probability lead to death in the near future, and "is a resident of New Mexico." *Id.* §§ 27-4-3 to -5.

93. 91 N.M. 334, 573 P.2d 689 (Ct. App. 1977), *cert denied*, 91 N.M. 491, 576 P.2d 297 (1978).

94. *Id.* at 336, 573 P.2d at 691.

95. *Id.* at 337, 573 P.2d at 692.

96. ARIZ. REV. STAT. §§ 11-251 to -299 (1990). The statute grants county boards of supervisors "sole and exclusive authority to provide for the hospitalization and medical care of the indigent sick in the county. . . ." *Id.* § 11-291(A). "Qualified" patients must be indigent. *Id.* § 11-297(A). For cases holding that the statute imposes a "mandatory duty" on counties, see *supra* note 73.

97. Maricopa County Department of Health Service, Eligibility Manual, Regulation 4.05-3.

98. 142 Ariz. 94, 688 P.2d 986 (1984).

99. *Id.* at 100, 688 P.2d at 992.

100. *Id.*

101. 109 Idaho 412, 707 P.2d 1051 (1985).

102. IDAHO CODE §§ 31-3501 to -3516 (1983). The statute provided, in pertinent part, that "[p]ayment for hospitalization of a medically indigent individual shall be provided by the county in which such individual maintained a residence immediately preceding hospitalization or institutionalization." *Id.* § 31-3506. This section of the statute was amended to clarify that the obligated county shall be that in which the individual last resided for six months within the last five years, and if he/she has not resided in any county for this period, then the county where he/she maintained a residence immediately preceding hospitalization shall be obligated. *See id.*

United States citizen child whose undocumented parents were not considered "residents." The court held that if both the child and the parents met the law's financial and residence criteria, the parents' illegal status was not a bar to the child's receiving nonemergency hospitalization care.[103] As in *Perez* and *St. Joseph's Hospital*, the *Intermountain Health Care* court found that there was no indication that the legislature meant to give "residence" anything other than its ordinary meaning.[104] Because the court did not rest its opinion on the child's citizenship status, arguably the child herself could have been undocumented without affecting the result. Thus, at least three state courts have given statutory residence language its ordinary meaning to invalidate policies, regulations, and *ad hoc* practices denying health care to illegal aliens.

In two other states where undocumenteds' entitlement to medical assistance as residents has been judicially addressed, the question has been left unsettled, although benefits have not been foreclosed. Using Texas' mandatory statute requiring county hospital districts to furnish aid to the indigent "persons residing in" the district,[105] two illegal aliens challenged a district's requirement that undocumenteds pay fully in advance for nonemergency services.[106] Upon hearing the matter, the Fifth Circuit abstained on the basis that the question whether illegals could be "persons residing in" the district presented an unsettled issue of state law.[107] While the court did not grant the plaintiffs' requested hospital fee reduction, it left open the possibility of favorable state court construction, stating that the terms at issue were sufficiently vague that they could be interpreted either way.[108] Certainly the Texas statute's residence language was no narrower than that of New Mexico, Arizona or Idaho, where illegals have been held to be entitled to assistance.

Even in California, where a mandatory statute limits county aid to "lawful residents" of the county,[109] state courts are divided as to whether this language excludes undocumenteds. One court has held that they are eligible for subsidized nonemergency care because the law defines a lawful resident of the county as a person who "has resided therein continuously for one year immediately preceding his application for assistance."[110] Another court has given the statute a contrary reading, however, holding that a county could reasonably interpret the lawful resident limitation to remove county responsibility for underwriting non-emergency assistance

---

103. *Intermountain Health Care*, 109 Idaho at 414, 707 P.2d at 1053.

104. *Id.*

105. TEX. REV. CIV. STAT. ANN. art. 4494n, § 1 (1976). The same provision in slightly altered form is currently found in TEX. REV. CIV. STAT. ANN. § 61.052 (1989).

106. Ibarra v. Bexar County Hosp. Dist., 624 F.2d 44 (5th Cir. 1980).

107. *Id.* at 47.

108. *Id.*

109. CAL. WELF. & INST. CODE §§ 17000-17410 (West 1980). The statute provides, in pertinent part, that "[e]very county . . . shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein . . . ." *Id.* § 17000.

110. *Id.* § 17105; Sequoia Community Health Found. v. Board of Supervisors of Fresno County, No. 269548-6 (Cal. App. Dep't Super. Ct., June 29, 1983).

to illegals.[111] That court did note that an unauthorized alien might be eligible for nonemergency care if his condition posed an imminent public health hazard, as in the case of a tuberculosis patient.[112]

The decisions in Texas and California thus leave open the possibility that health care entitlements can be applied to undocumented aliens in those states and in others with similar legislation.[113] In the absence of favorable judicial interpretation of statutory language, public agencies and hospitals may still provide assistance to illegal aliens on a discretionary basis as a matter of public policy. For example, in response to a legal services lawsuit, an El Paso, Texas county hospital discontinued its informal requirement that undocumented patients pay a large advance deposit as a precondition to treatment.[114] And, in Colorado, a state with a discretionary indigent health care statute[115] and no legal precedent applying this legislation to illegals, the Denver hospital system provides undocumenteds with medical assistance in the interest of public health.[116]

Therefore, health benefits can be provided to unauthorized aliens via broad definitions of "residence" criteria in applicable welfare statutes. Mandatory legislation, as in New Mexico and Idaho, or discretionary statutes construed to be mandatory, as in Arizona, can be used to invalidate agency or hospital policies denying illegals access to treatment. Even discretionary laws merely authorizing care may support claims that restrictions on undocumenteds are inconsistent with legislative intent that public health be protected. Where the question of illegals' inclusion as "residents" is unsettled or disputed, as in Texas and California, assistance is still not foreclosed. Certainly there is a strong argument that a mere restriction to lawful *county* residents, as in California and Utah, need not exclude undocumenteds. Moreover, absent judicial willingness to apply existing entitlement language, hospitals may always allow treatment on a discretionary basis as a matter of public policy.

