ALIEN STATUS RESTRICTIONS ON ELIGIBILITY FOR FEDERALLY FUNDED ASSISTANCE PROGRAMS†

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INTRODUCTION

Most restrictions on an alien's eligibility for federally funded assistance programs are imposed by alien status classifications.[1] The Immigration Reform and Control Act (IRCA)[2] made several important changes in the eligibility of aliens for numerous federal programs. This Article explores these changes, placing them in the context of existing eligibility rules.[3] An overview of the current restrictions on alien eligibility for federally funded assistance programs and a detailed explanation of eligibility for selected programs will be presented to ascertain whether they serve purported objectives and how they affect other societal interests.

This Article begins with a description of the various immigration statuses so the reader can better understand the extent and impact of restrictions on assistance eligibility based on alien status. Included is a description of the new alien statuses created by IRCA. An overview of IRCA's impact on eligibility for assistance programs follows. The current post-IRCA eligibility criteria of selected major benefits programs are then discussed in detail. Included are the major antipoverty federal financial assistance programs — Aid to Families with Dependent Children (AFDC)[4] and Supplemental Security Income (SSI)[5] — which respectively provide cash payments for basic maintenance costs such as food, shelter, and clothing to needy eligible families with dependent children (AFDC)[6] and the needy elderly, disabled and blind (SSI).[7] Also included are the major in-kind programs — Medicaid,[8] which reimburses health care providers for the services provided to persons eligible for Medicaid,[9] the federal food stamp program[10] through which individuals are provided with vouchers that can be exchanged for basic food products,[11] and public and as-

1. Restrictions on alien eligibility that affect financial eligibility are outside the scope of this article. For example, a permanent resident alien with a sponsor who had signed an affidavit of support on her behalf is not financially eligible for Aid to Families with Dependent Children (AFDC) or Supplemental Security Income (SSI) for three years if her sponsor has adequate funds available for her support. 42 U.S.C. § 615(a) (Supp. IV 1986).

2. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 [hereinafter IRCA] (codified in scattered sections of 8 U.S.C. (1986)).

3. Although this Article addresses the issue of an alien's eligibility for public assistance, it does not purport to examine the issue of whether an alien should apply for any particular program. Because the participation in some programs may have adverse consequences on the alien's immigration status, practitioners should be sure to weigh all factors when advising alien clients to pursue specific public assistance programs.

4. Social Security Act, tit. IV, 42 U.S.C. §§ 610-615 (1982 & Supp. III 1985).

5. *Id.* §§ 1381-1385 (1982 & Supp. III 1985).

6. *Id.* § 601, 602 (1982 & Supp. IV 1986)

7. *Id.* § 1382 (1982 & Supp. IV 1986). Needy elderly, disabled and blind individuals living in Guam, Puerto Rico or the Virgin Islands receive cash assistance through the Aid to the Aged, Blind and Disabled (AABD) program. Pub. L. No. 92-603, § 303(b), 86 Stat. 1484 (1972) (codified at 42 U.S.C. § 301 (1982)).

8. 42 U.S.C. §§ 1396-1396s (1982 & Supp. III 1985).

9. *Id.* § 1396 (Supp. IV 1986).

10. 7 U.S.C. § 2011-2029 (1982).

11. *Id.* § 2013 (1982 & Supp. IV 1986).

sisted housing programs,[12] which provide a variety of subsidized housing programs for low-income families, the elderly and the handicapped.[13] This Article also discusses restrictions on alien access to legal services,[14] although not usually considered a form of public assistance, because of the severity and impact of these restrictions. These programs are divided into two major categories: programs that restrict alien access to assistance programs by reference to specific immigration classifications and programs that utilize the more general criterion, "permanently residing in the United States under color of law." Further, this Article analyzes the case law interpreting the "permanently residing in the United States under color of law" criterion.

The totality of federal restrictions on eligibility for federally funded assistance programs is then analyzed. This Article concludes that these restrictions create a confusing and complex system of eligibility which lack a consistent underlying rationale. The restrictions do not serve the two purported rationales of limiting assistance to aliens whose residence is sanctioned by federal immigration law, policy or practice or avoiding undue burdens on states or localities. Further, the restrictions undermine other important societal interests including the preservation of citizens' rights, the protection of the community, and our society's stake in being just and humane.

I.
IMMIGRATION STATUSES

Because the eligibility of aliens for federally funded public assistance programs is most frequently designated by reference to particular immigration statuses, an understanding of the various alien statuses created by immigration law, policy and practice is an essential preliminary step for understanding the restrictions on alien eligibility.

A generally held view of immigration status divides aliens into three groups. The first group consists of non-resident aliens possessing valid, temporary visas such as students or visitors for pleasure or business.[15] The second group includes permanent resident aliens who are allowed to reside in the United States on a continuing basis subject to the deportation and exclusion provisions of the Immigration and Nationality Act (INA).[16] Members of this group may apply for United States citizenship after five years.[17] The third group includes other aliens residing on a continuing basis in the United States, who are frequently labeled "illegal" or "undocumented" aliens. The simplistic labeling of the third group as "illegal" or "undocumented" is erroneous. There are many categories of aliens who are not temporary sojourners or legal

12. 42 U.S.C. §§ 1404a-1440 (1982 & Supp. III 1985, Supp. IV 1986).
13. *Id.* § 1437 (1982).
14. *Id.* at § 2996-2996k (1982).
15. 8 U.S.C. §§ 1101(15)(B), 1184 (1982).
16. *Id.* §§ 1101(a)(20), 1182, 1251 (1982 & Supp. IV 1986).
17. *Id.* § 1427(a)(1)(1982).

permanent residents who lawfully reside in the United States pursuant to immigration law, policy or practice. This group includes those aliens residing in the United States under the alien classifications created or modified by IRCA.

The immigration statuses of aliens who are not classified as permanent residents, but who are nonetheless residing in the United States pursuant to immigration law, policy, or practice can be divided into five general categories. Each category encompasses several classifications of aliens. Some aliens, particularly those who have lived in the United States for a long time or those who have relatives who are citizens of the United States, may be eligible for immigration statuses that fall into more than one of the five categories.

A. Aliens with Long Residency

The first category consists of aliens whose long residence in the United States provides the basis for their continued residence. Included in this category is one of the newly created statuses under IRCA, that of the temporary resident alien.[18] To achieve temporary resident alien status, an alien had to make a timely application (generally by May 1987);[19] demonstrate continuous unlawful residence in the United States since January 1, 1982, and continuous physical presence in the United States since November 6, 1986; and establish general admissibility as an immigrant.[20] Under a law passed in 1987, certain aliens previously eligible for an "extended voluntary departure" status can also become temporary resident aliens.[21] These are aliens who entered and resided in the United States since before July 21, 1984, and who are nationals of countries whose nationals were granted voluntary departure status between November 1982 and November 1987.[22] This group has until December 1989 to apply for temporary resident alien status.[23] After eighteen months in temporary resident status, an alien can become a legal permanent resident.[24] If the alien does not apply for permanent residency by the thirty-first month after being granted temporary resident status, the alien loses that status.[25]

IRCA also modified registry status, an existing alien classification based on long-term residence in the United States. Before IRCA, aliens were eligible for registry if they had resided in the United States since June 30, 1948.[26] IRCA changed the date so that aliens are eligible for registry based on a resi-

18. *Id.* § 1255a(a) (Supp. IV 1986).

19. Some cases have afforded aliens the relief of applying for temporary resident status after the May 1987 deadline. *See, e.g.*, Catholic Social Services v. Meese, Civ. No. S-86-1433 (E.D. Cal. June 10, 1988).

20. 8 U.S.C. § 1255a(a) (Supp. IV 1986).

21. State Department Authorizations, Pub. L. No. 100-204, § 902, 101 Stat. 1400, 1400-01 (1987).

22. *Id.* § 902(a).

23. *Id.*

24. 8 U.S.C. § 1255a(b) (Supp. IV 1986).

25. *Id.* § 1255a(b)(2)(C) (Supp. IV 1986).

26. *Id.* § 1259(a) (1983).

dence in the United States since January 1, 1972.[27]

Aliens eligible for suspension of deportation constitute an additional classification of aliens residing in the United States because of long term residence.[28] Aliens who have resided in the United States for at least seven years, who are of good moral character and who show that their deportation would result in extreme hardship either to themselves, to a United States citizen, or to a permanent resident spouse, parent or child can be granted suspension of deportation and become permanent residents.[29]

B. Aliens Fleeing Persecution

A second category of aliens residing in the United States pursuant to immigration law, policy or practice consists of aliens seeking to escape persecution. These include refugees,[30] as well as aliens who have requested or have been granted either asylum[31] or withholding of deportation.[32] In order to qualify as members of this category, these aliens must have a fear of persecution in their countries of origin because of their religion, nationality, political opinion or membership in a particular social group.[33] For refugees, the determination that they meet this standard is made before they enter the United States.[34] For aliens seeking asylum or withholding, the determination is made while the alien is already present in the United States.[35] Prior to the Refugee Act of 1980,[36] numerous aliens seeking to escape persecution were admitted to the United States as "conditional entrants."[37]

C. Aliens Admitted for Humanitarian Reasons

A third category includes aliens in various statuses who are allowed to reside in the United States because of humanitarian reasons. These reasons include concern for individuals of either advanced or tender years, hardship on citizens, conditions in home countries or long residence in the United States.[38] This category sometimes overlaps the first and second categories because aliens who have a long United States residence or face adverse conditions in their home countries but who do not fit into a specific alien status based on long residence or a fear of persecution may nevertheless be eligible for the discretionary statuses described below.

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27. *Id.* § 1259(a) (Supp. IV 1986).
28. *Id.* § 1254(a)(1) (1982).
29. *Id.*
30. *Id.* § 1157 (1982 & Supp. IV 1986).
31. *Id.* § 1158 (1982 & Supp. IV 1986); INS Form I-589, Request for Asylum in the United States.
32. 8 U.S.C. § 1253(h) (1982).
33. *Id.* §§ 1101(a)(42)(A), 1158(a), 1253(h) (1982).
34. *Id.* § 1157 (1982).
35. *Id.* §§ 1158, 1253(h) (1982).
36. Refugee Act of 1980, Pub. L. No. 96-212, 93 Stat. 102 (1980).
37. 8 U.S.C. § 1153(a)(7) (1982 & Supp. IV 1986).
38. *See, e.g.*, INS OPERATIONS, Instruction 242.1(a)(22).

The "humanitarian" categories include several alien statuses. Deferred action status can be afforded to aliens who are of low INS enforcement priority and who are able to demonstrate facts establishing that their removal from the United States would be inhumane or contrary to INS interests.[39] Deportable aliens whose deportation would be inhumane can be granted long-term stays of deportation[40] or can be put under orders of supervision.[41] Further, there is evidence that, in practice, the INS does not generally initiate deportation against either the very young or the very old.[42] When "reasons deemed strictly in the public interest" mandate such action, the Attorney General may use discretion in "paroling" into the United States aliens who have applied for admission.[43] Certain aliens from Cuba or Haiti, because of the conditions in those countries, have been granted the special status of Cuban/Haitian entrant.[44] Under IRCA, Cuban/Haitian entrants are allowed to become temporary residents or permanent residents.[45] Aliens may also be placed in an administrative status entitled "voluntary departure" because of their individual circumstances or the conditions in their countries of origin. This status in reality allows these aliens to reside in the United States on a long-term basis.[46]

D. Aliens with Relatives in the United States

A fourth classification consists of certain relatives of United States citizens and permanent residents who are afforded special eligibility for immigration status to prevent the separation of families. Included are the spouses and unmarried sons and daughters of citizens and permanent residents, the siblings and married sons and daughters of citizens, and the parents of adult citizens.[47] Many of these relatives are afforded permission to reside in the United States while they complete the processing for permanent resident status.[48]

E. Aliens with Special Employment

A fifth classification includes aliens who are allowed special status because of their employment. Included in this category are the statuses of special agricultural worker[49] (SAW) and replenishment agricultural worker[50]

39. *Id.*

40. 8 C.F.R. § 243.4 (1988); INS OPERATIONS, Instruction 243.3(a).

