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When Others Get Too Close: Immigrants, Class, and the Health Care Debate

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WHEN OTHERS GET TOO CLOSE: IMMIGRANTS, CLASS, AND THE HEALTH CARE DEBATE

Janet L. Dolgin* & Katherine R. Dieterich**

This Article describes one genre of contemporary anti-immigrant rhetoric, examines the social and economic forces that engender that rhetoric, and delineates its implications for the national debate about health care reform.

The Article details the underlying significance of America's opaque, yet highly competitive, class system to immigration reform and to health care reform. It locates the population most compelled by anti-immigrant rhetoric in the so-called intermediate strata (more generally referred to as the lower middle class). Careful examination of the relevant rhetoric suggests a broad explanation of the nation's reluctance, over almost a century, to construct a system of universal or near-universal health care coverage.

In supporting its claims, the Article examines the remarkable story of Luis Jimenez, an undocumented Guatemalan immigrant who was deported to Guatemala at the expense and initiative of a Florida hospital; further, it examines a number of recent federal and state laws that preclude or significantly limit health care benefits for undocumented (and for many documented) immigrants.

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INTRODUCTION

Anti-immigrant rhetoric, aimed especially at undocumented immigrants from Mexico and its Latin American neighbors, stridently portrays these immigrants as unworthy usurpers of governmental and private largesse. The rhetoric contends that this largesse—especially that presumptively offered with regard to health care coverage—deprives hard-working “Americans” of resources they would otherwise enjoy. This Article considers this rhetoric, the motivations behind it, and its implications for health care reform and for society more generally.

In particular, this rhetoric is a product of America's opaque, yet profoundly consequential and competitive, class system. The Article examines two sets of conflicting motivations that energize anti-immigrant rhetoric. Each reflects the contours of the nation's class system. In the first place, immigrants—especially undocumented, Hispanic immigrants—have become scapegoats on which social discontent and economic anxiety are displaced. Second, anti-immigrant rhetoric portrays immigrants, especially poor, undocumented immigrants, in such a way that they become a psychological buffer for Americans in the “intermediate strata.”¹ People in this category are especially anxious about losing their vulnerable status within the nation's hierarchy. In examining each motivation, the Article focuses on the distinct role each plays in shaping public responses to undocumented immigrants, to health care coverage, and to health care reform.

The next two parts of the Article discuss, in turn, two discrete legal responses—the first judicial and the second legislative—to undocumented immigrants in need of health care in the United States. Part I reviews court responses to a Florida hospital's deportation of an undocumented, Guatemalan immigrant. This man had received long-term, uncompensated hospital care after he was the victim of an automobile accident caused by an inebriated Floridian. Part II considers laws, enacted variously by states or by the federal government, that have limited health care and other benefits for immigrants.

Parts III and IV focus expressly on the distinct implications of the motivations underlying anti-immigrant rhetoric. Part III delineates and analyzes contemporary anti-immigrant narratives—both those serving to objectify immigrants as the cause of the nation's economic troubles and as unworthy beneficiaries of health care benefits that more rightly belong to “Americans,” and those portraying immigrants as the prototypic socioeconomic “Other.” In comparing the presumptively undeserving Other to themselves, those voicing anti-immigrant rhetoric find “reassurance,” however shakable, about their own socioeconomic status. Part IV then reviews the gap between these narratives and reality. This part contends that to the extent that this gap cannot be disguised, the usefulness of anti-immigrant rhetoric, as a source of socioeconomic reassurance for those espousing it, diminishes. One consequence is an intensification of calls for the deportation of immigrants.

¹ See John B. Judis, *Phantom Menace: The Psychology Behind America's Immigration Hysteria*, THE NEW REPUBLIC, Feb. 13, 2008, at 21 [hereinafter Judis, *Phantom Menace*]; see also *infra* notes 280–89 and accompanying text.

I. HOSPITAL DEPORTATIONS

Undocumented immigrants² ready to be discharged from hospitals, but in need of continuing medical care, sit at the intersection of an immigration system torn by multiple, frequently conflicting, goals and a pot-pourri of rules that has constituted the so-called American "health care system" since the 1970s. If such patients need rehabilitative care or other forms of long-term care, they may remain in the hospitals that admitted them for emergency care. The hospitals bear the cost of this care if the patients have no coverage or other resources. Until recently, little note has been paid to one response by hospitals to such patients—transporting them back to their home countries at hospital expense. In 2003, the first case involving a hospital "repatriation" was entertained by a U.S. court.³

A. *Emergency Care and Then What?: A Hospital's Obligation to Undocumented Immigrants*

The great majority of hospitals in the United States are required to screen, and if needed, to treat patients arriving at emergency rooms for care.⁴ Congress passed the law mandating such care, the Emergency Medical Treatment and Labor Act (EMTALA), in order to prevent hospitals from dumping people without the ability to pay, and thereby to ensure that everyone would have access to emergency medical care.⁵ EMTALA applies to any hospital with an emergency room that accepts Medicare payments.⁶

EMTALA applies to "any individual" arriving at a hospital's emergency room for emergency medical care or who is in labor.⁷ The statute requires hospitals to "provide for an appropriate medical screening examination" to determine whether an "emergency medical condition" or labor exists.⁸ If a hospital identifies an emergency condition or labor, it is precluded from discharging or transferring patients who have not been stabilized.⁹

² Some documented immigrants—in particular those who have been in the United States less than five years—may be treated much as undocumented immigrants are with regard to health care coverage. See *infra* notes 66, 112, 143, and accompanying text.

³ See *Montejo v. Martin Mem'l Med. Ctr., Inc.*, 874 So.2d 654 (Fla. Dist. Ct. App. 4th Dist. 2004).

⁴ Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd (2006).

⁵ See *Hardy v. New York City Health & Hosp. Corp.*, 164 F.3d 789, 792 (2d Cir. 1999) ("The purpose of EMTALA is to prevent 'patient dumping.'").

⁶ 42 U.S.C. § 1395dd.

⁷ See *id.* § 1395dd(b)(1).

⁸ *Id.* § 1395dd(a).

⁹ See *id.* § 1395dd(c). Transfer is permitted in accordance with 42 U.S.C. § 1399(d)(c).

Within these parameters, hospitals are obliged to provide the same level of care to undocumented immigrants that they provide to anyone else. At present, however, there is virtually no reimbursement guarantee.¹⁰ Between 2005 and 2008, limited funds, referred to as "Section 1011 funds," were available to compensate providers for emergency care to undocumented immigrants.¹¹ Even this limited funding was not available to reimburse providers for needed continuing care of a patient who was stabilized.¹² After 2008, unused funds remained available to reimburse hospitals for uncompensated emergency care.¹³ A bill to reauthorize Section 1011 funding through 2012 is currently in committee.¹⁴

Hospitals have faced significant expenses caring for patients in this situation. Federal law and various accreditation standards make hospitals responsible for identifying and affecting an "appropriate discharge" for

¹⁰ Congress made \$250 million a year available to hospitals between 2005 and 2008 for unreimbursed emergency care provided to undocumented immigrants. Centers for Medicare & Medicaid Services, Section 1011 MMA Emergency Health Services to Undocumented Aliens, https://www.fbo.gov/index?s=opportunity&mode=form&id=aaaba9e28a0ee901f17facd0e32b43aa&tab=core&_cview=0&cck=1&au=&cck (last visited Oct. 4, 2009). EMTALA provided for "medical assistance to aliens not lawfully admitted for permanent residence." 42 U.S.C. 1396(b)(v) (2006). Funding was available as long as "care and services that are furnished to an alien" are "for the treatment of an emergency medical condition" or "such alien otherwise meets the eligibility requirements for medical assistance under the State plan approved under this subchapter. . ." and "such care and services are not related to an organ transplant procedure." *Id.* As of 2009, some funds from the original allocation are available to be spent; no new funds have been allocated. See Centers for Medicare & Medicaid Services, *supra*.

¹¹ See Centers for Medicare & Medicaid Services, *supra* note 10. This compensation was authorized in the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA), Pub. L. 108-173, § 1011, 117 Stat. 2432, Federal Reimbursement of Emergency Health Services Furnished to Undocumented Aliens. See *id.*; see also SHAWN FREMSTAD & LAURA COX, CTR. ON BUDGET & POLICY PRIORITIES, COVERING NEW AMERICANS: A REVIEW OF FEDERAL AND STATE POLICIES RELATED TO IMMIGRANTS' ELIGIBILITY AND ACCESS TO PUBLICLY FUNDED HEALTH INSURANCE 1, 15 (2004), <http://www.kff.org/medicaid/upload/Covering-New-Americans-A-Review-of-Federal-and-State-Policies-Related-to-Immigrants-Eligibility-and-Access-to-Publicly-Funded-Health-Insurance-Report.pdf>. Hospitals also obtain reimbursement under the Disproportionate Share Program and Emergency Medicaid; these programs are also considered inadequate to meet existing needs. See Ryan Knutson, Note, *Deprivation of Care: Are Federal Laws Restricting the Provision of Medical Care to Immigrants Working as Planned?*, 28 B.C. THIRD WORLD L.J. 410, 426-31 (2008).

¹² See 42 U.S.C. § 1396(b)(v).

¹³ See Centers for Medicare & Medicaid Services, *supra* note 10.

¹⁴ See Border Health Care Relief Act of 2009, H.R. 1639, 111th Cong. (1st Sess. 2009); see also AHAnews.com, AHA Advocacy Priority, September 2, 2008, http://www.ahanews.com/ahanews_app/jsp/display.jsp?dcrpath=AHANEWS/AHANewsArticle/data/AHA_News_080901_AHA_Advocacy&domain=AHANEWS. H.R. 1639's purpose is "[t]o amend the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 to extend Federal reimbursement of emergency health services furnished to undocumented aliens," and was referred to the House Committee on Energy and Commerce in March 2009. See Border Health Care Relief Act of 2009, *supra*.

each patient.¹⁵ However, it is virtually impossible to locate a long-term care facility willing to provide care for a patient with serious needs and no health care coverage or resources.¹⁶ Undocumented immigrants are not eligible for federally-funded health care.¹⁷ It can therefore be especially challenging for hospitals to provide an appropriate discharge for an undocumented immigrant-patient in need of continuing care after he or she has been stabilized. Hospitals may be forced to bear huge economic burdens in such cases, at least in the majority of states in which Medicaid excludes undocumented immigrants from coverage.¹⁸ It also creates dangerous health risks for undocumented immigrants in need of continuing care. The story of Luis Jimenez is illustrative.

B. *Luis Jimenez's Story*

Luis Jimenez, an undocumented immigrant from Guatemala, was working as a landscape gardener in Florida in February 2000 when an uninsured, inebriated Floridian hit the car in which Jimenez was riding.¹⁹ Jimenez suffered a traumatic brain injury and other serious harms.²⁰ He was taken to Martin Memorial Medical Center (Martin Memorial), a not-for-profit Florida hospital.²¹ He survived as a result of the intensive care he received.²² After several months of hospitalization, Martin Memorial transferred Jimenez to a nursing home.²³ At the nursing home, his condition deteriorated.²⁴ Jimenez returned to the hospital in an emergent con-

¹⁵ See 42 C.F.R. 482.43 (2008) (requiring "discharge planning" as a "condition of participation"). This provision applies to hospitals accepting Medicare payments. The Joint Commission on Accreditation of Health Care Organizations requires discharge planning. See 1999 Hospital Accreditation Standards, PE 1.5, Intent of PE 1.5 (1999); see also Sidney D. Watson, *Discharges to the Streets: Hospitals and Homelessness*, 19 ST. LOUIS U. PUB. L. REV. 357, 373-74 (2000).

¹⁶ Deborah Sontag, *Deported*, by U.S. Hospitals, N.Y. TIMES, Aug. 3, 2008, at A1 [hereinafter Sontag, *Deported*, by U.S. Hospitals].

¹⁷ See *infra* notes 137-43 and accompanying text.

¹⁸ Almost half of the states offer coverage to documented immigrants not eligible for Medicaid. See FREMSTAD & COX, *supra* note 11, at ii. About half of the states provide state-funded prenatal care to immigrants, regardless of immigration status. *Id.* Medi-Cal, California's Medicaid system, and New York City's Health and Hospital Corporation are unusual in paying for long-term care for undocumented immigrants (as well as for temporary legal residents and legal immigrants in the United States for less than five years). See Sontag, *Deported*, by U.S. Hospitals, *supra* note 16, at A1.

¹⁹ See Sontag, *Deported*, by U.S. Hospitals, *supra* note 16, at A1; see also *Montejo v. Martin Mem'l Med. Ctr., Inc.*, 874 So.2d 654, 655-56 (Fla. Dist. Ct. App. 4th Dist. 2004). In 2008, Sontag authored a series of N.Y. Times articles about responses of the U.S. health care system to insured immigrants. See, e.g., Deborah Sontag, *Deported in Coma, Saved Back in U.S.*, N.Y. TIMES, Nov. 9, 2008, at A1 [hereinafter Sontag, *Deported in Coma*].

²⁰ *Montejo*, 874 So.2d at 655-56.

²¹ Sontag, *Deported*, by U.S. Hospitals, *supra* note 16, at A18.

²² *Id.* at A1.

²³ *Montejo*, 874 So.2d at 655-56.

²⁴ Sontag, *Deported*, by U.S. Hospitals, *supra* note 16, at A18.

dition.²⁵ Again, he received life-saving care.²⁶ According to Montejo Gaspar Montejo, Jimenez's guardian and cousin by marriage, Jimenez remained at Martin Memorial in a vegetative state for over a year.²⁷ The outlook for Jimenez was very dim, but surprisingly, he recovered significant cognitive facilities.²⁸ The hospital described him as having advanced to the cognitive level of a nine-year old.²⁹

At this point, Jimenez needed rehabilitative and nursing care. The hospital sought a rehabilitation facility or nursing home willing to take him.³⁰ None agreed to do so.³¹ Martin Memorial already had spent more than \$1.5 million caring for Jimenez.³² Yet, federal law precluded the hospital from discharging a patient, such as Jimenez, in need of continuing care unless the hospital could show that "appropriate" care had been made available to the patient.³³

Unable to find a fitting placement for Jimenez in the United States, Martin Memorial solicited help from Guatemala.³⁴ Supplied with a letter from a Guatemalan health official, the hospital sought a court order permitting it to transport Jimenez to Guatemala at the hospital's expense.³⁵ Martin Memorial argued that Jimenez would receive appropriate care in Guatemala.³⁶ The hospital's lawyer told the judge that the case was "not simply" about money.³⁷ Rather, he contended, "[t]his is a case about care for a man in this country illegally who has reached maximum medi-

²⁵ *Montejo v. Martin Mem'l Med. Ctr., Inc.*, 874 So.2d 654, 655–56 (Fla. Dist. Ct. App. 4th Dist. 2004).

²⁶ Sontag, *Deported, by U.S. Hospitals*, *supra* note 16, at A18.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at A19.

³⁰ *Id.*

³¹ *Id.*

³² Bruce Patsner, *Repatriation of Uninsured Immigrants by U.S. Hospitals: The Jimenez Case*, HEALTH L. PERSPS., Dec. 16, 2008, [http://www.law.uh.edu/healthlaw/perspectives/2008/\(BP\)%20deport.pdf](http://www.law.uh.edu/healthlaw/perspectives/2008/(BP)%20deport.pdf).

³³ *Montejo v. Martin Mem'l Med. Ctr., Inc.*, 935 So.2d 1266, 1267 (Fla. Dist. Ct. App. 4th Dist. 2006). Pursuant to federal regulations, hospitals are required to "transfer or refer patients, along with necessary medical information, to appropriate facilities, agencies, or outpatient services, as needed, for followup or ancillary care." 42 C.F.R. § 482.43(d) (2007). Appropriate facilities have been defined as those that "can meet the patient's medical needs on a post-discharge basis." 59 Fed. Reg. 64149 (Dec. 13, 1994). There is, here, reference to the conclusion that the discharge planning requirement is to apply to all patients, not just Medicare patients. *See id.* at 64144; *see also* Kit Johnson, *Patients Without Borders: Extralegal Deportation by Hospitals*, 78 U. CIN. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1396882> (reviewing laws relating to medical care for undocumented immigrants).

³⁴ Sontag, *Deported by U.S. Hospitals*, *supra* note 16, at A19.

³⁵ *Montejo v. Martin Mem'l Med. Ctr., Inc.*, 874 So.2d 654, 656 (Fla. Dist. Ct. App. 4th Dist. 2004); Sontag, *Deported, by U.S. Hospitals*, *supra* note 16, at A19.

³⁶ Sontag, *Deported, by U.S. Hospitals*, *supra* note 16, at A20.

³⁷ *Id.*

cal improvement at our hospital and is ready to be discharged and whose home government" is ready to accept him back and to provide for him.³⁸

In June 2003, a Florida trial court authorized Martin Memorial to transport Luis Jimenez to Guatemala, and to provide a suitable escort and necessary medical support for the trip back at the hospital's expense.³⁹ Jimenez's guardian filed a notice of appeal and a motion to stay the trial court's transport order.⁴⁰ Early in the morning on the day that Martin Memorial's response to the motion was due and before the court could rule on the pending motion for a stay, the hospital transported Luis Jimenez to Guatemala by private plane, accompanied by a nurse.⁴¹

Diana Gregory, a Martin Memorial nurse, brought Jimenez to Guatemala's National Hospital for Orthopedics and Rehabilitation (National Hospital).⁴² Although the facility impressed Gregory, it housed only 32 beds for rehabilitation patients and did not offer the sort of care for brain injuries that Jimenez needed.⁴³ The National Hospital soon discharged Jimenez, claiming it needed his bed.⁴⁴ From the National Hospital, Jimenez was transferred to another public hospital, which, according to Jimenez's brother, failed to provide even basic hygienic care.⁴⁵ The family brought Jimenez home to his mother's house in Jolomcu, Guatemala.⁴⁶ There, he has remained.⁴⁷

Almost a year later, in May 2004, the District Court of Appeal of Florida, responding to the guardian's appeal, reversed the trial court order that had approved Martin Memorial's sending Jimenez to Guatemala.⁴⁸ The appellate court concluded that the hospital had not provided sufficient evidence to show that Jimenez would indeed receive adequate care in Guatemala, and, even more, that a state trial court does not enjoy jurisdiction to authorize a "transportation (deportation)" of an immigrant hospital patient to his country of origin.⁴⁹ Neither the trial court nor the appellate court entertained questions about whether Martin Memorial's

³⁸ *Id.*

³⁹ *Montejo v. Martin Mem'l Med. Ctr., Inc.*, 935 So.2d 1266, 1267 (Fla. Dist. Ct. App. 4th Dist. 2006); *Montejo*, 874 So.2d at 656.