2. Public Assistance

As discussed above, many undocumented aliens suffer from problems related to poverty, but avoid seeking assistance for fear of exposing

---

111. Bay Gen. Community Hosp. v. County of San Diego, 156 Cal. App. 3d 944, 203 Cal. Rptr. 184 (1984).

112. *Id.* at 962 n.11, 203 Cal. Rptr. at 194 n.11.

113. As in California, the medical indigency statute in Utah only requires recipients to be lawful *county* residents and thus arguably covers illegal aliens. *See* UTAH CODE ANN. § 17-5-55 (1987), applying to "all indigent sick persons who have lawfully settled in any part of the county." The only state welfare legislation in the nation which explicitly excludes undocumenteds from benefits is that of Montana, providing that "[a]liens found to be illegally within the United States are not eligible for relief from state funds." MONT. CODE ANN. § 53-3-201(3) (1989).

114. Annotation, *El Paso Hospital Changes Policy and Accepts Undocumented Aliens for Indigent Care*, 21 CLEARINGHOUSE REV. 285 (1987).

115. *See supra* note 73.

116. Colorado Legislative Council, Report to the Colorado General Assembly: Recommendations for 1988, Medically Indigent/Illegal Aliens 21 (1987).

themselves by requesting government aid.[117] At the federal level, public assistance addressing these needs is limited because, as with health benefits, most programs are restricted to lawful aliens through PRUCOL[118] or other language. PRUCOL-covered entitlements include: Aid to Families with Dependent Children ("AFDC"),[119] Supplemental Security Income ("SSI"),[120] and Unemployment Insurance ("UI").[121] Federally funded housing benefits,[122] food stamps,[123] and legal services[124] are limited to United States citizens and specific categories of aliens.

The Social Security program, which provides insurance benefits to elderly and disabled workers, requires recipients to have credited wages to a valid Social Security account (unavailable to illegals after 1974).[125] Only several minor programs are accessible to undocumenteds, including the Special Supplemental Food Program for Women, Infants and Children ("WIC"),[126] school meals for children,[127] and the Low Income Home Energy Assistance Program ("LIHEAP").[128]

---

117. *See supra* text accompanying notes 9-10.

118. Although PRUCOL has been broadly defined in the public assistance context to include visa overstays, *see* Holley v. Lavine, 533 F.2d 845 (2d Cir. 1977), *cert. denied*, 435 U.S. 947 (1978), and even aliens residing in the United States with INS knowledge but whose departure the INS does not contemplate enforcing, *see* Berger v. Secretary of HEW, 771 F.2d 1556 (2d Cir. 1985), the language certainly excludes undocumenteds. On PRUCOL restrictions generally, see *supra* note 11. On PRUCOL in the context of specific federal poverty programs, see Calvo, *supra* note 11, at 411-18, 420-21; Rubin, *supra* note 11, at 414-19; NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-5 to 11-11, 11-16 to 11-25.

119. 42 U.S.C.A. §602(a)(33) (Supp. 1991); 45 C.F.R. § 233.50 (1990). AFDC provides joint federal and state grants to families deprived of one or both parents' support due to absence, disability, or unemployment. NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-5 to 11-9. An eligible child of an undocumented parent may receive benefits, but ineligible alien siblings cannot be considered in calculating the amount of aid. 45 C.F.R. § 206.10(a)(1)(vii)(B) (1990).

120. 42 U.S.C.A. § 1382c(a)(1)(B) (Supp. 1991). SSI provides federal cash assistance for aged, blind, or disabled persons with low incomes. NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-9 to 11-11.

121. 26 U.S.C.A. § 3304(a)(14)(A) (1989). UI consists of state compensation funds collected from employers and administered under federal guidelines. An employee's eligibility is based on his earnings prior to becoming unemployed. NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-22 to 11-25. Although one state has held that an alien who lacked INS work authorization during his UI base period but has applied for permanent residence meets the PRUCOL eligibility requirement for receiving UI payments, *see* Sandoval v. Colorado Div. of Employment, 757 P.2d 1105, 1108 (Colo. App. 1988), even this expanded definition of PRUCOL still excludes undocumenteds.

122. 42 U.S.C.A. § 1436(a) (Supp 1991). The various federal housing programs include fully or partially subsidized housing, rent supplements, and loans. *See* cites and descriptions in NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-26 to 11-28. For a discussion of the litigation which has prevented HUD from implementing the alienage restrictions, see Calvo, *supra* note 11, at 407-10; NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-27.

123. 7 C.F.R. § 273.4 (1991). The food stamp program provides coupons for low-income persons to purchase food items and thereby obtain adequate nutrition. NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-31 to 11-33.

124. 45 C.F.R. §§ 1626.4(a), 1626.10, 1626.11, 1626.12 (1990). The federal Legal Services Corporation funds free legal services in civil matters for low-income persons. NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-37 to 11-41.

125. 42 U.S.C.A. §§ 401-404, 405(c)(2)(B)(i) (1983); 20 C.F.R. §§ 422.104 422.107 (1991). Social Security, based on a federal compensation fund collected from employers and employees, provides benefits to persons aged 62 or older, to those physically or mentally disabled, and to their survivors. NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-16 to 11-20.

126. 42 U.S.C.A. § 1786 (Supp. 1991). The WIC program provides food, vitamins, counseling,

The federal PRUCOL restrictions on public aid leave indigent illegal aliens without the cash, housing, and food assistance for which other poor, elderly, and disabled individuals are eligible. Under "public welfare" statutes,[129] state programs can partially fill this gap with general relief (cash maintenance)[130] and vouchers for housing[131] and food.[132] Although these types of aid are often furnished only on a temporary basis and merely provide subsistence support,[133] they would provide some protection for those undocumenteds in dire conditions. In fact, short-term, limited assistance corresponds well to the needs of illegal aliens, given their low unemployment rate and high percentage of labor force participation.[134] As with health care, broad statutory "residence" language can be used to ensure coverage of undocumenteds under these programs.