41. 8 U.S.C. § 1252(d) (1982).

42. Lewis v. Grinker, 660 F. Supp. 169 (E.D.N.Y. 1987) (No. CV-79-1740) (Deposition of Alan Freiss, Assistant INS District Director for Deportation).

43. 8 U.S.C. § 1182(d)(5) (1982).

44. Cuban/Haitian entrants are aliens who are physically present in the United States but considered to be applicants for admission with their status pending. 61 INTERPRETER RELEASES 847 (1984).

45. IRCA, § 202, 100 Stat. 34 (1986).

46. 8 U.S.C. § 1254(a)(1) (1982); 8 C.F.R. § 242.5 (1987). *See, e.g.*, 66 INTERPRETER RELEASES 38 (January 9, 1989) (regarding extended voluntary departure for Polish nationals).

47. 8 U.S.C. § 1252(d) (Supp. IV 1986).

48. *Id.* § 1151(b) (1982 & Supp. IV 1986).

49. *Id.* § 1160 (Supp. IV 1986).

(RAW), both of which IRCA created. To be eligible for SAW status, an alien must have resided in the United States and performed seasonal agricultural services in this country for at least ninety days between May 1985 and May 1986.[51] SAWs who have worked in certain specified types of agricultural employment for at least ninety days, three years in a row (from May 1, 1984, to May 1, 1986) can become permanent residents after one year in temporary SAW status,[52] subject to a numerical limitation of 350,000.[53] All other SAWs can become permanent residents after two years in temporary SAW status.[54]

IRCA also provides for another agricultural classification — RAW status.[55] If the Secretaries of Labor and Agriculture determine that there is a shortage of workers to perform certain seasonal agricultural labor in each of the fiscal years from 1990 to 1993, eligible aliens can be granted RAW temporary status.[56] After three years, aliens with temporary RAW status may become permanent residents — but only if they have performed specified agricultural labor for at least ninety days during each of those years.[57]

II.
IRCA'S IMPACT ON ELIGIBILITY BY ALIEN STATUS

IRCA had a major impact on alien status restrictions and eligibility for public entitlement programs. It created new classifications of aliens and then imposed complex restrictions on their eligibility for a variety of programs. In doing so, IRCA set up a major exception to the general rule that permanent residents are eligible for assistance programs.[58] Further, it limited the definition of "permanently residing in the United States under color of law,"[59] a basic eligibility criteria for several programs. On the other hand, IRCA made some additional aliens eligible for assistance programs by liberalizing the criteria[60] for registry eligibility since registry eligible aliens are generally eligible for assistance programs.[61] The impact of these changes can be understood

50. *Id.* § 1161 (Supp. IV 1986).
51. *Id.* § 1160(a)(2)(B) (Supp. IV 1986).
52. *Id.* § 1160(a)(2)(A) (Supp. IV 1986).
53. *Id.* § 1160(a)(2)(C) (Supp. IV 1986).
54. *Id.* § 1160(a)(2)(B) (Supp. IV 1986).
55. *Id.* § 1161 (Supp. IV 1986).
56. *Id.* § 1161(a)(1) (Supp. IV 1986). The INS has issued for public comment a preliminary working draft of proposed regulations to implement the provisions of IRCA relating to the admission of RAWs. 65 INTERPRETER RELEASES 854, App. II (1988).
57. 8 U.S.C. § 1161(d)(5)(A) (Supp. IV 1986).
58. *See infra* text accompanying notes 115, 130, 147, 193, 201, 219.
59. *See infra* text accompanying notes 193, 201, 219.
60. 8 U.S.C. § 1259(a) (Supp. IV 1986).
61. For example, the regulations regarding SSI eligibility list aliens who have entered and continuously resided in the United States since before January 1, 1972, as an example of aliens "permanently residing in the United States under color of law." These aliens are, therefore, eligible for SSI. The regulation goes on to state that "we ask for any proof establishing this entry and continuous residence." 20 C.F.R. § 416.1618(b)(13) (1988).

only in the context of the already existing pre-IRCA eligibility criteria and the changes that have been made since IRCA.

Most restrictions on alien eligibility vary by program, with each program designating eligibility by alien status. There are, however, some exceptions. For example, there are no restrictions based on alien status for Social Security and related Medicare benefits which are provided to persons eligible for Social Security. These benefits depend on contributions made to a trust fund through covered employment.[62] However, the 1972 amendments to the Social Security Act curtailed the participation of aliens in the system by restricting their eligibility for a Social Security number. Since the 1972 amendments, an alien must first prove authorization to work to obtain a Social Security number which authorizes her to contribute to the fund.[63] Alien statuses created or modified by IRCA (temporary residents, SAWs, RAWs, registry eligible aliens and Cuban/Haitian entrants) are among the classifications of aliens who are afforded the work authorization necessary to obtain a Social Security card for employment purposes.[64]

Prior to IRCA, permanent resident aliens were generally eligible for public assistance programs.[65] One minor exception involves eligibility for Medicare. Aliens over age sixty-five who are not eligible for Social Security benefits must have been permanent residents for five years before they become eligible for Medicare.[66] IRCA made a major change in the general eligibility of permanent residents by restricting the eligibility of aliens who became permanent residents based on the immigration statuses created under IRCA. The restrictions on eligibility imposed on temporary residents, SAWs, and RAWs continue for a five-year period even after those aliens become permanent residents.[67]

IRCA also affected the eligibility of aliens not in permanent resident status who are nonetheless residing in the United States. The restrictions on the eligibility for federal entitlement programs on non-permanent resident aliens imposed prior to the passage of IRCA were of two general kinds. Some programs — SSI, AFDC, unemployment compensation and Medicaid for non-emergency health services — adhered to a general eligibility criterion which required that aliens be "permanently residing in the United States under color of law."[68] Other programs — including food stamps,[69] legal services[70] and

62. 42 U.S.C. § 401-501 (1982 & Supp. III 1985).

63. Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (1972) (codified at 42 U.S.C. § 405(c)(2)(B) (1982)). *See* 20 C.F.R. § 422.104 (1987).

64. 8 U.S.C. §§ 1160(a)(4), 1255a(b)(3)(B) (Supp. IV 1986).

65. *See infra* text accompanying notes 115, 130, 147, 193-95, 201, 219.

66. 42 U.S.C. § 1395b-1(a)(2) (1982).

67. 8 U.S.C. §§ 1160(a)(4), 1161, 1255a(b)(3)(B) (Supp. IV 1984).

68. 26 U.S.C. § 3304(a)(14)(A); 42 U.S.C. §§ 602(a)(33), 1382c(a)(1)(B)(ii), 1396b(v)(1) (1982 & Supp. IV 1986).

69. 7 U.S.C. §§ 2011-2029 (1982 & Supp. IV 1986).

70. 42 U.S.C. §§ 2996-2996k (1982).

federally financed housing programs[71] — limited eligibility to specific narrow classifications of aliens. Refugees, conditional entrants, and aliens granted asylum or withholding of deportation could participate in all these programs.[72] Registry aliens and parolees additionally qualified for food stamps and housing programs.[73] The parents, unmarried minor children, and spouses of United States citizens who had pending adjustment-of-status applications were entitled only to legal services.[74] A special program for refugees provided cash and medical assistance to refugees who could not meet AFDC family composition, or SSI age or disability requirements.[75]

On top of this fairly complicated system, IRCA imposed different restrictions on the eligibility for federally funded public assistance programs of aliens in the statuses it created — temporary resident,[76] SAW and RAW. Although the temporary resident, SAW, and RAW categories have different qualification requirements for public assistance programs, members of each category are restricted from becoming eligible for certain programs for five years after the initiation of those statuses. The five-year restrictions apply even if they become permanent residents during that period.[77] Most temporary resident aliens are subject to this rule for AFDC, some medical assistance and food stamps as well as for additional financial assistance programs that the Attorney General designates.[78] Only temporary residents who fall into the category of Cuban/Haitian entrants are completely exempt.[79] Aged, blind and disabled aliens are partially exempt, being precluded from eligibility only for AFDC.[80] They remain eligible for SSI and for the Assistance to the Aged, Blind and Disabled program available in Guam, Puerto Rico and the Virgin Islands because the basic criteria for receipt of these benefits are old age, blindness or disability.[81] Additionally, IRCA allows temporary resident aliens who are

71. *Id.* §§ 1404(a)-1440 (1982 & Supp. IV 1986).

72. *Id.* § 1436(a) (1982 & Supp. IV 1986) (as amended by the Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 164(a), 101 Stat. 1860 (1987)); 133 CONG. REC. 12,061 (daily ed. Dec. 21, 1987); 45 C.F.R. § 1626.4(a) (1986); 7 U.S.C. § 2015(f) (Supp. IV 1986).

73. 7 U.S.C. § 2015(f) (Supp. IV 1986); 42 U.S.C. § 1436a(a) (1982) (as amended by the Housing and Community Development Act of 1987, Pub. L. No. 100-242 § 164(a), 101 Stat. 1860 (1987)).

74. 45 C.F.R. § 1626.4(a) (1986).

75. 45 C.F.R. Part 400 (as amended by 53 Fed. Reg. 32,222-25 (1988)).

76. IRCA uses the term "temporary resident status" to refer to temporary residents who have resided in the United States continuously and unlawfully since January 1, 1982, as well as to SAWs and RAWs. In this Article, the term "temporary resident" refers only to aliens who have resided in the United States continuously and unlawfully since January 1, 1982, and to aliens granted temporary resident status because of prior eligibility for voluntary departure.

77. 8 U.S.C. §§ 1160(f), 1161(d)(6), 1255a(h) (Supp. IV 1986). It is possible that aliens initially eligible for IRCA-created statuses become eligible to gain permanent resident status on another basis. For example, an alien may achieve permanent resident status through marriage to a citizen of the United States. IRCA restrictions should not then apply to them.

78. *Id.* § 1255a(h)(1)(B) (Supp. IV 1986).

79. *Id.* § 1255a(h)(2)(A) (Supp. IV 1986).

80. *Id.* § 1255a(h)(2)(B) (Supp. IV 1986).

81. *See supra* note 7.

under eighteen years of age or who are in need of emergency services or services for pregnant women to receive Medicaid benefits.[82]

The programs which IRCA allows the Attorney General to make unavailable to temporary residents for five years must provide federal financial assistance on the basis of financial need.[83] For the purposes of temporarily disqualifying newly legalized aliens from receiving federally funded public benefits, IRCA specifically indicates that certain programs — including child nutrition and public health programs, school lunch, head start, foster care, adoption assistance, certain job training programs and services provided through block grants to states — do not constitute financial assistance.[84] In August 1987 the Attorney General proposed that temporary residents be ineligible for a long list of housing, education, job training and community development programs.[85] Also included on this list were legal services through the Legal Services Corporation.[86]

The Attorney General's designation of programs as temporarily unavailable to newly legalized aliens goes beyond the mandate of IRCA in several ways. First, it includes programs which do not provide financial assistance. For example, the Legal Services Corporation provides legal advice and representation, not grants or loans.[87] Additionally, individuals who participate in federal employment programs work for the money they receive.[88] Secondly, the Attorney General's list includes housing programs that the 1987 Housing and Community Development Act[89] made specifically available to temporary residents. Lastly, the list includes programs which are designed to benefit local communities rather than to provide financial assistance to an individual. For example, the primary objective of the community development block grant program is "the development of viable urban communities,"[90] and the statute states that a specific program objective is "the elimination of slums and blight and the prevention of blighting influences and the deterioration of property and neighborhood and community facilities of importance to the welfare of the community."[91]

Under IRCA, aliens with SAW status also have restricted access to assistance programs. However, their access is more extensive than that of temporary resident aliens. Like temporary residents, SAWs may not receive AFDC

82. 8 U.S.C. § 1255a(h)(3) (Supp. IV 1986).