⁴⁰ *Montejo*, 935 So.2d at 1268.

⁴¹ *Id.* at 1267-68; *Montejo v. Martin Mem'l Med. Ctr., Inc.*, 874 So.2d 654, 656-57 (Fla. Dist. Ct. App. 4th Dist. 2004).

⁴² Sontag, *Deported*, by *U.S. Hospitals*, *supra* note 16, at A19.

⁴³ *Id.*

⁴⁴ *Id.* at A20.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Montejo v. Martin Mem'l Med. Ctr.*, 874 So.2d 654, 658 (Fla. Dist. Ct. App. 4th Dist. 2004).

⁴⁹ *Id.*

sending of Jimenez to Guatemala violated the Equal Protection or the Due Process Clauses of the Fourteenth Amendment.⁵⁰

One commentator has described hospitals' private decisions to deport patients, such as Jimenez, as "institutionalized vigilantism."⁵¹ The hospital, in contrast, defended its position, in general, and its treatment of Jimenez, in particular. Four years after Martin Memorial had returned Jimenez to Guatemala, Carol Plato, Director of Corporate Business Practices at the hospital, explained that the Jimenez case had not disappeared with the patient.⁵² Plato, who referred tellingly to Jimenez as an "illegal immigrant" and an "illegal patient," told a Florida legislative committee that Luis Jimenez was "forcibly returned" (her term) to Guatemala at the hospital's expense and suggested that continuing to provide for Jimenez (and presumably other uninsured patients requiring long-term care) was not an economically feasible option for American hospitals.⁵³ In an on-line video that captured Plato's testimony, she seems unambiguously to believe that Jimenez's transportation to Guatemala at Martin Memorial's hands was a reasonable response to the costs that the hospital would have faced had it been required to continue caring for Jimenez.⁵⁴ Her testimony is remarkable for its confident, almost self-righteous, certainty that the hospital's sending Jimenez back to Guatemala was its only sane option.

In July 2003, Jimenez's guardian in the United States, Montejó Gaspar Montejó, initiated suit against Martin Memorial, contending that Jimenez's repatriation by the hospital constituted false imprisonment.⁵⁵ Gaspar sought financial resources from the hospital to provide for Jimenez's needs for life.⁵⁶

⁵⁰ See *Montejó v. Martin Mem'l Med. Ctr.*, 935 So.2d 1266, 1267 (Fla. Dist. Ct. App. 4th Dist. 2006); *Montejó*, 874 So.2d at 658. The Due Process Clause precludes any state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Equal Protection Clause precludes any state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." *Id.*

⁵¹ Johnson, *supra* note 33. Johnson proposes an "administrative process whereby hospitals can call upon the Department of Homeland Security to initiate the expedited removal and transfer of medically needy undocumented migrants." *Id.* at 5.

⁵² *Project Immigration: Illegal Immigrant Healthcare*, ABC 7 NEWS, June 20, 2008, <http://www.wjla.com/news/stories/0608/529974.html>.

⁵³ *Id.*

⁵⁴ See *id.* Plato's testimony was termed an "online sensation" by Project Immigration. It was viewed by about 700,000 people within three weeks. Americans for Legal Immigration, *Illegal Aliens Cost Florida Hospitals \$100 Million*, April 24, 2009, www.alipac.us/article4161.html.

⁵⁵ *Montejó Gaspar Montejó v. Martin Mem'l Med. Ctr.*, No. 4D03-2638 (Docket) (Fla. Dist. Ct. App. 4th Dist. July 10, 2003).

⁵⁶ Melissa E. Holsman, *Opening Statements Begin in Illegal Immigrant's Lawsuit*, TREASURE COAST NEWSPAPERS, July 8, 2009, at A1.

According to a local news report during the pre-trial period, a majority of people in the jury pool voiced “negative opinions against illegal immigration.”⁵⁷ Trial Judge Midelis had informed the jurors that pursuant to the earlier decision of the Florida appellate court, it was “a matter of law” that Martin Memorial had detained Jimenez illegally when it transported him to Guatemala.⁵⁸ Yet, in July 2009, the jury concluded that Martin Memorial was not guilty of false imprisonment and owed Jimenez no damages.⁵⁹

It is unclear what effect this case will have on future hospital deportations. Some speculate that the case may provide comfort to hospitals looking to deport patients,⁶⁰ presumably because of Martin Memorial’s success in avoiding paying damages. Others expect instead that the appellate court’s determination that state judges are without power to authorize deportation in such cases will deter hospitals.⁶¹ Still others express concern that there will be “a chilling effect on the front end,” with hospitals trying to limit their obligations to emergency patients when they “show[] up at the emergency room.”⁶²

⁵⁷ Melissa E. Holsman, *Immigration Issues Dominate Jury Selection in Guatemalan’s Case Against Stuart Hospital*, TREASURE COAST NEWSPAPERS, July 3, 2009, at A1.

⁵⁸ Deborah Sontag, *Fla. Jury Rules for Hospital that Deported Patient; Says Center Did Not Act Unreasonably*, N.Y. TIMES, July 28, 2009, at A10 [hereinafter Sontag, *Fla. Jury Rules for Hospital*]. In Florida, the elements of a cause of action for false imprisonment are: “(1) the unlawful detention and deprivation of liberty of a person 2) against that person’s will 3) without legal authority or ‘color of authority’ and 4) which is unreasonable and unwarranted under the circumstances.” *Montejo v. Martin Mem’l Med. Ctr., Inc.*, 935 So. 2d 1266, 1268–69 (Fla. Dist. Ct. App. 4th Dist. 2006). Martin Memorial had moved for dismissal, arguing that a cause of action could not be stated because “he had not and could not demonstrate the detention was unreasonable and unwarranted—a necessary element of a claim for false imprisonment”—because Memorial acted under immunity from a then-valid court order. *Id.* at 1268. The appeals court rejected this immunity argument and resolved as a matter of law that Memorial did not act with legal authority, leaving as a matter of fact to be determined by the trial court whether Memorial’s actions were unwarranted and unreasonable under the circumstances. *Id.* at 1269–72. For further discussion of the false imprisonment claim, see *Johnson, supra* note 33, at 41–45.

⁵⁹ Sontag, *Fla. Jury Rules for Hospital, supra* note 58, at A10. “The jury deliberated for about nine hours in all before finding Martin Memorial did not act in an unreasonable or unwarranted manner when the hospital relied upon a 2003 court order obtained by a state probate judge to privately repatriate former patient Luis Jimenez to his native Guatemala.” Melissa E. Holsman, *Jury finds for Martin Memorial in immigrant’s deportation case*, TCPALM, July 27, 2009, <http://www.tcpalm.com/news/2009/jul/27/jury-favor-martin-memorial-immigrant-deportation-c/?printer=1/>.

⁶⁰ Jennifer Ludden, *Deportation Dilemmas Deepen for U.S. Hospitals*, NPR, July 31, 2009, <http://www.npr.org/templates/story/story.php?storyId=111353362>.

⁶¹ See *id.*; Holsman, *supra* note 59 (quoting Memorial attorney Scott Michaud as saying, “[t]he important decision was the decision that the 4th District Court of Appeal made many years ago when they found—and we respectfully disagree with them—that the probate judge did not have the jurisdictional authority to find that it was in the ward’s best interest to be returned to a facility in his home country”).

⁶² See Ludden, *supra* note 60 (quoting lawyer Bill King who “plans to appeal the jury decision in the Jimenez case denying damages”).

While acknowledging pleasure with the verdict, Mark E. Robitaille, Martin Memorial's CEO, expressed disappointment that neither the state nor the federal government has successfully entertained questions about health care for undocumented immigrants.⁶³ Martin Memorial issued a statement noting that "the issue of providing health care to undocumented immigrants remains unresolved on a state and national level."⁶⁴

C. Hospital Deportations

Luis Jimenez's story has occasioned the only case law on the phenomenon of hospital-arranged deportation, but his story is not unique. Hospitals have deported scores of undocumented immigrants.⁶⁵ There have also been some hospital deportations of documented—so-called "legal"—immigrants in need of long-term, expensive care.⁶⁶ In 2008, the *New York Times* reported that an official with the Mexican consulate claimed to have helped arrange 80 "medical repatriations" to Mexico in the previous year.⁶⁷ All were from Phoenix.⁶⁸ As the Jimenez case was going to trial, in July 2009, an attorney for the Guatemalan consulate office in Miami reported that uncertainty about the court's eventual decision in the case had, at least temporarily, stilled hospital deportations—at least to Guatemala.⁶⁹

The plight of undocumented immigrants in need of care beyond that assured by EMTALA⁷⁰ affects patients with mental as well as physical disorders. Some undocumented immigrants, ill with mental conditions, have remained in psychiatric hospitals even though deemed medically

⁶³ Laura Wides-Munoz, *Jury Rules in Favor of Hospital that Deported Injured Guatemalan*, MIAMI HERALD, July 28, 2009, available at <http://www.miamiherald.com/news/florida/story/1160221.html>.

⁶⁴ Press Release, Martin Memorial Health Systems, Martin Memorial releases statement in Jimenez case (July 27, 2009), available at <http://www.tcpalm.com/news/2009/jul/27/martin-memorial-releases-statement-jimenez-case/?feedback=1>.

⁶⁵ There are no clear figures on exactly how many immigrants have been deported by U.S. hospitals, in part because hospitals admitting emergency cases have not generally sought information about patients' immigration status. See Sontag, *Deported*, by U.S. Hospitals, *supra* note 16.

⁶⁶ See Sontag, *Deported in Coma*, *supra* note 19, at A1. In 2008, a Phoenix hospital deported a documented immigrant to Mexico. The young patient, 19-year old Antonio Torres, suffered from serious injuries and was in need of long-term care as the result of a car accident. After the deportation his parents located a hospital in California that agreed to care for their son. He was driven there in a donated ambulance. After several months of successful care, Antonio was discharged, having regained the ability to walk and talk. *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Joe Carlson, *International Intrigue: Legal Experts Following Civil Trial on Fla. 'Dumping' Case*, MODERN HEALTHCARE, July 6, 2009.

⁷⁰ 42 U.S.C. § 1395dd (2006); see *supra* notes 4, 6–8 and accompanying text.

ready to move to less restrictive community facilities.⁷¹ As undocumented immigrants, they are ineligible for federal resources that would cover less restrictive alternatives for many citizens.⁷² In consequence, explained one official with the New Jersey Division of Mental Health Advocacy, these patients are not only kept in hospital wards unnecessarily; they often become increasingly incapable of re-entering community settings.⁷³ A New Jersey Public Advocate's Department report characterized assistance with "repatriation" (presumably for a patient anxious to return to his or her original country) as more "humane" than continued and unnecessary hospitalization.⁷⁴

At least some of the repatriations arranged by hospitals in the United States in the last several years for both psychiatric patients and for other hospital patients have apparently differed from Luis Jimenez's deportation in that, at least in theory, they were not compelled. One hospital in Chicago explained to a news reporter that in the last several years, the hospital transferred undocumented immigrants back to Poland, Lithuania, Mexico, and Central American countries.⁷⁵ All of them, she assured the reporter, were transported with their consent or with that of their families.⁷⁶ In fact, it is questionable whether hospitals, motivated at least in some part by pressing financial concerns, are able routinely to obtain genuine informed consents from ill or disabled patients, far from home and enjoying few resources, or from the family members and legal guardians of such patients.⁷⁷

The federal government, though responsible for the "removal" of undocumented immigrants from the United States,⁷⁸ has remained aloof from hospital deportations.⁷⁹ A spokesperson for Immigration and Customs Enforcement told the *New York Times* in 2008 that it only involves

⁷¹ Elizabeth Lorente, *Undocumented Trapped in State Mental Hospitals*, THE RECORD (HACKENSACK, NJ), June 17, 2009, at A06.

⁷² *Id.*

⁷³ *Id.* (quoting Ann Portas, deputy director of the Division of Mental Health Advocacy in the New Jersey Public Advocate's Department).

⁷⁴ *Id.*

⁷⁵ Judith Graham, *Sending Sick Undocumented Immigrants Back Home*, CHI. TRIB., Aug. 20, 2008, <http://newsblogs.chicagotribune.com/triage/2008/08/sending-sick-un.html>.

⁷⁶ *Id.*

⁷⁷ Hospital deportations of immigrant patients are sometimes "outsourced" to transport companies. Johnson, *supra* note 33. One such company, MexCare, asserts "pride" at its "ability to design and develop customized healthcare programs that meet the needs of both hospital administrators and Latin American patients alike." MexCare Home Page, <http://mexcare.com> (last visited June 15, 2009). In answer to a prospective client's question about choice, MexCare's website explains: "You have a choice. We will not transfer you unless you sign a transfer agreement." MexCare Frequently Asked Questions, http://mexcare.com/faq_MexCare.html (last visited June 15, 2009). Despite the signature of the patient or of the patient's guardian on the transport form, patients and their guardians may not understand their options.

⁷⁸ 8 U.S.C. § 1229a (2006).

⁷⁹ Johnson, *supra* note 33, at 14.

itself in health care for undocumented immigrants if they are in federal immigration detention.⁸⁰

Hospitals' sending post-acute care patients back to their home countries raises troubling moral conundrums. Even the choice of language is suggestive of the conundrums and of responses to them. "Deportation" sounds more ominous than "repatriation," and the term "removal" suggests compulsion while "transport" suggests assistance.⁸¹

On the whole, individual physicians and physician groups have expressed concern about hospital deportations.⁸² In 2004, *Medical Economics* reported physicians' responses to a story in a previous issue about an uninsured, undocumented immigrant from Mexico, cared for in a U.S. hospital where she had had a leg amputated.⁸³ She was also being treated for end-stage renal disease.⁸⁴ Over 40% of the physicians who commented on the story reported that they would not have discharged the patient unless the hospital had provided an alternative plan for her care.⁸⁵ Just over a fifth of those who responded would have discharged the patient and required her family to pay for her care; another quarter would have consulted the hospital's ethics committee, and the rest of the group (13 percent) would have found "another solution."⁸⁶

Indeed, both the California Medical Association (CMA) and the American Medical Association (AMA) have entertained resolutions responding to moral and practical questions raised by the repatriation of immigrant patients. In the fall of 2008, the CMA passed a resolution opposing non-voluntary deportations.⁸⁷ In the same period, the AMA's House of Delegates (the organization's policy-making arm) voted to un-

⁸⁰ Sontag, *Deported in Coma*, *supra* note 19, at 39.

⁸¹ One internet commenter, in response to an article noting the possibility that national health care reform could extend health care coverage to undocumented immigrants commented: "There are no such things as illegal immigrants or undocumented aliens. All immigrants are documented. If they are undocumented th[e]n they are illegal aliens or criminal trespassers. It would be nice if the media would put an end to whitewashing what the illegals really are." Posting of Clovis, responding to Jim Landers, *Senator Says Health Insurance Plan Won't Cover Illegal Immigrants*, DALLAS MORNING NEWS, May 22, 2009, http://www.dallasnews.com/sharedcontent/dws/news/washington/jlanders/stories/0522DNBUShealthcare.25377b8.html?ocp=1&so=TimeStampDescending&ocp=1#slcgm_comments_anchor.

⁸² See Dorothy L. Pennachio, *What Would You Do? In This Border-Town Dilemma*, MEDICAL ECONOMICS, June 18, 2004, available at <http://medicaleconomics.modernmedicine.com/memag/Infectious+Disease/What-would-you-doIn-this-border-town-dilemma/ArticleStandard/Article/detail/108972> (providing conflicting responses of physicians where an overwhelming percentage of them claimed they would not immediately discharge illegal immigrant patients).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Sontag, *Deported in Coma*, *supra* note 19, at 39.

dertake study of the issue and to re-consider it at the organization's Interim Meeting in 2009.⁸⁸ An AMA trustee described the matter as "complex," noting that patients should not be "dumped," but neither should hospitals be pushed into insolvency by laws requiring them to provide for people with no health care coverage and no private resources.⁸⁹ Both the California and the national medical group focused on "forced" deportations, but neither group defined the term.⁹⁰

In short, the story of Martin Memorial and Luis Jimenez, as well as stories about the deportations of other immigrant patients that have been carried out by American hospitals, conflate two complicated American debates. One concerns the future of a costly health care system that fails to provide coverage for many millions of people.⁹¹ The other concerns a controversial system of immigration, in general, and more particularly, the country's conflicting responses to undocumented immigrants.⁹²

D. *The Implications of Luis Jimenez's Experience*

Luis Jimenez's tale encompasses important aspects of the intertwined stories of the relationships between the U.S. government and health care providers, between employers and immigrants, between the government and immigrants, and between immigrants⁹³ and citizens.

Most obviously, Jimenez's story underscores the dysfunctionality of America's health care system. One set of rules, supported by the notion

⁸⁸ Joseph Wolpin, *Medical Repatriation of Alien Patients*, 37 J.L. MED. & ETHICS 152, 153 (2009) (citing Deborah Sontag, *Immigrants Facing Deportation by Hospitals*, N.Y. TIMES, August 3, 2008, at A1).

⁸⁹ *American Medical Association Votes to Study Repatriation of Uninsured Immigrants by Hospitals*, MEDICAL NEWS TODAY, Nov. 12, 2008, <http://www.medicalnewstoday.com/articles/129022.php>. In 2006, the AMA's House of Delegates recommended adoption of a resolution that opposed any effort to criminalize providing health care to undocumented immigrants and any policy or law that required health care providers to collect or report information about a patient's legal status. See Report of Reference Committee of the American Medical Association, House of Delegates (H. David Burton, Chair) on Resolution 920 (1-06) (2006).