There have been no judicial decisions as yet involving non-medical benefits for unauthorized aliens under state welfare statutes, but courts construing analogous public benefit laws and agencies promulgating aid regulations have interpreted "residence" language expansively. In 1965, a New York court held that undocumenteds were "residents" qualified to receive compensation under the state's Motor Vehicle Accident Indemnification Law.[135] The court distinguished between the mere residence required by the statute and the narrower "domicile" language the legislature could have used.[136] Similarly, a California court held in 1980 that a crime victims' compensation law requiring that recipients be state residents could not be construed by the administering agency's regulations to further mandate that such residence be "lawful."[137] Such an alteration

---

and referrals to low-income pregnant women and children under five years of age. NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-33 to 11-34.

127. Several federal programs provide free or reduced-price meals to children of low-income families. *See* cites and descriptions in NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-34 to 11-35.

128. 42 U.S.C.A. §§ 8621-8629 (1983). LIHEAP, administered by states pursuant to federal guidelines, provides winter heating subsidies to low-income families. NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-37.

129. *See* discussion *supra* notes 73-74 and accompanying text.

130. General relief programs may be funded at state, county, or municipal levels, and they provide short-term cash assistance to unemployed indigents. Handler, *supra* note 3, at 483-84; *see also* NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-41 to 11-42.

131. State and local housing programs may include vouchers for hotels, temporary shelters, and relocation assistance. NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-43.

132. Nutritional aid may include home-delivered meals or meals at shelters and shopping/transportation for the elderly and disabled. NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-43.

133. *Id.* at 11-22.

134. In 1985, one study reported an illegal alien unemployment rate of 1.3% nationally and a labor force participation rate of 76%. J. SIMON, HOW DO IMMIGRANTS AFFECT US ECONOMICALLY? 17 (1985).

135. Catalanotto v. Palazzolo, 46 Misc. 2d 381, 259 N.Y.S.2d 473 (Sup. Ct. 1965).

136. *Id.* at 383, 259 N.Y.S.2d at 475-76. The court defined "residence" as a "fixed abode where one actually lives for the time being" and "domicile" as "the place where a person intends eventually to return and remain," following the fourth edition of Black's Law Dictionary. *Id.* at 383, 259 N.Y.S.2d at 475. These definitions are almost identical to those in Black's fifth edition, cited *supra* note 72.

137. Cabral v. State Bd. of Control, 112 Cal. App. 3d 1012, 169 Cal. Rptr. 604 (1980).

of the statute, said the court, constituted an "unauthorized administrative amendment."[138] Both of these judicial interpretations suggest that public welfare statutes, which usually contain similar "residence" language, should also be applied broadly.

In addition to expansive statutory construction by courts, agencies charged with implementing welfare laws may protect undocumenteds via administrative regulations. For example, in 1985, the Massachusetts Department of Public Welfare supplemented that state's general relief statute (covering residents)[139] with a regulation explicitly stating that "citizenship and alien status have no bearing on eligibility."[140] The provision was added in response to a gubernatorial executive order mandating that state agencies refrain from investigating the citizenship or residency status of any person.[141] As in the health care area, state public assistance programs provide a resource for illegal aliens that can be tapped through litigation or through political pressure on disbursing agencies.

Thus, "residence" eligibility criteria in state welfare statutes can be applied to include undocumenteds. Most of these laws contain provisions requiring that indigent state or county residents be furnished medical aid and financial assistance. Since the implementation of the PRUCOL restrictions on federal entitlements, state programs have become the only recourse for illegals in need of nonemergency health care and other social services. Broad statutory language can provide the basis for expansive judicial interpretations of coverage, more inclusive agency regulations, and informal policies of furnishing aid without inquiry as to the recipient's status.

C. *Workers' Compensation*

Another state-level benefit that could be applied to protect unauthorized aliens is workers' compensation. Concentrated in low-wage, often dangerous industries such as agriculture, food processing, and garment manufacturing,[142] illegals are highly likely to suffer on-the-job accidents and illnesses.[143] Workers' compensation programs address this problem by

---

138. *Id.* at 1015, 169 Cal. Rptr. at 606.

139. MASS. GEN. LAWS ANN. ch. 117, § 1-117 (West 1990). The statute provides, in pertinent part, that "[t]he commonwealth, acting by and through the department of public welfare, shall provide assistance to residents of the commonwealth, found by the department to be eligible for such assistance in accordance with this chapter." *Id.* § 1.

140. Massachusetts Department of Public Welfare, Massachusetts Assistance Payments Manual, § 312.350 (Revised Dec. 1985).

141. Commonwealth of Massachusetts, Executive Department, Executive Order No. 257 (Oct. 4, 1985). It should be noted that for the fiscal year 1991 budget, the Massachusetts legislature excluded some illegal aliens from general relief, but most needy undocumenteds are still eligible, including minor children, their parents, the handicapped, the elderly, and pregnant women. Massachusetts Law Reform Institute, Memorandum Re Status of the Final FY91 Budget for Immigrants and Refugees (Aug. 3, 1990) (language modifying General Relief eligibility is attached).

142. For a representative sampling of undocumented immigrants' occupations, as well as summaries of earlier surveys, see CORNELIUS & CHAVEZ, *supra* note 9, at 29-34.

