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## UNJUST BARRIERS: PRENATAL CARE AND UNDOCUMENTED IMMIGRANTS

*Casey Colleen Lee\**

In the fall of 2007, Pennsylvania Hospital’s emergency room admitted a young woman who was seven-months pregnant and suffering from convulsions and hypertension.<sup>1</sup> Doctors quickly diagnosed her with eclampsia, a severe condition that can develop during pregnancy.<sup>2</sup> Eclampsia is known to cause premature delivery, seizures, strokes, blood clotting difficulties, and in some cases, death.<sup>3</sup> In the United States, this disorder is normally detected early in the pregnancy and can usually be treated with basic prenatal care.<sup>4</sup> Unfortunately, this mother could not afford prenatal care and was prohibited from accessing publicly funded care in Pennsylvania because she was an undocumented immigrant.<sup>5</sup> Given the mother’s condition, doctors decided to deliver the baby, even though she would be born premature.<sup>6</sup> The newborn spent her first few months of life attached to respiratory tubes while the mother endured three separate procedures to drain excess blood from her brain.<sup>7</sup> The hospital spent approximately \$250,000 on medical care for the mother and child.<sup>8</sup> Ultimately, the eclampsia partially paralyzed the mother, making it difficult for her to take care of her sick baby—“who, it’s worth noting, is a U.S.

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1. Ben Crair, *Undocumented Shouldn’t Mean Uninsured*, CBSNEWS (Nov. 16, 2007, 1:44 PM), <http://www.cbsnews.com/news/undocumented-shouldnt-mean-uninsured/>.

2. *Id.*

3. Preeclampsia develops prior to eclampsia. Treating preeclampsia significantly reduces the risk that eclampsia will develop. This is one of the reasons why “early and ongoing prenatal care” is strongly recommended by physicians. MEDLINEPLUS – Health Information from the National Library of Medicine, *Eclampsia*, <http://www.nlm.nih.gov/medlineplus/ency/article/000899.htm> (last visited Aug. 29, 2014); *see* Crair, *supra* note 1.

4. *See* Crair, *supra* note 1.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

citizen whose continued care taxpayers must now fund.”<sup>9</sup> Dr. Jack Ludmir, the Chair of Obstetrics and Gynecology at Pennsylvania Hospital, noted that this all could have been prevented “[f]or as little as a few hundred dollars worth of prenatal care.”<sup>10</sup>

As of 2012, an estimated 11.4 million undocumented immigrants live in the United States.<sup>11</sup> Approximately fifty-nine percent of undocumented immigrants do not have health insurance.<sup>12</sup> Even though ninety-six percent of undocumented immigrant households have at least one person in the work force, they often hold jobs that earn low wages and that provide no health insurance.<sup>13</sup> Due to their immigration status, they are ineligible for many federal and state benefit programs, such as non-emergency Medicaid.<sup>14</sup> Thus, undocumented immigrants face major barriers in obtaining health care coverage, including a lack of access to prenatal care.<sup>15</sup>

Beginning with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“Welfare Reform Act”),<sup>16</sup> there have been various statutory and regulatory changes to healthcare and immigrant eligibility for public benefits. One of society’s especially vulnerable groups, undocumented pregnant women,<sup>17</sup> has found itself in the political crossfire

9. *Id.*

10. Crair, *supra* note 1.

11. Bryan Baker & Nancy Rytina, DHS OFFICE OF IMMIGRATION STATISTICS, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012* (2013), [http://www.dhs.gov/sites/default/files/publications/ois\\_ill\\_pe\\_2012\\_2.pdf](http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf).

12. Michael K. Gusmano, *Undocumented Immigrants in the United States: Use of Health Care*, THE HASTINGS CTR., <http://www.undocumentedpatients.org/issuebrief/health-care-use/> (last updated Oct. 03, 2012).

13. Patrick Glen, *Health Care and the Illegal Immigrant*, 23 HEALTH MATRIX 197, 234 (2013); Steven A. Camarota, *Immigrants in the United States: A Profile of America’s Foreign-Born Population*, CTR. FOR IMMIGRATION STUDIES (Aug. 2012), <http://cis.org/node/3877#illegal>; Seam Park, *Note: Substantial Barriers in Illegal Immigrant Access to Publicly-Funded Health Care: Reasons and Recommendations for Change*, 18 GEO. IMMIGR. L.J. 567, 568 (2009).

14. NAT’L IMMIGRATION LAW CTR., *Access to Public Benefits* (2005), <http://www.nilc.org/access-to-bens.html>; Cynthia Dailard, *New SCHIP Prenatal Care Rule Advances Fetal Rights At Low-Income Women’s Expense*, THE GUTTMACHER REPORT ON PUBLIC POLICY (Dec. 2002), <http://www.guttmacher.org/pubs/tgr/05/5/gr050503gr050503.html>.

15. See Jeffrey T. Kullgren, *Restrictions on Undocumented Immigrants’ Access to Health Services: The Public Health Implications of Welfare Reform*, 93 AM. J. OF PUBLIC HEALTH 1630, 1632 (2003).

16. 8 U.S.C. §§ 1611, 1621 (2012).

17. See Beth A. Mandel, *Comment and Casenote: Fighting for Fetal Rights at the Expense of Women’s Health: The Redefinition of “Child” under the State Children’s Health Insurance Program*, 73 U. CIN. L. REV. 319, 328 (2004); Julia Field Costich,

surrounding this debate.<sup>18</sup> The Welfare Reform Act prohibits undocumented immigrants from accessing federally funded benefits<sup>19</sup> and denies them access to state and locally funded benefits, unless the state passes a law affirmatively extending eligibility to undocumented immigrants.<sup>20</sup> Therefore, undocumented immigrants are ineligible for Medicaid, except when receiving emergency medical treatment.<sup>21</sup> Emergency medical treatment includes labor and delivery of a child, but not prenatal care.<sup>22</sup>

Prenatal care is extremely important for the health of both pregnant women and their babies.<sup>23</sup> Prenatal testing can determine if mothers and babies are experiencing any complications, and prenatal visits give doctors the opportunity to educate mothers and prepare them for pregnancy.<sup>24</sup> Compared to mothers who receive prenatal care, mothers who do not receive that care are three times more likely to give birth to babies with low birth weight, and infant mortality is five times greater.<sup>25</sup> Politicians have fiercely debated the issue of prenatal care for undocumented immigrant women since the passage of the Welfare Reform Act, and the debate continues today.<sup>26</sup> Politicians have used this debate to advance their own political agendas, turning the focus towards fetal rights, illegal immigration, and reproductive justice.<sup>27</sup> This Note focuses on human rights and argues that providing

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*Legislating a Public Health Nightmare: The Anti-Immigrants Provisions of the "Contract with America" Congress*, 90 KY. L.J. 1043, 1061 (2002).

18. Nebraska serves as an example of the intense battle between politicians over prenatal care for undocumented immigrants. The debate has been deemed a "sick political game" with the fate of expecting mothers hanging in the balance. See Deena Winter, *NE Lawmakers Debate Prenatal Care for Illegal Immigrants*, NEBRASKAWATCHDOG.ORG (Mar. 21, 2013), <http://watchdog.org/76061/ne-lawmakers-debate-prenatal-care-for-illegal-immigrants/>.

19. 8 U.S.C. § 1611.

20. *Id.*

21. 8 U.S.C. §§ 1611, 1621.

22. 42 U.S.C. § 1396b(v)(3) (2012).

23. See UNITED HEALTH FOUND., *America's Health Rankings: A Call to Action for Individuals and Their Communities* (2013), <http://cdnfiles.americashealthrankings.org/SiteFiles/Reports/AnnualReport2013-r.pdf>; Letter from James N. Martin, MD, FACOG, President, The Am. Cong. of Obstetricians and Gynecologists, to the 2012 Declared Presidential Candidates (Feb. 21, 2012), <http://www.acog.org/~media/Departments/Government%20Relations%20and%20Outreach/20120221FactsareImportant.pdf?dmc=1&ts=20131224T1003248793>.