⁹⁰ Wolpin, *supra* note 88, at 153.

⁹¹ According to a 2009 report by the Pew Hispanic Center, 59% of undocumented immigrant adults in the U.S. had no health insurance during all of 2007. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 18 (2009), <http://pewhispanic.org/files/reports/107.pdf>. This was about double the rate of uninsured people among legal immigrants, and it was about four times the rate among U.S.-born adults. *Id.* Among the 47 million people in the U.S. without health insurance, between 15 percent and 22 percent are estimated to be undocumented immigrants. Landers, *supra* note 81.

⁹² See Wayne Cornelius, *Controlling 'Unwanted' Immigration: Lessons from the United States, 1993-2004*, 31 J. ETHNICS & MIGRATION STUDIES 775 (2005) ("The US strategy—quite intentionally, in the view of many critics—addresses only the supply side: the flow of unauthorised migrants; it does nothing serious to reduce employer demand for immigrant labour.").

⁹³ It may be important here to note again that the term "immigrant," unless otherwise specified, refers to undocumented or new immigrants to the United States.

that adequate health care should be available to rich and poor alike, requires hospitals to care for everyone who appears in an emergency room, and mandates that hospitals provide each patient with an appropriate discharge.⁹⁴ Another set of rules, grounded in a commitment to free enterprise, fails adequately to ensure that hospitals receive compensation for care extended to uninsured patients for whom, pursuant to the first set of rules, hospitals must provide care.⁹⁵

Further, Luis Jimenez's story developed out of America's interest in securing an inexpensive source of labor while avoiding an obligation to provide social benefits for the people who service that end. Jimenez worked as a gardener in Florida, in a job that offered him no health care benefits, no pension, and no job security. Yet, unlike citizens in a comparable position, Jimenez was ineligible for all forms of state-funded health care. Even as the nation contemplates reforming its health care system, it seems to have agreed implicitly, and often openly, that undocumented immigrants will not be included.⁹⁶

In short, beneath Luis Jimenez's story lies a vision of immigrants, and particularly of undocumented immigrants, as the outsiders against whose experiences and options insiders can assess their own lot. The rest of this Article explores the implications of the immigrant as Other; first, in Part II, for the law, and then, in Parts III and Part IV, for society more broadly.

II. EXCLUDING IMMIGRANTS FROM STATE-FUNDED HEALTH CARE AND OTHER BENEFITS: 1993–2009

This part considers three sets of laws, one federal and two promulgated by states; each excludes undocumented immigrants as well as many "legal" immigrants from state-funded health care, as well as from other social benefits. These laws illustrate a complicated, confused, and often angry response to undocumented immigrants, and to many other newly arrived immigrants in the United States.

During the last several decades, United States policy toward immigrants, and toward undocumented immigrants in particular, has served goals that, on their surface at least, are openly contradictory.⁹⁷ The federal government and a number of states (especially in the Southwest) have promulgated a variety of laws aimed at limiting immigration from Mexico and Central American countries through stricter border control

⁹⁴ See *supra* notes 4–9, 15, and accompanying text.

⁹⁵ See *supra* notes 11–14, 17–18, and accompanying text.

⁹⁶ See *infra* Part III.A.1.

⁹⁷ See, e.g., Cornelius, *supra* note 92, at 777 (arguing that existing immigration control aims to restrict through border control, while doing nothing to reduce U.S. demand for immigrant workers).

and by rationing or precluding welfare benefits to those who do enter the United States.⁹⁸ These laws aim to preserve American resources and to discourage future immigrants from entering the country.⁹⁹ Yet, in contrast with efforts to block the entry of undocumented immigrants and to limit benefits for those who do enter the United States, both the federal and state governments have done little to preclude the participation of undocumented immigrants in the nation's labor force.¹⁰⁰ Even more, the United States and at least one state have entertained laws to encourage the entry of "guest workers," even as they tightened border controls.¹⁰¹ This part reviews these efforts and a variety of social and political interests that undergirds them and suggests that the nation's response to immigrants is less contradictory, though perhaps more complicated and unsettling, than it appears to be on its surface.

A. *Attempts by the United States to Control the Border*

It is estimated that 11 million immigrants entered the United States in the last decades of the twentieth century, that about a million and a half entered each year since the start of the twenty-first century, and that about one-third of these immigrants are undocumented.¹⁰² The size of the U.S. border patrol grew by 42% in the last years of the twentieth century.¹⁰³ That increase, initiated in 1993 by the Clinton administration, is said to have been motivated by concern that anti-immigration sentiment in California could jeopardize a Clinton victory in that state in the 1996 election.¹⁰⁴

⁹⁸ See *id.* at 778.

⁹⁹ Laws limiting social welfare for undocumented, and sometimes also documented, immigrants are not expressly aimed at any particular group of immigrants.

¹⁰⁰ See Cornelius, *supra* note 92, at 775–77.

¹⁰¹ See *infra* notes 176–81 and accompanying text.

¹⁰² See Cornelius, *supra* note 92, at 776; see also Judis, *Phantom Menace*, *supra* note 1, at 25 (estimating the presence in 2008 of 12 million "illegal immigrants" in the United States).

¹⁰³ In 1997, four years before the 9/11 attack, there were 6,817 full time members of the Border Patrol. In 2001 the number had increased to 9,651. TRANSACTIONAL ACCESS RECORDS CLEARINGHOUSE, BORDER PATROL EXPANDS BUT GROWTH RATE AFTER 9/11 MUCH LESS THAN BEFORE; DIVISION BETWEEN NORTH/SOUTH BORDER LITTLE CHANGED, <http://trac.syr.edu/immigration/reports/143/>. In the four years after 9/11, the number of full-time agents increased, but only by 15% (to 11,106). *Id.* The size of the Border Patrol grew more during the two Clinton administrations than during the Bush administration. *Id.* However, in 2006, President Bush announced plans to increase the Border Patrol by 6,000 over two years, with the express aim of "stopping illegal immigration." Danielle Blumenthal, *President Bush to accelerate Border Patrol strategy with National Guard*, U.S. CUSTOMS & BORDER PROTECTION TODAY, May 2006, http://www.cbp.gov/xp/CustomsToday/2006/may/president_bush.xml.

¹⁰⁴ See Cornelius, *supra* note 92, at 776–78; *infra* Part II.B.1 (describing passage of Proposition 187 in California).

That border enforcement effort¹⁰⁵ was not effective if its actual aim was to deter unauthorized border crossings. Wayne Cornelius contends that the program was probably more effective at keeping undocumented immigrants from Mexico and Central American nations inside the United States than in deterring new arrivals.¹⁰⁶ The effort may have been deemed somewhat more successful if the aim—or an aim—was to quell anti-immigration backlash that might have undermined lawmakers' political ambitions.¹⁰⁷

Alongside federal efforts to guard the border, states have considered and passed a record number of laws focused on immigrants in the last few years.¹⁰⁸ In 2007, state legislatures, as a group, entertained over 1,500 relevant bills, and 46 states enacted immigration-related laws.¹⁰⁹ This represented a three-fold increase over similar legislative activity in 2006.¹¹⁰ In the first several months of 2009, every state considered large numbers of immigration-related bills.¹¹¹ Many proposed the creation of enforcement and integration plans that focused on both documented and undocumented immigrants.¹¹² The most active areas of legislative response to immigration have included employment, identification schemes (in particular, related to driver's licenses), and law enforce-

¹⁰⁵ Beginning in the 1990s, the federal government effected "concentrated border enforcement strategies." Katrina J. Ordonez, *Securing the United States-Mexico Border: An Ongoing Dilemma*, HOMELAND SECURITY AFFAIRS, Supp. No. 2 (2008), <http://www.hsaj.org/pages/supplement/issue2/pdfs/supplement.2.5.pdf>. The concentrated border enforcement strategies involved initiation of four focused border patrol areas, each viewed as a strategic crossing point for undocumented immigrants arriving in the United States from Mexico and other nations. *Id.* at 4. The four border patrol operations in the plan included one in El Paso, Texas (Operation Hold-the-Line, begun in 1993); one in San Diego (Operation Gatekeeper, begun in 1994); one along the Rio Grande in South Texas (Operation Rio Grande, begun in 1997); and one in central Arizona (Operation Safeguard, begun in 1995). *Id.* Former Immigration and Naturalization Service (INS) Commissioner, Doris Meissner, explained that INS had concluded that crossing the border at other points was so dangerous that few people would attempt it. *Id.* at 5. The key to the patrols was erection of a high, steel fence. See Cornelius, *supra* note 92, at 779.

¹⁰⁶ See Cornelius, *supra* note 92, at 777 (noting that "[t]he U.S. strategy . . . inevitably fails to deter 'unwanted' immigration from Mexico and other Third World countries, while further entrenching unauthorized workers in the U.S. labor force").

¹⁰⁷ The veracity of this claim would be difficult to prove; that effort is, in any event, beyond the scope of this Article.

¹⁰⁸ See National Conference of State Legislatures: Immigrant Policy Project, *2007 Enacted State Legislation Related to Immigrants and Immigration*, Jan. 31, 2008, available at <http://www.ncsl.org/Portals/1/documents/immig/2007Immigrationfinal.pdf> [hereinafter NCSL, *2007 Enacted State Legislation*]; National Conference of State Legislatures: Immigrant Policy Project, *2009 Immigration-Related Bill and Resolutions in the States*, Apr. 22, 2009, available at <http://www.ncsl.org/documents/immig/2009ImmigFinalApril222009.pdf> [hereinafter NCSL, *2009 Immigration-Related Bills*].

¹⁰⁹ NCSL, *2007 Enacted State Legislation*, *supra* note 108, at 1.

¹¹⁰ NCSL, *2009 Immigration-Related Bills*, *supra* note 108, at 1.

¹¹¹ *Id.*

¹¹² NCSL, *2007 Enacted State Legislation*, *supra* note 108, at 1.

ment.¹¹³ In addition, a number of states entertained shifts in policies regarding educational, health, and other benefits.¹¹⁴

B. *Limiting Social Benefits for Immigrants*

This section reviews three legislative efforts—one by California, one by the federal government, and one by Arizona—to limit social benefits available to immigrants.

1. California: Proposition 187

Passed by a significant majority¹¹⁵ of California voters in 1994¹¹⁶ (though later found unconstitutional), this ballot initiative, dubbed the “Save Our State” initiative,¹¹⁷ denied all social services, health care services except for emergency hospital care, and public education to undocumented immigrants.¹¹⁸ Further, it required state officials to identify the immigration status of “arrestees, applicants for social services and health care, and public school students and their parents”; to direct undocumented immigrants to obtain legal status or leave the country; and to transmit information about immigration status to both “state and federal authorities.”¹¹⁹

The provision that rendered undocumented immigrant children ineligible to attend public schools (including elementary, secondary, and post-secondary schools) in California¹²⁰ was consciously included in the initiative, even though it was clearly unconstitutional at the time.¹²¹ The

¹¹³ See *id.* at 2.

¹¹⁴ NCSL, *2009 Immigration-Related Bills*, *supra* note 108, at 1.

¹¹⁵ The initiative was passed with 59 percent of the vote. Anna Williams Shavers, *The Invisible Others and Immigrant Rights: A Commentary*, 45 HOUS. L. REV. 99, 134 (2008) (citing 1994 California Voter Information, Analysis of Proposition 187 by the Legislative Analyst, available at <http://www.americanpatrol.com/REFERENCE/187AnalysisVoterInfo.html>).

¹¹⁶ The provisions of the initiative were codified at CAL. EDUC. CODE § 48215(a) (West Supp. 1995); CAL. HEALTH & SAFETY CODE § 130(a) (West Supp. 1995); CAL. WELF. & INST. CODE § 10001.5 (West Supp. 1995).

¹¹⁷ T. Alexandeer Aleinikoff & Ruben G. Rumbaut, *Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?*, 13 GEO. IMMIGR. L. J. 1, 6 (1998).

¹¹⁸ See *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 764–65 (C.D. Cal. 1995), *amended by* 997 F.Supp. 1244, 765–66 (C.D. Cal. 1997) (summarizing major provisions of the initiative).

¹¹⁹ *Id.*; see also Tony Miller, Acting Secretary of State, California Ballot Pamphlet: General Election, Nov. 8, 1994, at 92, available at http://traynor.uchastings.edu/ballot_pdf/1994g.pdf (requiring the facility to “notify the State Director of Health Services, the Attorney General of California, and the United States Immigration and Naturalization Service of the apparent illegal status”).

¹²⁰ See Miller, *supra* note 119, at 91–92.

¹²¹ In *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court had invalidated a Texas law that precluded the use of state funds for the education of undocumented immigrant children. The legislative analysis that California included with information about the initiative for voters noted that the savings that would presumably follow from excluding undocumented immigrant

initiative openly aimed at ridding California of undocumented immigrants¹²² and, to the extent that that effort failed, at precluding them from using state resources.¹²³ Certainly, the initiative made California an inhospitable host.

Several legal challenges to the initiative were consolidated in *League of United Latin American Citizens v. Wilson*.¹²⁴ A California federal district court invalidated most of the initiative's provisions on the ground that they were preempted by federal authority.¹²⁵ The case settled while on appeal.¹²⁶

In the end, Proposition 187 was more significant as a reflection of public spirit than as state law. Promoters of the initiative¹²⁷ defended it as an opportunity for the "voice of the people" to be heard "against an arrogant bureaucracy."¹²⁸ The promoters' "Argument" in favor of the initiative read, in part:

If the citizens and the taxpayers of our state wait for the politicians in Washington and Sacramento to stop the incredible flow of ILLEGAL ALIENS, California will be in economic and social bankruptcy. We have to act and ACT NOW! On our ballot, Proposition 187 will be the first giant stride in ultimately ending the ILLEGAL ALIEN invasion.

...

While our own citizens and legal residents go wanting, those who choose to enter our country ILLEGALLY get royal treatment at the expense of the California taxpayer.

IT IS TIME THIS STOPS!

Welfare, medical and educational benefits are the magnets that draw these ILLEGAL ALIENS across our borders.¹²⁹

children from state public schools "would not be realized" because the provision was not constitutional. See Miller, *supra* note 119, at 50.

¹²² See Aleinikoff & Rumbaut, *supra* note 117, at 6.

¹²³ See *League of United Latin American Citizens*, 908 F. Supp. at 765.

¹²⁴ *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 763 (C.D. Cal. 1995).

¹²⁵ See *id.* at 764.

¹²⁶ See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 748 (2d ed., Aspen 2002) (explaining that in the meantime, California had elected a Democratic governor who opposed this measure).

¹²⁷ These promoters included Assemblyman Dick Mountjoy, identified as "author of Proposition 187," Ronald Prince, Chairman of the "Save Our State" Committee, and Mayor Barbara Kiley, Co-Chair of the "Save Our State" Committee. See Miller, *supra* note 119, at 54.

¹²⁸ *Id.*

¹²⁹ *Id.*

The "Argument" concluded by noting that the state legislature had recently voted to cut dental and prescription drug benefits for citizens and at the same time, had "voted to continue free pre-natal care for ILLEGAL ALIENS."¹³⁰

This pro-initiative "Argument" focused on two linked themes. First, "illegal aliens" (a term always written in capital letters) were unattractive as people and "un-American."¹³¹ The traits that made the "illegal alien" unattractive were left unspecified.¹³² Presumably, those reading the document supplied their own interpretations of why and how "illegal aliens" were deemed unworthy of inclusion in the American whole. One commentator suggested that the phrase "illegal alien" was intended to be synonymous with undocumented Mexican (or perhaps even, simply, "Mexican").¹³³ Perhaps so. But as important, the negative construction of the "illegal alien" that accompanied pleas to vote for Proposition 187 was framed so that it might have referred to almost any immigrant group viewed to threaten American customs and identity.¹³⁴ Second, the pro-initiative "Argument" asserted that local government was unjustly rewarding "illegal aliens" at the expense of Americans ("by birth or naturalization").¹³⁵ The document thus suggested that Americans, concerned about limitations in their own health coverage and other social benefits, need only to have looked to the size of the state's largesse to "illegal aliens" in order to understand why their own needs (for health care, education, and other forms of social welfare) were not met adequately.¹³⁶

2. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996

The ideological climate signaled by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)¹³⁷ echoed that of Proposition 187.¹³⁸ Ironically, Congress passed the Act, at least in part, in response to laments from states on or near the border with

¹³⁰ *Id.*

¹³¹ Elsewhere, the "Argument in favor of proposition 187" proclaims: "We are American, by birth or naturalization. . . ." *Id.*

¹³² *See id.*

¹³³ Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263, 286 (1996-97).

¹³⁴ Johnson recognizes the "malleability" of the term "illegal alien." *Id.* at 290.

¹³⁵ The "Argument" explains that "those who choose to enter our country ILLEGALLY get royal treatment at the expense of the California Taxpayer." Miller, *supra* note 119, at 54.

¹³⁶ *See* Shari B. Fallek, *Health Care for Illegal Aliens: Why It Is a Necessity*, 19 Hous. J. INT'L L. 951, 963-64 (1997) (noting that 22 states were considering such legislation in 1997).

¹³⁷ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (codified as amended at 8 U.S.C. §§ 1601-46 (2006)).

¹³⁸ *See* Cornelius, *supra* note 92, at 787-88 (asserting that PWRORA was "inspired by California's Proposition 187").

Mexico about the financial burden of providing health care for immigrants.¹³⁹ The Act precluded the use of federal funds for many immigrants but did not significantly relieve the states of the financial burden of providing immigrants with health care.¹⁴⁰ PRWORA went even further than Proposition 187 in restricting social benefits for many *documented* immigrants.¹⁴¹

Before passage of PRWORA, immigrants with permanent residence status were eligible for a wide variety of public benefits, including Medicaid. But in addition to denying almost all public benefits to undocumented immigrants, PRWORA denied these benefits to many immigrants who had entered the country legally and who had become permanent residents.¹⁴² More specifically, under PRWORA permanent residents who had not resided in the United States for at least five years became ineligible for Medicaid, Medicare, cash welfare from Temporary Assistance for Needy Families (TANF), disability benefits from Supplemental Security Income (SSI), and food stamps.¹⁴³

PRWORA's passage constituted a sweeping response to rhetoric about the expense and dangers brought by immigrants, especially in the

¹³⁹ Julia Field Costich, *Legislating a Public Health Nightmare: The Anti-Immigrant Provisions of the "Contract With America" Congress*, 90 KY. L.J. 1043, 1044 (2002).

