Winter 1979

Undocumented Aliens: Education, Employment and Welfare in the United States and in New Mexico

Andrea Smith

UNDOCUMENTED ALIENS: EDUCATION, EMPLOYMENT AND WELFARE IN THE UNITED STATES AND IN NEW MEXICO

It is estimated that eight to ten million people in the United States are here without proper documentation.[1] These people have the same needs and concerns as American citizens and lawfully admitted aliens; for example, finding jobs, obtaining an education, and paying for medical care. These concerns and activities raise certain problems when the people involved are illegally present in this country. These problems are of special concern to New Mexico, a border state with a large number of Hispanic-American citizens. Courts and legislatures have frequently addressed the issues raised by these problems. Their approach and answers, in the United States generally and New Mexico specifically, to the problems raised by the needs and activities of this group of undocumented people is the subject of this note. The discussion will focus on the areas of education, employment, and welfare.

The term "undocumented alien" will be used throughout this paper because it is the most accurate term. The label "illegal alien" has a certain stigmatizing connotation. The term "undocumented migratory worker"[2] includes only some of those persons in the United States without proper documentation, for not all of them are Mexican nationals or migratory workers.[3] "Undocumented alien," then, best describes the eight to ten million people in the United States without documentation.

Many Americans feel that undocumented aliens have no right to welfare, medical care or an education because these services are

1. Time, October 16, 1978, at 58. This figure is also based on an extrapolation of an estimate made by Leonard F. Chapman, Jr. in 1975. Chapman, *A Look at Illegal Immigration: Causes and Impact on the U.S.*, 13 San Diego L. Rev. 34, 35 (1975).

2. The United States and Mexico joined in a U.N. resolution which directed the Secretary General to employ the term "undocumented migratory workers" to define those workers who illegally or surreptitiously enter another country to obtain work. Telegram from the Secretary of State to the U.S. Ambassador to the U.N., November, 1975, cited in Salinas and Torres, *The Undocumented Mexican Alien: A Legal, Social and Economic Analysis*, 13 Houston L. Rev. 863 (1976).

3. Leonard F. Chapman, Jr., former Commissioner of Immigration and Naturalization Service, has estimated that between 5 and 10% of the six million foreign visitors who come annually to visit the U.S., do not depart, but stay and look for work. Chapman, *A Look at Illegal Immigration: Causes and Impact on the United States*, 13 San Diego L. Rev. 34 (1975).

supported by tax dollars and undocumented aliens do not pay taxes. Undocumented aliens, however, do contribute to the American economy. First, every American benefits from the lower prices on goods and services that result from cheap undocumented alien labor. Secondly, undocumented aliens do pay sales taxes, income taxes and social security taxes. A sales tax is imposed on most goods sold in this country. Although one study conducted by the Internal Revenue Service suggests that the federal government loses about $100,000,000 annually due to the failure of undocumented aliens to file income tax returns,[4] a Department of Labor study estimates that in 1975 73% of undocumented workers had federal income taxes deducted from their paychecks.[5] The federal government, therefore, retains millions of dollars of income tax paid by those who do not apply for a refund because of fear of discovery and subsequent deportation. The fact that the Social Security Amendments of 1972 were promulgated, in part, to make it more difficult for undocumented aliens to obtain social security cards, and to punish those who did,[6] indicates that great numbers of undocumented aliens pay social security taxes. The Department of Labor study, in fact, estimated that in 1975 77% of undocumented aliens had social security taxes withheld.[7] Of course, none of this money is recoverable, nor are the benefits forthcoming.

EDUCATION

Everyone born in the United States is automatically an American citizen. If a child has proof of his/her American birth, attending public schools creates no problem. But the education of undocumented alien children, who are those children without proof of U.S. citizenship or lawfully admitted status, raises two issues: whether these children have a right to a public education and whether there is some obligation on the part of the schools to report these children or their parents to the Immigration and Naturalization Service [hereinafter cited as INS].

The question of whether undocumented alien children have a right to a public education has generally been left to local school boards and state agencies.[8] The Albuquerque public school system has no

4. Report from House Committee on Government Operations, Interim Report on Immigration and Naturalization Service Regional Office Operations, House of Representatives, 93rd Congress, 2d Session, 31 (1974) (hereinafter cited as Reg. Off. Rep.).

5. U.S. Dep't of Labor, Characteristics and Role of the Illegal Alien in the U.S. Labor Market (1975). A copy of this report is on file at the University of New Mexico Law School Library.

6. 4 U.S.C. § 408(f) (1976). *See also* Salinas and Torres, *supra* note 2, at 888.