143. On occupational health risks in agriculture, see Drake, *supra* note 8, at 502-03. On food processing, see Mora, *The Tolteca Strike: Mexican Women and the Struggle for Union Representation*,

awarding medical and temporary disability payments for employment-related injuries or death, regardless of who is at fault.[144] Unlike public welfare statutes, state workers' compensation laws do not even require that the recipient be a "resident," but only that his or her injury or illness arise from the course of employment.[145]

In fact, courts in three states have held that undocumenteds are entitled to workers' compensation. As early as 1960, a New York appellate court affirmed an award to an illegal entrant who agreed to depart voluntarily, holding that unauthorized status or any other "wrongdoing" was not a bar to the award.[146] The court also stated that because the New York statute compensated employees' future loss of earning power, the award should not be commuted at the time of the alien's departure.[147] More recently, courts in Texas (1972) and Florida (1982) have similarly held that the undocumented status of a claimant does not preclude full benefits for work-related injuries.[148]

The remaining states could well apply the unrestrictive language of their workers' compensation statutes to cover illegal aliens.[149] Various federal and state courts have held that these laws should be liberally construed to accomplish the social policy of justly compensating injured workers and their families.[150] Given their concentration in high-risk occupations, undocumenteds should be entitled to benefit from this policy at least to the same extent as other workers. As one court noted in the parallel context of allowing an illegal alien to sue for personal injury, "aliens unlawfully in the country must live. They must in the nature of things make the ordinary contracts incident to existence."[151] To deny the

---

in A. RIOS-BUSTAMANTE, MEXICAN IMMIGRANT WORKERS IN THE U.S. 111, 112-13 (1981). On the garment industry, see Schlein, *Los Angeles Garment District Sews a Cloak of Shame*, in M. MORA & A. DEL CASTILLO, MEXICAN WOMEN IN THE UNITED STATES: STRUGGLES PAST AND PRESENT 113, 114 (1980).

144. Programs are governed by state laws, which usually require the employer to secure its liability through insurance. In return for coverage, the employee gives up his common-law right to sue the employer for the injury. For a detailed description of the workers' compensation system, see A. LARSON, WORKMEN'S COMPENSATION LAW (1952, Supp. 1989).

145. NATIONAL IMMIGRATION LAW CENTER, *supra* note 11, at 11-25; *see also* A. LARSON, *supra* note 144, at § 35.20.

146. Testa v. Sorrento Restaurant, Inc., 10 A.D.2d 133, 197 N.Y.S.2d 560 (N.Y. App. Div. 1960).

147. *Id.* at 134-35, 197 N.Y.S.2d at 562.

148. *See* respectively, Commercial Standard Fire and Marine Co. v. Galindo, 484 S.W.2d 635 (Tex. Ct. App. 1972) and Gene's Harvesting v. Rodriguez, 421 So. 2d 701 (Fla. Dist. Ct. App. 1982); *see also* Ayala v. Florida Farm Bureau Casualty Ins., 543 So. 2d 204 (Fla. 1989) (nonresident alien beneficiaries of deceased worker entitled to full workers' compensation death benefits). For an argument that this line of cases now conflicts with IRCA's policy of discouraging the employment of undocumented aliens, see Note, *Illegal Aliens and Workers' Compensation: The Aftermath of Sure-Tan and IRCA*, 7 HOFSTRA LAB. L.J. 393, 405-08, 412-13 (1990). This theory, however, has not been accepted by any legislature or court.

149. The workers' compensation legislation of at least one state, California, defines the class of protected employees as including those "unlawfully employed" and "aliens." CAL. LAB. CODE § 3351 (West 1989). Arguably, this definition comprehends aliens illegally in the United States.

150. *See, e.g.*, Finnerman v. McCormick, 499 F.2d 212 (10th Cir.), *cert. denied*, 419 U.S. 1049 (1974); Conley v. Industrial Comm'n, 43 Colo. App. 10, 601 P.2d 648 (1979).

151. Janusis v. Long, 284 Mass. 403, 409, 188 N.E. 228, 231 (1933).

undocumented the benefits of their employment contracts would vitiate the social policy underlying workers' compensation and would impose an unnecessary economic burden on the affected individuals and their families.

We have seen that state constitutions requiring aid to the needy, public welfare laws protecting "residents," and workers' compensation can all be applied to cover unauthorized aliens. These state benefits address illegals' most pressing needs—medical care, poverty assistance, and redress for disabling injuries—thus partially filling the gap left by PRUCOL limitations on federal programs. Formal amendment of constitutions and statutes could further close this gap by changing discretionary language to mandatory language and thus explicitly entitling undocumenteds.[152] Local jurisdictions also can ban discrimination against illegal aliens in the disbursement of social services, as some cities already have done.[153] Having established that state benefits for the undocumented are not preempted by the federal immigration power, and that state constitutions and statutes can be read to require such assistance, it is necessary to examine the policy reasons why states should provide these services.

IV. POLICIES SUPPORTING STATE ASSISTANCE TO UNDOCUMENTED ALIENS

Not only do states have the legal facility to provide benefits to the undocumented, but their doing so is supported by strong public policy arguments. Immigration issues have been hotly debated during the last two decades, with many "nativist" politicians and academics militating for tighter controls on illegal entry and claiming that unauthorized individuals should not be entitled to civil rights or public assistance.[154] A

---

152. On the advantages and disadvantages of the amendment process, see *supra* note 71.

153. *See* Chicago, Ill., Executive Order 85-1 (Mar. 7, 1985); Oakland, Calif., City Council Res. 63950 (July 8, 1986); New York, N.Y., Executive Order No. 124 (Aug. 7, 1989); San Francisco, Calif., Administrative Code, § 12H.2 (amended Sept. 28, 1989). Of course, local power to disburse benefits is a two-edged sword and can also be used to explicitly bar aid to illegals. *See* City of Costa Mesa, Calif., Council Policy No. 100-4 (Aug. 7, 1989). It should be noted that Costa Mesa's policy withholding city funds from any individual, agency, or organization which provided benefits to undocumenteds was rescinded after ten months and that a United States Department of Housing and Urban Development ("HUD") ruling approving the policy was withdrawn as well. City of Costa Mesa, Calif., Press Release, June 7, 1990; Letter from HUD General Counsel Frank Keating to Representative Christopher Cox, June 7, 1990; *Kemp Reverses HUD Ruling on Illegal Aliens*, Los Angeles Times, June 12, 1990.