¹⁴⁰ See *id.* (describing some of the costs to states as a result of PRWORA's precluding the use of federal funds to pay for Medicaid for immigrants).

¹⁴¹ *Id.*

¹⁴² See 8 U.S.C. §§ 1601–46.

¹⁴³ *Id.* Almost a decade and a half after the promulgation of PRWORA, most of its provisions remain in effect. However, one of the first bills signed by President Obama restored benefits through the State Children's Health Insurance Program (SCHIP) to all legal immigrant children under age 19 and to pregnant women (otherwise eligible for these programs). Signed in January 2009, the State Children's Health Insurance Program Reauthorization Act of 2009 reauthorized SCHIP for millions of children and extended SCHIP coverage to millions of additional children, including documented immigrants residing in the United States for less than five years. See State Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. 111-3 (2009) (codified in various sections of 42 U.S.C.).

Even more, PRWORA's limiting or precluding benefits for undocumented immigrants and for many documented immigrants has become a model for states. In 2009, Massachusetts, faced with a budget shortfall, relied on PRWORA's model to eliminate state-funded health care for permanent residents not holding green cards for at least five years. See Abby Goodnough, *Massachusetts Takes a Step Back from Health Care for All*, N.Y. TIMES, July 15, 2009, at A10. Governor Deval Patrick asked the legislature to consider restoring a significant part of the cut. *Id.* By the end of August 2009, the state agreed to provide continuing coverage for "legal" immigrants. *Id.* That coverage was to be somewhat less generous than coverage previously provided. In particular, the coverage does not include dental, skilled nursing, or hospice care. Bureau of Nat'l Affairs, BNA's Health Care Daily Report, Coverage, *Mass. Governor Announces Program to Provide Coverage for Legal Immigrants*, Sept. 1, 2009, http://news.bna.com/hdln/HDLNWB/split_display.adp?fedfid=14890153&vname=hcenotallissues&fn=14890153&jd=a0b9u2x3p5&split=0. The proposed Massachusetts budget cut was significant because Massachusetts' three-year old Commonwealth Care program has resulted in the state's having the lowest percent of uninsured residents in the nation. Goodnough, *supra*. In Massachusetts, 2.6 percent of residents are without health care insurance. *Id.* In the nation, the figure is 15%. *Id.*

Southwest. The pleas to lawmakers that preceded enactment of the law resembled those, voiced a couple of years earlier, that urged California voters to pass Proposition 187. A 1993 speech to the House of Representatives by a Nevada representative captures the tone of these pleas. Representative Vucanovich invoked the burden "illegal aliens" placed on the federal budget; the refusal of "illegal aliens" to "assimilate"; and the illnesses, including "tuberculosis and AIDS," brought into the United States by "immigrants."¹⁴⁴ The "admission of immigrants with communicable diseases," she argued, "result[s] in health problems of epidemic proportions[,] and the care of the infected and contagious aliens adds to our disease control problems and strains the health care system."¹⁴⁵

The irony is clear. Restricting health care coverage for any group—especially one identified as having "communicable diseases" will not serve that group or the larger public. As one commentator explained with what may have been considerable restraint, PRWORA's restrictions on coverage would have "adverse health consequences for the rest of the population."¹⁴⁶

Echoing the message of anti-immigrant claims, such as those voiced by Representative Vucanovich, advocates for PRWORA in the early 1990s suggested that immigrants to the United States were motivated by the opportunity to obtain social benefits, including health care, and that precluding such benefits for immigrants would stem illegal immigration and thus save significant state and federal funds.¹⁴⁷ Yet, research with immigrant populations belied the veracity of the presumption that the promise of social benefits was luring immigrants (documented or undocumented) to the United States.¹⁴⁸ In fact, immigrants in the relevant period were far less likely than citizens to take advantage of health care services provided by the government.¹⁴⁹ Undocumented immigrants, in

¹⁴⁴ Fallek, *supra* note 136, at 956–57. Food stamps and SSI benefits were restored for some immigrants residing in the United States at the time. See Michael Fix & Wendy Zimmermann, *The Legacies of Welfare Reform's Immigrant Restrictions*, 75 INTERPRETER RELEASER 1577, 1580 (1998).

¹⁴⁵ Fallek, *supra* note 136, at 956–57.

¹⁴⁶ Costich, *supra* note 139, at 1044.

¹⁴⁷ See *id.*; see also 8 U.S.C. § 1601 (2006) (noting a "compelling government interest" to limit illegal immigration).

¹⁴⁸ Costich, *supra* note 139, at 1045 (citing Marc L. Berk et al., *Health Care Use Among Undocumented Latino Immigrants*, HEALTH AFFAIRS, July/Aug. 2000, at 51, 56 (examining surveys in El Paso, Houston, Fresno, and Los Angeles and finding that "social services" were a motivating factor behind immigration to the U.S. in less than one percent of cases)).

¹⁴⁹ *Id.* (citing Leighton Ku & Sheetal Matani, *Left Out: Immigrants' Access to Health Care and Insurance*, HEALTH AFFAIRS, Jan./Feb. 2001, at 247; Bill Waddell, *United States Immigration: A Historical Perspective*, in HANDBOOK OF IMMIGRANT HEALTH 1, 15 (Sana Loue ed., 1998); Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555 (1996); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509 (1995); Jeffrey R. Margolis, Comment, *Closing the Doors to the Land of Oppor-*

particular, feared, and continue to fear, being reported to federal immigration authorities as a result of identifying themselves to any government agent.¹⁵⁰

The harsh consequences of PRWORA for immigrants were reinforced and extended with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).¹⁵¹ IIRIRA provided for an increase in border patrols and imposed various deterrents to undocumented immigrants entering and remaining in the United States.¹⁵² Among other things, it made it even more difficult for an immigrant to obtain public benefits because it attributed income earned by an immigrant's sponsor to the immigrant.¹⁵³

These statutes, much like California's Proposition 187, reflected a longstanding pattern in the United States of responding to new immigrant groups as unwelcome interlopers and defining those in the group as "freeloaders" and as undeserving.¹⁵⁴ These laws reflected and energized a moral distinction between "us" (hardworking, responsible citizens) and "them" (lazy, sick, undeserving immigrants). This distinction served to justify precluding those in the group categorized as "them" from enjoying many of society's social benefits.¹⁵⁵ In this, Americans aimed openly to safeguard a presumptively limited pie. And they aimed to construct an image of those in the newest group of immigrants as unworthy of a place in mainstream society.¹⁵⁶ PRWORA facilitated the continuation and strengthening of this trend.

3. Arizona's Legal Responses to Immigrants

PRWORA gave states constitutional warrant to limit social welfare benefits to immigrants. In *Plyler v. Doe*,¹⁵⁷ decided in 1982, the Supreme Court invalidated a Texas statute that denied a free public school education to undocumented immigrants while offering free schooling to

tunity: *The Constitutional Controversy Surrounding Proposition 187*, 26 U. MIAMI INTER-AM. L. REV. 363 (1995)).

¹⁵⁰ *Id.*

¹⁵¹ Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in various sections of 8 U.S.C.).

¹⁵² *Id.*

¹⁵³ *Id.*; see also Priscilla Huang, *Anchor Babies, Over-Breeders, and the Population Bomb: The Reemergence of Nativism and Population Control in Anti-Immigration Policies*, 2 HARV. L. & POL'Y REV. 385, 389 (2008) (noting impact of IIRIRA on immigrant women seeking benefits).

¹⁵⁴ See Berta Esperanza Hernandez-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform"*, 71 S. CAL. L. REV. 547, 560-61 (1998).

¹⁵⁵ *Id.* at 561.

¹⁵⁶ Nora V. Demleitner, *The Fallacy of Social "Citizenship," or the Threat of Exclusion*, 12 GEO. IMMIGR. L. J. 35, 42-43 (1997).

¹⁵⁷ 457 U.S. 202 (1982).

citizens and documented immigrants. The Court suggested that the federal government, but not states, had authority to limit benefits as a means of controlling immigration.¹⁵⁸ Commentators widely viewed PRWORA to extend constitutional license to states to limit social benefits.¹⁵⁹

Arizona has been especially ready to rely on PRWORA's presumptive license. The state has tried time and time again—and has sometimes succeeded—in restricting immigrants' rights. At least in part, these legislative efforts have reflected public fears about the arrival of many documented and undocumented immigrants from Mexico in the first decade of the twenty-first century.¹⁶⁰ Indeed, in Arizona, "immigrant" can usually be interpreted to mean "Mexican."¹⁶¹

By 2004, the tightening of security at the Mexico-U.S. border in California and Texas, as well as Arizona's successful economy at that time, resulted in the crossing into Arizona from Mexico of about two million people each year.¹⁶² Some stayed. According to one estimate, there were about a half million undocumented immigrants in Arizona by 2004, an increase of more than 300 percent in eight years.¹⁶³ The size of this immigration spawned fears of economic and cultural competition and provided fuel for anti-immigration activists.¹⁶⁴ They responded with anger and energy.¹⁶⁵

In 2008, a *New York Times* feature story reported that "consular officials" had identified Arizona as uniquely harsh on immigrants.¹⁶⁶ One official told the *Times* that Arizona is less humane in its treatment of undocumented immigrants than other states.¹⁶⁷ In 2004, an Arizona proposition that resembled California's Proposition 187 was passed with 56

¹⁵⁸ Brietta R. Clark, *The Immigrant Health Care Narrative and What it Tells Us About the U.S. Health Care System*, 17 ANN. HEALTH L. 229, 238 (2008) (citing *Plyer*, 457 U.S. at 219 n.19).

¹⁵⁹ See, e.g., *id.* at 238–39; Cindy Chang, *Health Care for Undocumented Immigrant Children: Special Members of an Underclass*, 83 WASH. U.L.Q. 1271, 1285–86 (noting that "no federal rule barred undocumented immigrant children from public schools, PRWORA excludes undocumented immigrant children from state health care benefits").

¹⁶⁰ See Judis, *Phantom Menace*, *supra* note 1, at 21.

¹⁶¹ Cf. Aaron Terrazas & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION INFORMATION SOURCE, Oct. 2009, <http://www.migrationinformation.org/usfocus/display.cfm?ID=747> ("The foreign born from Mexico accounted for over half of the immigrant population in . . . Arizona (65.6 percent). . .").

¹⁶² Judis, *Phantom Menace*, *supra* note 1, at 22.

¹⁶³ *Id.* at 22–23 (referring to figures provided by the PEW Hispanic Center).

¹⁶⁴ John B. Judis, *Border War*, THE NEW REPUBLIC, Jan. 16, 2006, at 15, 16 [hereinafter Judis, *Border War*] (describing Arizonans' fear of "Mexicanization").

¹⁶⁵ *Id.* at 17–18; see also Tamar Diana Wilson, *Research Note: Issues of Production vs. Reproduction/Maintenance Revisited: Towards an Understanding of Arizona's Immigration Policies*, 81 ANTHROPOLOGICAL Q. 713, 714 (2008) (noting sponsorship of 20 anti-immigration bills by Arizona legislature in 2004 and 2005, and more in subsequent years).

¹⁶⁶ Sontag, *Deported*, by U.S. Hospitals, *supra* note 16, at 18.

¹⁶⁷ *Id.*

percent of the vote.¹⁶⁸ Proposition 200 informed Arizona voters that: "This state finds that illegal immigration is causing economic hardship to this state and that illegal immigration is encouraged by public agencies within this state that provide public benefits without verifying immigration status."¹⁶⁹ It added that: "[T]he people of this state declare that the public interest of this state requires all public agencies within this state to cooperate with federal immigration authorities to discourage illegal immigration."¹⁷⁰ The proposition precluded anyone from receiving state or local benefits "not federally mandated" without verifying the individual's immigration status.¹⁷¹ Moreover, it obliged state and local government employees to report any "violation of federal immigration laws by an applicant for public benefits" to "federal immigration authorities."¹⁷²

In Arizona, other legislative efforts, similarly aimed at limiting benefits for, or apprehending, undocumented immigrants, followed Proposition 200. In 2008, Governor Janet Napolitano vetoed a proposed law that would have required state law enforcement officials to enforce immigration rules, in cooperation with federal immigration authorities.¹⁷³ A year later, the Arizona State Senate passed a bill that would have required local law enforcement personnel to inquire as to the immigration status of anyone suspected of being undocumented.¹⁷⁴ However, the state House defeated the bill.¹⁷⁵

At the same time that they limited immigrants' benefits and wrote laws designed to render immigrants more vulnerable to police detection, Arizonans also entertained a guest-worker program aimed at encouraging migrant workers to come to the state. In 2008, the state legislature considered a bill that would have permitted employers able to demonstrate a

¹⁶⁸ Wilson, *supra* note 165, at 714.

¹⁶⁹ Arizona, Proposition 200, available at http://www.azsos.gov/election/2004/info/PubPamphlet/Sun_Sounds/english/prop200.htm (last visited Feb. 10, 2010) [hereinafter Prop. 200]. The current version is the American Taxpayer and Citizen Protection Act, ARIZ. REV. STAT. ANN. §46-140.01 (2008).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Matthew Benson, *Napolitano Vetoes Bill on Police Role in Immigration*, ARIZ. REPUBLICAN, Apr. 28, 2008, <http://www.azcentral.com/community/pinal/articles/2008/04/28/20080428immig-veto0428-ON.html>; see also Wilson, *supra* note 165, at 715.

¹⁷⁴ Jacques Billeaud, *Immigration Enforcement in Arizona Could Toughen*, ASSOCIATE PRESS, June 21, 2009, available at <http://www.azcentral.com/12news/news/articles/2009/06/21/20090621immigrationenforcement21-ON-CP.html>. By the time the state Senate passed the bill, Governor Napolitano had resigned to head the federal Homeland Security Department. *Id.* She was replaced by a Republican, Governor Jan Brewer. *Id.* Opponents of the bill expressed concerns about racial profiling, untrained local police officers handling the job of the U.S. Immigration and Customs Enforcement, and about the bill's constitutionality. *Id.*

¹⁷⁵ Jacques Billeaud, *Arizona House Rejects Immigration Enforcement Bill*, ARIZ. DAILY STAR, July 1, 2009.

labor shortage to hire Mexicans who would be allowed to live and work in Arizona for up to two years.¹⁷⁶

The juxtaposition of these apparently contrary responses to Mexican immigrants—one set of responses aimed at sending workers away and a second aimed at importing them—starkly suggests a bottom-line interest: to benefit from the labor of immigrant workers while continuing to exclude such workers from public benefits and to continue categorizing them as a social and cultural “Other.” S.B. 1508, the temporary worker bill, did not disguise that interest. The “Arizona temporary worker program,” the bill explained, aimed to “provide foreign workers to employers in this state that are experiencing a labor shortage.”¹⁷⁷ Each “approved worker” was to be given a “temporary worker legal identification card[].”¹⁷⁸ The bill precluded “foreign workers” from filing for unemployment benefits or from bringing family members into the United States,¹⁷⁹ and it called for the deportation of an “approved foreign worker” on a number of grounds, including travel outside of Arizona.¹⁸⁰

The bill, in short, was surprisingly transparent. It invited individuals, without their families, and without any right to social welfare, to enter the United States for a limited period as a laborer. Such laborers would presumably not impose costs on the state or on businesses within the state for children’s education, for medical care, or for unemployment insurance. And they would not stay long enough to become members of Arizonan communities.¹⁸¹

C. *A Social Vortex*

Such legislative efforts reflect toleration for immigrants—documented as well as undocumented—as workers and distaste for them as

¹⁷⁶ E. J. Montini, *Standing Bravely on Migration Middle Ground*, ARIZ. REPUBLIC, May 7, 2008, available at <http://www.azcentral.com/arizonarepublic/local/articles/0507montini0508.html>.

¹⁷⁷ Arizona Temporary Worker Program, S.B. 1508, 48th Leg., 2d Reg. Sess. § 23-1602(a) (Ariz. 2008) (proposing amendments to Title 23 of the Arizona Revised Statutes by adding chapter 10).

¹⁷⁸ *Id.* § 23-1602(f).

¹⁷⁹ *Id.* § 23-1602(g) (allowing family members to enter the United States only with “authorization from the federal government”).

¹⁸⁰ *Id.* § 23-1602(h).

¹⁸¹ United States Senator Kay Hagan (D-NC) proposed (in July 2009) to the Health, Education, Labor and Pensions Committee in the Senate that “temporary or seasonal agricultural workers” be excluded from the definition of “employee” for purposes of determining the number of workers employed by an agricultural employer. See Rob Schofield, *The Progressive Pulse: NC Policy Watch Blog*, <http://pulse.ncpolicywatch.org/2009/07/10/c%E2%80%9999mon-kay-you-can-do-better-than-this/> (last visited Feb. 15, 2010). This was relevant insofar as the Committee’s bill (the Affordable Health Choices Act) provides that only employers with 25 or more employees must provide them with health care coverage. Hagan’s proposed amendment was almost expressly aimed at protecting the interests of agricultural employers.

people. Those supporting such efforts acknowledge that immigrants, and especially undocumented immigrants, often work at tasks Americans reject.¹⁸² Moreover, many Americans rely on undocumented immigrant labor in their businesses and in their homes.¹⁸³ But, at the same time, they express fear that immigrants take jobs that, in their view, rightfully belong to Americans.¹⁸⁴ Even more, they worry that governmentally-funded benefits provided to immigrants will deprive Americans of such benefits.¹⁸⁵

A similar set of contradictory impulses toward immigrants, and the willingness to act on them, underlay shifts in federal policy during World War II and the two subsequent decades. Concerned about labor shortages, the United States, through the auspices of the so-called "braceros" program, arranged for the entry of Mexican laborers, most of whom worked in agriculture.¹⁸⁶ By the mid-1950s, interest in the availability of inexpensive labor met with conflicting concerns about the presence of millions of Mexican laborers in the United States.¹⁸⁷ In 1954, the U.S. Border Patrol engaged in a mass deportation of Mexican workers in what came to be called Operation "Wetback."¹⁸⁸ Those rounded up were not released at the Mexican border but were transported by bus, train, and ship to the south of Mexico.¹⁸⁹

¹⁸² See Jean Stevens, *Basic Humanity of Immigrants Denied by Racism*, THE DAILY ORANGE, April 12, 2006, http://www.dailyorange.com/home/index.cfm?event=displayArticlePrinterFriendly&uStory_id=937ea24c-6af0-4cc4-827f-887c5066059e.