7. U.S. Dep't of Labor, *supra* note 5.

8. NEWSWEEK, February 20, 1978, at 32.

written policy concerning this issue. The principal of each school, however, has the discretion to refuse admittance to a child who cannot prove citizenship.[9] It is economically advantageous to a school to have alien children enrolled because schools receive a certain number of dollars for every child in attendance. Although there is no written policy, nor are principals encouraged by the school system to refuse admittance, there are reports of undocumented alien children not being permitted to enroll in Albuquerque schools.[10]

Texas, however, has taken a different approach to this problem. In 1975, the Texas Attorney General ruled that children were entitled to attend public schools in the district of their residence regardless of whether they were "legally" or "illegally" within the United States.[11] In response, the Texas legislature passed a law which limited free public education to "citizens of the United States or legally admitted aliens."[12] Presently, if undocumented alien children want to attend public schools in Texas they must pay tuition.

In Tyler, Texas, where the tuition is $1,000 a year, undocumented alien children filed a suit against the school district claiming that the tuition requirement denied them their right to equal protection under the Fourteenth Amendment.[13] They also claimed that the Texas statute and policy were preempted by federal law. In September, 1977, the U.S. District Court for the Eastern District of Texas granted a preliminary injunction enjoining the Tyler school district from refusing to enroll undocumented alien children. In granting the preliminary injunction, U.S. District Judge Justice concluded that the Equal Protection Clause applies to both legal and illegal aliens within the United States. Strict scrutiny, Judge Justice concluded, was therefore appropriate in determining whether the Texas statute discriminated against a class—undocumented alien children—by depriving them of an education on the basis of wealth. The Justice Department filed an *amicus curiae* brief urging the court to find the tuition requirement unconstitutional.[14]

In September, 1978, plaintiffs were granted a permanent injunction.[15] The Texas statute was found to violate the equal protection

9. From conversations with Tom Lockwood of the Albuquerque Public Schools Information Office, March, 1978.

10. From conversations with Elsie Duran of the Catholic Social Services, Albuquerque, New Mexico, March, 1978.

11. 1975 Texas Attorney General Opinion No. H 586.

12. Tex. Educ. Code Ann. § 21.031 (Supp. 1975-76).

13. Doe v. Plyler, Civil Action No. TY-77-261-CA (E.D. Tex. Sept. 12, 1977), [1977] Pov. L. Rep. (CCH) ¶ 25,022.

14. NEWSWEEK, *supra* note 8.

15. 47 U.S.L.W. 1049 (1978).

rights of illegal alien children. The court also held the Texas statute to be inconsistent with both the federal immigration scheme as expressed in the INA and with federal laws relating to funding and discrimination in education. Texas, according to the court, attempted to cut its educational costs by implementing this arbitrary policy which neither addressed nor solved a major social problem.[16]

In contrast to this finding by a Texas federal court, a Texas state court, in *Hernandez v. Houston Independent School District,*[17] upheld the Texas statute. The Court of Civil Appeals of Texas reaffirmed a district court ruling which barred undocumented alien children from attending the Houston public schools until they paid tuition. Justice Shannon held that a free education is not a "fundamental right;" therefore, the Texas statute was not subject to strict judicial scrutiny. If a reviewing court does not have to apply the standard of strict scrutiny which requires a state to establish a compelling state interest in the statute's enactment, Justice Shannon stated, the statute is accorded a presumption of constitutionality.[18] "Th[is] presumption may not be disturbed unless the enactment rests upon grounds wholly irrelevant to the achievement of a legitimate state objective."[19] Because there is only limited revenue available for educational purposes and a state can choose to spend its resources on insuring that its citizens obtain a certain quality of education, Justice Shannon held that the Texas statute bears a rational relationship to a legitimate state purpose. On appeal to the Texas Supreme Court, a writ of error was refused.

If this issue is reviewed by the United States Supreme Court, it is difficult to predict whether the court will adopt the reasoning of the Texas state court or the Texas federal court.[20] The outcome may depend on whether the case appealed is the state case or a federal case. The state court reached its decision after determining that a free education was not a "fundamental right" and, therefore, an equal protection analysis did not subject the Texas statute to strict scrutiny.[21] The federal court, on the other hand, examined the question of wealth discrimination and concluded that requiring undocumented alien children to pay tuition to attend public schools con-