24. See UNITED HEALTH FOUND., *supra* note 23.

25. *Id.*

26. See Fred Knapp, *Unusual Alliances Form in Nebraska's Prenatal Care Debate*, NPR (Apr. 18, 2012, 3:03AM), <http://www.npr.org/blogs/health/2012/04/18/150839788/unusual-alliances-form-in-nebraskas-prenatal-care-debate>.

27. See *id.*

undocumented immigrants access to prenatal care makes for good economic, health, and moral policy that should be implemented through federal legislation.

Part I of this Note gives a brief overview of federal legislation and publicly funded health care for undocumented immigrants. Part II discusses the most recent congressionally created barriers for undocumented immigrants in need of publicly funded prenatal care. Part III offers economic, health, and moral policy rationales for providing undocumented pregnant women access to prenatal care, and also critiques the failure of federal legislation to offer solutions to ensure that undocumented immigrant women receive adequate prenatal care. Finally, Part IV recommends amending federal legislation to include prenatal care in the list of exceptions to federal, state, and local public benefits for which undocumented immigrants are eligible.

## I. BRIEF OVERVIEW OF FEDERAL LEGISLATION AND PUBLICLY FUNDED HEALTH CARE FOR UNDOCUMENTED IMMIGRANTS

### A. *Children's Health Insurance Program (CHIP)*

The Children's Health Insurance Program ("CHIP") was enacted in 1997.<sup>28</sup> CHIP offers health insurance coverage to children from low socioeconomic families that are ineligible for Medicaid but are unable to afford private insurance.<sup>29</sup> Similar to Medicaid, CHIP is a state and federally funded program that is administered by the states.<sup>30</sup> The federal government annually dispenses funding to each state for use in implementing CHIP initiatives.<sup>31</sup> Participating states are required to match federal contributions in order to receive their federal allotment.<sup>32</sup> States can design their CHIP programs using one of three approaches: Medicaid

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28. CTRS. FOR MEDICARE & MEDICAID SERVS., *Children's Health Insurance Program*, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Childrens-Health-Insurance-Program-CHIP/Childrens-Health-Insurance-Program-CHIP.html> (last visited Aug. 29, 2014).

29. *Id.*

30. *See id.*

31. *See* CTRS. FOR MEDICARE & MEDICAID SERVS., *Children's Health Insurance Program Financing*, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Financing-and-Reimbursement/Childrens-Health-Insurance-Program-Financing.html> (last visited Aug. 29, 2014).

32. *Id.*

expansion,<sup>33</sup> a separate child health insurance program, or a combination of those two methods.<sup>34</sup>

No federal program exists that offers health care coverage to undocumented immigrant children.<sup>35</sup> However, children born in the United States to undocumented parents can qualify for CHIP if they satisfy the age and income eligibility requirements.<sup>36</sup> In 2002, the United States Department of Health and Human Services published a new regulation in the Federal Register that changed the definition of “child” under CHIP to include fetuses.<sup>37</sup> This federal regulation is often referred to as the “unborn child option,” and it allows states to provide prenatal care to pregnant women based on the fetus’ eligibility for CHIP.<sup>38</sup> Currently, fifteen states use CHIP’s unborn child option to provide prenatal care to undocumented immigrants.<sup>39</sup> Three other states offer prenatal care using state funds only.<sup>40</sup>

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33. States retain the option to extend coverage that exceeds the federal income standard. See CTRS. FOR MEDICARE & MEDICAID SERVS., *Medicaid: Eligibility*, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Eligibility.html> (last visited Aug. 29, 2014); CTRS. FOR MEDICARE & MEDICAID SERVS., *Medicaid: By Population*, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Population/By-Population.html> (last visited Aug. 29, 2014); Gusmano, *supra* note 12.

34. See CTRS. FOR MEDICARE & MEDICAID SERVS., *Children’s Health Insurance Program*, *supra* note 28 (noting that seven states, the District of Columbia, and the United States territories have expanded Medicaid coverage. Seventeen states designed their own separate child health insurance programs. Twenty-six states have combination programs). The Centers for Medicare and Medicaid Services provides a map to show each state’s CHIP program design. CTRS. FOR MEDICARE AND MEDICAID SERVS., *Children’s Health Insurance Program*, (Jan. 14, 2013), <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Childrens-Health-Insurance-Program-CHIP/Downloads/CHIPMap-01-14-13.pdf>.

35. See Gusmano, *supra* note 12.

36. Children born in the United States are automatically granted United States citizenship. U.S. CONST. amend. XIV, § 1 (stating that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”); see Gusmano, *supra* note 12.

37. For purposes of the Children’s Health Insurance Program, “[c]hild means an individual under the age of 19 including the period from conception to birth.” 42 C.F.R. § 457.10 (2013) (emphasis in original).

38. 42 C.F.R. § 457.10; see Karina Fortuny & Ajay Chaudry, *ASPE Issue Brief: Overview of Immigrants’ Eligibility for SNAP, TANF, Medicaid, and CHIP*, U.S. DEP’T OF HEALTH & HUMAN SERVS. & THE URBAN INST. (March 2012), <http://aspe.hhs.gov/hsp/11/ImmigrantAccess/Eligibility/ib.shtml#Medicaid>.

39. The following fifteen states offer federally funded prenatal care coverage expansion to undocumented pregnant women using the unborn child option: Arkansas, California, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, Nebraska, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Washington, and Wisconsin. See

The federal government does not provide additional CHIP funding to states that choose to implement the unborn child option.<sup>41</sup> In recent years, the annual funds allotted to the states have been insufficient to cover the cost of existing services under the program.<sup>42</sup> Thus, in order to implement the unborn child option, states must take away funds from other important state funded programs.<sup>43</sup>

### B. Emergency Medicaid

Federal law denies Medicaid benefits to undocumented immigrants, except for emergency medical treatment.<sup>44</sup> Undocumented immigrants can qualify for emergency Medicaid if they are suffering from an “emergency medical condition” and satisfy all of the Medicaid eligibility requirements of their state, other than the requirements related to immigration status.<sup>45</sup> Under federal Medicaid law, the term “emergency medical condition” is defined as

a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—(A) placing the patient’s health in serious jeopardy, (B) serious impairment to bodily functions, or (C) serious dysfunction of any bodily organ or part.<sup>46</sup>

Federal regulation also requires the emergency medical condition to have a “sudden onset” that presents itself by “acute symptoms of sufficient severity (including severe pain) . . .”<sup>47</sup> Prenatal care is commonly classified as a preventive care service, and thus, does not fit within the emergency Medicaid exception.<sup>48</sup>

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NAT’L IMMIGRATION LAW CTR., *Medical Assistance Programs for Immigrants in Various States* (Feb. 2014), <http://www.nilc.org/document.html?id=159>.

40. The District of Columbia, New Jersey, and New York provide prenatal care to undocumented woman using state funds only. *See id.*

41. Mandel, *supra* note 17, at 359; PHYSICIANS FOR A NAT’L. HEALTH PROGRAM, *HHS to Allow States to Provide SCHIP Coverage for Prenatal Care* (Feb. 1, 2002), <http://www.pnhp.org/news/2002/february/hhs-to-allow-states-to-provide-schip-coverage-for-prenatal-care>.

42. *See* Mandel, *supra* note 17, at 358.

43. *See id.*

44. 8 U.S.C. §§ 1611, 1621.

45. 8 U.S.C. § 1611; *see also* 42 U.S.C. § 1396b(v)(2) (2012).