¹⁸³ Despite popular conceptions, most work done by Mexican migrants in the United States is not agricultural. See Cornelius, *supra* note 92, at 776. However, Cornelius reports that the jobs taken by Mexican migrant workers "cannot be filled with native-born workers." *Id.* at 21. Peter Bartholomew Brownell, relying on figures obtained in a survey carried out by the Mexican National Council on Population, the College of the Northern Border, and Mexico's Secretary of Labor, reports that 25.4% of Mexican migrants in the U.S. are agricultural workers, 28.5% work in manufacturing, 13.4% in "unskilled manufacturing," and 6.5% in domestic services. PETER BARTHOLOMEW BROWNELL, U.S. IMMIGRATION POLICY AND THE WAGES OF UNDOCUMENTED MEXICAN IMMIGRANTS 8, 12 (2002), http://www.allacademic.com/meta/p_mla_apa_research_citation/1/1/0/8/0/pages110801/p110801-2.php; see also PAUL HAGSTROM, HAMILTON COLLEGE/ZOGBY INTERNATIONAL IMMIGRATION OPINION POLL 5 (2003), <http://www.hamilton.edu/Levitt/surveys/immigration/immigration.pdf> (reporting that about 60% of Americans "believe that immigrants fill jobs that Americans would not want, while only 23 percent feel that immigrants take jobs away from Americans").

¹⁸⁴ Cornelius, *supra* note 92, at 777.

¹⁸⁵ See *infra* notes 211–18 and accompanying text.

¹⁸⁶ The Historical Society of Pennsylvania, *El Bracero Mexicano/The Mexican Workers*, <http://www.hsp.org/default.aspx?id=533> (last visited Feb. 15, 2010) (noting that about 1,000 braceros, brought to Philadelphia to work on the Pennsylvania Railroad, had limited access to social benefits, including health care).

¹⁸⁷ See John Dillin, *How Eisenhower Solved Illegal Border Crossings from Mexico*, CHRISTIAN SCI. MONITOR, July 6, 2006, at 9.

¹⁸⁸ *Id.*; see also Johnson, *supra* note 133, at 274.

¹⁸⁹ Dillin, *supra* note 187, at 9.

The braceros program operated for over two decades and brought millions of Mexican farm laborers to the United States.¹⁹⁰ This is not surprising in that Americans want, and have long wanted, to *use* immigrants, especially undocumented immigrants, to service them and their economy, but they fear economic competition from immigrants.¹⁹¹ Beyond this even, they are apprehensive that immigrants are diluting their culture and threatening their identity, but at the same time, they “need” these immigrants to provide inexpensive labor.¹⁹² And they also need them (though less consciously) as an “Other” against whom Americans can assess their own lot within the nation’s system of status.¹⁹³

PRWORA, Proposition 187 in California, and Proposition 200 in Arizona suggest, and in significant part they engendered, a troubling social vortex.¹⁹⁴ A 2004 article published in the journal *Pediatrics* provocatively captures the moral challenge at the center of the vortex.¹⁹⁵ The article focuses on undocumented immigrant children in need of health care in the United States.¹⁹⁶ More particularly, it addresses the plight of a pediatrician asked to provide life-saving care to an undocumented immigrant child in a hospital concerned about incurring potentially enormous, unreimbursed expenses.¹⁹⁷ Cognizant of the economic pressure on hospitals, the physician-authors still ask whether it is “ethical for a pediatrician and/or a hospital to refuse to provide life-saving care to an uninsured child without documentation when it would provide the care to an uninsured child who is a citizen or legal resident.”¹⁹⁸ Further, they ask whether “a child’s place of birth [should] determine if a patient will be treated and live.”¹⁹⁹

The sort of program described in Arizona’s 2008 temporary worker bill would at least partially mask the moral shortfall inherent in PRWORA, Proposition 187, and Proposition 200. But, it would not ob-

¹⁹⁰ See Lisa Basurto et al., *Rent Seeking, the Bracero Program and Current Mexican Farm Labor Policy*, 15 INT’L ECO. J. 21, 22–24 (2001), available at <http://www.iejournal.com/01spring/01-S2.pdf>.

¹⁹¹ This is a restatement of Prof. Cornelius’s formulation. See Cornelius, *supra* note 92, at 777, 788. It may be, of course, that the specific group of people in the United States that is reliant on immigrant labor differs from the group that fears socioeconomic competition from immigrants.

¹⁹² See *id.* at 24.

¹⁹³ See *infra* Part III.A.

¹⁹⁴ See Janine Young et al., *Providing Life-Saving Health Care to Undocumented Children: Controversies and Ethical Issues*, 114 PEDIATRICS 1316, 1319 (2004), available at <http://pediatrics.aappublications.org/cgi/reprint/114/5/1316>.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* The authors propose expansion of federal health care coverage to all uninsured children in the United States. *Id.* at 1319–20.

viate that shortfall.²⁰⁰ Such programs would prevent migrant laborers' families from joining them in the United States, and would limit migrant laborers to a two-year period of residence. In effect, such programs supply employers with inexpensive labor while significantly limiting the social expense of caring for an immigrant population's social needs. And such programs mitigate, even if they do not preclude, the cultural competition that follows inevitably from the arrival of immigrant families who settle within ongoing communities.

Temporary worker programs may disguise the sort of underlying moral challenges created by a system of law and politics that facilitates the ("illegal") migration of laborers and that limits benefits for them once they are in the United States. Workers, in the United States temporarily, without families, and bereft of social benefits, are likely to serve the nation's apparent interest in preserving an inexpensive, compliant labor force. They reflect the Swiss playwright Max Frisch's stunning characterization of this moral shortfall: "We wanted workers, but people came."²⁰¹

III. ANTI-IMMIGRANT RHETORIC

Undocumented immigrant workers serve the same labor needs as migrants granted legal entry to the country for restricted periods of time. But undocumented immigrants are more likely to remain in the U.S. and to come with children who attend schools and seek medical help. They thus become a more likely target for anti-immigration rhetoric than guest workers.

This part considers the tone and contour of this recent anti-immigrant rhetoric. It further entertains the potential significance of that rhetoric for a segment of the American population at the lower edges of the middle class. For members of this group, in particular, narratives of new or undocumented immigrants who are seen as eating up resources viewed as belonging more appropriately to citizens offer a ready scapegoat for those anxious about their own limited resources. At the same time, however, such narratives offer the same group "reassurance" that some Other sits even less comfortably than they do on the nation's socioeconomic ladder.²⁰² Luis Jimenez's story is illustrative of such narratives.

²⁰⁰ See *supra* Part II.B.

²⁰¹ Max Frisch, *Überfremdung I*, in *Schweiz als Heimat?* 219 (1990) ("Man hat Arbeitskräfte gerufen, und es kommen Menschen.") (quoted in Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2094 (2008)).

²⁰² Francine Lipman refers to the institutionalization of the notion of the "undeserving poor," and one step lower in society's hierarchy, "the less than undeserving poor." Francine J. Lipman, *Bearing Witness to Economic Injustices of Undocumented Immigrant Families: A New Class of "Undeserving" Poor*, 7 NEV. L. J. 736, 742 (2007) (quoting and citing KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 93-96 (2004)).

Section A of this part characterizes the portrait of the immigrant at the center of such narratives. Then Section B describes, in more detail, the economic status and social concerns of those most likely to construct such narratives and to listen to them.

A. *Narratives About the Immigrant Other*

Anti-immigrant rhetoric serves two very different needs. The immigrant²⁰³ is posited as both the cause of the nation's economic ills and as the Other who, in comparison with the Self (the "citizen," the "native" American), renders that Self more worthy of sharing in the nation's resources. In consequence, anti-immigrant voices seek to exclude the immigrant Other as a real person but to re-create and sustain that Otherqua-Other in image and in narrative.

Far more widely, Americans have concluded, for a variety of reasons, that they do not wish that federally-funded health care be made available to undocumented immigrants. The first subsection herein considers responses to providing health care coverage for immigrants by those shaping national health care reform, and deciphers some of the assumptions undergirding such responses. The second subsection illustrates and summarizes relevant, contemporary anti-immigrant images and stories.

1. Excluding Undocumented Immigrants from National Health Care Reform

Recognition of American anxieties about undocumented immigrants reached center-stage in the national health care reform debate in the spring of 2009 when Senator Max Baucus of Montana, Chair of the Senate Finance Committee at the time, announced that if Congress were to pass a law creating a national health care program, it would not include coverage for "undocumented aliens, undocumented workers."²⁰⁴ Baucus described any proposal to provide such coverage as "too politically explosive."²⁰⁵ He added that if coverage were provided at all for undocu-

²⁰³ Unless otherwise indicated, the term "immigrant" in this part should be read to refer either to undocumented immigrants or to documented, but new immigrants. Moreover, unless otherwise indicated, it refers to immigrants from Mexico and neighboring Latin American nations.

²⁰⁴ Landers, *supra* note 81.

²⁰⁵ Indeed, Representative Joe Wilson, Republican of South Carolina, brought the volatility of the issue center stage on September 9, 2009. While President Obama was speaking before both houses of Congress, Representative Wilson shouted, "You lie!" to the President after he had stated that "the reforms I am proposing would not apply to those who are here illegally." Michael Scherer, *'You Lie!': Representative Wilson's Outburst*, TIME, Sept. 10, 2009, available at <http://www.time.com/time/politics/article/0,8599,1921455,00.html>. At the time, the Senate Finance Committee's framework for the health plan provided, "No illegal immigrants will benefit from the health care tax credits," and Section 246 of the major House

mented immigrants (“undocumented aliens, undocumented workers”), it would not be through a federally-funded program.²⁰⁶ Rather, it might come in the form of “charity care.”²⁰⁷

Baucus’s assertions about undocumented immigrants were especially significant for two unrelated reasons. First, millions of people among those without health coverage in the United States are undocumented immigrants.²⁰⁸ Second, during the spring of 2009, it was widely assumed that the Obama administration’s hope for health care reform rested largely in Baucus’s hands.²⁰⁹

Senator Baucus’s unapologetic declaration about the exclusion of undocumented immigrants from a new, federally-funded health care program seemed clearly to suggest that public opposition to extending health care coverage to undocumented immigrants was widespread and strong enough that including undocumented immigrants would have risked undermining the entire health care reform enterprise.²¹⁰

Clearly, Baucus assumed broad social anxiety about undocumented immigrants competing for social benefits.²¹¹ Such anxiety is evident in responses from readers of a *Dallas Morning News* story reporting

health care reform bill, H.R. 3200, is titled “No Federal Payment for Undocumented Aliens.” *Id.* An editorial in the *N.Y. Times*, two days after the event, began, “Illegal immigration is an all-purpose policy explosive. Toss it into any debate and, boom, discussion stops because you’ve got people afraid that benefits or services might be going to those who don’t deserve them.” Editorial, *Immigrants, Health Care and Lies*, *N.Y. TIMES*, Sept. 11, 2009, at A26.

²⁰⁶ Landers, *supra* note 81.

²⁰⁷ *Id.*

²⁰⁸ See *id.* N. Gregory Mankiw estimates the number at less than 10 million. N. Gregory Mankiw, *Beyond Those Health Care Numbers*, *N.Y. TIMES*, Nov. 4, 2007, at 4 (placing the number of undocumented immigrants without insurance in the U.S. at between 15 and 22 percent of about 47 million people); see also Elizabeth R. Chesler, Note, *Denying Undocumented Immigrants Access to Medicaid: A Denial of Their Equal Protection Rights?*, 17 *B.U. PUB. INT. L.J.* 255, 260 (2008) (reporting that between seven and ten million undocumented immigrants lived in the United States in 2008 and that the majority were uninsured).

²⁰⁹ See David M. Herszenhorn, *Baucus Grabs Pacesetter Role on Health Bill*, *N.Y. TIMES*, June 24, 2009, at A19 (noting that Baucus’s role became especially central after the health committee chair, Edward Kennedy (D-Mass.), developed brain cancer and after former Senate Majority Leader Tom Daschle (Obama’s first choice to head Health and Human Services) failed to report taxable income and subsequently withdrew his nomination); see also Ron Lieber, *How to Avoid a Tom Daschle Tax Problem*, *N.Y. TIMES*, Feb. 4, 2009, at B1.

²¹⁰ Government officials apparently estimate that excluding undocumented immigrants from health care coverage would result in coverage for about 94% of the public in the United States. Matthew DoBias, *As Democrats Talk Reform . . . GOP gets Ball Rolling with Insurance-Related Bills*, *MODERN HEALTHCARE*, May 25, 2009, available at <http://www.modernhealthcare.com/article/20090525/SUB/905229970>.

²¹¹ Those expressing anxiety about competition from undocumented immigrants often focus on competition for jobs. In fact, however, that concern is largely unwarranted. In Arizona, for instance, it is estimated that there are more jobs than workers to fill them. See Judis, *Border War*, *supra* note 164, at 17–18. Arizona was estimated to have had about a half million undocumented workers in 2008. PASSEL & COHN, *supra* note 91, at 12. Most of them arrived from Mexico. *Id.*

Baucus's declaration that undocumented immigrants would not be beneficiaries of public health care coverage.²¹² These responses ranged from anger at the issue (e.g., suggesting that illegal immigrants be shot at the border²¹³), to gratitude to Baucus (e.g., noting unfairness of Americans not getting free health care while illegal immigrants do²¹⁴), to skepticism that Baucus's promise, even if fulfilled, would actually benefit the nation (e.g., expressing worry about the [citizen] children of "illegal aliens" "show[ing] up on the numbers . . . [as] uninsured").²¹⁵

Among responses to the story that described undocumented immigrants as unwelcome competition, many focused on the possibility that "citizens" might lose social benefits (health care, in particular) because of the expense incurred in treating undocumented immigrants.²¹⁶ Some responses expressed concern about "citizens" losing jobs as a result of immigrants ready to work at low wages.²¹⁷

Moreover, beneath the worry about losing social benefits, was a still deeper concern. This underlying concern reflected a pervasive anxiety within the middle class, and especially among those sitting at the lower edges of the middle class, about losing their standing in the nation's complicated, opaque socioeconomic hierarchy.²¹⁸ Access to health care and other social benefits plays a major part in defining and in establishing a person's socioeconomic status. Thus, people anxious about the risk of losing their socioeconomic status are likely to be especially concerned about losing or competing for health care and other social benefits.

²¹² See *infra* notes 213–17, 234.

²¹³ See Posting of chott, responding to Landers, *supra* note 81, http://www.dallasnews.com/sharedcontent/dws/news/washington/jlanders/stories/0522DNBUShealthcare.25377b8.html?ocp=4#slcgm_comments_anchor&skipReg=false ("Just build two walls 20 feet high around the border. Monitor electronically. Then shoot trespassers. Illegal Immigration problem solved. Any illegal that shows up at a hospital gets a band aid, and free ride home." (written in capital letters on the blog)).

²¹⁴ See Posting of Chris2008, responding to Landers, *supra* note 81, http://www.dallasnews.com/sharedcontent/dws/news/washington/jlanders/stories/0522DNBUShealthcare.25377b8.html?ocp=6#slcgm_comments_anchor&skipReg=false.

²¹⁵ Posting of Zachary Hilbun, responding to Landers, *supra* note 81, http://www.dallasnews.com/sharedcontent/dws/news/washington/jlanders/stories/0522DNBUShealthcare.25377b8.html?ocp=4#slcgm_comments_anchor&skipReg=false.

²¹⁶ See, e.g., Posting of greatgran, responding to Landers, *supra* note 81, http://www.dallasnews.com/sharedcontent/dws/news/washington/jlanders/stories/0522DNBUShealthcare.25377b8.html?ocp=5#slcgm_comments_anchor&skipReg=false ("One of the reasons we have a healthcare crisis is because we are having to pay the enormous bill for illegal immigration health cost.").

²¹⁷ Posting of pulp fiction, responding to Landers, *supra* note 81, http://www.dallasnews.com/sharedcontent/dws/news/washington/jlanders/stories/0522DNBUShealthcare.25377b8.html?ocp=5#slcgm_comments_anchor&skipReg=false (claiming that 80% of the construction jobs for a new hotel in Dallas will go to illegal aliens).

²¹⁸ See *infra* notes 223–26 and accompanying text (considering the significance of stress about preserving socioeconomic status to the larger debate about health care and to responses to undocumented immigrants).

2. An American Ideology²¹⁹ of Class: Underneath Recent Anti-Immigrant Rhetoric

Behind much anti-immigrant rhetoric sits an ideology that values individualism and autonomy, and that, accordingly, locates responsibility for socioeconomic failure at the level of the individual. Almost from the nation's start, Americans have explained poverty as a correlate of individuals' bad choices. "Diligence," declared Benjamin Franklin in the eighteenth century, "is the mother of good luck," and similarly, "[i]f we are industrious we shall never starve."²²⁰ Americans may no longer be convinced that this *is* true, but they cling to the presumption that if it is not true, it should be.²²¹ Although, in fact, class mobility is not typical in the United States, Americans remain convinced that people's autonomous choices determine their socioeconomic status.²²²

Moreover, while deeply concerned about sustaining their class status, Americans are uncertain about how to assess that status.²²³ They recognize poverty, but have no clear indicia of socioeconomic status above the federal poverty level.²²⁴ The opacity of their class system, along with the assumption that individuals' moral worth is reflected in class status, creates uncertainty and anxiety.²²⁵

More specifically, the tension between Americans' widespread belief that class is mutable for anyone who tries hard enough and the American reality—within which class mobility is more rare than common—is a source of tension, especially for those most uncertain about whether

²¹⁹ The term "ideology" is used here, following its use in the word of the French Indologist, Luis Dumont, to refer to a pervasive, underlying system of beliefs in terms of which people think about and act in the world. Dumont explained:

Our definition of ideology thus rests on a distinction that is not a distinction of matter but one of point of view. We do not take as ideological what is left out when everything true, rational, or scientific has been preempted. We take everything that is socially thought, believed, acted upon, on the assumption that it is a living whole, the interrelatedness and interdependence of whose parts would be blocked out by the a priori introduction of our current dichotomies.