83. *Id.* § 1255a(h) (Supp. IV 1986).

84. *Id.* § 1255a(h)(4) (Supp. IV 1986).

85. 52 Fed. Reg. 31,786 (1987) (to be codified at 8 C.F.R. § 245a.4) (proposed August 24, 1987).

86. *Id.*

87. 42 U.S.C. §§ 2996, 2996b (1982).

88. *E.g., id.* § 2751 (1982 & Supp. IV 1986) (work-study programs for students); *id.* § 3056 (1982 & Supp. IV 1986) (community service employment programs for aged persons).

89. Pub. L. No. 100-242, § 164(a), 101 Stat. 1860 (1987).

90. 42 U.S.C. § 5301(c) (Supp. IV 1986).

91. *Id.* § 5301(c)(1) (Supp. IV 1986).

until five years after being granted resident status.[92] SAWs who would otherwise be eligible for AFDC but for this statutory restriction also have limitations on their eligibility for Medicaid.[93] They may receive Medicaid for emergency services, or for services during pregnancy, or if they are under the age of eighteen, aged, blind or disabled.[94] Other SAWs should be fully eligible for Medicaid. Unlike temporary resident aliens, SAWs are eligible for food stamps.[95] Also, the restrictions on eligibility for programs designated by the Attorney General imposed on temporary residents do not necessarily apply to SAWs.[96] Furthermore, SAWs are statutorily considered legal permanent residents except for immigration purposes and the other specific limitations imposed by IRCA,[97] thus opening up to SAWs other assistance programs for which permanent residents are eligible.

RAWs will encounter restrictions on their eligibility for public assistance programs that are more stringent than those currently imposed on SAWs, albeit more generous than those imposed on temporary residents. Under IRCA, RAWs are eligible for food stamps,[98] legal assistance through the Legal Services Corporation,[99] and farm housing programs.[100] However, RAWs are subject to the same disqualifications as those that restrict the eligibility of temporary aliens for AFDC, Medicaid, and programs designated by the Attorney General.[101]

The IRCA restrictions discussed above limit the meaning of "permanently residing in the United States under color of law," a general alien category eligible for SSI, AFDC and full Medicaid coverage. Although the meaning of this phrase has been subject to much dispute,[102] "permanently residing in the United States under color of law" basically includes aliens who are residing in the United States on a continuing basis under immigration law, policy or practice.[103] Without the IRCA restrictions on Medicaid and AFDC eligibility, aliens in the statuses created by IRCA would meet even a restrictive interpretation of "permanently residing in the United States under color of law" because these aliens are clearly residing in the United States pursuant to law with government knowledge and permission. IRCA attempts to go beyond federal restrictions by providing that, subject to the exceptions in IRCA, aliens in temporary resident status need not be considered to be permanently residing under color of law for purposes of any state or local law which pro-

92. 8 U.S.C. § 1160(f) (Supp. IV 1986).
93. *Id.*
94. *Id.* §§ 1160(f), 1255a(h)(3) (Supp. IV 1986).
95. 7 C.F.R. § 273.4(a) (1988).
96. 8 U.S.C. § 1160(a)(4) (Supp. IV 1986).
97. *Id.* § 1160(a)(5).
98. *Id.* § 1161(d)(6) (Supp. IV 1986).
99. *Id.*
100. *Id.*
101. *Id.*
102. *See infra* text accompanying notes 164-92.
103. *See infra* text accompanying notes 163.

vides for a program of financial assistance.[104]

IRCA worked one expansion in the eligibility of aliens for assistance programs. IRCA increased the number of aliens who can receive public assistance by changing the date of eligibility for registry from June 30, 1948, to January 1, 1972.[105] Generally, to establish eligibility for public assistance programs, an alien eligible for registry does not actually have to apply for registry but need only show that she has continuously resided in the United States since January, 1, 1972.[106]

IRCA also impacted on the eligibility of aliens for assistance by requiring verification of the immigration status of aliens applying for food stamps, housing assistance programs, unemployment compensation, AFDC, Medicaid and Title IV educational assistance[107] through an INS system entitled "System for Alien Verification of Eligibility" (SAVE).[108] The statute allows agencies to obtain waivers of participation in this program if the agency can demonstrate that SAVE will not be cost-effective or the agency has a viable alternative verification system.[109]

Under this program, alien applicants must declare that they are in satisfactory immigration status and provide documentation of their status to be verified by the INS.[110] An alien who submits reasonable evidence of satisfactory immigration status must be given presumptive eligibility and must not have her benefits delayed, denied or terminated while waiting for the INS verification.[111]

This verification system has created concern because pilot programs revealed serious problems. The system was not adequately keyed to eligibility criteria for some of the programs, particularly the provision of eligibility to aliens "permanently residing under color of law." In addition, the INS' information on an alien's status was frequently inaccurate, thereby leading to the denial of benefits for aliens who, in fact, possessed satisfactory immigration status.[112] Furthermore, it is not at all clear that the object of the program,

104. 8 U.S.C. § 1255a(h)(1)(B) (Supp. IV 1986).

105. *Id.* § 1259(a) (Supp. IV 1986).

106. *See supra* note 61.

107. IRCA, § 121, 100 Stat. 3359, 3384-86 (1986).

108. IRCA, § 121(d)(1)(A), 100 Stat. 3359, 3393 (1986).

109. IRCA, § 121(c)(4)(B), 100 Stat. 3359, 3392 (1986).

110. IRCA, §§ 121(a)(1)(C), 100 Stat. 3359, 3384-86 (1986) (amending 42 U.S.C. § 1320b-7); 121(a)(2), 100 Stat. 3359, 3386-88 (1986) (amending 42 U.S.C. § 1463a); 121(a)(3), 100 Stat. 3359, 3388-90 (1986) (amending 20 U.S.C. § 1091).

111. IRCA, §§ 121(a)(i)(C), 100 Stat. 3359, 3386 (1986) (creating 42 U.S.C. § 1320b-7(d)(4)(B)(ii)); 121(a)(2), 100 Stat. 3359, 3388 (creating 42 U.S.C. § 1436a(d)(4)(A)(ii)); 121(a)(3), 100 Stat. 3359, 3390 (1986) (creating 20 U.S.C. § 1091(c)(4)(A)(ii)).

112. *Impact of an Alien Verification System on Assisted Housing Programs: Joint hearings on H.R. 3810 Before the Subcommittee on Housing and Community Development of the House Committee on Banking, Financing and Urban Affairs and the Select Committee on Aging,* H.R. REP. No. 3810, 99th Cong. 2d Sess. 171, 175 (1986) (statement of Congressman Roybal), Memo of the National Council of LaRaza, "INS SAVE Program—The Question of Nationwide Adoption," §§ 11(B) and (C) (Nov. 18, 1985); H.R. REP. No. 682, 99th Cong. 2d Sess. 149 (1986).

cost savings, will be forthcoming.[113]

III.
THE ELIGIBILITY OF ALIENS FOR SELECTED FEDERAL ENTITLEMENT PROGRAMS

This section discusses in detail the current status of the eligibility of aliens for selected federally funded public assistance programs.

A. Programs Which Limit Eligibility of Aliens by Specific Alien Statuses

Food stamps programs, housing programs, and legal services programs are all restricted to aliens in specific statuses. An important issue in these programs is the extent to which aliens in IRCA-created statuses are included.

1. Restrictions on the Eligibility of Aliens for Food Stamps

The pre-IRCA food stamp statute and regulations limited eligibility to the following aliens: permanent residents, registry aliens, conditional entrants, parolees, refugees, political asylees, and aliens who have had their deportation withheld because of their fear of persecution.[114] IRCA appeared to impose a five-year food stamp eligibility disqualification only on temporary residents who were not Cuban/Haitian entrants or aged, blind or disabled.[115] The Department of Agriculture, however, has interpreted IRCA in a narrow way to permit aged, blind or disabled temporary residents to be eligible for food stamps only after they have become permanent residents.[116] Thus, under the food stamp regulations, the following IRCA aliens are added to the list of eligible persons: Cuban/Haitian temporary residents; aged, blind or disabled permanent residents who achieved that status after being temporary residents; permanent residents who have been temporary residents after five years have passed from the inception of their temporary resident status; SAWs; and RAWs.[117]

2. Restrictions on the Eligibility of Aliens for Federally Assisted Housing Programs

There are several federally funded programs for housing low-income families, the elderly and the handicapped[118] which were designed to remedy the acute shortage of decent, safe and sanitary housing.[119] Two major examples are the low-income public rental housing program and the Section Eight

113. GENERAL ACCOUNTING OFFICE, IMMIGRATION REFORM: VERIFYING THE STATUS OF ALIENS APPLYING FOR FEDERAL BENEFITS (Oct. 1987).
114. 7 U.S.C. § 2015(f) (1982).
115. 8 U.S.C. § 1255a(h) (Supp. IV 1986).
116. 7 C.F.R. § 273.4(a) (1988).
117. *Id.*
118. 42 U.S.C. § 1437 (1982).
119. *See, e.g., id.* § 1437b (1982 & Supp. IV 1986).

Housing Certification, Voucher and Moderate Rehabilitation Programs.[120] Under the low-income public rental housing program, local public housing agencies develop housing projects with federal funds.[121] Eligibility for residence is limited to low-income families who pay a designated portion of their income as rent.[122] The Section Eight programs involve subsidization of rental payments for dwelling units in privately owned and operated buildings as well as for public housing units.[123] The Department of Housing and Urban Development (HUD) or a local housing authority enters into a contract with a private owner to subsidize the rent of lower income families or individuals.[124]

In 1981, Congress limited the eligibility for federally assisted housing programs to aliens in specific statuses.[125] However, these restrictions were never implemented. Actions by Congress[126] and a preliminary injunction[127] prevented the implementation of the Department of Housing and Urban Development (HUD) regulations.[128]

In 1987, Congress amended the restrictions on the eligibility of aliens for public housing and on Indian housing programs, the Section 8 housing assistance payments programs, the Section 236 interest reduction and rental programs, the Rent Supplement Program and the Section 235 homeownership program.[129] Temporary residents were added to the list of eligible aliens. Under the current statute, eligibility is limited to the following groups of aliens: permanent residents, registry aliens, refugees, aliens granted either asylum or withholding of deportation, parolees, conditional entrants, and temporary residents.[130] However, there is some provision for exceptions. The agency, authority or private owner which administers a housing program, may in its discretion continue financial assistance to a family with an ineligible alien family member if the head of household or spouse is a United States citizen or national or an alien eligible for housing assistance.[131] The definition of family member includes the head of the household, a spouse, and the children or parents of the head of the household or spouse.[132] Additionally, the termination of financial assistance to any family or individual may be postponed for six-month intervals up to a total of three years in order to permit an orderly transition to other affordable housing.[133]

120. *Id.* § 1437a(a)-(b)(1) (1982 & Supp. IV 1986).
121. *Id.* § 1437a(b)(1) (1982).
122. *Id.* §§ 1437a(c)(1), 1437b, 1437c, 1437g (1982 & Supp. IV 1986).
123. *Id.* § 1437a(a) (1982 & Supp. IV 1986).
124. *Id.* § 1437f (1982 & Supp. IV 1986).
125. *Id.* § 1436a(a) (1982).
126. 51 Fed. Reg. 42,088-89 (1986).
127. Yolano-Donnelly Tenant Ass'n v. Pierce, Civ. No. S-86-0846 MLS (E.D. Cal. 1986).
128. 53 Fed. Reg. 842, No. 8 (1988).
129. Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 164(a), 101 Stat. 1860 (1987).
130. 42 U.S.C.A. § 1436a(a) (West Supp. 1988).
131. *Id.* § 1436a(c)(1)(A) (West Supp. 1988).
132. *Id.* (West Supp. 1988).
133. *Id.* § 1436a(c)(1)(B) (West Supp. 1988).