154. Nativism is defined as anti-immigration sentiment. W. CORNELIUS, AMERICA IN THE ERA OF LIMITS: NATIVIST REACTIONS TO THE "NEW" IMMIGRATION 3-4 (1982). Nativist movements have been a recurrent feature of United States history, opposing, *inter alia*, Irish, Chinese and most European immigration in the nineteenth century, and Japanese and Mexican newcomers in the twentieth. For historical surveys of American nativism, particularly its political manifestations, see Seller, *Historical Perspectives on American Immigration Policy: Case Studies and Current Implications*, in U.S. IMMIGRATION POLICY 139-162 (R. Hofstetter ed. 1984); J. HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925 (1955). For a more focused historical study of the impact of nativism on a particular series of immigration restrictions, see L. SALYER, GUARDING THE 'WHITE MAN'S FRONTIER': COURTS, POLITICS, AND THE REGULATION OF IMMIGRATION, 1891-1924 (University of California, Berkeley, 1989) (unpublished doctoral dissertation). Beginning in the 1970's, a new wave of nativism has been directed primarily at refugees from Southeast Asia and illegal immigrants

commonly raised rationale for such restrictions is that undocumented aliens are a net drain on the United States economy, costing more in social services than they contribute in taxes.[155] Often accompanying these arguments are claims that by entering without documents, illegals have waived membership in the American political community,[156] and that their nonconforming culture will erode the national language and lifestyle.[157] While other charges have been leveled at undocumented immigrants, including the assertion that they unfairly compete with both United States-born and lawful resident workers,[158] the above-mentioned "net drain," "waiver," and "cultural erosion" theories are those most often used to criticize illegals' access to entitlements and so are the most relevant arguments here.

---

from Mexico. W. CORNELIUS, *supra*, at 9-17. This new restrictionism appears to be based in part on fears that an overburdened economy cannot support an increase in population, and on a perception that traditional American culture is being eroded. *Id.* at 17-28; *see also* Waldinger, *The Occupational and Economic Integration of the New Immigration*, in Seller, *supra*, at 219.

155. Leading proponents of this view include, *inter alia*, ex-governor of Colorado Richard Lamm (see McBean, *Statistics Fly in Debate over Immigration*, Denver Post, Sept. 11, 1984; *Halt! U.S. Can't Absorb All Its Immigrants*, Rocky Mountain News, July 19, 1981), Yale law professor Peter Schuck (see P. SCHUCK, CITIZENSHIP WITHOUT CONSENT 112-13 (1985)), the organization Federation for American Immigration Reform (FAIR) (see discussion in J. SIMON, *supra* note 5, at 294-295), and environmentalist Edward Abbey (see Abbey, *Immigration and Liberal Taboos*, in E. ABBEY, ONE LIFE AT A TIME, PLEASE at 41-44 (1988)). The extent to which the net cost idea has been accepted by the general public is shown by two successive national opinion surveys conducted by the Los Angeles Times. In 1981, 62% of those polled felt that undocumented aliens "take more from the U.S. economy through social services and unemployment benefits than they contribute to the U.S. economy through taxes and productivity." Bernstein, *Seventy-Five Percent of Jobless Would Accept Menial Work*, Los Angeles Times, Apr. 6, 1981. By 1989, this figure had increased to 75%. Skelton, *Americans Give High Marks to Quality of Life*, Los Angeles Times, Jan. 1, 1990.

156. For the "waiver" theory, see P. SCHUCK, *supra* note 155, at 99. Schuck considers that "[undocumenteds] have migrated here, after all, in knowing violation of American law, well aware that they may at any moment be obliged to return. If anybody may be said to have taken a calculated risk, they can." *Id.*

157. For the belief that undocumenteds threaten American cultural hegemony, see Simpson, *Statement of Commissioner Alan K. Simpson*, in SELECT COMMISSION, *supra* note 41, Appendix B at 408, 412-13. Senator Simpson, co-sponsor of IRCA, asserts that "if linguistic and cultural separation rise above a certain level, the unity and political stability of the nation will in time be seriously eroded." *Id.* at 413; *see also* E. ABBEY, *supra* note 155, at 43 ("[T]hese uninvited millions bring with them an alien mode of life which - let us be honest about this - is not appealing to the majority of Americans.").

158. For an often-cited, though qualified statement of this view, see SELECT COMMISSION, *supra* note 41, at 41 ("[I]t is apparent that the continuing flow of undocumented workers across U.S. borders has certainly contributed to the displacement of some U.S. workers and the depression of some U.S. wages.").

Quotations from INS, anti-immigrant activist and union sources expressing this belief in more sweeping terms can be found in J. SIMON, *supra* note 5, at 296-97. However, substantial empirical research conducted at national and local levels contradicts the "labor competition" theory, demonstrating that the jobs illegals hold would not be filled by natives in their absence, and that illegals enhance United States productivity and generate consumer demand by holding these jobs. *See id.* at 298-300; E. BOGEN, IMMIGRATION IN NEW YORK 90-96 (1987); K. MCCARTHY & R. VALDEZ, CURRENT AND FUTURE EFFECTS OF MEXICAN IMMIGRATION IN CALIFORNIA 37-47 (1986). The debate regarding labor competition has been carried on in relation to the general question of unauthorized entry rather than as to the specific issue of access to benefits. It should also be noted that hostility to undocumented aliens has not been limited to argumentation, but has been manifested in violent physical attacks on illegals residing near the Mexican border. *See* Freedman, *In an Area Growing Too Fast, Anger Is Taken Out on the Weak*, Los Angeles Times, Feb. 19, 1990.

These nativist claims can be countered by both empirical and philosophical arguments that benefits should be provided to unauthorized aliens by any government level capable of so doing. In the first place, critics of assistance ignore the reality that undocumenteds continue to enter the United States in large numbers and that their health and poverty problems may be detrimental to the general welfare if not addressed. As to the "net drain" argument, every empirical study of illegals' economic impact demonstrates the opposite of what the nativists allege: undocumenteds actually contribute more to public coffers in taxes than they cost in social services. Finally, the "waiver" and "cultural erosion" concepts are at odds with traditional humanitarian principles embedded in American culture.