LOUIS DUMONT, FROM MANDEVILLE TO MARX 22 (University of Chicago Press 1977).

²²⁰ Benjamin Franklin excerpts, TeachingAmericanHistory.org, <http://teachingamericanhistory.org/library/index.asp?document=2218> (last visited July 13, 2009).

²²¹ See Erika Blacksher, *Healthcare Disparities: The Salience of Social Class*, 17 CAMBRIDGE Q. OF HEALTHCARE ETHICS 143, 144 (describing the American class system as "submerged"); Janny Scott & David Leonhardt, *Class in America: Shadowy Lines That Still Divide*, N.Y. TIMES, May 15, 2005, at A1 (noting errors underlying previous studies of changes in class status; some studies, for instance, relied on one year's income or on childhood memories of family income).

²²² See Scott & Leonhardt, *supra* note 221, at A1.

²²³ See KAISER FAMILY FOUNDATION AND HARVARD SCHOOL OF PUBLIC HEALTH, PUBLIC VIEWS ON SCHIP REAUTHORIZATION: SURVEY HIGHLIGHTS 3 (2007), www.kff.org/kaiserpolls/pomr101707pkg.cfm [hereinafter PUBLIC VIEWS ON SCHIP].

²²⁴ See *id.*

²²⁵ See *id.*

they can, in fact, sustain their current socioeconomic status.²²⁶ In order to assess that status, Americans look nervously to elusive, shifting symbols of class. And they construct narratives about putative “outsiders” that reassure them that they are “insiders.” Their construction of the narrative of the immigrant Other is paradigmatic.

a. Immigrants as a Source of Economic Competition

Immigrants are viewed as competing for jobs and for social resources.²²⁷ They are blamed for low wages,²²⁸ for “taking jobs from Americans,”²²⁹ for “stealing taxpayer money,”²³⁰ and generally “for the shape of our economy.”²³¹

Although the claim that immigrants deprive Americans of jobs has usually been voiced less forcefully than claims about immigrants’ usurpation of socioeconomic resources, it is part of a broad anti-immigrant narrative, which is largely belied by reality. For the most part, Americans have not wanted, and thus have not competed for, jobs at which undocumented and new immigrants from Latin America work.²³² Some, in effect acknowledging this, have begun to wonder if the deep recession that began in 2008 will result in Americans’ seeking jobs that they would

²²⁶ See Scott & Leonhardt, *supra* note 221, at A1 (reporting that, with the exception of a “few high achievers,” the likelihood has increased during the last 30 years that people will not rise in class status during their life span, and that Americans enjoy less class mobility than people in Canada and some countries in Scandinavia and no more class mobility than people in Britain and France).

²²⁷ Lipman, *supra* note 202, at 756 (noting that Americans blame undocumented immigrants for a wide set of woes, including “exploding deficits, the looming Social Security crisis, and failing health care services”).

²²⁸ *Id.*

²²⁹ See, e.g., Posting of Patrick to Dvorak Uncensored, <http://www.dvorak.org/blog/2009/06/22/should-hospitals-deport-illegal-immigrants/> (June 23, 2009, 7:12 EST) (responding to another internet commenter who claimed that Americans would not take jobs at which “illegal” immigrants work, and claiming, “You’d be wrong. Before the illegals, Americans worked them”).

²³⁰ See, e.g., Posting of Blog-Editor to OrthodoxNet.com Blog, <http://www.orthodox-today.org/blog/2009/05/12/illegal-immigrants-a-key-reason-why-us-healthcare-costs-keep-growing/> (May 15, 2009).

²³¹ Posting of Delaware Bob, responding to Daphyne Eviatar, *Right-Wing Restrictionists Blame Illegal Immigrants for Swine Flu*, WASH. INDEPENDENT, April 28, 2008, <http://washingtonindependent.com/40785/right-wing-restrictionists-blame-illegal-immigrants-for-swine-flu>.

²³² This claim, though correct, is far more complicated than it might seem. See Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1178–79 (2008). Jennifer Gordon and R.A. Lenhardt, considering job competition between African Americans and immigrants, note that “African Americans are reluctant to work under the increasingly abusive and poorly remunerated conditions in the poultry industry.” *Id.* at 1178. But, they explain, those conditions are one product of employers taking advantage of immigrant workers’ willingness to work in positions that Americans would shun. *Id.* at 1178–79.

not previously have considered—jobs filled by immigrants.²³³ Still, however, concern is more widely voiced about the burden that undocumented immigrants place on American schools, social service agencies, hospitals, and on the health care system more generally.²³⁴ PRWORA, as well as Proposition 187 in California and Proposition 200 in Arizona, reflects this set of related concerns.²³⁵

²³³ See, e.g., Posting of Rick's Café to Dvorak Uncensored, <http://www.dvorak.org/blog/2009/06/22/should-hospitals-deport-illegal-immigrants/> (June 22, 2009, 17:08 EST).

²³⁴ See Judis, *Border War*, *supra* note 164, at 17 (reporting that “even Latinos” in Arizona “were worried about the burden that illegal immigrants were placing on schools and hospitals”).

A few examples of responses to stories about Luis Jimenez or other immigrants being cared for in U.S. hospitals are suggestive:

“Yes. He should be sent back. Why should taxpayers have to pay the Extreme Medical Expenses incurred for [UNDOCUMENTED] Comatose Patients? We have enough freeloading people depleting our resources in the US who ARE Americans & Documented. This is why we won't have any benefits when the Americans are retirement age.”

Posting of Sylvia, responding to Judith Graham, *Sending Sick Undocumented Immigrants Back Home*, CHI. TRIB., Aug. 20, 2008, <http://newsblogs.chicagotribune.com/triage/2008/08/sending-sick-un.html> (Aug. 20, 2008, 10:08 EST) (brackets and capitalizations in original).

“Overpopulation, congestion, urban sprawl, crime, pollution, diminishing resources, vanishing farm land and green space, failing schools, inadequate health care, increased taxation, the balkanization of our communities, depressed wages, declining quality of life are all the result of unconstrained immigration. . . . Until someone makes a case for ‘more people chasing fewer resources’ the only sane option is to secure our borders and enforce our existing immigration laws.”

Posting of edweirdness, responding to Richard Wolf, *Rising Health Care Costs Put Focus on Illegal Immigrants*, USA TODAY, Jan. 22, 2008, http://www.usatoday.com/news/washington/2008-01-21-immigrant-healthcare_N.htm (Jan. 29, 2008, 11:26:40 EST).

“Illegal aliens have no right to be in our country!!They broke the law They think they can come here and live just like an American citizen. Everything we pay for they freely use.They have inundated our schools,hospitals,jails,parks.EVERYTHING THE HONEST HARDWORKING AMERICAN PAYS FOR THEY USE. . . . I'M LOOKING FORWARD TO ALL THE ILLEGAL ALIENS BEING DEPORTED!!!!”

Posting of susan, responding to Opinion Staff, *Give Illegal Immigrants Health Care?*, PALM BEACH POST.COM, <http://blogs.palmbeachpost.com/opinionzone/2009/06/20/give-illegal-immigrants-health-care/> (June 22, 2009, 1:23 EST).

“We are too generous here in the usa with free schooling, social programs and health care that some america's go without. What we need is an immigration policy that would have found and deported him before this happened.”

Posting of Jerry Powers, responding to Opinion Staff, *Give Illegal Immigrants Health Care?*, PALM BEACH POST.COM, <http://blogs.palmbeachpost.com/opinionzone/2009/06/20/give-illegal-immigrants-health-care/> (June 22, 2009, 1:26 EST).

The responses noted here were selected because they seem representative of a much larger set of internet commenters' responses. This Article makes no quantitative claims about the frequency of each sort of response. Rather, it aims to characterize the contentions underlying anti-immigrant rhetoric, especially with regard to the provision of health benefits for undocumented immigrants. Spelling and grammatical errors have not been corrected in reproducing internet commenters' texts and are not marked with the term “sic”; the frequency with which the term would need to be used would make it difficult to read the comments.

²³⁵ See *supra* Part II.B.

b. Socio-cultural Competition

Correlatively, immigrants are portrayed as socio-cultural outsiders who threaten mainstream culture. Anti-immigrant voices, responding to media reports about immigrants working in low-paying jobs and, even more, about immigrants seeking or receiving social benefits in the U.S., have connected an understanding of immigrants as sources of unfair and undesirable economic competition with an understanding of immigrants as social and cultural outsiders.²³⁶ Immigrants from Mexico and neighboring countries are described as a threat to the survival of “American” culture.²³⁷ In 2006, John Judis reported that anti-immigrant Arizonans were “fret[ting] about ‘Mexicanization’—about Arizona becoming a ‘Third World country’ or ‘the next Mexifornia.’”²³⁸ They accused Hispanic immigrants of lacking any interest in assimilation, and thus in the “American way.”²³⁹ Judis quoted a local congressional candidate, who exemplified this view:

I don’t have any problem about anyone who wants to salute our flag and learn our language and be a citizen. What got me into the whole issue was that I was standing in line in a Safeway, and this woman was ahead of me, and she had an infant, and was pregnant, and her mother was with her. She was paying for groceries in food stamps. And, when the clerk asked for her signature, she acted like she didn’t understand English, and neither did her mother. I found it odd that an entire family could be here on welfare and not speak any English.²⁴⁰

²³⁶ See, e.g., Posting of nick the greek, responding to Landers, *supra* note 81, http://www.dallasnews.com/sharedcontent/dws/news/washington/jlanders/stories/0522DNBUShealthcare.25377b8.html?ocp=6#slegm_comments_anchor&skipReg=false (“So what’s new? Health care, schmealth care! What differences does it make! Just as always, they’ll show up for stab and gunshot wound treatments, child birth and whatever else they might need, and as usual, good, ol’ U.S. citizen taxpayer’ll pick up the tab.”).

²³⁷ See Judis, *Border War*, *supra* note 164, at 17; Judis, *Phantom Menace*, *supra* note 1, at 22.

²³⁸ Judis, *Border War*, *supra* note 164, at 17.

²³⁹ One internet commenter explained that illegal immigrants increase the nation’s health care costs and undermine the school system. This person further declared:

When I see these illegal aliens marching in our streets, waving the Mexican flag, I know these people do NOT want to be citizens other than to make money to send back to their HOME country and to get benefits from the US citizen. They are not trying to become Americans and they do not want to learn the American way.

Posting of brown, responding to Wolf, *supra* note 234, <http://content.usatoday.com/community/comments.aspx?id=30761282.story&p=2> (Jan. 23, 2008, 12:23:06 EST).

²⁴⁰ Judis, *Border War*, *supra* note 164, at 17.

Anti-immigrant Americans punctuate this picture of immigrants as cultural aliens by imputing a number of specific, negative characteristics to immigrants. In particular, they imagine immigrants as criminals,²⁴¹ un-American,²⁴² and diseased.²⁴³ The ideology underlying these claims is largely populist, grounded in a challenge to corporate authority and to disdain for immigrant laborers.²⁴⁴

Each claim (that immigrants are criminals, un-American, and diseased) can be, and often is, presented as evidence that immigrants are inherently unworthy of receiving American social benefits. Some, for instance, accuse "liberal" media of "support[ing] illegal law-breakers instead of American or legal citizens. . . ." ²⁴⁵ Some argue that "law-breakers" should not receive health care coverage.²⁴⁶ Others entertain the specter of an immigrant "invasion,"²⁴⁷ and the consequent loss of "America" to the global elites and Mexican immigrants.²⁴⁸ And still others portrayed immigrants as vectors of disease, and explained that im-

²⁴¹ See, e.g., Posting of Mr. Fustion to Dvorak Blog, <http://www.dvorak.org/blog/2009/06/22/should-hospitals-deport-illegal-immigrants> (June 22, 2009 22:15 EST).

²⁴² See, e.g., Posting of brown, *supra* note 239.

²⁴³ See, e.g., Posting of SPQR_US, responding to Wolf, *supra* note 234, <http://content.usatoday.com/community/comments.aspx?id=30761282.story&p=11> (Jan. 22, 2008, 14:22:43 EST).

²⁴⁴ See, e.g., David S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* 24–25 (Harcourt 2000).

²⁴⁵ Posting of Americana, responding to Judith Graham, *Sending Sick Undocumented Immigrants Back Home*, CHI. TRIB., Aug. 20, 2008, <http://newsblogs.chicagotribune.com/triage/2008/08/sending-sick-un.html> (Aug. 20, 2008 11:38 EST). The author was responding to an article in the *Chicago Tribune* about the deportation of non-paying immigrant patients and added:

I sure wish the Tribune would stop already with the sob stories about the illegals. Their reporting is so biased as to TRY to make us feel sorry for people who have no objection whatsoever to breaking multiple laws to be in this country. Sorry, that just is not flying for many people anymore. . . . The liberal media is so willing to stand up for lawlessness instead of reporting on the burden that illegals place on our country.

Id.

²⁴⁶ One internet commenter, responding to the same *Chicago Tribune* story declared: "These leaches broke the law. They don't deserve medical care in the first place. Let them rot in the gutter." Posting of Carl, responding to Graham, *supra* note 245, <http://newsblogs.chicagotribune.com/triage/2008/08/sending-sick-un.html> (Aug. 20, 2008, 10:39 EST).

²⁴⁷ Posting of John Doe 2, responding to Wolf, *supra* note 234, <http://content.usatoday.com/community/comments.aspx?id=30761282.story&p=4> (Jan. 22, 2008, 4:22:39 EST).

²⁴⁸ One worried that "our borders, language and American culture are lost it won't really matter anymore because the global elite will have accomplished there goals by that time, it's the common American citizens that will become the losers if they keep allowing the pro-illegal shills to continue to dance around us. . . ." Posting of Alamo Joe, responding to Wolf, *supra* note 234, <http://content.usatoday.com/community/comments.aspx?id=30761282.story&p=4> (Jan. 22, 2008, 4:24:50 EST).

migrants would swamp the health care system and introduce serious illnesses to the American public.²⁴⁹

3. Characteristics of this Rhetoric

This anti-immigrant, anti-Hispanic rhetoric is characterized by a set of distinct features. Some of these features characterize prejudicial rhetoric generally; others do not. This rhetoric is transparently prejudicial. Its tone is especially harsh. It occurs in both the presence *and* in the absence of the targeted group. And it is disaffirming and condemnatory without being concrete.

a. The Transparency of Anti-immigrant/Anti-Hispanic Rhetoric

The explicit, intense anger directed at undocumented immigrants from Mexico and neighboring nations demands attention and study. Susan Fiske, a psychologist and student of prejudicial rhetoric, characterizes anti-Mexican rhetoric as distinctly transparent.²⁵⁰ In general, Fiske notes, Americans have learned to disguise prejudicial responses.²⁵¹ Expressions of sexism and racism, for instance, are more opaque than was the case years ago.²⁵² Once, Fiske reports, Americans would have described Blacks as lazy, Jews as sly, and women as “dumb or bitchy.”²⁵³ Today people are more circumspect, even if they are not necessarily free of prejudice.²⁵⁴

Yet, Fiske pinpoints an exception to the move away from transparent expressions of prejudice.²⁵⁵ Negative responses toward Mexican immigrants, according to Fiske, are much more explicit than most contemporary expressions of prejudice.²⁵⁶ She refers, for example, to the

²⁴⁹ One person, responding to a news article about U.S. care for sick immigrants explained that “[m]any times, it they [undocumented immigrants] had tryied [sic] to enter legally these people would never have passed the required medical examination. There are too many people with TB and leprosy sneaking in already.” Posting of BOB C, responding to Graham, *supra* note 245, <http://newsblogs.chicagotribune.com/triage/2008/08/sending-sick-un.html> (Aug. 20, 2008, 6:19 EST). Another explained, somewhat more hysterically: “Illegal Aliens are bringing plagues of diseases to the US and anyone that is near them is at risk; Typhoid, Scarlet Fever, Small Pox, plague, and polio are common in rural Mexico” Posting of SPQR_US, responding to Wolf, *supra* note 234, <http://content.usatoday.com/community/comments.aspx?id=30761282.story&p=10> (Jan. 22, 2008, 14:22:43 EST).

²⁵⁰ See Susan T. Fiske, *Are We Born Racist?*, GREATER GOOD, Summer 2008, at p. 14.

²⁵¹ *Id.* at 15.

²⁵² *Id.* at 14–15.

²⁵³ *Id.* at 14.

²⁵⁴ Fiske adds: “Our own prejudice—and our children’s and grandchildren’s prejudice, if we don’t address it—takes a more subtle, unexamined form.” *Id.* at 14–15. Thus, Fiske worries that prejudice survives despite the more muted tones of its expression.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 14.

portrait of Mexican immigrants as “criminals”—a characterization, Fiske notes, that is belied by the facts: “[C]rime rates in Latino neighborhoods are lower than those of other ethnic groups at comparable socioeconomic levels.”²⁵⁷

This survival of an old pattern—angry, explicit expressions of prejudice against “out” groups—in contemporary characterizations of Hispanic immigrants suggests a continuing need in the United States for a group filling the role of disparaged “Other.”

b. The Tone and Intensity of Anti-immigrant Rhetoric

In effect, American society seems to have identified a peculiar license to say things about Hispanic immigrants that Americans no longer generally say about other groups of people, at least not openly. That license facilitates the harsh, often deeply angry tone of much anti-immigrant, anti-Hispanic rhetoric. As Fiske notes, criminality is often attributed to Hispanic immigrants despite an absence of evidence in support of the characterization.²⁵⁸ Even more, anti-immigrant voices that clamor for the “deportation” of all Mexicans or of all “illegal” immigrants support their demand by characterizing members of these groups as drug users and gang members or as dirty, un-American bearers of contagion.²⁵⁹

An organization that calls itself “The American Resistance” maintained a blog that sported particularly vituperative rhetoric about immigrants.²⁶⁰ The tone of the postings on this website is far angrier than the tone of many other anti-immigrant websites.²⁶¹ Postings to the American Resistance website, for instance, describe “politicians [who]. . . pander to illegal aliens, not to their own citizens,”²⁶² and exclaim about “all the bad people from Mexico,” characterized as rapists and murderers,²⁶³ and about immigrants from “Central America” who bring “poverty, crime,

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ See *supra* notes 241–43 and accompanying text (quoting negative characterizations of immigrant groups). This Article suggests, *infra* Part IV, that calls for deportation are, ironically, motivated in large part by the comparative *good* health of Hispanic immigrants.