46. 42 U.S.C. § 1396b(v)(3).

47. 42 C.F.R. § 440.255(b)(1) (2013).

48. U.S. DEP’T OF HEALTH & HUMAN SERVS., *Women’s Preventive Services Guidelines*, <http://www.hrsa.gov/womensguidelines/> (last visited Sept. 24, 2014).

### C. Immunizations and the Treatment of Infectious Diseases

Although federal law prohibits undocumented immigrants from accessing public health benefits, the law makes an exception for “public health assistance . . . for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.”<sup>49</sup>

Communicable diseases are a major public health and humanitarian issue.<sup>50</sup> These diseases are extremely infectious and are transmitted from person to person or from animal to person through airborne viruses or bacteria, blood, or other bodily fluid.<sup>51</sup> Immunization is a cost-effective tool for preventing and reducing the spread of communicable diseases.<sup>52</sup> One study showed that an immunized cohort of children could save thirty-three thousand lives, prevent fourteen million cases of diseases, and save over thirty-three billion dollars in direct and indirect health care costs.<sup>53</sup>

## II. THE LATEST CONGRESSIONALLY CREATED BARRIERS FOR UNDOCUMENTED IMMIGRANTS IN NEED OF PUBLICLY FUNDED PRENATAL CARE

### A. Affordable Care Act

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act (“Affordable Care Act”).<sup>54</sup> Although the new health reform law is supposed to increase the number of individuals covered by health insurance, it does not extend coverage to undocumented

49. 8 U.S.C. §§ 1611(b)(1)(C), 1621(b)(1)(C).

50. U.S. DEP’T OF HEALTH & HUMAN SERVS., *Immunization and Infectious Diseases*, <http://www.healthypeople.gov/2020/topicsobjectives2020/overview.aspx?topicid=23> (last updated Sept. 01, 2014).

51. U.S. DEP’T OF HEALTH & HUMAN SERVS., *Communicable Diseases*, <http://www.globalhealth.gov/global-health-topics/communicable-diseases/> (last visited Aug. 29, 2014); CTR. FOR DISEASE CONTROL & PREVENTION, *Diseases and Conditions*, <http://www.cdc.gov/diseasesconditions/> (last visited Aug. 29, 2014).

52. See U.S. Dep’t of Health & Human Servs., *supra* note 50.

53. *Id.*

54. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). The Affordable Care Act is often referred to as “Obamacare.” Gregory Wallace, ‘Obamacare’: *The Word that Defined the Health Care Debate*, CNN, [http://www.cnn.com/2012/06/25/politics/obamacare-word-debate/index.html?\\_s=PM:POLITICS](http://www.cnn.com/2012/06/25/politics/obamacare-word-debate/index.html?_s=PM:POLITICS) (last updated June 25, 2012, 1:20 AM).

immigrants.<sup>55</sup> The undocumented population is still ineligible for Medicaid, denied access to federal subsidies, and prohibited from purchasing coverage through the new health insurance exchanges.<sup>56</sup> A health insurance exchange is a state-run marketplace where consumers can access information about federally subsidized private healthcare plans that are available for consumer enrollment.<sup>57</sup> The Affordable Care Act contains an individual mandate that requires individuals either to be insured or pay a penalty for being uninsured.<sup>58</sup> Undocumented immigrants are exempt from the individual mandate and are not required to pay the penalty for not having coverage.<sup>59</sup> The Affordable Care Act also extends the current federal funding for CHIP through the end of September 2015.<sup>60</sup> On October 1, 2015, the federal matching rate for CHIP will increase by twenty-three percent.<sup>61</sup> This increased rate will be implemented through September 30, 2019.<sup>62</sup>

*B. Border Security, Economic Opportunity, and Immigration Modernization Act (S.744)*<sup>63</sup>

In June 2013, the Senate passed the Border Security, Economic Opportunity, and Immigration Modernization Act (“S. 744”).<sup>64</sup> If this

55. Julie Appleby, *Obamacare and Coverage for Immigrants*, KAISER HEALTH NEWS (Sept. 19, 2013), <http://www.kaiserhealthnews.org/stories/2012/october/11/health-care-immigrants.aspx>.

56. 42 U.S.C. § 18032(f)(3) (2012); Greg Siskind, *The Impact of Immigration Reform on the Healthcare Sector*, 26 HEALTH LAW 9, 12 (Apr. 2014); see NAT’L IMMIGRATION LAW CTR., *Access to Health Care and Benefits Under S.744* (July 8, 2013), <http://www.nilc.org/hlthcarebensS744.html>.

57. Vinita Andrapalliyal, “Healthcare for All?”: *The Gap Between Rhetoric and Reality in the Affordable Care Act*, 61 UCLA L. REV. DISC. 58, 62 (2013); CTRS. FOR MEDICARE & MEDICAID SERVS., *Health Insurance Marketplace*, <https://www.healthcare.gov/glossary/health-insurance-marketplace-glossary/> (last visited Aug. 29, 2014).

58. 26 U.S.C. § 5000A (2012); 42 U.S.C. § 1312; THE HENRY J. KAISER FAMILY FOUND., *The Requirement to Buy Coverage Under the Affordable Care Act* (2013), [http://kaiserfamilyfoundation.files.wordpress.com/2013/04/requirement\\_flowchart\\_3.pdf](http://kaiserfamilyfoundation.files.wordpress.com/2013/04/requirement_flowchart_3.pdf).

59. 26 U.S.C. § 5000A; see NAT’L IMMIGRATION LAW CTR., *Access to Health Care and Benefits Under S.744*, *supra* note 56.

60. See CTRS. FOR MEDICARE & MEDICAID SERVS., *Children’s Health Insurance Program*, *supra* note 28.

61. *Id.*

62. CTRS. FOR MEDICARE & MEDICAID SERVS., *Children’s Health Insurance Program Financing*, *supra* note 31.

63. This section of the Note discusses the impact that the Senate’s immigration reform bill would have had on publicly funded health care for undocumented immigrants if the bill had become law. S.744 is an example of proposed immigration reform that preserves the restrictions on undocumented women’s access to prenatal care.

comprehensive immigration reform bill had passed the House of Representatives (“House”) and become law, undocumented immigrants would have had a pathway to citizenship, but it would have taken most of them thirteen years to ultimately obtain it.<sup>65</sup> Under the bill, eligible undocumented immigrants would have been permitted to apply for registered provisional immigrant (“RPI”) status,<sup>66</sup> and after ten years RPIs would have had the opportunity to adjust to lawful permanent resident (“LPR”) status.<sup>67</sup> Once immigrants obtained LPR status, they would have been required to wait another three years to apply for United States citizenship.<sup>68</sup>

Under S.744, RPIs would have been prohibited from accessing publicly funded benefits until they were granted citizenship, and LPRs who chose to remain LPRs could have accessed publicly funded benefits after they retained their status for five years.<sup>69</sup> RPIs would have been ineligible for the federal subsidies offered by the Affordable Care Act, but RPIs would have been permitted to use the health insurance exchanges to purchase unsubsidized health coverage.<sup>70</sup> They would also have been allowed to enroll in group health insurance plans<sup>71</sup> if their employer provided it.<sup>72</sup> If S.744 had become law, undocumented immigrants who obtained RPI status would have had to wait at least thirteen to fifteen years to access publicly funded benefits such as prenatal care.<sup>73</sup>

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64. Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. (2013); Siskind, *supra* note 56, at 13.

65. S.744.

66. “Registered Provisional Immigrant” is the term used in the Senate’s immigration bill to categorize the undocumented immigrants who are eligible to legalize, but who are not yet eligible to obtain permanent residency. See Siskind, *supra* note 56, at 13.