Although HUD proposed rules to implement this statute in October 1988, it has taken the position that restrictions on alien eligibility will not be imposed until it promulgates final regulations.[134] The regulations propose to limit financial assistance to ineligible aliens or families with ineligible alien members and to require the denial of their applications for housing.[135] The regulations would also require the termination of assistance to aliens and families with ineligible alien members currently residing in assisted housing if their housing assistance is not continued in accord with the statute's exceptions.[136] The proposed HUD regulations provide that the only way to terminate federal financial assistance to a family with an ineligible alien member in public housing is to evict the family.[137] In other programs, however, HUD proposes that termination of financial assistance be made either by eviction of the family or by the creation of a new tenancy without federal assistance.[138]

Two lawsuits which had been filed challenging prior attempts by HUD to implement restrictions on alien eligibility are applicable to the current HUD regulations. In *The City of New York v. Pierce*,[139] the plaintiffs asserted that the alien restrictions would result in the eviction of citizens and particularly vulnerable people such as the disabled, the elderly and children, adversely affect neighborhood revitalization programs, discourage private landlords from participating in housing programs, add to the homeless population and further strain the already burdened local resources needed to deal with homelessness.[140] They further claimed that requiring the eviction of families with ineligible alien members would violate both the federal housing assistance statute and the United States Constitution. The federal statute required that financial assistance not be afforded to ineligible aliens. The plaintiffs argued that the proper implementation of that congressional intent would not require eviction of families. Rather, the housing subsidy should be withdrawn only from the ineligible alien, and the family should be allowed to remain in their dwelling unit by paying a slightly higher rent.[141] The plaintiffs also asserted that the constitutional rights of citizens and eligible aliens in families with ineligible alien members to due process under the fifth amendment was violated by forcing the break-up of families.

In *Yolano-Donnelly v. Pierce*,[142] the court addressed a similar constitutional claim and issued a nationwide preliminary injunction preventing the implementation or enforcement of regulations that denied or terminated the housing assistance of citizens and eligible aliens who would be eligible for

134. 53 Fed. Reg. 41,038 (1988).
135. *Id.* at 41,043.
136. *Id.* at 41,048.
137. *Id.* at 41,050.
138. *Id.*
139. No. 86 Civ. 6068 (S.D.N.Y. Aug. 1986).
140. *Id.*, Complaint, ¶¶ 66, 82, 83, 85, 87, 88, 89, 90.
141. *Id.*
142. Civ. No. S-86-0846 MLS (E.D. Cal. Dec. 18, 1986).

housing assistance but for the presence in the family of an adult who is an ineligible alien.[143] The court found that the plaintiff's constitutional claim was substantial. The court recognized the right to live with one's family is a fundamental right, and the alien restrictions worked a genuinely significant deprivation of this right because depriving an individual of her shelter is a significant penalty for choosing to live with one's family.[144] The *Yolano-Donnelly* court has denied the defendant's motion for summary judgment based on the congressional enactment of the 1987 restrictions on alien eligibility; therefore, the nationwide preliminary injunction is still in effect.[145]

3. *Restrictions on the Eligibility of Aliens for Legal Services*

Agencies funded through the Legal Services Corporation, a corporation created by Congress,[146] make legal advice and representation available to persons of low income. Generally, a legal services program is not considered to be a federal public assistance program, but it is included here because serious restrictions on alien access to the provision of legal services have been imposed. Appropriation riders to Legal Services Corporation funding have provided that funds cannot be expended to provide services to aliens unless they are permanent residents, refugees, aliens granted asylum or withholding of deportation, conditional entrants, or the parents, unmarried minor children and spouses of United States citizens with pending adjustment of status applications.[147]

IRCA did not specifically restrict the eligibility of temporary residents for legal services.[148] However, both the Attorney General and the Legal Services Corporation have proposed regulations that would make any alien granted temporary resident status ineligible for legal services for five years even after the alien becomes a permanent resident.[149] SAWs and RAWs, on the other hand, are designated as eligible for legal services.[150]

Restrictions on the eligibility of temporary residents even after they become permanent residents appear to violate congressional intent since Congress, after the passage of IRCA, has continued to designate permanent residents (without exception) as eligible for legal services.[151] Further, this denial of eligibility for legal services programs undermines a congressional objective in passing the legalization program. Congress was concerned that undocumented aliens "live in fear, afraid to seek help when their rights are

143. *Id.* at 12.
144. *Id.* at 4.
145. Yolano-Donnelly v. Pierce, Civ. No. S-86-0846 (Oct. 28, 1988).
146. 42 U.S.C. §§ 2996, 2996b (1982).
147. *E.g.*, Further Continuing Appropriations, 1983, Pub. L. No. 98-377, 97 Stat. 1830, 1874 (1982).
148. 8 U.S.C. § 1255a(h) (Supp. IV 1986).
149. 52 Fed. Reg. 31,784, No. 163 (1987); 53 Fed. Reg. 40,914, No. 202 (1988).
150. 53 Fed. Reg. 40,914 (1988).
151. Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-159, 102 Stat. 2186, 2218 (1988).

violated, when they are victimized by criminals, employers or landlords."[152] The proposed regulations would prevent these same aliens from getting help to protect their rights.

The proposed legal services regulations also attempt to limit the eligibility of citizen and eligible aliens for legal services if these services would benefit an ineligible alien in more than an incidental way.[153] For example, under this proposal a citizen of the United States could not obtain help in regularizing the immigration status of an alien family member.[154]

B. Programs That Afford Eligibility to Aliens "Permanently Residing in the United States Under Color of Law"

The SSI, AFDC and Medicaid programs have different alien status eligibility criteria. However, they share in common the provision of eligibility to aliens who are "permanently residing in the United States under color of law."[155] The proper interpretation of this phrase has been the subject of much dispute. An understanding of the legislative history of the phrase and how courts have interpreted it is essential to a full understanding of the alien status restrictions on eligibility for SSI, AFDC and Medicaid, particularly since court decisions have forced changes in the federal administrative limitations on alien eligibility.

1. Interpretations of "Permanently Residing in the United States Under Color of Law"

The legislative histories of the various statutes that employ the criterion of "permanently residing in the United States under color of law" indicate that Congress intended it to be interpreted broadly. This phrase was first used in 1972 in legislation regarding public entitlements under the SSI program.[156] As originally proposed in the House, the SSI program was to be restricted to citizens and legal permanent residents.[157] In the Senate, however, the senators from Florida expressed concern that the state would have to bear the economic burden of caring for aged, blind and disabled aliens who, while not legal permanent residents, were residing in the state pursuant to actions of federal immigration authorities.[158] The senators from Florida proposed an amendment, which eventually became part of the SSI statute, extending benefits to aliens who were "permanently residing in the United States under color of law."[159]

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152. H.R. REP. NO. 682, *supra* note 112, at 49.
153. 53 Fed. Reg. 40,916 (1988).
154. *Id.* at 40,916-17.
155. *See infra* text accompanying notes 193, 201, 219.
156. 42 U.S.C. § 1382c(a)(1)(B) (1982).
157. H.R. REP. NO. 231, 92d Cong., 1st Sess. 5322 (1971).
158. 118 CONG. REC. S33,959 (daily ed. Oct. 5, 1987) (statements of Senators Chiles and Gurney).
159. 42 U.S.C. § 1382c(a)(1)(B) (1982).

In 1985, legislation was proposed to interpret the phrase "permanently residing in the United States under color of law" to include only a few classifications of aliens.[160] This proposal was not passed, and the next year's bill did not include this limitation.[161] Most recently, Congress made "permanently residing in the United States under color of law" the criterion for alien eligibility for non-emergency health care under the Medicaid program.[162] According to the House report on the bill, Congress intended that the Secretary of Health and Human Services interpret this phrase broadly so as to include aliens residing in the United States pursuant to immigration law, policy or practice.[163]

Most courts have broadly interpreted "permanently residing under color of law" and have focused on the factual realities of immigration law, policies or practices as they were applied to the circumstances of individual aliens. *Holley v. Lavine*[164] was the first case to provide an interpretation of the phrase. It involved the eligibility for AFDC of an alien whose children were American citizens. In its decision, the United States Court of Appeals for the Second Circuit first discussed the meaning of "under color of law" and then turned to an analysis of "permanently residing." The court explained that the most common example of action taken "under color of law" involved the decision of an official to exercise her "discretion not to enforce the letter of a statute or regulation because such enforcement would involve consequences, or inflict suffering, beyond what the authors of the law contemplated."[165] The phrase "embraces not only situations within the body of the law, but also others enfolded by a colorable imitation . . . [It] encircles the law, its shadows, and its penumbra."[166] The court then held that Ms. Holley was in the United States "under color of law" because the INS had decided not to enforce her deportation out of humanitarian concern for her citizen-children.[167]

To interpret "permanently residing," the court turned to the definition contained in the Immigration and Nationality Act[168] of "permanent" which includes aliens whose presence in the United States is "continuing or lasting," even though their residence here is susceptible to termination.[169] This definition was applicable to Ms. Holley because although she had no indication that she would be allowed to remain in the United States forever, an INS letter had stated that she would not be deported "at this time" because of concern for the

160. H.R. REP. No. 3810, 99th Cong., 1st Sess. § 121(c) (1985).

161. H.R. REP. No. 3810, 99th Cong., 2d Sess. § 121 (1986). *See also supra* note 112.

162. 42 U.S.C. § 1396b(v) (Supp. IV 1986).

163. H.R. REP. No. 727, 99th Cong., 2d Sess. 111 (1986).

164. 553 F.2d 845 (2d Cir. 1977), *cert. denied sub nom.*, Shang v. Holley, 435 U.S. 947 (1978).

165. 553 F.2d at 850.

166. *Id.* at 849.

167. *Id.* at 850.

168. Immigration and Nationality Act, c. 477, tit. I, § 101, 66 Stat. 166 (1952) (codified as amended at 8 U.S.C. §§ 1101-1503 (1982 & Supp. IV 1986)).

169. 8 U.S.C. § 1101(a)(31) (1982). The court found further support for its interpretation of "permanently residing" in the examples given in the AFDC regulation and in the definitions of "conditional entry" and "parolee." 553 F.2d at 851.

well-being of her citizen-children. The INS' letter specifically noted that "[s]hould the dependency of the children change, [Ms. Holley's] case would be reviewed for possible action consistent with circumstances then existing."[170] Finding that Ms. Holley's residence was of a continuing and lasting nature, the court held that she met the standard of "permanently residing."[171] Thus, the court interpreted and applied "permanently residing in the United States under color of law" by looking at the immigration law and the reality of the INS practice.