A. Public Health and Welfare Argument

The most important reason for providing assistance is that unauthorized aliens' health and poverty difficulties may pose risks to the public at large. Nativists assume that unlawful immigration can be easily controlled, ignoring the ineffectiveness of INS enforcement and denying the reality of a continued undocumented presence.[159] Although estimates vary, the illegal population is large, and despite the 1986 passage of IRCA, it continues to grow.[160] Many undocumenteds have severe medical problems, but they often lack insurance and fear seeking needed care.[161] Illegals also suffer from hardships related to poverty: cash shortages, poor housing, and malnutrition.[162]

Because of these conditions, undocumenteds with untreated diseases may pose an imminent danger of contagion,[163] and the denial of preventive care and short-term poverty assistance is creating an unhealthy, potentially non-productive underclass.[164] Some courts have acknowledged that failure to provide essential services to illegals may have medical and long-range social consequences for the general population.[165] Because these benefits

---

159. For an example of nativist sanguinity that the border can simply be closed, see E. ABBEY, *supra* note 155, at 44. Abbey claims that "[t]he means are available, it's a simple technical-military problem." For similar optimism about the potential of employer sanctions to deter illegal entry (expressed before IRCA's enactment), see Governor Richard Lamm's comments in McBean, *supra* note 155.

160. *See supra* notes 5-7 and accompanying text.

161. *See supra* notes 8, 10 and accompanying text.

162. *See supra* note 9 and accompanying text.

163. *See* Conard, *supra* note 10, at 108; SELECT COMMISSION, *supra* note 41, Staff Report at 528; Nickel, *Should Undocumented Aliens Be Entitled to Health Care?*, HASTINGS CENTER REP. 20 (Dec. 1986). Nickel argues that because undocumenteds are not medically screened at the time of entry, treatment should be available to them without cost or risk in order to avoid the spread of contagious diseases such as hepatitis and tuberculosis. *Id.*

164. *See* Chavez & Cornelius, *supra* note 8, at 99; Conard, *supra* note 10, at 109; Nickel, *supra* note 163, at 20; SELECT COMMISSION, *supra* note 41, Staff Report at 532.

165. In Bay Gen. Community Hosp. v. County of San Diego, 156 Cal. App. 3d 944, 203 Cal. Rptr. 184 (1984), a California court of appeals noted that "[a] tubercular undocumented alien refused long-term, nonemergency care . . . would most certainly be a most real imminent threat to the public health, the general welfare of this country." *Id.* at 962 n.11, 203 Cal. Rptr. at 194 n.11; *see also* Plyler v. Doe, 457 U.S. at 807.

are no longer available from the federal government, states should furnish them as a matter of practical necessity.

B. Cost-Benefit Argument

A second argument in favor of providing aid is that, nativist claims to the contrary, undocumented aliens pay a larger dollar amount to public coffers in taxes than they cost in social services.[166] A voluminous empirical literature published from the late 1970's through the present illustrates this point, with studies focusing either specifically on the unauthorized population or on immigrants generally.[167] Both types of research show clearly that illegals contribute more to the national, state, and local economies than they take out in assistance.

Several investigations have been concerned explicitly with undocumenteds, using original questionnaire results as well as public data. The most comprehensive of these studies, a 1984 survey of state revenues and expenditures in Texas, found that state income from illegals' tax payments far exceeded the cost of providing them with services.[168] Although the survey also suggested that some localities within the state bore higher expenses in relation to their revenues, state and local income taken together still exceeded the combined cost of services.[169] Significantly, other studies of undocumenteds' economic impact have found that some local jurisdictions, such as New York City and San Diego County, California, have reaped a fiscal gain from illegals' tax contributions.[170] As for cities or counties that do suffer net losses from aiding the undocumented, it can be argued that the federal and state governments should reimburse these localities from excess revenues in order to spread the burden more equitably.[171]

---

166. "Taxes" is used here as a general term for monies collected from individuals and corporations by national, state, and local governments on the basis of income, property, and purchases/sales. "Services" includes publicly-provided health care, welfare, social insurance, and short-term poverty relief. For a description of federal, state, and local services currently available to undocumenteds, see NATIONAL IMMIGRATION LAW CENTER, *supra* note 11.

167. Most of these studies are cited in the succeeding two paragraphs, *infra*. For a recent summary of published research on the cost-benefit issue, see J. SIMON, *supra* note 5, at 289-96.

168. S. WEINTRAUB & G. CARDENAS, THE USE OF PUBLIC SERVICES BY UNDOCUMENTED ALIENS IN TEXAS: A STUDY OF STATE COSTS AND REVENUES (1984). Based on a sample of 253 undocumented individuals, the survey estimated annual revenues of $157-277 million, in contrast to costs of only $50-97 million. *Id.* at 87. Throughout the study, revenues were consistently biased downward and costs biased upward in an effort to make the relationship of the final totals more reliable. *Id.* at 88.

169. *Id.* at 87, 88. An unspecified amount of the state's excess revenue was returned to localities, thus easing the local burden.

170. On New York City, see D. PAPADEMETRIOU & N. DIMARZO, UNDOCUMENTED ALIENS IN THE NEW YORK METROPOLITAN AREA 105-06, 109 (1986). On San Diego County, see COMMUNITY RESEARCH ASSOCIATES, UNDOCUMENTED IMMIGRANTS: THEIR IMPACT ON THE COUNTY OF SAN DIEGO (1980). The latter study found that in San Diego County, illegal workers and their employers contributed $16-31 million annually, while the fiscal impact of these workers was only $11-22 million. *Id.*

171. When federal income and Social Security taxes are added to state and local revenues, then offset by assistance provided at all levels, illegals are a national fiscal asset. J. SIMON, *supra* note 5, at 293. Merely adding a state's income to that of its localities and subtracting the combined cost of services may also produce a net gain, as in the case of Texas. *See supra* note 169 and

The majority of empirical investigations cover "immigrants" generally (foreign-born persons intending to live permanently in the United States)[172] and are based upon the analysis of census data, government statistics, and questionnaire results. The "immigrant" category includes undocumenteds as an unspecified percentage, but as illegals are considerably less likely than documented aliens to partake of public services, the former would tend to be less of a drain than the latter.[173] These studies show that at national, state, and local levels, unauthorized aliens pay far more in taxes than they use in health, welfare, and other benefits.[174] A corollary of this conclusion is that, contrary to popular wisdom, illegals do not enter the United States in order to take advantage of free services and welfare, but rather simply seek employment opportunities unavailable in their countries of origin.[175]

Thus, in contrast to claims of a "net drain," empirical surveys show that undocumenteds generate tax revenues exceeding the cost of the social services they use. Studies of illegals specifically, as well as studies of immigrants generally, demonstrate this contribution at national and state levels of government. Some localities surveyed also experienced a fiscal gain.[176] But even when cities or counties sustain losses, the argument can be made from an equitable standpoint that these jurisdictions should retain a larger proportion of the federal and state taxes that undocumenteds pay.