67. “Lawful Permanent Resident” is “[a]ny person not a citizen of the United States who is residing in the U.S. under legally recognized and lawfully recorded permanent residence as an immigrant.” U.S. CITIZENSHIP & IMMIGRATION SERVS., *Glossary: Lawful Permanent Resident (LPR)*, <http://www.uscis.gov/tools/glossary/lawful-permanent-resident-lpr> (last visited Aug. 29, 2014); S.744; Siskind, *supra* note 56, at 12.

68. Siskind, *supra* note 56, at 12.

69. *Id.*

70. *Id.*

71. A “group health insurance plan” is “an employee welfare benefit plan . . . to the extent that the plan provides medical care . . . to employees or their dependents . . . directly or through insurance, reimbursement, or otherwise.” 42 U.S.C. § 300gg-91(a)(1) (2012).

72. Siskind, *supra* note 56, at 12.

73. *Id.*; NAT’L IMMIGRATION LAW CTR., *Access to Health Care and Benefits Under S.744*, *supra* note 56.

A vote on immigration reform in 2014 appeared possible,<sup>74</sup> but Speaker of the House, John Boehner, declared in June 2014 that the House would not vote on comprehensive immigration legislation in 2014.<sup>75</sup> Speaker Boehner's announcement prompted a response from President Obama, who has appeared resolute in fixing the United States' broken immigration system.<sup>76</sup> On November 20, 2014, the President used his executive authority to enact changes to the country's immigration system.<sup>77</sup> His plan incorporates five major initiatives. First, the plan calls for increasing "the deferred action period and employment authorization" from two years to three years, and widening the age eligibility requirement for the Deferred Action for Childhood Arrivals ("DACA") program to individuals of any age if they entered the United States before age sixteen and lived in the country continuously since January 1, 2010.<sup>78</sup> Second, the plan emphasizes implementing a new Deferred Action for Parents of American and Lawful Permanent Residents program, which permits parents of United States citizens and LPRs "to request deferred action and employment authorization for three years" if "they have lived in the United States continuously since January 1, 2010, and pass required background checks."<sup>79</sup> The third initiative involves broadening the Provisional Unlawful Presence Waiver program by permitting the children of United States citizens and the spouses and children of LPRs to obtain a waiver if a visa is available.<sup>80</sup> As its fourth prong, the plan focuses on "[m]odernizing, improving and clarifying immigrant and nonimmigrant visa programs" to advance the United States economy and bolster job creation.<sup>81</sup> The fifth and final initiative works to "[p]romot[e] citizenship education and public awareness for lawful permanent residents" and permit "naturalization applicants to use credit cards to pay the application fee."<sup>82</sup>

On February 16, 2015, two days before the United States Citizenship and Immigration Services was scheduled to begin processing requests for President Obama's initiative to expand DACA, a federal judge in Texas

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74. See Greg Sargent, *Immigration Reform Coming in 2014?*, WASH. POST (Dec. 20, 2013, 9:15AM), <http://www.washingtonpost.com/blogs/plum-line/wp/2013/12/20/the-morning-plum-immigration-reform-coming-in-2014/>.

75. Alex Altman, *Obama Eyes Major Immigration Move*, TIME, 1-4 (July 24, 2014), <http://time.com/3028637/obama-eyes-major-immigration-move/>.

76. *Id.*

77. U.S. CITIZENSHIP & IMMIGRATION SERVS., *Executive Actions on Immigration*, <http://www.uscis.gov/immigrationaction> (last updated Feb. 17, 2014).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

issued a last-minute temporary injunction which halted all of the president's executive actions on immigration.<sup>83</sup> Judge Andrew S. Hanen found in favor of Texas and twenty-five other states that challenged the president's immigration actions in court.<sup>84</sup> Judge Hanen determined that "the administration's programs would impose major burdens on states, unleashing illegal immigration and straining state budgets, and that the administration had not followed required procedures for changing federal rules."<sup>85</sup> President Obama has promised to appeal Judge Hanen's decision and continue preparing to implement his executive actions.<sup>86</sup> The President also has not stopped pleading with Congress to pass a comprehensive immigration reform bill so that the executive actions he takes will no longer be necessary.<sup>87</sup> On the night President Obama announced his immigration plan, he put pressure on Congress, saying, "to those members of Congress who question my authority to make our immigration system work better, or question the wisdom of me acting where Congress has failed, I have one answer: Pass a bill."<sup>88</sup>

Instead of working on an immigration reform bill, Republicans in Congress have been strategizing ways that the legislative branch can block the President's immigration initiatives.<sup>89</sup> Many Republicans in the House have expressed that defunding the Department of Homeland Security ("DHS")<sup>90</sup> "would be an acceptable cost of thwarting the executive actions

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83. Michael D. Shear & Julia Preston, *Dealt Setback, Obama Puts Off Immigrant Plan*, N.Y. TIMES (Feb. 17, 2015), [http://www.nytimes.com/2015/02/18/us/obama-immigration-policy-halted-by-federal-judge-in-texas.html?\\_r=0](http://www.nytimes.com/2015/02/18/us/obama-immigration-policy-halted-by-federal-judge-in-texas.html?_r=0).

84. *Id.*

85. *Id.*

86. *Id.*

87. See Shear & Preston, *supra* note 83. During his Immigration Address, President Obama said:

I continue to believe that the best way to solve this problem is by working together to pass that kind of common sense law . . . But until that happens, there are actions I have the legal authority to take as President - the same kinds of actions taken by Democratic and Republican presidents before me - that will help make our immigration system more fair and more just.

Rebecca Kaplan, *Obama to immigration critics in Congress: "Pass a bill,"* CBSNEWS (last updated Nov. 20, 2014, 8:30 PM), <http://www.cbsnews.com/news/obama-move-to-shield-millions-from-deportation-is-lawful/>.

88. Kaplan, *supra* note 87 (quoting President Obama's Immigration Address).

89. See Eyder Peralta & Bill Chappel, *Congress Agrees To Maintain Homeland Security Funding — For A Week*, NPR (Feb. 27, 2015, 8:48 AM), <http://www.npr.org/blogs/thetwo-way/2015/02/27/389470991/congress-will-vote-on-homeland-security-agencys-funding-ends-tonight>.

90. United States Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE) are

on immigration.”<sup>91</sup> On February 27, 2015, just hours before DHS funding was scheduled to expire, the Senate and House were able to pass a bill that extended DHS funding for one week.<sup>92</sup> Thus, the state of immigration reform is still uncertain as government leaders remain acrimoniously divided and unwilling to compromise on the issue.<sup>93</sup>

### III. ARGUMENTS AGAINST RESTRICTING UNDOCUMENTED IMMIGRANTS’ ACCESS TO PRENATAL CARE

#### A. *The Economic Reality*

##### 1. *Extending Prenatal Care Coverage to Undocumented Women Saves Money in the Long Run*

If an immigrant’s child is born in the United States, the child automatically obtains United States citizenship and is eligible for public benefits.<sup>94</sup> Taxpayers are financially responsible for medical treatment needed by that child if he or she develops health problems that could have been prevented with proper prenatal care.<sup>95</sup> Legislators who oppose government funded prenatal care for undocumented immigrants have

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components of DHS and they are the agencies that are responsible for executing immigration law and policy. DEP’T OF HOMELAND SEC., *Department Components*, <http://www.dhs.gov/department-components> (last published Aug. 15, 2014); “Republicans chose the DHS funding fight to take a stand on immigration because the department is responsible for securing the border and issuing the work permits that would allow undocumented immigrants to remain in the U.S.” Jake Miller, *Congress narrowly averts DHS shutdown—for now*, CBSNEWS (last updated Feb. 28, 2015, 8:06 AM), <http://www.cbsnews.com/news/congress-averts-dhs-department-of-homeland-security-shutdown/>.