The post-*Holley* cases have failed to reach a consensus as to the type of INS action which would meet the under color of law standard and the certainty of the alien's continued residence required to meet the permanently residing standard. Most courts have looked to the reality of immigration law, policy or practice and found the standard met by aliens whose presence was known to the INS and in whose continued residence the INS had acquiesced by some action or inaction.[172] This has led to a finding of permanently residing in the United States under color of law in a variety of circumstances: when the alien could have been deported under immigration law, but the INS had a policy or practice not to deport her; when the alien had an INS status which allowed limited continuous residence; and when the alien's continuous residence was known to the government officials, and the INS did not in fact pursue the alien's deportation. A minority of cases have taken a more limited view and required that to be permanently residing in the United States under color of law, the INS must have granted an alien a specific immigration status that allows her to remain in the United States indefinitely.[173]

In some cases, courts have concluded that an alien is "permanently residing in the United States under color of law" because the INS had a policy not to deport her during a certain continuing (albeit limited) time period, although she could have been deported under the immigration law. In *Papadopoulos v. Shang*,[174] for example, an alien who had filed for adjustment of status, which was eventually denied, was held to be "permanently residing in the United States under color of law" during the period in which the application was pending because an INS Operating Instruction stated that the INS had a policy not to deport an adjustment applicant.[175] In *Division of Employment and Training v. Turyuski*,[176] the court reached a similar result where the INS had a policy which granted Polish nationals the status of extended voluntary departure because of the political situation in Poland.

Other courts have also held that aliens are "permanently residing in the United States under color of law" when the INS has granted the alien a status

170. *Id.* at 850.
171. *Id.*
172. *See infra* notes 174-81 and accompanying text.
173. *See infra* notes 182-83 and accompanying text.
174. 67 A.D.2d 84, 414 N.Y.S.2d 152 (App. Div. 1979).
175. 414 N.Y.S.2d at 154.
176. 735 P.2d 469 (Colo. 1987).

that allows her to continue to reside in the United States, even if only on a limited basis. For example, in *Rubio v. Employment Division*,[177] an alien who had been granted voluntary departure in three-month intervals by the INS was found to be permanently residing under color of law.

Many courts have reviewed the facts and circumstances of an alien's case and concluded that she was "permanently residing in the United States under color of law" when the INS or State Department officials knew about the alien's continuous residence in the United States and yet did not in fact pursue her deportation. The factual reality of the INS' practice was the controlling factor. In *Papadoupoulos*, after the denial of the aliens' application for adjustment of status, the INS was considering her for deferred action status on humanitarian grounds. The court concluded that she was permanently residing in the country under color of law during the period of time that she was still being considered by the INS for deferred action status because, although she had received no individual assurance that she would not be deported, the INS had, in fact, taken no steps to deport her.[178] In *St. Francis Hospital v. D'Elia*,[179] an alien living in New York while processing a visa application through a United States Consular Office in Canada was found to be "permanently residing in the United States under color of law." The court considered the following facts to be particularly relevant: the alien had entered the United States on a valid non-immigration visa; she had applied for an immigrant visa; following the expiration of her non-immigrant visa, the State Department had corresponded with her at her residence in the United States; and, finally, the INS had not, in fact, deported her.

A Florida court in *Alfred v. Florida Department of Labor and Employment Security*[180] held that to be "permanently residing in the United States under color of law," an alien need have neither an application for lawful status pending with the INS nor a direct indication from the INS that it does not intend to deport her. The court found that aliens who had been placed under deportation proceedings, released on their own recognizance, and given employment authorization while their cases were pending were permanently residing under color of law until their status was changed by an affirmative INS action.[181]

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177. 66 Or. App. 525, 674 P.2d 1201 (Or. App. 1984). *See* Flores v. Department of Jobs and Training, 393 N.W.2d 231, 232-34 (Minn. Ct. App. 1986) (the combination of the INS' grant of voluntary departure and an authorization for employment warranted a finding that the alien was "permanently residing in the United States under color of law").

178. 414 N.Y.S.2d at 155. *See* Cruz v. Commissioner of Public Welfare, 478 N.E.2d 1262 (Mass. 1985), where a Massachusetts court found that the INS had been aware of the alien's continued residence in the United States and had not proceeded to deport her. The alien had lived in the United States for twelve years and had a mother who was a permanent resident.

179. 71 A.D.2d 110, 422 N.Y.S.2d 104 (App. Div. 1979), *aff'd*, 53 N.Y.2d 825, 440 N.Y.S.2d 185, 422 N.E.2d 830 (1981).

180. 487 So. 2d 355 (Fla. Dist. Ct. 1986).

181. In other cases, the INS' knowledge and acquiescence were sufficient for a finding that an alien was "permanently residing in the United States under color of law." In Lapre v. Dep't of Employment Security, 513 A.2d 10 (R.I. 1986), the court held that "the INS had acceded to

The Ninth Circuit, in *Sudomir v. McMahon*,[182] exemplified the minority, more restrictive view of the proper interpretation of "permanently residing in the United States under color of law." In *Sudomir*,[183] the court found that an applicant for asylum was in the United States "under color of law" but was not "permanently residing." In the court's view, the color of law component was satisfied because, under the INS' policy, asylum applicants are not deportable during the pendency of their applications. The court held, however, that the asylum applicant was not "permanently residing in the United States" because, in the court's view, "the alien's continued presence was solely dependent upon the possibility of having his application for asylum acted upon favorably."[184] Despite evidence that the INS' policy permits an asylum applicant continued residence while her application is pending, the court refused to interpret permanently residing under color of law in accord with the INS policy. The court also ignored the immigration law's definition of "permanent" upon which the Second Circuit in *Holley* had based its reasoning. Instead of recognizing that under the immigration law a continuing status that can be dissolved by INS is sufficient to meet the definition of permanent, the court required an affirmative grant of INS status which guaranteed perpetual residence.

In *Gillar v. Employment Division*,[185] the Oregon Supreme Court took a broader view than did the Ninth Circuit in *Sudomir* and determined that an asylum applicant was "permanently residing in the United States under color of law." However, the court did not accept the reality of the INS' practice toward a particular individual as a valid basis for finding that an alien was "permanently residing in the United States under color of law." Instead, the court stated that it was necessary for the INS to take some affirmative action with regard to that individual alien or have a policy prohibiting the alien's deportation. It found that an asylum applicant meets this test because INS policy allowing an asylum applicant's continuing residence was found in the Refugee Act of 1980[186] and in INS regulations.[187]

When the Second Circuit returned to the issue eight years after *Holley* in

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Lapre's permanent residence in the United States under color of law when it told her that her permanent resident status had expired but at the same time, took pains to instruct her how to regain that status." *Id.* at 12-13.

Similarly, in Industrial Comm'r v. Arteaga, 735 P.2d 473 (Colo. 1987), an alien who had been arrested by the INS and had deportation proceedings initiated against him also met the "permanently residing in the United States under color of law" criterion because his citizen-wife had subsequently filed a petition on his behalf, and the INS had subsequently granted him employment authorization and had not deported him.

182. 767 F.2d 1456 (9th Cir. 1985).

183. *Id.*

184. *Id.* at 1462.

185. 300 Or. 672, 717 P.2d 131 (Or. 1986).

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

187. 717 P.2d at 135-37.

Berger v. Heckler,[188] it reaffirmed an expansive interpretation of the "permanently residing under color of law" language. *Berger* involved the proper interpretation of the statutory requirement that aliens be permanently residing in the United States under color of law for SSI eligibility. A consent decree in *Berger* stated that the phrase included any alien residing in the United States with the knowledge and permission of the INS and whose departure from the United States the INS does not contemplate enforcing. By district court amendment the meaning of "whose departure INS does not contemplate enforcing" was clarified. The amendment stated:

> An alien in a particular category shall be considered as one whose departure the INS does not contemplate enforcing if it is the policy or practice of the INS not to enforce the departure of aliens in such category or if, on all the facts and circumstances in that particular case, it appears that the INS is otherwise permitting the alien to reside in the United States indefinitely.[189]

The amendment also set forth examples of the categories of aliens which would meet this test.[190]

The Secretary of Health and Human Services sought to be relieved from the terms of the *Berger* decree, arguing that it was ultra vires and inconsistent with *Holley*. The Secretary contended that the only aliens who were permanently residing under color of law were those for whom there had been an official determination that they were legitimately present in the country for an indefinite period of time.[191] The court rejected the Secretary's arguments and affirmed the decree as amended. In doing so, however, the court did not limit the interpretation of permanently residing in the United States under color of law only to the definition or categories found in the consent decree. Rather, the court stated that the phrase was both expansive and elastic, designed to be adaptable and interpreted over time in accordance with experience and developments in the law.[192]

2. *Restrictions on the Eligibility of Aliens for Supplemental Security Income*

Aliens are eligible for SSI if they are permanent residents, temporary residents, SAWs, RAWs or "permanently residing in the United States under color of law." Nine years after the original *Berger* consent decree, the Secretary issued a regulation to implement its provisions.[193] The regulation states in pertinent part:

> We will consider you to be permanently residing in the United States under color of law and you may be eligible for SSI benefits if you are

188. 771 F.2d 1556 (2d Cir. 1985).
189. *Id.* at 1577 n.33.
190. *Id.*
191. *Id.* at 1570.
192. *Id.* at 1571.
193. 52 Fed. Reg. 21,939-45, No. 111 (1987).

> an alien residing in the United States with the knowledge and permission of the Immigration and Naturalization Service and that agency does not contemplate enforcing your departure. The Immigration and Naturalization Service does not contemplate enforcing your departure if it is the policy or practice of that agency not to enforce the departure of aliens in the same category, or if from all the facts and circumstances in your case, it appears that the Immigration and Naturalization Service is otherwise permitting you to reside in the United States indefinitely.[194]

The regulation further lists fifteen examples of alien statuses which meet these criteria.[195] In addition to these specific examples, the regulation allows any other alien to demonstrate that she is living in the United States with the knowledge and permission of the Immigration and Naturalization Service and that the INS does not contemplate enforcing her departure.[196] Aliens who are applicants for various immigration statuses may demonstrate their eligibility under this general category.[197]

Under the regulation, an alien is automatically eligible for SSI if she proves that she falls within one of the following statuses: refugees; parolees (including Cuban/Haitian entrants); aliens holding indefinite stays of deportation; aliens granted indefinite voluntary departures; aliens granted asylum; conditional entrants; aliens with deferred action status; aliens under orders of supervision; aliens who have resided in the United States since before January 1, 1972; and aliens whose deportation has been withheld.[198]

For the five remaining alien statuses and the general category, an alien will be eligible for SSI only if the INS informs the Secretary of Health and Human Services that it does not intend to enforce the alien's departure. These five alien statuses include: aliens on whose behalves immediate relative petitions have been approved and their families, covered by the petition, who are entitled to voluntary departure; applicants for adjustment of status; aliens granted stays of deportation; aliens granted voluntary departure; and aliens granted suspension of deportation.[199]

The additional requirement that the INS inform the Secretary of Health and Human Services that it does not intend to enforce the alien's departure violates *Berger*. The *Berger* decree stated that an alien in a particular alien status can show that the INS does not contemplate enforcing her departure either by demonstrating that it is not the practice or policy of the INS to enforce the departure of aliens in that category or by proving that the INS has made a specific determination based on that alien's particular circum-

194. 20 C.F.R. 416.1618(a) (1988).
195. *Id.* at 416.1618(b).
196. *Id.* at 416.1618(b)(16).
197. *Id.* at 416.1618(b).
198. *Id.* at 416.1618(d)(2).
199. *Id.* at 416.1618(d)(3).

stances.[200] *Berger* does *not* require an alien to show that the INS has informed the Secretary of Health and Human Services that it does not intend to enforce the alien's departure.