The United States Supreme Court in *Plyler v. Doe* recognized the efficacy of the cost-benefit argument for assisting unauthorized aliens, stating that "[t]here is no evidence in the record suggesting that illegal entrants impose any significant burden on the state's economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and

---

accompanying text. However, some localities receive only a small fraction of the taxes collected from their unauthorized alien residents; for example, in 1982, Los Angeles County received 4% of the tax payments collected from its undocumenteds, while the federal government received 58%. CORNELIUS & CHAVEZ, *supra* note 9, at 59-60. A more equitable intergovernmental system might finance needed services by allocating tax receipts to local jurisdictions where illegals are concentrated. *See id.* at 60.

172. *See supra* note 4.

173. Blau, *Immigration and the U.S. Taxpayer*, in ESSAYS ON LEGAL AND ILLEGAL IMMIGRATION 108 (S. Pozo ed. 1987); J. SIMON, *supra* note 5, at 292.

174. On the national fiscal impact, see Blau, *supra* note 173; J. SIMON, *supra* note 5, at 288-96. The one comprehensive state-level investigation, K. MCCARTHY & R. VALDEZ, *supra* note 158, at 47-53, focuses on California. For discussion of localities, see E. BOGEN, *supra* note 4, at 207-17 (New York City); CORNELIUS & MINES, *supra* note 9, at 5, 43-56 (Northern California); CORNELIUS & CHAVEZ, *supra* note 9, at 9, 53-68 (Southern California).

175. SELECT COMMISSION, *supra* note 41, Final Report at 36; COMMISSION FOR THE STUDY OF INTERNATIONAL MIGRATION, *supra* note 41, at 13, 107; ECONOMIC REPORT, *supra* note 41, at 233. As the latter report succinctly put it, "[m]ost come to the United States to work, and government benefits do not appear to be a major attraction." *Id.*

176. Summarizing the results of the research at all governmental levels, economist Julian Simon concluded that "every study that provides dollar estimates shows that when the sum of the tax contributions to city, state and federal government are allowed for, those tax payments vastly exceed the cost of the services used, by a factor of perhaps five, ten, or more." J. SIMON, *supra* note 5, at 295.

tax money to the state fisc."[177] Just as the *Plyler* court applied the results of empirical research in upholding undocumenteds' educational rights, so should state legislatures, courts, and agencies utilize similar reasoning to extend other necessary forms of public aid.

C. *Humanitarian Argument*

A final reason that states should furnish benefits to unauthorized aliens is a philosophical one: American traditions of justice and generosity mandate fair treatment of individuals in need. While nativists may assert that illegal entrants have waived all rights and threaten a hypothetical "national culture," longstanding humanitarian values militate against surrendering to these irrational fears. Such values include a willingness to help the needy regardless of their wrongful conduct (the "no waiver principle") or foreign origin (the "hospitality principle"). In fact, undocumenteds as a group may be highly deserving of public assistance because of their contributions to this country's economic growth and social stability (the "contributive principle").

One philosophical basis for benefits, the "no waiver principle," rejects the notion that illegals have forfeited any right to entitlements by entering without documents. The waiver concept advanced by nativists does not appear to derive from any moral norm present in American culture or incorporated into our legal system.[178] Even criminals are not stripped of all protections, and it is questionable whether undocumented aliens (subject only to deportation) fall into the same category as convicted felons.[179] Arguably, a violation of entry restrictions is merely a *malum prohibitum* that the United States has never effectively attempted to enforce.[180] The idea that an illegal's misconduct waives access to public services leads inexorably to the conclusion that the state could legitimately allow such a person to starve—a result we consider unconscionable treatment of criminals and thus no more acceptable for undocumenteds. In short, there is no moral or legal foundation for considering that assistance has been impliedly waived.

A second humanitarian value, one which has long guided American social ethics, is the "hospitality principle" that needy aliens should be assisted as if they were citizens. This tradition runs contrary to the nativist belief that undocumenteds threaten to erode this country's culture and

---

177. Plyler v. Doe, 457 U.S. 202, 228 (1982).

178. *See* P. SCHUCK, *supra* note 155, at 99. A discussion of the waiver theory by a non-proponent can be found in Nickel, *supra* note 163, at 23.

179. For a comparison of the moral status of unauthorized aliens with that of criminals, see Nickel, *Human Rights and the Rights of Aliens*, in P. BROWN & H. SHUE, THE BORDER THAT JOINS 42 (1983). *See also* J. SIMON, *supra* note 5, at 301, arguing that "illegal immigration must be the most victimless of crimes. Neither natives nor illegals are injured, even in their pocketbooks, by the illegal immigration."