91. Peralta & Chappell, *supra* note 89.

92. *Id.*

93. See Rebecca Kaplan, *Boehner: GOP infighting an “argument over tactics,”* CBSNEWS (Mar. 1, 2015, 11:26 AM), <http://www.cbsnews.com/news/john-boehner-says-gop-infighting-an-argument-over-tactics/>; see Miller, *supra* note 90; Peralta & Chappell, *supra* note 89.

94. “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1.

95. Park, *supra* note 13, at 581 (stating that “[t]he current legislation, therefore, takes a back-end approach to providing illegal immigrants health care access by providing emergency services. However, this approach is critically flawed because it is more expensive to provide emergency care than it is to take a front-end approach by providing preventative care”); see Julia Field Costich, *Legislating a Public Health Nightmare: The Anti-Immigrants Provisions of the “Contract with America” Congress*, 90 KY. L.J. 1043, 1061-62 (2002).

claimed that preventive care, such as prenatal care, is a strain on state and local resources.<sup>96</sup> Opponents of preventive care only see the immediate financial costs and fail to consider the future economic consequences of limiting undocumented women's access to prenatal care.<sup>97</sup>

Prenatal care greatly lowers the risk of preterm birth and other serious labor complications.<sup>98</sup> A normal delivery without complications costs approximately \$6,400.<sup>99</sup> Complicated deliveries can cost between \$20,000 and \$400,000.<sup>100</sup> Babies born at low birth weights may need longer hospital stays and additional medical services.<sup>101</sup> When a newborn is admitted into a neonatal intensive care unit (NICU), the cost is between \$1,000 and \$2,500 per day.<sup>102</sup> Studies have estimated that every dollar states put towards prenatal care saves states between \$2.57 and \$3.38 in future health care expenses.<sup>103</sup> Therefore, offering publicly funded prenatal care to undocumented immigrants would not create a fiscal burden for state and local governments. Rather, it would ultimately save states money because prenatal care can prevent the development of pregnancy-related health conditions that would demand more expensive medical services, and it reduces the long-term medical care costs for United States citizen children by helping ensure that they are born healthy.<sup>104</sup>

## *2. Access to Publicly Funded Prenatal Care Will Not Significantly Increase Illegal Immigration*

Legislators who opposed the inclusion of undocumented immigrants in the Affordable Care Act feared that allowing undocumented immigrants to access health care under the health reform law would entice even more

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96. See Park, *supra* note 13, at 581.

97. "Supporters of the bill, on both sides of the abortion debate, cite their own polls in support and say the savings from avoiding intensive care for babies born without prenatal care would outweigh the costs of the program." Knapp, *supra* note 26.

98. United Health Found., *supra* note 23.

99. VOICES FOR CHILDREN IN NEB., *Prenatal Care Issue Brief 4* (June 2010), <http://voicesforchildren.com/wpcontent/uploads/2011/07/Prenatal-Care-Issue-Brief.pdf>.

100. *Id.*

101. *Id.*

102. *Id.*

103. Laura Parisi & Rachel Klein, *Covering Pregnant Women: CHIPRA Offers a New Option*, FAMILIES USA (July 2010), <http://familiesusa2.org/assets/pdfs/chipra/Covering-Pregnant-Women.pdf>.

104. See Janet M. Calvo, *The Consequences of Restricted Health Care Access for Immigrants: Lessons from Medicaid and SCHIP*, 17 ANNALS HEALTH L. 175, 199 (Summer 2008); see also NAT'L INST. OF HEALTH, *What is prenatal care and why is it important?*, <http://www.nichd.nih.gov/health/topics/pregnancy/conditioninfo/Pages/prenatal-care.aspx> (last updated July 12, 2013).

illegal immigration.<sup>105</sup> Republican Representative Hal Rogers of Kentucky illustrated this rationale during the House floor debates on the Affordable Care Act when he stated that allowing undocumented immigrants to benefit from health care reform “. . . opens the floodgates of taxpayer money for illegal immigrants to abuse the system and obtain free government health insurance—all on the backs of law-abiding Americans.”<sup>106</sup> However, empirical data strongly suggests that undocumented immigrants’ chief reason for coming to the United State is not to access our health care system.<sup>107</sup> A 2013 survey of undocumented immigrants conducted by Latino Decisions revealed that seventy-seven percent of undocumented immigrants came to the United States primarily for better economic opportunities or to make a better life for their families and children.<sup>108</sup> Another twelve percent immigrated to the country to join family members.<sup>109</sup> Additionally, undocumented immigrants generally access medical services less frequently than American citizens.<sup>110</sup> According to the American Civil Liberties Union (ACLU), “the average immigrant uses less than half the dollar amount of health care services as the average native-born citizen.”<sup>111</sup> Access to health care such as prenatal care, “is ancillary when compared to whether upward social and economic mobility is possible through available jobs.”<sup>112</sup> Thus, the “floodgates” argument is unpersuasive. The complete exclusion of undocumented immigrants from all benefits under the Affordable Care Act is not an appropriate or justifiable means to deter illegal immigration because health care is not currently one of the principal reasons for migrating to the United States.<sup>113</sup>

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105. See 155 CONG. REC. H12870 (daily ed. Nov. 7, 2009) (statement of Representative Rogers).

106. *Id.*

107. See Dayna Bowen Matthew, *The Social Psychology of Limiting Healthcare Benefits for Undocumented Immigrants – Moving Beyond Race, Class, and Nativism*, 10 HOUS. J. OF HEALTH L. & POL’Y 201, 204-05 (2010), available at [https://www.law.uh.edu/hjhlp/Issues/Vol\\_102/Matthew.pdf](https://www.law.uh.edu/hjhlp/Issues/Vol_102/Matthew.pdf).

108. Matt Barreto & Gary Segura, *Poll of Undocumented Immigrants Reveals Strong Family and Social Connections in America*, LATINO DECISIONS (Apr. 15, 2013), <http://www.latinodecisions.com/blog/2013/04/15/poll-of-undocumented-immigrants-reveals-strong-family-and-social-connections-in-america/>.

109. *Id.*

110. AM. CIVIL LIBERTIES UNION, *Immigration Myths and Facts* (Apr. 11, 2008), <https://www.aclu.org/immigrants-rights/immigration-myths-and-facts>.

111. *Id.*

112. Andrapalliyal, *supra* note 57, at 73.

113. See Calvo, *supra* note 104, at 211.

### 3. *Undocumented Immigrants Pay Taxes*

Members of Congress also demanded that the healthcare reform law exclude undocumented immigrants because they do not pay taxes, and thus, do not deserve to access government subsidized health insurance, which is paid for by America's hard working taxpayers.<sup>114</sup> Congress evidently overlooked the fact that many undocumented immigrants actually contribute a considerable amount of money to federal and local taxes.<sup>115</sup> Not only do they pay consumption taxes when they buy goods and services, they also pay property taxes, either directly if they are homeowners or indirectly if they are renters.<sup>116</sup> Studies have found that between fifty and seventy-five percent of undocumented immigrants pay personal income taxes using either a false Social Security number or an individual tax identification number.<sup>117</sup> A 2013 report published by the Institute on Taxation and Economic Policy revealed that in 2010, undocumented immigrants contributed approximately \$10.6 billion altogether to state and local taxes, making their total effective tax rate 6.4 percent.<sup>118</sup> While the aggregate state and local taxes paid by undocumented immigrants in each state may seem modest compared to overall tax collections, their effective rate is close to taxpayers in similar income situations.<sup>119</sup> This data suggests that undocumented immigrants are not looking for handouts, but are actually contributing a substantial amount of their hard-earned money to taxes.<sup>120</sup>

If the Senate's comprehensive immigration reform bill had been enacted into law, undocumented immigrants who would have been granted RPI status would have been required to pay all taxes, but would still have been denied access to benefits offered under the Affordable Care Act, such as the health insurance exchanges and federal subsidies.<sup>121</sup> They would also have

114. U.S. Representative Ted Poe of stated:

This massive government takeover of our health care still allows the 20 million people in this country that are illegally here to get one of those fake Social Security cards without benefit of even a photo ID and get some of that free government health care that everybody else has to pay for.