3. *Restrictions on the Eligibility of Aliens for Medicaid*

The first federal restriction on the availability of Medicaid to aliens was a regulation which limited eligibility to legal permanent residents and aliens permanently residing in the United Stated under color of law.[201] In July 1986, a federal district court held, in *Lewis v. Gross*,[202] that this regulation had no statutory basis and invalidated it. In October 1986, partially in response to *Lewis*, Congress addressed the eligibility of aliens for Medicaid but did not ratify the regulation which the court had invalidated. Instead, Congress passed a law which made a broad range of emergency services available without regard to alien or citizenship status.[203] The statute defines an emergency as:

> a medical condition (including emergency labor and delivery) that manifests itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to place the patient's health in serious jeopardy, or result in serious impairment of bodily functions or serious dysfunctions of any body or organ part.[204]

The statute, however, excludes non-permanent residents from eligibility for non-emergency medical services unless they are "permanently residing in the United States under color of law."[205] The statute's legislative history calls for a broad interpretation of this phrase to include all categories of aliens residing in the United States under immigration law, policy or practice.[206] The Secretary of Health and Human Services however, has not fully complied with Congress' directive. The Secretary applied only the narrower interpretation of the phrase found in the *Berger* consent decree,[207] even though the *Berger* decree did not purport to include an exhaustive list of aliens who were residing

200. Berger v. Heckler, 771 F.2d 1556, 1575 (2d Cir. 1985).

201. The regulation adopted in November 1973 by the Department of Health, Education and Welfare (HEW) was codified at 45 C.F.R. § 248. A regulation promulgated by the Department of Health and Human Services ("HHS"), 42 C.F.R. § 435.402 (1984), currently governs the eligibility of aliens for Medicaid. Prior to 1973, HEW regulations provided for federal participation in state Medicaid programs which covered aliens residing in the state regardless of their citizenship or alien status, and in some circumstances the regulations required Medicaid coverage for all otherwise eligible aliens. 45 C.F.R. § 248.50 (1971).

202. 663 F. Supp. 1164 (E.D.N.Y. 1986).

203. 42 U.S.C. § 1396b(v) (Supp. IV 1986).

204. *Id.* § 1396b(v)(3) (Supp. IV 1986).

205. *Id.* § 1396b(v)(1).

206. H.R. REP. NO. 727, *supra* note 163, at 111.

207. 53 Fed. Reg. 38,032-33, No. 189 (1988); DEPARTMENT OF HEALTH AND HUMAN SERVICES, STATE MEDICAID MANUAL, PART 3, ELIGIBILITY, TRANSMITTAL NO. 14 (August 1987); Berger v. Heckler, 771 F.2d 1556 (2d Cir. 1985).

in the United States pursuant to immigration law, policy or practice.[203]

The *Lewis* court, however, refused to grant a preliminary injunction which would have required the Secretary to specify additional categories of aliens that meet the permanently residing under color of law criterion.[209] The court found, at least preliminarily, that the Secretary's interpretation was sufficiently consistent with the statute because it included a general open-ended category through which an alien not in the listed categories could demonstrate that she is "permanently residing in the United States under color of law." The court left open the possibility of requiring the addition of other alien categories if the plaintiffs demonstrated that the Secretary's interpretation was so unworkable as to violate the due process clause or various statutes.[210]

However, the *Lewis* court did issue a New York statewide preliminary injunction which enjoins the denial of Medicaid benefits to a pregnant woman based on her alien status if her child would be eligible for Medicaid when born.[211] The court determined that under a long-standing administrative interpretation, "unborn children" are considered eligible for Medicaid as children under the age of twenty-one, and therefore, otherwise ineligible pregnant women can receive Medicaid benefits for the sake of the children when born.[212]

Currently, all aliens — including those in IRCA-created statuses — are eligible for Medicaid for emergency services.[213] Aliens become fully eligible for Medicaid if they fall into the status of permanent residents, are permanently residing in the United States under color of law, or are SAWs who have been deemed ineligible for AFDC.[214] Temporary residents, RAWs and SAWs, who are eligible for AFDC, are fully eligible for Medicaid only if five years have passed since they achieved their IRCA status, or if they are Cuban/Haitian entrants, aged, blind, disabled, or under eighteen years old.[215] Pregnant aliens whose children (if born alive) would be eligible for Medicaid are also covered by Medicaid (at least in New York state).[216] Pregnant temporary residents, RAWs and SAWs who are eligible for AFDC are eligible in their own right for specific services for pregnant women.[217]

Through regulations, the Secretary of Health and Human Services may modify the eligibility of SAWs for Medicaid. The Secretary proposes not to recognize the IRCA language which does not restrict the eligibility of SAWs

208. 771 F.2d at 1560.

209. Lewis v. Grinker, [New Developments] Medicare & Medicaid Guide (CCH) ¶ 36,213 at 13,549 (Mar. 6, 1987).

210. *Id.* at 13,556-57.

211. *Id.* at 13,557.

212. *Id.* at 13,553-55.

213. 8 U.S.C. §§ 1160(f), 1161(d)(6), 1255a(h)(3) (Supp. IV 1986); 42 U.S.C. § 1396b (v)(3) (Supp. IV 1986).

214. 8 U.S.C. § 1160(f) (Supp. IV 1986).

215. *Id.* §§ 1160(f), 1161(d)(6), 1255a(h)(3) (Supp. IV 1986).

216. *Supra* text accompanying note 211.

217. 8 U.S.C. §§ 1160(f), 1161(d)(6), 1255a(h)(3) (Supp. IV 1986).

for Medicaid unless they would qualify for the AFDC programs — except for IRCA's restriction on SAWs receiving AFDC assistance — and has proposed to limit the eligibility of all SAWs.[218]

4. *Restrictions on the Eligibility of Aliens for Aid to Families with Dependent Children*

In 1981, Congress enacted a statute which limited eligibility for AFDC to aliens who are permanent residents of the United States or who are "permanently residing in the United States under color of law."[219] Aliens in statuses created by IRCA, temporary residents, SAWs, and RAWs are not eligible for AFDC for five years, even if they become permanent residents, unless they are Cuban/Haitian entrants.[220] However, these aliens may be eligible for Emergency Assistance to Families (EAF)[221] if they live in states which have not imposed citizenship and alien status requirements on EAF in their state plans.[222]

The interpretation of permanently residing in the United States under color of law in the AFDC regulations gives limited examples of alien statuses which would meet this criterion. These include only refugees, conditional entrants, parolees or aliens granted asylum,[223] but the regulation does not state that this is an exclusive list, AFDC eligibility should be afforded at least to those aliens who meet the SSI and Medicaid definition of permanently residing in the United States under color of law. However, the Department of Health and Human Services has interpreted "permanently residing under color of law" more narrowly for AFDC than for Medicaid or SSI. HHS' Office of Family Assistance requires that to be permanently residing in the United States under color of law an alien must show that she is legitimately present in the United States and present evidence that her legitimate presence is for an indefinite period of time.[224] This standard imposes nationwide for AFDC eligibility the minority position on the definition of permanently residing in the United States under color of law found in the Ninth Circuit's opinion in *Sudomir v. McMahon*[225] even in those jurisdictions like the Second Circuit where the majority view is established.[226]

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218. Proposed Rules, 53 Fed. Reg. 38,032 (1988).

219. Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, § 2320(a)(3), 95 Stat. 357, 857 (1981) (codified as amended 42 U.S.C. § 602(a)(33) (Supp. IV 1986)).

220. 8 U.S.C. §§ 1160f, 1161(d)(6), 1255a(h) (Supp. IV 1986).

221. Emergency assistance for families is money or in kind payments given to a family for a maximum of thirty days to avoid the destitution of or provide living arrangements for a child. 42 U.S.C. § 606(e) (1982).

222. NEW YORK STATE DEP'T OF SOCIAL SERVICES, INFORMATION BULLETIN (89-INF-12).

223. 45 C.F.R. § 233.50(b) (1987).

224. HHS OFFICE OF FAMILY ASSISTANCE TRANSMITTAL, FSA-AT-88-4 (Mar. 3, 1988) [hereinafter HHS TRANSMITTAL].

225. 767 F.2d 1456 (9th Cir. 1985). *See supra* notes 182-84 and accompanying text.

226. *See supra* notes 164-71, 188-92 and accompanying text.

The Office of Family Assistance's list of examples of aliens classifications which would meet it definition of permanently residing in the United States under color of law include refugees, aliens granted political asylum or temporary parole status, Cuban/Haitian entrants, aliens under an INS order of supervision, alien granted an indefinite stay of deportation or indefinite voluntary departure, aliens granted voluntary departure for at least a one year time period, aliens granted deferred action status or suspension of deportation, registry eligible aliens and aliens who have an approved immediate relative petition and voluntary departure.[227] While the Office of Family Assistance states that this list is not exclusive, it does state that aliens with voluntary departure for less than one year or aliens who are applying for an alien status or seeking to adjust an ineligible status will not be considered permanently residing in the United States under color of law.[228]

IV.
CRITIQUE OF THE FEDERAL ALIEN STATUS RESTRICTIONS ON ELIGIBILITY FOR PUBLIC ASSISTANCE

The rules governing the eligibility of aliens for public assistance create a confusing and complicated system of eligibility. This complex system is difficult to understand, costly to administer, and holds great potential for error. The complexity might be justified if there was a strong and consistent underlying rationale for the restrictions imposed. Two purported rationales are: 1) assistance should be limited to aliens whose residence is sanctioned by federal immigration law, policies or practices; and 2) assistance to aliens should avoid undue burdens on states and localities. However, the current system does not meet these objectives. Furthermore, important social interests are undermined, including the preservation of citizens' rights and community needs and our society's stake in being just and humane.

A. Aliens Residing in the United States Pursuant to Immigration Law, Policy or Practice Are Excluded from Receiving Public Assistance

One rationale for imposing restrictions on eligibility of aliens for federally funded public assistance programs is the goal of targeting public assistance to those aliens who are residing in the country pursuant to federal immigration law, policies or practices.[229] This goal recognizes that such aliens have made the United States their home under official sanction and that they bear the responsibilities of their United States residence: "[a]liens like citizens pay taxes and may be called into the armed forces . . . [they] work in the state and contribute to [its] economic growth."[230] Therefore, they should have the pro-

227. HHS TRANSMITTAL, *supra* note 224, at 2-3.

228. *Id.* at 3.

229. *See supra* text accompanying note 163.

230. Graham v. Richardson, 403 U.S. 365, 376 (1971) (quoting Leger v. Sailer, 321 F. Supp. 250 (E.D. Pa. 1970)).

tection that the society affords those who undertake such responsibilities.

This goal has not been achieved because many aliens residing in the country under immigration law, policy or practice are excluded from eligibility for federally funded public assistance programs. Several programs such as food stamps, housing programs, and legal services are limited to a few categories of aliens.[231] Administrative agencies and some court interpretations of "permanently residing in the United States under color of law" do not consistently include all the categories of aliens residing in the country pursuant to immigration law, policy or practice.[232] Further, IRCA excluded from eligibility for public assistance aliens residing in the United States pursuant to that statute even when they become permanent residents.[233]

Eligibility for food stamps illustrates the inconsistency of the restrictions on aliens entitled to reside in the United States. Only a few categories of aliens are eligible for food stamps, even though other categories of aliens are residing in the United States in similar or stronger immigration status. For example, parolees are eligible for food stamps, but aliens granted deferred action status or long term voluntary departure are not.[234]

A parolee is an alien who has been allowed to come into the United States at the discretion of the Attorney General, and by statutory definition her status is "temporary."[235] An alien granted deferred action or long term voluntary departure status have similarly been allowed to live in the United States because of the exercise of the Attorney General's discretion based on humanitarian considerations such as conditions in countries of origin or hardship to citizens.[236] Yet parolees are eligible for food stamps but aliens with deferred action or long term voluntary departure are not.