²⁶⁰ The group seems not to maintain the website at this point. The entries in question, posted under Contact Us - Feedback, on The American Resistance website are still available at <http://www.theamericanresistance.com/feedback/feedback.html>.

²⁶¹ The angry tone of postings on the site found in responses from those expressing anti-immigrant sentiments and also from those opposing the first group. See Contact Us - Feedback to The American Resistance Foundation, <http://www.theamericanresistance.com/feedback/feedback.html> (last visited Feb. 10, 2010).

²⁶² Posting of L.R., *id.* (July 9, 2006).

²⁶³ Posting of J.H., *id.* (April 8, 2006). The actual language reads: “We are getting all the bad people from Mexico. Rapist, Muders, gangs and so on . . .” *Id.*

gangs" with them and "get[] everything for free while we the legal citizens . . . pay[]."²⁶⁴

c. Anti-Immigrant Rhetoric in the Absence of Immigrants

Tellingly, anti-immigrant rhetoric is not limited to states with significant undocumented immigration or to states experiencing significant immigration from Mexico and its neighbors. New Hampshire, for instance, is ranked near the bottom of a list of states ordered by the number of undocumented immigrants living in them.²⁶⁵ Yet, according to John Judis, writing in 2008, almost one quarter of those who voted in the previous GOP primary in New Hampshire told exit poll takers that immigration was the most serious problem facing the nation.²⁶⁶ Judis reports similar negativity about undocumented immigrants in other states that have comparatively small immigrant populations, including Kansas and Ohio.²⁶⁷ Residents of each state blame immigrants for their state's ills.²⁶⁸ Judis reports that in one white, rural, congressional district in Kansas, the Democratic representative in Congress received large numbers of complaints about undocumented immigrants.²⁶⁹ And in the central states, more than 30 percent of people—the highest percent within any geographic region in the United States—reported that immigrants "take jobs from native workers."²⁷⁰ Yet, no central state is among the top five in the United States as rated by percent of undocumented immigrants within the population, and only one, Illinois, is among the top ten.²⁷¹ Clearly, something other than, or at least something more than, contact with, or actual competition from, undocumented immigrants accounts for the proliferation of negative portraits of undocumented immigrants.

²⁶⁴ Posting of I.L., *id.* (Oct. 23, 2004). This internet commenter claimed to be a "latino legal immigrant" who "paid . . . dues" and "never got anything for free." *Id.*

²⁶⁵ Judis, *Phantom Menace*, *supra* note 1, at 21 (noting that according to the Pew Hispanic Center, New Hampshire ranks 42 of 50 states in this regard).

²⁶⁶ *Id.* The Pew Hispanic Center reports that only 2% of the New Hampshire population is Hispanic. Pew Hispanic Center, Demographic Profile of Hispanics in New Hampshire, 2007, <http://pewhispanic.org/states/?stateid=NH>.

²⁶⁷ Judis, *Phantom Menace*, *supra* note 1, at 21.

²⁶⁸ *Id.*

²⁶⁹ *Id.* The representative in question was Nancy Boyda, who represented the state's second congressional district in 2007–2008. She was defeated in November 2008. See GovTrack.us, <http://www.govtrack.us/congress/person.xpd?id=412210> (last visited July 13, 2009).

²⁷⁰ HAGSTROM, *supra* note 183, at 7. The central region of the United States has had fewer immigrants than others. See Steven A. Camarota & Nora McArdle, Center for Immigration Studies, *Where Immigrants Live*, Table 7, (Sept. 2003) <http://www.cis.org/articles/2003/back1203table7a.jpg>. Illinois is an exception; however, Illinois has had fewer immigrant settlers than other states, including California and Texas. See *id.*

²⁷¹ PASSEL & COHN, *supra* note 91, at 4. The five states with the largest population of undocumented immigrants in the U.S. in 2008 were, in descending order, California, Texas, Florida, New York, and New Jersey. *Id.*

d. Unsupported Slurs

In addition, the claims spawned by this rhetoric are rarely supported by examples, statistics, or any other sort of data. Undocumented immigrants are referred to as “criminals”; they are described as drug users; they are characterized as dirty and as carriers of contagious illnesses. Each claim is voiced with insistence, but without support.

Anger, frustration, and worry fill the spaces in which one might expect data or illustrative stories. These emotions, it would seem, came before, and can likely survive independently of, their presumptive target. Even those clamoring for the “deportation” of all Mexicans or all “illegal” immigrants write as if the case, somehow, speaks for itself. They rely on the “fact” of illegality as proof that undocumented immigrants cannot be trusted. Others offer accounts of their own hard luck and financial anxieties, as if those accounts constitute proof that “illegal” immigrants are responsible for the speaker’s plight—and that they are thus anathema. Some declare that were they only “illegal,” their economic woes would be addressed. One person, for instance, who responded to an MSNBC story about cuts in benefits for undocumented immigrants, proclaimed that she was denied health care coverage for a sick husband because “we are not illegals.”²⁷² “I was pissed,” she added, “and let it be known. I am tired of paying for health care for people in this state illegally.”²⁷³

This lament is representative of many. For this person, “illegals” (as she referred to undocumented immigrants) provide evidence in their very being of the unfair hand that she believes fate has dealt to her and to her husband. Another, responding to the same story, explained: “California is the most filled with illegals, and is the most broke. These things go hand in hand.”²⁷⁴ The writer’s accusation is grounded in assumed fact and in unsupported presumptions.

The intensity and repetition of characterizations of undocumented immigrants as rapacious, un-American, and diseased seem to displace efforts to present evidence on which to rest the conclusion that the targets of the anger are in fact responsible for its underlying causes.

²⁷² Posting of Margarita Mommy, responding to *Recession Cuts Illegal Immigrants’ Health Care: Calif. County Among 1st to Take Drastic Step, Deny Non-Emergency Services*, MSNBC.COM, Mar. 15, 2009, http://health.newsvine.com/_news/2009/03/15/2550063-recession-cuts-illegal-immigrants-health-care#comments (Mar. 15, 2009, 17:18 EST).

²⁷³ *Id.*

²⁷⁴ Posting of Robin Steele, responding to *Recession Cuts Illegal Immigrants’ Health Care: Calif. County Among 1st to Take Drastic Step, Deny Non-Emergency Services*, MSNBC.COM, Mar. 15, 2009, http://health.newsvine.com/_news/2009/03/15/2550063-recession-cuts-illegal-immigrants-health-care#comments (Mar. 15, 2009, 18:06 EST).

B. *Whose Voice Is It?*

Contemporary anti-immigrant sentiment finds ideological ancestors in the Know-Nothings and populists of the nineteenth century.²⁷⁵ Within the last decade, the sentiment has coalesced into a new movement with leaders who include white supremacists, nativists, and more mainstream media pundits and politicians.²⁷⁶ Among the latter two groups are radio and TV commentator Lou Dobbs and former-Representative Tom Tancredo from Colorado.²⁷⁷ Together Dobbs and Tancredo played a central role in popularizing rhetoric about the threat immigrants pose to the “American” way of life.²⁷⁸

In the first decade of the twenty-first century, that rhetoric has provided a scapegoat on which to focus socioeconomic anxieties felt by a broad spectrum of the public,²⁷⁹ including, in particular, the so-called “intermediate strata.”²⁸⁰ This category is situated at the lower, but not the lowest, end of the nation’s socioeconomic hierarchy.²⁸¹ It includes those with incomes above the federal poverty level—people who generally earn too much to be eligible for governmental benefits such as Medicaid or Food Stamps—but who do not earn enough to feel secure about their present lives or about the future.²⁸²

A 2006 survey characterized those earning about \$50,000 per year (roughly commensurate with the “intermediate strata”) as sitting on a “big divide.”²⁸³ People earning less see themselves as poor.²⁸⁴ People earning more generally feel that they can manage financially.²⁸⁵ Those at the “divide” are not sure that they can preserve their present social and economic status.²⁸⁶ They fear competition from those deemed

²⁷⁵ Judis, *Phantom Menace*, *supra* note 1, at 21.

²⁷⁶ See Leonard Zeskind, *The New Nativism: The Alarming Overlap Between White Nationalists and Mainstream Anti-Immigrant Forces*, THE AM. PROSPECT, Nov. 2005, at A15.

²⁷⁷ *Id.*

²⁷⁸ See *infra* Part IV.B.

²⁷⁹ See Judis, *Phantom Menace*, *supra* note 1, at 21.

²⁸⁰ *Id.* at 22. In the early twenty-first century, the intermediate strata includes, among others, “workers who lack adequate technical training or whose jobs are being sent overseas.” *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ STAN GREENBERG ET AL., THE ECONOMIC DISCONNECT, HOW THE LEFT AND THE RIGHT GOT IT WRONG 3 (Greenberg Quinlan Rosner Research eds. 2006), http://www.epi.org/page/-old/books/talking/greenberg-lake_report.pdf. The precise income level that defines the “divide” may have changed in light of larger economic shifts.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

"lower."²⁸⁷ And they worry that the nation is becoming a less hospitable place for them.²⁸⁸

For this socioeconomic group, undocumented and new immigrants constitute *both* a scapegoat on which to displace social and economic worry²⁸⁹ and a source of reassurance in comparison to the Self. The next part of this Article considers some ideological and political consequences of these often conflicting motivations. It focuses, in particular, on the role these motivations play in shaping Americans' responses to state-funded health care.

IV. ANTI-IMMIGRANT RHETORIC, ILLNESS, AND HEALTH CARE

Anti-immigrant responses to the jury verdict for the hospital in Luis Jimenez's false imprisonment suit reflect each understanding or, more accurately, each "use" of undocumented immigrants.²⁹⁰ This part considers each understanding and suggests an ironic mediation between the

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 5. The researchers reported that almost two-thirds of the "blue-collar" respondents agreed with the statement that "[m]ost people today face increasing uncertainty about employment, with stagnant incomes, paying more for health care, taxes and retirement, while those at the top have booming incomes and lower taxes."

²⁸⁹ Judis, *Phantom Menace*, *supra* note 1, at 22.

²⁹⁰ The following are illustrative of responses treating immigrants as scapegoats:

"The hospital, which spent more than \$1.5 million on Jimenez's care . . ." Maybe THAT's the new health care plan that this country needs. We should all renounce our citizenship, declare ourselves to be illegals, and then we'd get all of the FREE health care we'd ever need. Seems viable to me. Oh . . . but wait . . . there'd be no SUCKERS left to foot the tax bill.

Posting of tjcruster, responding to *Jury OKs Hospital's Repatriation of Injured Illegal Immigrant*, USA TODAY, July 27, 2009, <http://content.usatoday.com/communities/ondeadline/comments/2009/07/68495459/3> (July 27, 2009, 12:52:32, EST).

Another, responding to the same blog posting, declared: "And guess who pays for the 1 1/2 Mil already spent? that's right, and if you are still wondering who, the folks who live in that state have cities named Tampa, Miami, and Orlando. And will you get a big thank you? OH, no!" Posting of atilla the hun, responding to USA TODAY, *supra*, <http://content.usatoday.com/communities/ondeadline/comments/2009/07/68495459/3> (July 27, 2009, 13:46:57 EST). (The original includes multiple exclamation points after the last word. They are omitted here.)

Still other responses of a similar ilk are even more transparent in their nativistic scorn:

. . . . I read the first article . . . \$30,000 for a flight is a lot cheaper than the \$1.5 million that 3 YEARS of care cost. And his course, the legal guardian wanted to sue US for \$1 million PLUS, "damages." The million was to pay for his . . . "lifetime support?" Hmm. . . Now. . . the last time I check, the Statue of Liberty had not grown multiple teats from which to feed all nation. "Give me your tired, your poor . . . ?" So we can support them and become a welfare nation??

Posting of Old Nurse, responding to USA TODAY, *supra*, <http://content.usatoday.com/communities/ondeadline/comments/2009/07/68495459/1> (July 29, 2009, 2:32:07 EST).

The following are illustrative of efforts to portray immigrants at the lowest edge of the nation's socioeconomic hierarchy:

Send these illegal immigrants back. .they are a drain on our system! They don't produce, they drive around drunk all the time and get let go to offend again. Census should not count the illegal residents. They are here illegally anyway and have no

strain of anti-immigrant narratives that blames immigrants for America's economic and social problems, and calls for mass deportation,²⁹¹ and the strain that depends on immigrants' continued presence as a socioeconomic buffer. This second strain, which locates immigrants at the bottom of the nation's socioeconomic ladder, constitutes a source of solace, however misguided, to those who, comparing their status to that attributed to the immigrant Other, can thereby view their own apparently fragile status less forlornly than they otherwise might.

Section A of this part focuses on the social process of "somatization"²⁹² of the poor immigrant in anti-immigrant narratives. Section B presents data about immigrants' actual health status. This data does not support the narratives' central claims. Finally, Section C suggests that calls for deporting immigrants gain strength to the extent that those voicing anti-immigrant narratives are faced with the gap between the narrative and reality.

A. *Portraits of Poor Immigrants' Bodies*

Contemporary anti-immigrant narratives belong to a larger class of stories about the bodies of poor people.²⁹³ Distinctive physical traits associated with poverty exacerbate an impulse to segregate sick people from well people, and poor people from others.²⁹⁴ "People with power," explains David Berreby, "are often quick to capitalize on the mind's in-

constitutional rights here. Why coddle them as if they are law abiding US citizens deserving Medicare, Welfare, Healthcare?

Posting of BOzRulz, responding to USA TODAY, *supra*, <http://content.usatoday.com/communities/ondeadline/comments/2009/07/68495459/2> (July 27, 2009, 16:22:16 EST).

Another, writing before the jury verdict, declared:

Our country is already being swamped by foreign nations who cannot speak or write English and unable to comprehend road warning signs. Amongst the impoverished, the sick and others carry contagious diseases, comes the gang members, rapists, murders and other criminal elements. Those caught have already compromised our overcrowded penal system. Each day there is carnage on the highways to American family members.

Posting of Britannicus to Illegal Alien News, <http://illegalaliennews.blogspot.com/2009/07/opening-statements-begin-in-illegal.html> (July 7, 2009, 15:30 EST).

²⁹¹ The immigrant's departure would prove salutary for those calling for deportation only, of course, if immigrants actually cause the socioeconomic problems of which those expressing anti-immigrant rhetoric complain.

²⁹² Patrizia Panarella, *Educational and Anthropological Perspectives: An Italian View of Migration in Multi-cultural Urban Spaces*, SOCIAL WORK & SOCIETY, Vol. 6 Issue 1 (2008), <http://www.socwork.net/2008/1/articles/panarello>.

²⁹³ See, e.g., SIMON P. NEWMAN, EMBODIED HISTORY: THE LIVES OF THE POOR IN EARLY PHILADELPHIA 143 (Univ. of Pennsylvania Press 2003) (describing the embodiment of poverty in post-Colonial Philadelphia); Janet L. Dolgin, *Class Competition and the Failure of American Health Care: A Recent Illustration*, 70 LA. L. REV. (forthcoming 2010) (describing the "embodied" poor in rhetoric aimed at precluding expanded health care for poor children).

²⁹⁴ See, e.g., NEWMAN, *supra* note 293; Dolgin, *supra* note 293.

nate fear of sickness.”²⁹⁵ Berreby therein accounts for a general tendency within disparate societies to characterize “despised groups” with terms suggesting that they are sick or diseased.²⁹⁶ Such characterizations have a particular use in the United States, where people are uncertain about how to rank economic status above the level of abject poverty.²⁹⁷ The embodiment of the “poor” body through signs of illness (the social somatization of poverty) carries powerful messages for assessments of status.²⁹⁸

Even more, anti-immigrant narratives characterize undocumented immigrants as un-American even in their presumed debilities. Here, a clear distinction has been offered by anti-immigrant voices between documented and undocumented immigrants. A startling rendition of this construction appears in an article by Madeleine Perner Cosman entitled “Illegal Aliens and American Medicine.”²⁹⁹ Cosman’s account has been repeated often and has become an integral part of multiple versions of the anti-immigrant narrative.³⁰⁰ She contrasts “legal” immigrants with “illegal aliens” and asserts that “[t]he influx of illegal aliens has serious hidden medical consequences.”³⁰¹ “Legal” immigrants, she reports, “must demonstrate that they are free of communicable diseases and drug addiction to qualify for lawful permanent residency green cards.”³⁰² In contrast, argues Cosman, “[i]llegal aliens simply cross our borders medically unexamined, hiding in their bodies any number of communicable diseases.”³⁰³ She explains: “By default, we grant health passes to illegal aliens. Yet many illegal aliens harbor fatal diseases that American

²⁹⁵ DAVID BERREBY, *US AND THEM: UNDERSTANDING YOUR TRIBAL MIND* 245 (Little, Brown and Company 2005).

²⁹⁶ *Id.*

²⁹⁷ PUBLIC VIEWS ON SCHIP, *supra* note 223.