155 CONG. REC. H12615 (daily ed. Nov. 7, 2009) (statement of Rep. Poe).

115. INST. ON TAXATION & ECON. POLICY, *Undocumented Immigrants' State and Local Tax Contributions*, (July 2013), <http://www.itep.org/pdf/undocumentedtaxes.pdf>.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. NAT'L IMMIGRATION LAW CTR., *Access to Health Care and Benefits Under S.744*, *supra* note 56; Cristina Silva, *Healthcare Overhaul Excludes Some Immigrants*, THE HUFFINGTON POST (June 21, 2013, 12:20 PM), [http://www.huffingtonpost.com/2013/06/21/health-care-immigrants\\_n\\_3478109.html](http://www.huffingtonpost.com/2013/06/21/health-care-immigrants_n_3478109.html).

remained ineligible for non-emergency Medicaid.<sup>122</sup> Asserting that undocumented immigrants should be prohibited from receiving public benefits because they do not pay into the system is a specious argument since data has revealed that undocumented immigrants contribute significantly to the economy through taxes. The argument is further undermined by S.744's exclusion of RPIs from the health reform law even though RPIs would have been required to pay all taxes.<sup>123</sup>

### *B. Moral Grounds: We Are All in This Together*

#### *1. Undocumented Immigrants Are Essential to the United States Economy and Are Integrated Members of American Families and Communities*

Senator John McCain, a major proponent of S.744 and one of the eight senators who wrote the first draft of the immigration reform bill, described eligibility for benefits under the Affordable Care Act as “. . . one of the privileges of citizenship. That's just what it is. I don't know why we would want to provide Obamacare to someone who is not a citizen of this country.”<sup>124</sup> Although undocumented immigrants do not possess the “United States citizen” title, a recent poll of undocumented immigrants found that “they have deep roots in America, with strong family and social connections to U.S. citizens, painting a portrait of a community that is very integrated into the American fabric . . .”<sup>125</sup>

Undocumented immigrants account for only 3.7 percent of the United States population, but they comprise 5.2 percent of its workforce.<sup>126</sup> They offer their services to industries that are in dire need of workers.<sup>127</sup> Undocumented immigrants often work in jobs that not only are laborious, but that are generally low-paying.<sup>128</sup> They comprise thirty-seven percent of

122. Seth Freed Wessler, NAT'L LATINA INST. FOR REPROD. HEALTH, *No Obamacare or Safety Net While on Senate's Path to Citizenship* (Apr. 18, 2013), <http://latinainstitute.org/en/content/no-obamacare-or-safety-net-while-senate's-path-citizenship>.

123. See NAT'L IMMIGRATION LAW CTR., *Access to Health Care and Benefits Under S.744*, *supra* note 56.

124. Silva, *supra* note 121.

125. Barreto & Segura, *supra* note 108.

126. Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, PEW HISP. CTR. (Feb. 1, 2011), <http://pewhispanic.org/files/reports/133.pdf>.

127. CMTY. JUST. PROJECT, *Studies Show That Undocumented Immigrants Contribute to the National and Local Economy*, <http://www.ailadownloads.org/advo/CJP-Studies>ShowThatUndocumentedImmigrantsContribute.pdf> (last visited Aug. 29, 2014).

128. *Id.*

drywall installers, twenty-eight percent of dishwashers, twenty-seven percent of maids and housekeepers, and twenty-five percent of workers in the agricultural and construction industries.<sup>129</sup> The undocumented population uses the money they earn to pay taxes and to buy American goods and services.<sup>130</sup> They shop at local grocery stores and malls, eat at restaurants, purchase gas for their automobiles, and open bank accounts.<sup>131</sup> This leads to a boost in local economies and in the demand for goods and services, which consequently creates new jobs.<sup>132</sup> According to a 2010 report by the Immigration Policy Center and Center for American Progress, if undocumented immigrants were removed and excluded from the United States, the country's Gross Domestic Product ("GDP") would decrease by 1.46 percent annually, which totals \$2.6 trillion lost in GDP over a ten-year period.<sup>133</sup>

In addition to their vital contribution to the country's economy, many "unauthorized immigrants are integrated members of U.S. families and communities."<sup>134</sup> An estimated sixty-two percent of the undocumented population has resided in the United States for ten years or longer.<sup>135</sup> Undocumented immigrants work, attend school, pay taxes, and raise their families here.<sup>136</sup> An estimated 4.5 million United States citizen children

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129. Gregory Rodriguez, *Undocumented Workers: Essential but Unwanted*, L.A. TIMES (Oct. 11, 2011), <http://articles.latimes.com/2010/oct/11/opinion/la-oe-rodriguez-column-illegal-immigr20101011>; IMMIGRATION POLICY CTR., AM. IMMIGRATION COUNCIL, *Tackling the Toughest Questions on Immigration Reform* (July 29, 2013), <http://www.immigrationpolicy.org/special-reports/tackling-toughest-questions-immigration-reform>.

130. See CMTY. JUST. PROJECT, *supra* note 127.

131. *Id.*

132. *Id.*

133. Raul Hinojosa-Ojeda, IMMIGRATION POLICY CTR., AM. IMMIGRATION COUNCIL, *Raising the Floor for American Workers: The Economic Benefits of Comprehensive Immigration Reform* (Jan. 2010), <http://www.immigrationpolicy.org/sites/default/files/docs/Hinojosa%20-%20Raising%20the%20Floor%20for%20American%20Workers%20010710.pdf>.

134. IMMIGRATION POLICY CTR., *supra* note 133.

135. Michael Hofer et al., OFFICE OF IMMIGRATION STATISTICS, DEP'T. OF HOMELAND SEC., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010* (Feb. 2011), [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf).

136. See Jasmine Brown, *Affordable Care Act Still Doesn't Address Undocumented Immigrants*, PRESS-TELEGRAM (Nov. 28, 2013, 3:26 PM), <http://www.presstelegram.com/government-and-politics/20131128/affordable-care-act-still-doesnt-address-undocumented-immigrants>; see IMMIGRATION POLICY CTR., *supra* note 133.

have at least one parent who is undocumented.<sup>137</sup> Denying undocumented immigrants access to publicly funded programs as important as prenatal care essentially says that these people can reside here while the country benefits from their hard work and tax contributions, but implies that they are less worthy than the rest of society.<sup>138</sup> Refusing them essential medical care that could protect and statistically improve their health and the health of their unborn children during pregnancy “is a way of exploiting and devaluing people; using their labor and what they contribute, yet not valuing them as equal members of society.”<sup>139</sup>

## 2. Denying Publicly Funded Health Care to Undocumented Immigrants Fosters Disparities in Health Care

The Affordable Care Act has promised to insure millions of people who are currently living in the United States without health insurance coverage.<sup>140</sup> The Congressional Budget Office expects twenty-five million uninsured individuals to be insured under the Affordable Care Act by 2016.<sup>141</sup> However, the new law specifically excludes the 11.4 million undocumented immigrants residing in the United States from:

- (1) [A]ccessing temporary high-risk pools for those with preexisting conditions;
- (2) enrolling in special state-created plans for low-income individuals not eligible for Medicaid;
- (3) enrolling in new health care cooperatives;
- (4) receiving cost-sharing subsidies or premium tax credits to purchase health insurance; and

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137. Elise Foley, *Deportation Separated Thousands of U.S.-Born Children From Parents in 2013*, THE HUFFINGTON POST (June 25, 2014), [http://www.huffingtonpost.com/2014/06/25/parents-deportation\\_n\\_5531552.html](http://www.huffingtonpost.com/2014/06/25/parents-deportation_n_5531552.html).