IRCA has only compounded the inconsistencies in eligibility for food stamps. A Cuban/Haitian entrant in temporary status, for example, is eligible for food stamps, while an alien who has lived in the United States since before 1982 and has become a permanent resident is not.[237] An alien who has worked in agricultural labor for ninety days in each of three years is eligible, but an alien who has continuously resided in the United States for five years or more is not.[238]

One of the most serious blows to the consistent application of eligibility requirements based on the legitimacy of an alien's residence is IRCA's exclusion of certain permanent residents from public assistance. A report of the House Committee on the Judiciary attempts to justify IRCA's restrictions on

231. *See supra* notes 115, 135, 153 and accompanying text.
232. *See supra* text accompanying notes 182-84.
233. *See supra* note 77 and accompanying text.
234. 7 U.S.C. § 2015(f) (Supp. IV 1986).
235. 8 U.S.C. § 1182(d)(5) (1982).
236. INS OPERATION INSTRUCTIONS 242.1(a)(22); 8 U.S.C. § 1254(a)(1) (1982); 8 C.F.R. § 242.5 (1987).
237. *See supra* text accompanying notes 76-79.
238. *See supra* note 95 and accompanying text.

the eligibility of permanent resident aliens for public assistance by referring to the Supreme Court's decision in *Mathews v. Diaz*.[239] The Committee interpreted *Mathews* to stand for the proposition that Congress may grant benefits to some aliens and deny them to others based on the strength of their ties to this country.[240] In *Mathews*, the Court upheld the constitutionality of the federal statute that restricted the eligibility of aliens to some Medicare benefits; to be eligible the alien had to have been a permanent resident for five years.[241]

Leaving aside whether the Committee properly interpreted *Mathews*, there is a significant difference between what Congress implemented in the Medicare statute and in IRCA's provision. The Medicare statute had a relationship to the strength of an alien's ties to this country by focusing on length of residence. The inconsistencies in IRCA demonstrate that such an interest is not being advanced. Under IRCA, those permanent residents afforded public assistance eligibility do not have any stronger ties — and in some cases have weaker ones — to the United States than those permanent residents precluded from public assistance eligibility.

One example of the inconsistencies generated by IRCA may be found in the different treatment of aliens who become permanent residents through SAW status as opposed to aliens who become permanent residents through temporary alien status. There are many more restrictions on the eligibility for public assistance of aliens who become permanent residents through temporary resident status. Yet, aliens who become permanent residents through temporary resident status have stronger ties to the United States in terms of length of residence than aliens who become permanent residents because they are SAWs. SAWs need only reside in the United States at some time and perform agricultural labor in the United States for ninety days during a one-year period, whereas temporary residents must demonstrate at least five years of continuous residence.[242]

Another example may be found in the different treatment of aliens who became permanent residents based on Cuban/Haitian entrant status versus aliens who become permanent residents based on extended voluntary departure status after having been in temporary resident status. A Cuban/Haitian entrant who becomes a permanent resident has no restrictions on her public assistance eligibility, while an alien who has resided in the United States in an extended voluntary departure status who becomes a permanent resident is severely restricted.[243] However, the initial basis of the residence of aliens in both these statuses is the same; an exercise of discretion to allow them to reside in the United States because of conditions in their home countries.[244]

239. 426 U.S. 67 (1976).
240. H.R. REP. No. 682, *supra* note 112, at 74-75.
241. 426 U.S. at 70.
242. *See supra* text accompanying notes 20, 51.
243. *See supra* text accompanying notes 78-79.
244. *See supra* text accompanying notes 22, 44, 46.

Thus, rather than consistently affording eligibility to aliens who are continually residing in the United States under the authority of immigration law, policy or practice and thereby allowing them to assume the responsibilities of United States residence, federal law limits alien eligibility without reasonable distinctions.

B. Restrictions on the Eligibility of Aliens for Federally Funded Public Assistance Burden State and Local Governments

A second purported rationale for the current restrictions is the recognition of federal responsibility for the results of immigration policy, an exclusively federal province, and thereby avoidance of undue burden on states and localities. This goal is not achieved by the current alien eligibility restrictions. This federal goal is particularly important because the impact of federal immigration policy varies disproportionately among the states. Most aliens reside in California, New York, Texas, Illinois and Florida.[245] These states cannot alter federal immigration policy but must nevertheless bear the entire social and economic burden of these policies if the federal government does not contribute to their costs. The economic realities of the tax system further exacerbate the problem of funding social programs. Studies have shown that while aliens, including undocumented aliens, do contribute to social welfare programs through tax payments, their tax dollars primarily go to the federal government.[246] Thus, without federal participation in providing public assistance to aliens, local governments have to shoulder unequal burdens to preserve the health and welfare of their residents.

Local communities have objected to bearing the burden of providing health care for aliens without federal contribution. In California, for example, Los Angeles, Fresno, Tulane and San Diego Counties have each attempted to sue the federal government to seek reimbursement for the cost of providing health care to undocumented immigrants.[247] In New York, the New York City Health and Hospitals Corporation intervened as plaintiffs in *Lewis v. Gross*,[248] claiming millions of dollars in unreimbursed health care because of the federal government's restrictions on the eligibility of aliens for Medicaid.[249]

The 1986 amendment to the Medicaid statute[250] responded only partially to these concerns by making all aliens, regardless of status, eligible for Medi-

245. Passel & Woodrow, *Geographic Distribution of Undocumented Immigrants: Estimates of Undocumented Aliens Counted in the 1980 Census by State*, 18 INT'L MIGRATION REV. 642, 659 table 5 (1984).

246. Chavez, *Undocumented Immigrants and Access to Health Services: A Game of Pass the Buck*, 11 MIGRATION TODAY 15, 17 (1983).

247. *See id.*

248. 663 F. Supp. 1164 (E.D.N.Y. 1986), *on reconsideration*, Lewis v. Grinker, 660 F.Supp. 169 (E.D.N.Y. 1987).

249. *Id.*

250. 42 U.S.C. § 1396b(v) (Supp. IV 1986). *See supra* text accompanying note 203.

caid coverage for emergency services.[251] The amendment, however, did not solve the fiscal and health concerns of local governments because it excludes preventive health care and alternatives to in-patient hospitalization from Medicaid coverage. Lack of federal funding for preventive medical treatment of large groups of aliens effectively denies the treatment and augments the costs of medical care by forcing aliens to resort to more expensive emergency medical care.

Restrictions on the eligibility of aliens for Medicaid for preventive treatment curtails the early detection of serious illness such as heart disease, stroke, cancer, as well as diabetes, muscular-skeletal problems, kidney disease, and vision and hearing problems. Both the overall cost of treatment and the severity of the personal consequences of these debilitating illnesses could be minimized by early treatment.[252] Similarly, despite the fact that children represent an "ideal target population for whom investments in preventive health care will yield high returns,"[253] poor alien children who are ineligible for Medicaid receive little or no preventive medical care.[254] For the most part, diseases or conditions damaging to these children can be easily prevented by routine inoculations or easily detected through standard screening procedures.[255]

The lack of adequate prenatal care is another source of increased human suffering and fiscal burdens on local entities. Several studies, including one by the Institute of Medicine, have concluded that the provision of prenatal care is cost-effective, particularly for pregnant women with low incomes.[256] Receipt of adequate prenatal care contains health care costs by preventing conditions which require expensive treatment. The provision of prenatal care reduces low birth weight, many congenital disorders and birth defects.[257] Neo-natal health care for these conditions is very expensive.[258]

All alien women are eligible for Medicaid assistance to cover the costs of

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251. 42 U.S.C. § 1396b(v)(3) (Supp. IV 1986). *See supra* text accompanying note 204.

252. OFFICE OF THE ASSISTANT SECRETARY OF HEALTH AND SURGEON GENERAL, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, HEALTHY PEOPLE: THE SURGEON GENERAL'S REPORT ON HEALTH PROMOTION AND DISEASE PREVENTION, 53-59, 65-67 (1979) [hereinafter HEALTHY PEOPLE]; Medical Practice Committee, American College of Physicians, *Periodic Health Examination: A Guide for Designing Individualized Preventive Health Care in the Asymptomatic Patient*, 95 ANNALS OF INTERNAL MED. 730-31 (1981).

253. Aronson, *The Health Needs of Infants and Children Under 12*, in BETTER HEALTH FOR OUR CHILDREN: A NATIONAL STRATEGY: THE REPORT OF THE SELECT PANEL FOR THE PROMOTION OF CHILD HEALTH 243 (1981) [hereinafter BETTER HEALTH FOR OUR CHILDREN].

254. OFFICE OF INSPECTOR GENERAL, SERVICE DELIVERY ASSESSMENT, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, CHILD HEALTH CARE EPSDT AND MCH: A SERVICE DELIVERY ASSESSMENT 6 (1980); *see* OFFICE OF SPECIAL CONCERNS, ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, UNPAID MEDICAL COSTS AND UNDOCUMENTED ALIENS i, 6 (1979) [hereinafter UNPAID MEDICAL COSTS].

255. *See* Aronson, *supra* note 253, at 253.

256. INSTITUTE OF MEDICINE, PREVENTING LOW BIRTHWEIGHT, 156, 233 (1985).

257. *Id.* at 132-49.

258. *Id.* at 222-23; *see* BETTER HEALTH FOR OUR CHILDREN, *supra* note 253, at 237.

labor and delivery care as an emergency, but their eligibility for prenatal care has been limited by a federal administrative refusal to follow a long-standing interpretation that affords prenatal care for the benefit of the children to be born regardless of their mother's technical ineligibility. This imposes severe costs on states and localities which must bear the health care, special schooling and social services costs of citizen-children born with health problems because of their mother's inability to obtain adequate prenatal care.[259]

The 1986 amendment to the Medicaid statute is also inadequate because it does not address the issue of who should bear the costs of an alien's medical care once the emergency is over. Many patients recovering from an emergency do not require hospital care once the emergency has passed but are not well enough to be discharged without the provision of an alternate level of care, such as a rehabilitation facility, home health care or outpatient care.[260] These services are not only more appropriate than inpatient hospitalization but are also less costly.[261] They are not, however, available to patients who cannot pay for them or to those who are not eligible for Medicaid.[262] The hospitals must, therefore, bear the burden of inappropriate health care. Ultimately, the community, as a whole, must bear this burden through increased taxes to fund public hospitals, increased health insurance rates and increased costs for private hospitals.[263]

States and localities additionally bear the burdens of the federal government's failure to fully contribute to the cost of public assistance for aliens under statuses created by IRCA. Congress attempted to address these concerns but with unsatisfactory and incomplete results. IRCA set up a fund to reimburse states partially for assistance given to legalized residents. However, this fund has a cap and will not result in full reimbursement to the states.[264]

IRCA also contains a provision that purports to authorize states or localities to deny public assistance to legalized aliens.[265] The statute provides that a state or locality may deny financial and medical assistance to legalized aliens to the extent that IRCA limits alien eligibility for federal programs.[266] There are, however, flaws with this approach. It assumes that the burdens on states and localities will be removed if they, like the federal government, can restrict alien eligibility. This ignores the fact that states and localities must still bear

259. A. FINE, S. ADAMS-TAYLOR, C.A. MILLER, L.B. SCHORR, MONITORING THE HEALTH OF AMERICA'S CHILDREN: TEN KEY INDICATORS 35 (1984); Governor's Conference for the Prevention of Developmental Disabilities and Infant Mortality, Prevention Action Plan, State of New York, Preliminary Report, 17 (1981).

260. Affidavit of Victor Sidel, Distinguished University Professor of Social Medicine, Montefiore Medical Center and Albert Einstein College of Medicine, ¶¶ 118-19 (1985), Lewis v. Gross, 663 F. Supp. 1164 (E.D.N.Y. 1986) [hereinafter Affidavit of Victor Sidel].

261. MATHMATICA POLICY RESEARCH, REPORT ON A SURVEY OF UNDOCUMENTED ALIENS IN H.H.C. FACILITIES, NEW YORK CITY, 1983, 105-07 (1983).

262. *See* Affidavit of Victor Sidel, *supra* note 260, at ¶¶ 119-24.

263. *Id.*

264. IRCA, § 204, 100 Stat. 3405 (1986).

265. 8 U.S.C. § 1255a(h)(1)(B) (Supp. IV 1986).