180. Nickel, *supra* note 163, at 23, observes that the INS "has not made full-scale efforts to control unauthorized entrance," and that the United States Border Patrol, though responsible for guarding thousands of miles of territory, "has fewer personnel than the police departments of many large cities."

therefore should be shunned.[181] The hospitality principle is reflected in Biblical injunctions to deal fairly with "strangers" (foreigners): the Old Testament prohibits wronging a stranger, mandating that he "shall be to you as one of your citizens";[182] the New Testament calls for providing food and welcome.[183] Such Biblical values are a recognized source of American democratic ideals.[184] In *St. Joseph's Hospital v. Maricopa County*, the Arizona Supreme Court explicitly invoked the hospitality principle (along with a broad definition of residence), requiring a county to reimburse a private facility for furnishing illegals with emergency health care because "a general hospital may not deny emergency care to any person without valid cause."[185] In a recent reaffirmation of this ethic, the mayor of a Southern California city guaranteed unauthorized aliens access to municipal services, saying that "[w]hen Jesus told us to minister to the sick and feed the poor, he did not say only if they have a green card."[186]

Finally, states should aid undocumenteds because of the "contributive principle" that they are morally deserving of benefits because of their contributions to economic growth and social stability. Beyond the calculable tax revenues they generate, there is ample evidence that illegals are generally hard-working, productive individuals who help create consumer demand. Surveys have shown that, nationwide, unauthorized aliens have a low unemployment rate (1.3%) and a high rate of labor force participation (76%).[187] A comprehensive 1985 study of Mexican immigrants in California, a large proportion of which lack documents, demonstrated that this population is a key factor in the growing market for that state's goods and services.[188] As economist Julian Simon has noted, both legal and illegal immigrants "tend to be strong, courageous, vigorous, entrepreneurial types who enrich our economy and civilization with their drive and creative powers."[189] Thus, in addition to the other humanitarian grounds for providing them services, undocumenteds have earned a certain moral capital based on their solid, work-oriented participation in American society.

---

181. See *supra* note 157 and accompanying text.

182. *Leviticus* 19:33-34. A modern commentary based on archaeological research interprets this passage as requiring that "[t]he stranger is to share in the corners of the field, the forgotten sheaf, and every form of poor relief." THE PENTATEUCH AND HAFTORAHS 504 n.34 (J. Hertz ed. 1981).

183. *Matthew* 25:35. The complete verse reads "I was hungry, and you gave me food; I was thirsty and you gave me drink, I was a stranger and you welcomed me." *Id.*

184. *See* M. KONVITZ, JUDAISM AND THE DEMOCRATIC IDEAL (1978) for an analysis of Biblical influences on American political theory, and at 73-74 for discussion of the requirement to treat foreigners justly.

185. St. Joseph's Hosp. v. Maricopa County, 142 Ariz. 94, 100, 688 P.2d 986, 992 (1984).

186. *See* comments of Mayor George Cole of Bell, California in *Fight Vowed on HUD's Illegal Alien Fund Ruling*, L.A. Times, June 9, 1990, at A33.

187. J. SIMON, *supra* note 134, at 17. For a discussion of the tendency of Latino immigrants (including illegals) to avoid long-term unemployment, see Kotkin, *Fear and Reality in the Los Angeles Melting Pot*, L.A. Times Magazine, Nov. 5, 1989, at 18.

188. K. MCCARTHY & R. VALDEZ, *supra* note 158, at 45-47.

189. J. SIMON, *supra* note 134, at 3.

It is insufficient to argue that state assistance to unauthorized aliens is not preempted and is facilitated by statutory language without also discussing the policy reasons for providing such aid. Illegals must be given access to certain services in the interests of public health and welfare. Empirical research has conclusively established that undocumenteds pay more in taxes than they cost in services at national and state levels, and in many localities as well. Humanitarian principles based on lack of waiver, hospitality, and contribution support the furnishing of benefits. These arguments make irrelevant, or at least counter, nativist claims that illegals are a net economic drain, have forfeited their rights, and threaten American culture.

Some courts, in decisions such as *Plyler* and *St. Joseph's Hospital*, have incorporated the policies discussed here when extending entitlements to undocumenteds, and other tribunals may wish to follow their lead. These policy arguments are equally applicable to state governments and the federal government, but given present federal restrictions, the role of making benefits legally accessible to undocumenteds will fall largely to state courts.

V. CONCLUSION

Undocumented aliens' access to public services has been limited by legislative and judicial cutbacks at the federal level despite the severe health and poverty problems experienced by undocumenteds. This article has provided a three-part argument that illegals' needs may be addressed by state law entitlements. First, under a preemption analysis of the INA and its recent amending legislation, IRCA, states are not precluded from providing such benefits. Second, state constitutional and statutory language mandating or authorizing assistance to indigents may be interpreted to cover the undocumented. Finally, policies based on public welfare, economic, and humanitarian grounds support making services available.

The introduction to this article noted the irony of the recent recourse to state law by defenders of individual rights while Congress and the federal courts have been contracting the scope of such protection. Nowhere is this irony more apparent than in a proposal that states assist undocumenteds, for federal power over immigration has long been held to be plenary, and it has been assumed that the federal courts would be the sole forum for resolving questions regarding alienage.[190] Immigrants' rights advocates have traditionally eschewed state law remedies for illegals' unmet needs, looking principally to federal programs.[191] But with Congress' PRUCOL limitations and the judicial decisions implementing it, the federal government has clearly withdrawn from one sector of its long, inviolable immigration preserve.

Early in the "state law revival" movement, Justice Brennan argued that the foreclosure of federal remedies for individual rights violations

190. *See supra* note 17 and accompanying text.
191. *See supra* note 16 and accompanying text.

constituted "a clear call to state courts to step into the breach."[192] Partially answering Brennan's call, 1980's state law jurisprudence and scholarship have focused largely on criminal procedure, freedom of speech, land use, and privacy, while ignoring social resource allocation issues such as access to state health care and welfare for disadvantaged groups.[193] The coverage of undocumented aliens under state programs may serve as a prototype for closing other gaps left by federal unwillingness to provide essential public services.

192. *See* Brennan, *supra* note 2, at 503.

193. Ronald K.L. Collins, as discussed *supra* note 2, suggests that the future of the state law revival movement lies in litigation regarding the social allocation of resources. An example of a contemporary social problem analogous to the situation of illegals, but as to which state law solutions are only beginning to be explored, is the need of the homeless for emergency shelter. *See* Note, *supra* note 68; Connell, *A Right to Emergency Shelter for the Homeless Under the New Jersey Constitution*, 18 RUTGERS L.J. 765 (1987).