138. See 42 C.F.R. § 457 (2013); see also Dorothy E. Roberts, *Symposium: Immigration Reform Laws: Redefining Who Belongs: Transcription: Who May Give Birth to Citizens? Reproduction, Eugenics and Immigration*, 1 RUTGERS RACE & L. REV. 129, 134 (1998); see also Wessler, *supra* note 122. One author notes:

This us versus them mentality towards certain immigrants has deep historical roots. Unfortunately, however, allowing the millions of newly arrived immigrants, nonimmigrants, and undocumented immigrants to live in this country without socially or politically including them in the term “American” already has harmful social consequences. This two-tiered system will continue to tear at our societal bonds.

Andrapalliyal, *supra* note 57, at 75-76.

139. Roberts, *supra* note 138, at 134 (offering this quote to explain the negative sentiment that is applied when denying children the right of citizenship, but denying prenatal care to undocumented pregnant women has the same effect).

140. Jeffrey Young, *Obamacare Launches Today—What Happens Now?*, THE HUFFINGTON POST, [http://www.huffingtonpost.com/2013/10/01/obamacare-launch\\_n\\_4013753.html](http://www.huffingtonpost.com/2013/10/01/obamacare-launch_n_4013753.html) (last updated Oct. 3, 2013).

141. *Id.*

(5) purchasing policies in the newly created exchanges, even without the benefit of government subsidies or credits.<sup>142</sup>

According to the American Congress for Obstetricians and Gynecologists, undocumented immigrants are already far less likely than other individuals living in the United States to have health insurance coverage.<sup>143</sup> The Urban Institute reported that once all parts of the Affordable Care Act have been executed, undocumented immigrants will make up twenty-five percent of the uninsured population.<sup>144</sup> They are expected to make up the second-largest group without insurance, second only to the group of individuals who are eligible for health insurance under the Affordable Care Act, but choose not to enroll.<sup>145</sup> Excluding RPIs from federal benefits under S.744, if it had been enacted, would have meant that:

Millions of people who work overwhelmingly in low-income jobs and who owe several thousand dollars in fines and in some cases need cash for mandatory English classes (in addition to paying the regular taxes that all workers pay) [would have been] barred completely from programs meant to keep families afloat. That[] [includes] Medicaid, the State Children's Health Insurance Program, food stamps, cash assistance, Social Security Insurance and Obamacare's insurance exchange.<sup>146</sup>

Fifty-seven percent of undocumented immigrants are currently living at or below the poverty line.<sup>147</sup> Consequently, many RPIs would not have had the financial means necessary to purchase private health insurance at full price.<sup>148</sup> RPIs would have been denied the federal subsidies offered under the Affordable Care Act, which would have helped them afford private care,<sup>149</sup> and they would have been barred from qualifying for non-

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142. Nathan Cortez, *Embracing the New Geography of Health Care: A Novel Way to Cover Those Left out of Health Reform*, 84 S. CAL. L. REV. 859, 870 (2011).

143. THE AM. CONG. OF OBSTETRICIANS AND GYNECOLOGISTS, *Health Care for Undocumented Immigrants* (Jan. 2009), [http://www.acog.org/Resources\\_And\\_Publications/Committee\\_Opinions/Committee\\_on\\_Health\\_Care\\_for\\_Underserved\\_Women/Health\\_Care\\_for\\_Undocumented\\_Immigrants](http://www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Health_Care_for_Underserved_Women/Health_Care_for_Undocumented_Immigrants); Gusmano, *supra* note 12 (noting that fifty-nine percent of undocumented immigrants in the United States are uninsured).

144. Christopher Sherman and Ramit Plushnick-Masti, *Fewer Health Care Options for Illegal Immigrants*, ASSOCIATED PRESS, Dec. 14, 2012, available at <http://bigstory.ap.org/article/fewer-health-care-options-illegal-immigrants>.

145. *Id.*

146. Wessler, *supra* note 122.

147. See CTR. FOR IMMIGRATION STUDIES, *supra* note 13.

148. *Id.*

149. Wessler, *supra* note 122; Camarota, *supra* note 13.

emergency Medicaid.<sup>150</sup> Granting undocumented immigrants RPI status would have allowed them to work in the country legally, which would have given them a better opportunity to climb out of poverty and eventually procure the financial means necessary to buy private health insurance without the help of federal subsidies.<sup>151</sup> However, most undocumented immigrants' affordable health care options would have likely remained inadequate, even as RPIs.<sup>152</sup>

### *C. Mothers Are More Than Mere Vessels for Their Unborn Children*

The CHIP unborn child option permits states to provide prenatal care to undocumented women, which is an option not available under the Welfare Reform Act.<sup>153</sup> However, CHIP's justification for administering prenatal care under the unborn child option is concerning and creates the following problems:

#### *1. Prenatal Care Policy Discussion Turns into Abortion Debate*

Granting benefits to the unborn child, but not the mother, unnecessarily inserts the prenatal care issue into the abortion debate.<sup>154</sup> Developments in Nebraska are a prime example of this unnecessary tension.<sup>155</sup> In 2012, the Nebraska legislature passed a bill that provides prenatal care to undocumented women through CHIP.<sup>156</sup> The bill divided Republican politicians in the state.<sup>157</sup> Some representatives supported the bill because of their anti-abortion views, while others opposed it because of their unwavering opposition to illegal immigration.<sup>158</sup> Many of the state's anti-

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150. See Steven P. Wallace, Jacqueline M. Torres, Tabashir Z. Nobari & Nadereh Pourat, *Undocumented and Uninsured: Barriers to Affordable Care for Immigrant Populations*, UCLA CTR. FOR HEALTH POLICY & RESEARCH, at 14 (Aug. 2013), available at [http://www.commonwealthfund.org/~media/Files/Publications/Fund%20Report/2013/Aug/1699\\_Wallace\\_undocumented\\_uninsured\\_barriers\\_immigrants\\_v2.pdf](http://www.commonwealthfund.org/~media/Files/Publications/Fund%20Report/2013/Aug/1699_Wallace_undocumented_uninsured_barriers_immigrants_v2.pdf).

151. See *id.* at 13.

152. See *id.* at 12.

153. See 42 C.F.R. § 457.10 (2013).

154. See Dailard, *supra* note 14; see also Diana Aguilar, *Using SCHIP to Offer Prenatal Care to Undocumented and Non-Qualified Immigrants in Wisconsin: The Benefits, Risks, and Shortcomings*, 20 WIS. WOMEN'S L.J. 263, 265 (2005).

155. Laura Bassett, *Prenatal Care For Immigrants In Nebraska Bill Divides Anti-Abortion Lawmakers*, THE HUFFINGTON POST, [http://www.huffingtonpost.com/2012/04/10/prenatal-care-immigrants-nebraska\\_n\\_1416055.html](http://www.huffingtonpost.com/2012/04/10/prenatal-care-immigrants-nebraska_n_1416055.html) (last updated Apr. 11, 2012).

156. *Id.*

157. *Id.*

158. *Id.*

abortion groups, such as Nebraskans United for Life and Nebraska Right to Life, were major proponents of the bill.<sup>159</sup>

On the opposite side of the debate are reproductive rights advocates who support prenatal care for undocumented immigrants but disagree with the unborn child option.<sup>160</sup> Many of them view CHIP's unborn child option as a politically motivated attempt to undercut abortion rights "by imposing legal recognition of fetuses."<sup>161</sup> The debate between these two sides has turned a woman's desire to have a healthy pregnancy and baby into a new battlefield for the abortion debate.<sup>162</sup> Congress could easily eliminate the controversy created by the unborn child option by amending federal law to include prenatal care in the short list of public benefits that undocumented immigrants are allowed to access.