²⁹⁸ Simon Newman suggested that bodies told the tale of class status in early Philadelphia. See NEWMAN, *supra* note 293, at 1–3, 14, 144–47. Even more, narratives that portray poor immigrants through their physicality can serve as powerful instruments of prejudice. Susan Fiske reports that functional MRI scans of subjects looking at photographs of a homeless man revealed activation of brain areas associated with disgust. Susan T. Fiske, *Look Twice*, GREATER GOOD 14, 15 (Summer 2008) [hereinafter Fiske, *Look Twice*]. Moreover, reports Fiske, the areas of the brain activated when people think about other people were not activated when study subjects saw pictures of the homeless. *Id.*

²⁹⁹ Madeleine Perner Cosman, *Illegal Aliens and American Medicine*, 10 J. AM. PHYSICIANS & SURGEONS 1, 6 (2005). Cosman is identified as a “medical lawyer, who formerly taught medical students at the City University of New York.” *Id.* at 9.

³⁰⁰ See ANTI-DEFAMATION LEAGUE, IMMIGRANTS TARGETED: EXTREMIST RHETORIC MOVES INTO THE MAINSTREAM, 1, 13 (2008), http://www.adl.org/Civil_Rights/anti_immigrant/Immigrants%20Targeted%20UPDATE_2008.pdf.

³⁰¹ Cosman, *supra* note 299, at 6. The journal’s name resembles that of the mainstream *Journal of the American Medical Association*, but it is unrelated.

³⁰² *Id.* at 8.

³⁰³ *Id.* at 6, 8.

medicine fought and vanquished long ago, such as drug-resistant tuberculosis, malaria, leprosy, plague, polio, dengue, and Chagas disease.”³⁰⁴

From one perspective, the presumption that “illegal aliens” suffer from serious illnesses that are unusual in the American context might provide support for extending health care to members of this group. But in Cosman’s view and that of others who share her sentiments, the presumptively un-American illnesses born by “illegal aliens” have rendered them so marginal to the American health care system that including them in its reach would destroy the health care system and threaten the nation’s values:

We must choose either to surrender medicine to illegal aliens, or to fight illegal aliens. Surrender to illegal aliens is surrender to collectivist America: land of moral ambiguity and home of pacifist appeasement. Fighting against illegal aliens is fighting for individualistic American: land of moral strength, and home of responsible liberty.

As we fight to reclaim medicine, so we defend our nation.³⁰⁵

Cosman’s portrait of undocumented immigrants as “natural” sources of “foreign” illness, gives emotional weight to arguments that favor excluding undocumented immigrants from governmentally funded health care programs. In Cosman’s narrative of the “illegal alien,” the goal is to safeguard American medicine from those who bear “fatal diseases,” long since “vanquished” in the United States.

Other groups have followed Cosman’s lead. Mothers Against Illegal Aliens, for instance, posted a rant on its website that described immigrant workers as diseased, and suggested that people who “eat in a restaurant or sleep in a hotel or motel” should “remember to bring [their] own food, dishes, utensils [sic], glasses, towels, and maybe [their] own water” in order to afford protection from diseased immigrants’ working in restaurants and in hotels and motels.³⁰⁶

Such accounts suggest that American medicine cannot and should not help people whose very bodies offer witness to their essential Otherness.³⁰⁷ Even more, anti-immigrant narratives depicting the sicknesses that presumptively riddle “illegal” immigrants’ bodies aim, however unself-consciously, to reassure those in the intermediate strata that some

³⁰⁴ *Id.* at 6.

³⁰⁵ *Id.* at 9.

³⁰⁶ ANTI-DEFAMATION LEAGUE, *supra* note 300, at 13.

³⁰⁷ Cosman, *supra* note 299, at 9 (concluding that the “fight to reclaim medicine [from “aliens”] is the defense of “our nation”).

identifiable Other populates the lowest rungs of the nation's socioeconomic ladder. The more obvious the immigrant's Otherness, and the more often it is projected in anti-immigrant narratives, the easier it becomes for self-defined insiders to view immigrants as a *reassuring* socioeconomic buffer that safeguards the insiders' own socioeconomic positioning.³⁰⁸

B. *The Facts and the Narrative*

Accounts such as Cosman's³⁰⁹ have been widely disseminated through mass media³¹⁰ and repeated by diverse anti-immigrant voices,³¹¹ but they do not reflect reality. National television personality Lou Dobbs reported on CNN's *Lou Dobbs Tonight* that "unscreened illegal immigrants" brought 7,000 cases of leprosy into the United States between 2002 and 2005.³¹² In fact, there have been about 7,000 cases in the United States in the last three decades, with a small peak of new cases in 1983 (two decades before the period on which Dobbs focused).³¹³ Dobbs was called to task for the misstatement and others of a similar ilk.³¹⁴ He backtracked, but did not expressly acknowledge that his claims were misguided.³¹⁵

³⁰⁸ Cosman's platform differs from that of many others making similar claims in that her voice is presented in the pages of a presumptively professional journal and is accompanied by references and footnotes. The Association of American Physicians and Surgeons (AAPS) describes itself as "a non-partisan professional association of physicians in all types of practices and specialties across the country. Since 1943, AAPS has been dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship and the practice of private medicine." Association of American Physicians and Surgeons Home Page, <http://www.aapsonline.org/> (last visited July 17, 2009). However, others describe the group quite differently. For instance, Stephanie Mencimer reports that "despite the lab coats and the official-sounding name, the docs of the AAPS are hardly part of mainstream medical society. Think Glenn Beck with an MD." Stephanie Mencimer, *The Tea Party's Favorite Doctors: They're Not Just Against Health Care Reform*, MOTHER JONES, Nov. 18, 2009, <http://motherjones.com/politics/2009/11/tea-party-doctors-american-association-physicians-surgeons>. Cosman's assumptions about "immigrant aliens" undergird much anti-immigrant rhetoric in the U.S. See *supra* notes 299–307 and accompanying text.

³⁰⁹ Cosman, *supra* note 299; *supra* notes 299–307 and accompanying text.

³¹⁰ See ANTI-DEFAMATION LEAGUE, *supra* note 300.

³¹¹ *Id.* The U.S. Department of Health and Human Services reports just over 7,000 cases of leprosy in the United States in the last three decades, and does not attribute those cases to immigrants, in particular. *Id.*; MALDEF, *Leprosy and Lou: Fact-Checking Lou Dobbs*, May 6, 2007, http://www.maldef.org/truthinimmigration/leprosy_and_lou_fact-checking_lou_dobbs3202008/.

³¹² ANTI-DEFAMATION LEAGUE, *supra* note 300, at 25.

³¹³ David Leonhardt, *Truth, Fiction and Lou Dobbs*, N.Y. TIMES, May 30, 2007, at C1. In 1983, there were 456 reported cases of leprosy in the U.S. In 2000, there were only 76 cases. *Id.*

³¹⁴ *Id.*

³¹⁵ One reporter, who spoke with Dobbs, concluded that Dobbs both "admitted" that he was wrong ("sort of") and insisted that he was right. *Id.*

Claims such as those broadcast by Dobbs are lurid versions of more widespread assumptions about the health status of undocumented immigrants.³¹⁶ Yet, warnings about the dangers of contact with diseased

³¹⁶ Among additional examples are the following: "They ["Illegal immigrants"] have no sanitation, and are surrounded by mounds of garbage." The author reported that "illegal immigrants" have brought chagas disease, leprosy, and "antibiotic resistant strains" of tuberculosis. Posting of stsmith to City-Data.com, <http://www.city-data.com/forum/illegal-immigration/187354-illegal-immigrants-spreading-disease.html> (Nov. 3, 2007, 16:57 EST). Another, posting a comment on the same website, reported knowing "four people who have contracted TB in the lpast 2 years. The father/gradfather contacted it working i[n] a shelter where illegal aliens resided." Posting of Choctaw2 to City-Data.com, <http://www.city-data.com/forum/illegal-immigration/187354-illegal-immigrants-spreading-disease.html> (Nov. 3, 2007, 22:42 EST).

The so-called swine flu pandemic that started in the spring of 2009 refueled accusations against Mexicans as vectors of disease. Glock20, responding to an April 2009 news story about swine flu in Ohio, declared;

Most of the people that are brining it [swine flu] back, should have never been allowed in this country in the first place. They were down there visiting family, and I would bet that their citizen status is open for debate. First, they were a social scourge, and now they are a biological one.

Posting of Glock20, responding to Karen Matthews, *Swine Flu Fears Close Schools in Ohio, 4 Other States*, OHIO.COM, Apr. 27, 2009, http://www.ohio.com/news/top_stories/43774827.html (Apr. 27, 2009, 15:49 EST).

Several conservative talk-show hosts invoked a specter of dangerously-ill Mexicans ready to contaminate the population of the United States. During the April 24, 2009, edition of his nationally syndicated radio show, Michael Savage stated: "Make no mistake about it: Illegal aliens are the carriers of the new strain of human-swine avian flu from Mexico." He added:

How do you protect yourself? What can you do? I'll tell you what I'm going to do, and I don't give a damn if you don't like what I'm going to say. I'm going to have no contact anywhere with an illegal alien, and that starts in the restaurants. . . . I will have no any illegal alien workers around me. I will not have them in any of my properties, I will not have them anywhere near me.

MediaMatters for America, *Paranoia Pandemic: Conservative Media Baselessly Blame Swine Flu Outbreak on Immigrants*, April 27, 2009, <http://mediamatters.org/research/200904270037> (quoting Michael Savage, *The Savage Nation*, Apr. 24, 2009). Savage further stated:

Now, I'm going to talk about the horrible, horrible story of illegal aliens bringing a deadly new flu strain into the United States of America. Make no mistake about it: Illegal aliens are the carriers of the new strain of human-swine avian flu from Mexico. Make no mistake about it: Our incompetents at the CDC will hide this from you. Make no mistake about it: This is a disaster. Now, if you thought Turista was bad, wait until you get human-swine avian flu from Mexico.

Id.

Similarly, Neal Boortz, a syndicated radio show host, declared:

So if you want to get that epidemic into this country, get it going real good and hot south of the border. And, you know, then just spread a rumor that there's construction jobs available somewhere, and here it comes. Because we're not gonna do anything to stop them from coming across the border.

Id. (quoting Neal Boortz, *The Neal Boortz Show*, Apr. 27, 2009).

In fact, flu can develop, and has developed, in other countries, and American students vacationing in Mexico, and not Mexican migrant workers, appear to have brought the first cases from Mexico to the United States. Claire O'Connell, *How the World Caught the Flu*, IRISH TIMES, Aug. 1, 2009, available at <http://www.irishtimes.com/newspaper/weekend/2009/0801/1224251832208.html>; Anne Barnard, *Teenagers from Queens in Spotlight*, N.Y. TIMES, Apr. 28, 2009, at A11.

immigrants from Mexico and neighboring countries, are largely unsupported by fact. Indeed, Hispanic immigrants in the United States enjoy better health, on a wide set of measures, than the average native-born American.³¹⁷ This is so even though poverty is associated with ill-health, and first- and second-generation Mexican-Americans are likely to be poor.³¹⁸

Even more, on a variety of measures of health outcomes, the children of Mexican-American immigrants are healthier than other groups of children in the United States.³¹⁹ Yet, the parents of such children are likely to be poor, to have comparatively low levels of education, and to have comparatively limited access to health care—all factors correlated with ill-health.³²⁰ These children are less likely to be born at low-birth weights, and they are less likely to die as infants.³²¹ Moreover, immigrant children from Latin America experience lower rates of asthma than do African- and European-American children.³²² Additionally, the age-adjusted death rate for Mexicans, Cubans, and Puerto Ricans is lower than that for non-Hispanic whites in the United States.³²³ And in 2006, the Centers for Disease Control reported that although adult Hispanic immigrants in the United States had the highest rate of uninsurance among all “race/ethnicity groups,” and were less likely to have had a regular source of health care than others, they were in better health than their “U.S.-born counterparts.”³²⁴ The report defines the differences more specifically:

They were much less likely to have bed disability days, were less likely to smoke or to be obese, were less likely to experience symptoms of serious psychological distress, and had lower prevalence of hypertension and cardiovascular disease compared with their native-born counterparts. These findings are consistent with other

³¹⁷ See *infra* notes 319–27.

³¹⁸ Fernando S. Mendoza, Joyce R. Javier & Anthony E. Burgos, *Health of Children in Immigrant Families*, in IMMIGRANT FAMILIES IN CONTEMPORARY SOCIETY 33, 36 (Jennifer E. Lansford, Kirby Deater-Deckard & Marc H. Bornstein eds., 2007).

³¹⁹ *Id.* at 36.

³²⁰ *Id.*

³²¹ *Id.* at 37.

³²² *Id.* at 39.

³²³ DONALD A. BARR, HEALTH DISPARITIES IN THE UNITED STATES: SOCIAL CLASS, RACE, ETHNICITY, AND HEALTH 131–32 (2008). Barr relied on 2003 data reported by the National Center for Health Statistics. The age-adjusted death rate for the U.S. non-Hispanic white population was 826. For the Hispanic population, in the same year, it was 621. More particularly, for Mexicans, it was 604; for Puerto Ricans, 763; and for Cubans, 506. *Id.* at 132.

³²⁴ Achintya N. Dey & Jacqueline Wilson Lucas, *Physical and Mental Health Characteristics of U.S.- and Foreign-Born Adults: United States, 1998–2003*, 369 ADVANCE DATA: FROM VITAL AND HEALTH STATISTICS 6, at 5 (U.S. Dept Health and Hum. Services, CDC Mar. 1, 2006).

studies that have shown considerable health advantages for Hispanic immigrants despite adverse sociodemographic characteristics and access to care factors.³²⁵

These patterns have been named the "immigrant paradox"³²⁶ or the "Hispanic paradox."³²⁷ The social implications and consequences of the paradox are as powerful as they are subtle.

C. *When Fact Conflicts with Narrative*

In short, there is a wide gap between Hispanic immigrants, portrayed in anti-immigrant narratives as a bearer of disease and embodiment of poverty, and Hispanic immigrants as real people. The immigrant as an actual presence does not—at least not in his or her physicality—support a paradigm within which the intermediate strata might find the sort of socioeconomic reassurance that depends on identifying a relatively lower ranking group in the socioeconomic hierarchy.

Furthermore, the comparatively good health of new Hispanic immigrants, if acknowledged, challenges the notion that immigrants are a disproportionate drain on America's health care resources. Thus, narratives featuring diseased immigrants become less convincing if actual immigrants are brought into view.³²⁸

Prejudice often works unconsciously and rarely portrays its victims accurately.³²⁹ However, increased contact with the objects of prejudice diminishes prejudice's strength and scope.³³⁰ Insofar as the "need" for the immigrant Other overpowers any motivation to rethink anti-immigrant rhetoric, it becomes particularly important not to "see" that other, or alternatively, to favor policies likely to render the immigrant Other more like the narrative's portrait of the immigrant than is presently the case.

And so, it is unsurprising that anti-immigrant voices frequently demand that immigrants "go home" or suffer deportation. And it is unsurprising that those committed to anti-immigrant narratives oppose the extension of health care benefits to immigrants—a goal attempted, and sometimes affected, through a variety of federal and states laws, including PRWORA, California's Proposition 187, and Arizona's Proposition 200.³³¹ It is feared that providing such benefits to immigrants signifi-

³²⁵ *Id.*

³²⁶ Mendoza et al., *supra* note 318, at 37.

³²⁷ Dey & Lucas, *supra* note 324, at 6.

³²⁸ In part, this explains the intensity of anti-immigrant rhetoric in the central states where comparatively few immigrants live. HAGSTROM, *supra* note 183, at 7; *see also supra* note 271 and accompanying text.

³²⁹ Fiske, *Look Twice*, *supra* note 298, at 14.

³³⁰ *Id.* at 17.

³³¹ *See supra* Part II.B.

cantly reduces the resources available to “citizens.” And in addition, providing immigrants with access to health care is opposed—often unself-consciously—because it is assumed that such coverage would render immigrants even healthier than they are and would, in consequence, broaden the existing gap between the diseased immigrant featured in anti-immigrant narratives and the comparatively well immigrant documented by the facts.

In short, the overall force of anti-immigrant narratives may, at least temporarily, be enhanced by conflicting policy aims. The conflict is evident in responses to health care coverage for immigrants. On the one hand, those voicing anti-immigrant narratives rely on the presence of undocumented immigrants as an Other against whom to compare the Self, and toward this end, seek to render immigrants less healthy by precluding or limiting their access to health care. On the other hand, to the extent that that does not happen, anti-immigrant voices call for stricter border controls and mass deportation.

CONCLUSION

Recent anti-immigrant rhetoric, as well as laws that limit health care benefits for undocumented immigrants and for many immigrants who have documentation, have been grounded on a set of assumptions, and reflect a set of fears, engendered from within America’s intensely competitive, yet staunchly opaque, class system.

Despite significant evidence to the contrary, Americans widely continue to assume that class status is a product of autonomous choices. Moreover, Americans in the middle class, and especially those at the lower end of the middle class (those in the intermediate strata), fear losing their socioeconomic status. They are sensitive to competition from those just above them in the status system and fearful of gains made by those just below them. They find a discomfiting form of reassurance in narratives such as the anti-immigrant narratives considered in this Article. These narratives feature undocumented immigrants (and some immigrants with documentation) from Mexico and neighboring nations as criminally inclined, “un-American,” and carriers of strange diseases. In fact, Hispanic immigrants are less likely to be in jail than Americans, and are more likely to be healthy. To the extent that Americans become aware of the gap between anti-immigrant narratives and reality, the narratives are less likely to provide a psychological buffer for the intermediate strata. In consequence, anti-immigrant voices become more insistent that undocumented immigrants who live and work in the United States should be deported.

This became evident in a broad swath of public responses to Martin Memorial’s deportation of Luis Jimenez and in laws that have been

promulgated by states and by the federal government during the late twentieth and early twenty-first centuries. These laws have aimed variously to limit health care coverage and other social benefits for immigrants, and to facilitate the deportation of immigrants.

These responses sit at the intersection between anti-immigrant rhetoric and opposition to health care reform. In short, a similar set of fears underlies both anti-immigrant narratives and opposition to health care reform. Such reform, especially insofar as it might include coverage for undocumented and new immigrants, strikes those in the intermediate strata as the desecration of an ideology that prizes autonomous choice and, in consequence, as an assault on their own fragile and presumptively hard-won place within the society's socioeconomic hierarchy. These responses demand careful attention as the nation attempts both to craft new forms of health care delivery and to overhaul its immigration laws.