16. *Id.*
17. 558 S.W.2d 121 (1977).
18. *Id.* at 123.
19. *Id.* at 124-4.
20. *See* Yarbrough, *The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-so-Fundamental "Rights" or "Interests" Through a Flexible Conception of Equal Protection,* 1977 Duke L.J. 143 (1977); Note, *Equal Protection: Modes of Analysis in the Burger Court,* 53 Denver L.J. 687 (1976).
21. 558 S.W.2d 121, 124 (1977).

stituted, in effect, the deprivation of an education on the basis of wealth.[22]

Both of these questions were at issue in a 1973 United States Supreme Court case. In *San Antonio School District v. Rodriguez,*[23] the Texas system of financing public schools largely through property taxes was challenged. This financing system resulted in budget disparities among school districts. Plaintiffs claimed that the system discriminated against them on the basis of wealth and infringed on their fundamental right to an equal education. The Court refused to find that a right to an education is a "fundamental right" or that wealth is a suspect classification. In the absence of a "fundamental right" or a suspect classification, the Court found that there was a rational relationship between the financing system and the state interest in local control of education. The Texas financing system, therefore, was upheld. If this reasoning is followed in an appeal on the rights of illegal aliens to a freee education, then it is probable that the Texas statute will be upheld.

Another issue involved in the education of, or denial of education to, undocumented alien children is the reporting by the schools of these children or their parents to INS. Schools are not required to make such a report to INS. The federal immigration statutes, which generally preempts state efforts to regulate non-citizens,[24] are found in the Immigration and Nationality Act.[25] Section 1324 of the INA makes it illegal to willfully or knowingly conceal, harbor or shield from detection undocumented aliens.[26] This provision, however, only applies to "persons" who harbor or shield undocumented aliens from detection. Apparently, it has never been used to prosecute government or municipal employees who, in their official capacities, have obtained information concerning the whereabouts of undocumented aliens.[27]

A trial court in California recently granted a preliminary injunction enjoining the Los Angeles County School Superintendent from disclosing to INS the names and addresses of undocumented students attending school in that school district.[28] In that case the plaintiffs

22. Civ. Action No. TY-77-261-CA (E.D. Tex. Sept. 12, 1977) [1977] Pov. L. Rep. (CCH) ¶ 25,022.

23. 411 U.S. 1 (1973).

24. *See* Hines v. Davidowitz, 312 U.S. 52 (1941).

25. 8 U.S.C. § 1101 to § 1503 (1976).

26. 8 U.S.C. § 1324(a)(3) (1976).

27. *See, e.g.,* U.S. v. Cantu, 557 F.2d 1173 (1977); U.S. v. Washington, 471 F.2d 402 (1973); U.S. v. Callahan, 445 F.2d 552 (1971).

28. El Concilio Valle San Gabriel v. El Monte Elementary School District, No. C 177176 (Cal. Super. Ct., Los Angeles County).

alleged that the dissemination of this personally identifiable information without their consent violated the Federal Family Educational Rights and Privacy Act of 1974, which prohibits disclosure, with limited exceptions, of personal information by educational agencies without parental consent.[29] This Act applies to all educational agencies or institutions that receive funds under any federal program.[30]

The Albuquerque public school system does not have an official policy on this issue. Again, it is left to the discretion of the individual school principals.[31] There have been reports of principals or school officials in Albuquerque reporting children without documentation to INS.[32]

In summary, it costs money to educate undocumented alien children. One study indicated it cost the federal government 6.9 million dollars annually in New York alone for the public education of these children.[33] It seems unjust, however, to deny children an education because of the illegal acts of their parents. The question of whether a state or school system can legally deny them an education does not presently have a clear answer and may be resolved by the United States Supreme Court in the future. It does appear that schools are not required to report these children or their parents to INS. If the school or school system receives funds under any federal program, it may be a violation of the Federal Family Educational Rights and Privacy Act of 1974 to report the children.

EMPLOYMENT

A number of issues are pertinent to a discussion of the employment of undocumented aliens: first, whether undocumented aliens are prevented from obtaining employment by either federal or state laws; second, whether individual citizens can bring suit against employers of undocumented aliens; and third, whether undocumented workers can receive unemployment compensation.