## *2. The Unborn Child Option Disregards the Medical Needs of the Mother*

Medical treatment necessary for the undocumented mother's health is not covered under CHIP unless the care is essential to the unborn child's health.<sup>163</sup> This means that pain relief medicine for the mother, disease or injury treatment for the mother, miscarriage, and stillbirth are not likely to be covered under CHIP.<sup>164</sup> Postpartum care is not directly connected to the health of the fetus, and therefore, is not covered under CHIP.<sup>165</sup> Unless the

159. *Id.*

160. See Janel A. George, *Beyond a Beautiful Fraud: Using a Human Rights Framework to Realize the Promise of Democracy*, 42 U. BALT. L. REV. 277, 307-308 (2013) (noting that CHIP's "designation of personhood on the fetus inadvertently enabled immigrant women, who were otherwise ineligible to access public benefits, to access prenatal care for their unborn children, but also undermined the significant pro-choice legal victories that established personhood after birth"); see Mandel, *supra* note 17, at 353-54; see also THE GEORGE WASHINGTON UNIV., CTR. FOR HEALTH AND HEALTHCARE IN SCH., *Three States Will Extend SCHIP to Unborn Children*, <http://www.healthinschools.org/en/NewsRoom/EJournals/Volume4/~link.aspx?id=E324F7CC33AF45779E5D119C45B68EDA&z=z> (last visited Aug. 29, 2014).

161. Calvo, *supra* note 104, at 200; see Mandel, *supra* note 17, at 353-54; see also THE GEORGE WASHINGTON UNIV., *supra* note 160.

162. See THE GEORGE WASHINGTON UNIV., *supra* note 160.

163. See George, *supra* note 160, at 308 (criticizing the CHIP unborn child option for "discount[ing] the importance of the pregnant immigrant woman's ability to obtain health care for conditions affecting her and not her fetus, or other determinants that could affect her reproductive health, by only recognizing the right to provide health care to the citizen fetus."); see also Dailard, *supra* note 14, at 4.

164. Mandel, *supra* note 17, at 355.

165. "HHS . . . authoriz[ed] states that usually pay for pregnancy-related services through a bundled payment or global fee method that includes prenatal care, labor and delivery and postpartum care to receive federal reimbursement if they use this method."

state uses its own funds or provides a bundled payment method, these pregnancy related services will not be provided.<sup>166</sup> This method for expanding prenatal care to undocumented women raises serious ethical and practical concerns because it undermines the health of the mothers, which in turn, could negatively impact the health of their infants since they are dependent on their mothers.<sup>167</sup>

### III. FEDERAL LEGISLATION SHOULD GUARANTEE PUBLICLY FUNDED PRENATAL CARE FOR UNDOCUMENTED IMMIGRANTS

Maternal, infant, and child health is an important public health policy goal, as evidenced by its inclusion in the United States Department of Health and Human Services' Healthy People 2020, which presents the major health objectives for the country.<sup>168</sup> However, maternal and infant health is undermined by undocumented women's lack of consistent access to adequate prenatal care.<sup>169</sup> Even though federal legislation bars undocumented immigrants from accessing public benefits, it establishes a narrow list of exceptions for certain health-related services: Emergency Medicaid, immunizations, and the treatment of communicable diseases.<sup>170</sup> Each of these exceptions either advances public health, economic, or humanitarian policy.<sup>171</sup> Prenatal care promotes all three of these policies. It benefits the health and well-being of both mother and child and is one of the most effective ways to ensure that children will have a healthy start to life.<sup>172</sup> It also saves states significant amounts of money on future health care expenditures.<sup>173</sup> Current and proposed health and immigration reform legislation reveals that Congress is not ready to offer public benefits to

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NAT'L IMMIGRATION LAW CTR., *Issue Brief: Prenatal Coverage for Immigrants Through the State Children's Health Insurance Program (SCHIP)* 2 (June 2003), <http://www.nilc.org/document.html?id=483>; see also Letter from Cindy Mann, Dir., Centers for Medicare & Medicaid Services, to selected State Health Officials (Sept. 3, 2009), available at <http://downloads.cms.gov/cmsgov/archiveddownloads/SMDL/downloads/SHO090309.pdf> (enclosing a publication entitled *Questions and Answers Related to Coverage of Pregnant Women in the Children's Health Insurance Program (CHIP)*).

166. See NAT'L IMMIGRATION LAW CTR., *supra* note 165.

167. See Calvo *supra* note 104, at 200.

168. See U.S. DEP'T OF HEALTH & HUMAN SERVS., *2020 Topics and Objectives*, <http://www.healthypeople.gov/2020/topicsobjectives2020/default.aspx> (last updated Sept. 29, 2014).

169. See Calvo *supra* note 104, at 199.

170. 8 U.S.C. §§ 1611, 1621 (2012).

171. See *supra* Part I.B-C.

172. See UNITED HEALTH FOUND., *supra* note 23.

173. See Parisi & Klein, *supra* note 103.

undocumented immigrants.<sup>174</sup> One commentator remarked, “[w]ith the divisive political climate now prevailing, ‘there is little chance that legislators will offer funding to provide health care services to the undocumented immigrant population.’”<sup>175</sup> Amending federal legislation to include prenatal care in the list of health-related services that are exempt from restriction would be a fair, reasonable, and realistic approach to opening the barrier that is blocking many undocumented pregnant women from receiving adequate prenatal care.

#### IV. CONCLUSION

“Prenatal care is a service ‘for which there is such a clear consensus regarding [its] effectiveness and [its] importance to good health, that it should no longer be considered acceptable that an individual is denied access to [prenatal care] for any reason.’”<sup>176</sup> All women, including undocumented immigrants, deserve to have healthy pregnancies and babies. Not only are undocumented immigrants vital to the United States’ economy, they are also integrated members of American families and communities. They work, go to school, pay taxes, and raise families here. Although recent federal health care and immigration legislation indicates that Congress is not willing to give undocumented immigrants access to public benefits, the exceptions established in the Welfare Reform Act and adopted by the Affordable Care Act show that there are certain services that Congress views as important and effective enough to warrant universal access. Prenatal care is a very narrow exception that would effectively protect and benefit the health of both the undocumented mother and her United States citizen baby, while saving the government a significant amount of money on future medical costs. History has proven that incremental improvements can lead to

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174. See Patrick Glen, *Health Care and the Illegal Immigrant*, 23 HEALTH MATRIX 197, 235 (2013). Notably:

When Obamacare was debated before being passed in 2010, there was discussion around exclusion of undocumented workers. The Republicans yelled that inclusion of undocumented workers would have amounted to a giveaway to criminals. The Democrats and the administration backed down, saying that pushing the matter at that point would undermine the chance of passing health care reform.

Emily Schepers, *Health Care May Be a Problem in House Immigration Bill*, PEOPLE’S WORLD (May 29, 2013), <http://www.peoplesworld.org/health-care-may-be-problem-in-house-immigration-bill/>.

175. Glen, *supra* note 174, at 235 (quoting Marc L. Berk et al., *Health Care Use Among Undocumented Latino Immigrants*, 19 HEALTH AFF. 44, 54 (2000)).

176. Stacey M. Schwartz, *Article: Beaten Before They Are Born: Immigrants, Their Children, and a Right to Prenatal Care*, ANN. SURV. AM. L. 695, 730 (1997).

monumental change. It is unacceptable for legislators to continue “to tacitly ignore the problem while setting up additional barriers to coverage.”<sup>177</sup>

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177. Glen, *supra* note 174, at 236.