266. *Id.*

the burden of the consequences of these restrictions, such as homelessness, increased contagious disease rates and unnecessarily high medical costs.[267]

Furthermore, it is doubtful whether this kind of restriction would survive court scrutiny. In *Graham v. Richardson*,[268] the Supreme Court found that state restrictions on lawful aliens' eligibility for public benefits violated the equal protection clause of the fourteenth amendment to the United States Constitution. The Court held that restrictions on lawful aliens' public assistance eligibility were subject to close judicial scrutiny because such classifications based on alienage were inherently suspect.[269] It is doubtful whether state restrictions on the eligibility of legalized aliens could survive such strict scrutiny.

The House Committee on the Judiciary expressed the opinion that the IRCA provision which authorizes states to deny benefits to legalized aliens is constitutionally sound because "such restrictions would be wholly consistent with federal policy."[270] However, such an opinion does not appear to square with *Graham*. In *Graham*, one of the benefit programs involved was a federal program in which states participated.[271] The state attempted to justify its restrictions on alien eligibility by arguing that they were authorized by federal law. In response, the Court stated: "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause."[272]

But even if Congress could excuse a state from its federal constitutional obligations, it could not excuse a state from its state constitutional obligations. For example, the New York State Constitution contains a requirement that the state provide for its needy residents.[273] In *Tucker v. Toia*,[274] the New York Court of Appeals applied this provision to invalidate a state restriction on welfare eligibility that had been held by a federal court[275] to be consistent with the United States Constitution's fourteenth amendment equal protection clause. The Court of Appeals held that New York's constitution prevents the state from denying public assistance to individuals who are needy solely on the basis of criteria having nothing to do with need.[276] In *Minino v. Perales*,[277] a state court applied this reasoning to a state restriction on eligibility for public assistance based on alien status and denied the state's motion to dismiss the plaintiff's state constitutional claim.

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267. *See infra* notes 283, 288 and accompanying text.

268. 403 U.S. 365 (1971).

269. *Id.* at 372.

270. H.R. REP. NO. 682, *supra* note 112, at 75.

271. *Graham*, 403 U.S. at 366.

272. *Id.* at 382.

273. N.Y. CONST. art. XVIII, § 1 ("The aid, care and support of the needy are public concerns and shall be provided by the state.").

274. 43 N.Y.2d 1, 371 N.E.2d 449, 400 N.Y.S.2d 728 (1977).

275. Rasmussen v. Toia, 420 F. Supp. 757 (E.D.N.Y. 1976).

276. *Tucker*, 400 N.Y.S.2d at 732.

277. New York L.J., June 20, 1985, at 7, col. 5.

C. *Restrictions on Alien Eligibility Harm Individual Citizens and Communities*

The current rules governing the eligibility of aliens for public assistance have an adverse impact on the citizen-members of the aliens' families and communities. In its attempt to impose restrictions on aliens, Congress has lost sight of the fact that aliens do not comprise a separate population but are integrated into American society, often within the confines of the nuclear family. Aliens, for example, marry citizens and have citizen children. The restrictions imposed on aliens, therefore, result in adverse consequences for the citizen-members of the aliens' families as well as on their communities. Citizens can be threatened with homelessness, illness and lack of sufficient resources for subsistence because of the ineligibility of their alien family members.[278] Further, other citizens in the population as a whole have been subjected to such harms as the threat of increased rates of contagious diseases, increased urban congestion and unnecessarily high medical costs because of the ineligibility of their alien members for public entitlements.[279]

Severe problems for citizens caused by restrictions on alien eligibility were identified during the Congressional debate about alien eligibility for housing programs. A prime concern was that citizens, particularly children, would be evicted from their homes because a family member was an ineligible alien.[280] Another concern was avoiding an increase in homelessness.[281] Eviction of aliens and their families from assisted housing would result in homelessness for many because of the very dearth of safe, affordable housing which the housing programs were designed to alleviate.[282] Local community resources, already strained by a burgeoning homeless population, would be further burdened.[283]

Members of Congress also focused on the practical adverse impact on local communities. One pointed out that restrictions on alien eligibility severely limited local housing authorities' ability to carry out neighborhood revitalization programs.[284] Provision of housing assistance to residents in substandard housing is often essential for gaining cooperation in upgrading and renovating the housing. In order to revitalize neighborhoods, families displaced by renovation and demolition can usually be relocated only through housing assistance programs. If they cannot be relocated, the revitalization program cannot go forward.[285]

278. *See infra* notes 280-81, 292-94 and accompanying text.

279. *See infra* notes 292-94 and accompanying text.

280. Comments of Congressman Roybal and Congressman Torres, 132 CONG. REC. 3494 (June 11, 1986).

281. Comments of Congressman Biaggi, 132 CONG. REC. 3495 (June 11, 1986).

282. 42 U.S.C. § 1437 (1982).

283. Comments of Congressman Towns, 132 CONG. REC. 3496 (June 11, 1986).

284. Comments of Congressman Dornan, 132 CONG. REC. 3496 (June 11, 1986).

285. Memorandum to Congressman Dornan on the Adverse Impact of HUD Alien Restrictions on Buena-Clinton Neighborhood Revitalization, City of Garden Grove (on file with the New York University Review of Law & Social Change).

The break up of families and the other concerns detailed above are not adequately addressed by the current housing statute.[286] United States citizen-children who live with ineligible alien parents are still threatened with termination of their benefits and eviction. No provision is made to avoid impediments to revitalization programs. The threat of increases in homelessness is not removed. Although localities can phase in terminations based on ineligible alien status by affording individuals already living in housing six-month extensions of their residence, this action merely delays, rather than removes, the potential for these individuals to add to the burgeoning homeless population.

Another example of the adverse impact on citizens of policies restricting the access of aliens to public assistance is the federal administrative restriction on the eligibility of pregnant alien women for prenatal care.[287] The health of citizen-children throughout their lives is affected by the prenatal care which their mothers receive. Therefore, prenatal care for alien women residing in the United States is a major public health concern because the children they bear in the United States are citizens.[288]

The Select Panel for the Promotion of Child Health concluded that prenatal care was a type of service "for which there is such a clear consensus regarding [its] effectiveness and [its] importance to good health that it should no longer be considered acceptable that an individual is denied them for any reason."[289] HHS' Public Health Service designated the reduction of the number of women with inadequate prenatal care as one of its specific goals to promote health and prevent disease.[290] After a comprehensive review of the literature on prenatal care, the Institute of Medicine's Committee on Low Birth Weight concluded that the overwhelming weight of the evidence is that prenatal care reduces low birth weight. The report states that their "finding is strong enough to support a broad, national commitment to ensuring that all pregnant women in the United States, especially those at medical or socioeconomic risk, receive high-quality prenatal care."[291]

Because changing immigration patterns and refugee migrations affect disease trends in the United States,[292] controlling contagious diseases constitutes another public health concern for citizens. While the treatment of a contagious disease may be considered an emergency for the purpose of Medicaid

286. 42 U.S.C.A. §§ 1436(a), 1437 (West Supp. 1988) (as amended by the Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 164(a), 101 Stat. 1860 (1987)).

287. *Cf. supra* notes 211-12 and accompanying text.

288. 8 U.S.C. § 1401(a) (1982).

289. *See* BETTER HEALTH FOR OUR CHILDREN, *supra* note 253, at 8.

290. PUBLIC HEALTH SERVICE, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH SERVICE IMPLEMENTATION PLANS FOR ATTAINING THE OBJECTIVES FOR THE NATION, 24 (1983).

291. *See* INSTITUTE OF MEDICINE, *supra* note 256, at 8.

292. *Public Health Service Implementation Plans for Attaining the Objectives for the Nation*, PUB. HEALTH REP., at 24, 97 (Supp. Sept.-Oct. 1983) [hereinafter *Objectives*].

assistance, the screening for, and prevention of, these diseases is not.[293] Medicaid coverage for prevention of contagious diseases is precluded to many adults who are eligible for IRCA-created statuses and those alien children and adults who remain undocumented.[294]

Controlling contagious diseases requires immunization when vaccines exist and early detection and treatment when they do not.[295] Most aliens will probably not have been immunized against many diseases, whether prior to migration to the United States or upon arrival and, as a result, remain extremely vulnerable to the spread of contagion.[296] Immunization is necessary to avoid illness and death from common childhood diseases such as diphtheria, measles, mumps, whooping cough, polio, rubella and tetanus.[297] Because influenza and pneumococcal pneumonia rank among the ten leading causes of death in the United States, high risk groups need to be immunized or vaccinated against these diseases.[298] The protection of the health of citizens would, therefore, be served by the provision of health care to aliens for the control of contagious diseases.

Restrictions on the eligibility of aliens for AFDC and food stamps will harm citizen-children. Experience in AFDC and housing programs has demonstrated that families otherwise eligible for these programs have both citizen- and noncitizen-members.[299] The ineligibility of an alien-sibling for AFDC, for example, will have an adverse impact on the citizen-child. Although the citizen-child will be eligible for benefits, she will live in a family with members who are not and thereby suffer the consequences of fewer resources than those necessary for subsistence of the family.

D. Alien Eligibility Restrictions Undermine the Objective of a Humane Society

In addition to the direct adverse impact on citizens, the restrictions on

sary screening and preventative health care, thereby subjecting them to unnecessary illness and suffering.

Such results can have constitutional as well as public policy ramifications. In *Plyer v. Doe*,[300] the United States Supreme Court focused on the innocence and vulnerability of children in holding that the denial of a public school education to illegal alien children violated equal protection. In addressing whether such a discrimination comported with fundamental conceptions of justice,[301] the Court pointed out that the denial of access to education would mark children with the stigma of illiteracy and deny them the ability to contribute to our society.[302] Further, this burden was imposed on the basis of a legal characteristic — illegal alien status — over which children have little control.[303]

CONCLUSION

The current restrictions on the eligibility of aliens for federal public assistance programs are complex and confusing. They are without a consistent rationale and result in harm to individual citizens and society as a whole. Public assistance is not afforded to all aliens residing in the United States pursuant to immigration law, policy or practice. The federal government does not take responsibility for the consequences of its immigration policy, thereby imposing undue burdens on state and local governments. Citizens and eligible aliens are subjected to homelessness, ill health, and lack of adequate resources for basic subsistence. Communities are threatened with increased rates of contagious diseases, impediments to revitalization programs and unnecessarily high medical costs. Further, our sense of basic justice and humanity is threatened when we deny health care to children to prevent disease and when we subject children, the handicapped and the elderly to eviction from their homes.

The eligibility of aliens for federal public assistance programs should be simplified according to the following two guidelines. First, no restriction on the eligibility of aliens should be imposed if it would have a severe, adverse impact on families with members who either are citizens or are aliens eligible for public assistance, if the restriction would harm the community as a whole, or if it would undermine society's sense of basic humanity by subjecting particularly vulnerable residents to extreme hardship. Secondly, any restrictions on the eligibility of aliens for public assistance should at least afford eligibility to all aliens allowed to reside in the United States under federal immigration policy and practice. Compliance with this guideline would require that aliens in statuses created by IRCA not be restricted from eligibility. Other aliens who are permanently residing in the United States under color of law should

300. 457 U.S. 202 (1982).
301. *Id.* at 220.
302. *Id.* at 223-24.
303. *Id.* at 220.

also be eligible for a broad range of federally funded public assistance programs. This criterion should be interpreted to include all aliens with a status which allows an alien to reside in the United States under immigration law, policy or practice as well as aliens who, under all the facts and circumstances of their individual cases, demonstrate that the federal government, through its immigration law or administrative policies and practices, is acquiescing in their residence. This interpretation would serve two important interests. The federal government would bear a fair share of the cost of its immigration program, and those aliens allowed to live in the United States would bear the responsibilities and enjoy the entitlements of their residence.