Over the years, the federal government has made no real effort to discourage the employment of undocumented aliens. In fact, the federal government has specifically stated that the employment of undocumented aliens is not considered harboring and is therefore not unlawful.[34] The Social Security Amendments of 1972 made it more difficult to obtain a social security card and number, which many

29. 20 U.S.C. § 1232g(b)(1) (1976).
30. 20 U.S.C. § § 1230, 1232 (1976).
31. Lockwood, *supra* note 9.
32. Duran, *supra* note 10.
33. Reg. Off. Rep., *supra* note 4, at 49.
34. 8 U.S.C. § 1324(a) (1976).

employers require. The thrust of these Amendments, however, was more toward limiting the number of undocumented aliens on the welfare rolls than making it more difficult for them to obtain employment.[35]

Although there are some federal restrictions on the employment of legal aliens,[36] the Farm Labor Contractor Registration Act[37] is the only federal law which attempts to regulate the employment of undocumented aliens. This Act requires that any labor contractor who transports ten or more workers interstate must obtain a certificate of registration annually from the Department of Labor.[38] The certificate may be suspended, revoked, or not renewed if the labor contractor recruits, employs or utilizes the services of persons he knows to be undocumented aliens.[39] This Act is limited in its scope since most aliens probably do not seek or find employment through labor contractors.

Some states have made efforts to protect their employable citizens by regulating the employment of undocumented aliens. Both California[40] and Kansas[41] make it a crime to employ undocumented aliens. The New Mexico House of Representatives passed a similar bill in 1975, but the Senate rejected it by one vote.[42]

The California statute makes it illegal to knowingly employ an undocumented alien if such employment would have an adverse effect on lawful resident workers. In *DeCanas v. Bica*,[43] the United States Supreme Court held that the California statute was not unconstitutional, either as an attempt to regulate immigration in violation of the exclusive federal power to do so under the Constitution[44] or because it is preempted by the INA under the Supremacy Clause of the Constitution. The Court reasoned that the statute is

35. Comptroller General, *More Needs to be Done to Reduce the Number and Adverse Impact of Illegal Aliens in the U.S.*, Rep. No. B-125051, at 45 (1973). *See* Salinas and Torres, *supra* note 6, at 879.

36. 10 U.S.C. § 2279 (1976). This statute makes it illegal for a person who contracts with the federal government to build aircraft or aircraft parts to allow a legal alien employee to have access to the plans of the aircraft or parts. 10 U.S.C. § 5571 (1970). This statute states that only citizens are eligible to be officers in the Regular Navy or Regular Marine Corps.

37. 7 U.S.C. § 2041-53 (1976).

38. 7 U.S.C. § 2043(a) (1976).

39. 7 U.S.C. § 2044(b)(6) (1976).

40. Cal. Lab. Code § 2805 (West Supp. 1978).

41. Kan. Stat. Ann. § 21-4409 (1974).

42. N.M.H.B. 127, 32d Legislature, 1st Sess. (1975).

43. 40 Cal. App. 3d 976, 115 Cal. Rptr. 444 (1974), *rev'd and remanded*, 424 U.S. 351 (1976).

44. "The Congress shall have Power to . . . establish a uniform Rule of Naturalization, . . ." U.S. Constitution, art. I, § 8.

not, standing alone, a regulation of immigration and that it is within the states' police power to regulate employment. Inferring that Congress believes the problem created by the employment of undocumented aliens does not require uniform national regulations, the Court felt that the issue was appropriately addressed by the states as a local matter. Given this ruling, it is probably only a matter of time until many states pass similar laws at the insistence of both their labor unions and citizenry.

One court has held that citizens or lawfully admitted aliens cannot maintain a cause of action against employers of undocumented workers.[45] In a recent case, the United States Court of Appeals for the Ninth Circuit held that an INA provision prohibiting the transporting in and harboring of aliens was solely a penal provision and created no private right of action.[46] The plaintiffs had claimed that they were displaced from their jobs, that they suffered reduced wages, and that they were subjected to substandard working conditions because of the employment practices of the defendants who were employers of undocumented workers. Plaintiffs had sought damages under Section 1985(3) of the Civil Rights Act of 1964,[47] which provides a damage remedy for those injured by a conspiracy entered into for purposes of depriving persons of equal protection of the laws. The Court held that this provision is restricted to injuries inflicted because of the victims' status as a member of an identifiable class.[48] An "indiscriminate conspiracy" to only hire undocumented workers does not create the class status as impliedly required by Section 1985(3).[49]

The issue has arisen whether undocumented aliens who obtain employment should or can receive unemployment. Those who claim that they should be able to do so argue that the funds which pay unemployment compensation come primarily from employers[50] who are required under both federal and local laws to pay a set amount for every employee.[51] An employer takes into consideration the unemployment insurance tax he must pay and his profit margin

45. Chavez v. Freshpict Foods, Inc., 322 F. Supp. 146 (D. Colo. 1971).
46. Lopez v. Arrowhead Ranches, 523 F.2d 924 (1975).
47. 42 U.S.C. § 1985(3) (1970).
48. 523 F.2d at 927.
49. 523 F.2d at 928.
50. Only 3 states require the employee to share the cost of unemployment compensation: Alabama, Alaska, and New Jersey. [1974] Unemployment Insurance Reporter (CCH) ¶ 1130.
51. N.M. Stat. Ann. § 51-1-19 (1978). The New Mexico unemployment compensation fund obtains its moneys from compensations made by the employer, pursuant to N.M. Stat. Ann. § 51-1-10 (1978), and from the federal government, pursuant to 42 U.S.C. § § 1321-23 (1976), which taxes employers to obtain the money it transfers to the states.

when he determines the salary of his employees. Since, presumably, a worker's salary is less than it would be if his employer did not have to pay the unemployment tax, unemployment compensation should be the right of every employee. The actual effect of an employer who has paid the state and federal taxes while his ex-employee, the undocumented alien, is too frightened to apply for unemployment is the subsidization by undocumented aliens of unemployed American citizens and lawfully admitted aliens. Of course, this analysis does not apply to those undocumented workers who are paid in cash.

In 1955, after an extensive campaign by INS to locate and deport undocumented aliens from California, unemployment compensation recipients decreased approximately 8%, which represented a decrease in benefits valued at $188,000 a week.[52] But according to a California trail court in 1976, many of these recipients were probably entitled to their benefits. In *Ayala v. California Unemployment Insurance Appeals Board,*[53] the court held that an undocumented alien who had worked for four years and had made the required payments for unemployment insurance coverage under a mandatory state plan could not be denied his benefits. The statutory requirements had been met by the alien. The statute did not make legality of the employee's residence in the United States a criterion of eligibility.

Similarly, New Mexico's unemployment compensation laws do not condition eligibiltiy for unemployment compesnation on citizenship or lawfully admitted status.[54] The Employment Security Commission, which administers and operates the unemployement compensation system in New Mexico, however, presumes that if someone is in the United States illegally, that person is not available for work.[55] Availability for employment is one of the requirements for eligibility.[56] This situation effectively prohibits an undocumented alien from receiving unemployment in New Mexico, despite the fact that his employer may have paid the employee tax and decreased his wages accordingly. Further, if it comes to the attention of the Employment Security Commission that an undocumented alien is receiving unemployment, his beneifts will be terminated and he may be reported to INS.[57]

52. Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 596, 88 Cal. Rptr. 443, 448 (1970).
53. 54 Cal. App. 3d 676 (1976).
54. N.M. Stat. Ann. § 51-1-5 (1978).
55. Conversations with Lydia Santillanez of the New Mexico Employment Security Commission, Albuquerque office, March, 1978.
56. N.M. Stat. Ann. § 51-1-5 (1978).
57. Santillanez, *supra* note 55.

American employers openly hire undocumented aliens. The federal government's tacit approval of this activity is only marginally offset by the few states' statutes which make it illegal, and then only if such employment would adversely affect the state's lawful resident workers. In the absence of such a statute, individual citizens have no remedy against employers of undocumented workers. Although only one court has so held, those undocumented workers who are not paid in cash probably deserve to receive unemployment compensation. The employers of these workers have paid the unemployment insurance tax and the statutes generally do not condition eligibility on citizenship or lawfully admitted status.

WELFARE

In 1976, the United States Supreme Court upheld a provision of the Social Security Act[58] which denied eligibility in a federal medical insurance program to persons who had been admitted as permanent residents but had not resided in the United States for five years.[59] This provision, the Court held, did not deprive aliens of liberty or property without due process of law. Justice Stevens, writing for the majority, stated:

> [T]he fact that an act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.'
>
> In particular, the fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for *all aliens.* Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests.[60]

Given the fact that lawfully admitted aliens have difficulty obtaining welfare, undocumented aliens are obviously in a less advantageous position. It is unclear, at present, the amount of public assistance undocumented aliens do receive. In a recent study by the Comptroller General of the United States, it was concluded that: (1) undocumented aliens are collecting public assistance, although insufficient data exist to estimate to what extent public assistance programs are used or the financial impact on a nationwide basis; and (2)

58. 42 U.S.C. § 13950(2) (1970).
59. Mathews v. Diaz, 426 U.S. 67 (1976).
60. *Id.* at 80.

undocumented aliens contribute to our welfare system by paying taxes, although whether these payments are sufficient to offset benefits received is unknown.[61] The Human Resources Agency of the County of San Diego conducted a study, which extensively examined other reports and investigations, and concluded: "most people who have studied the matter [the costs of social welfare services used by illegal aliens] tend to agree that the direct social welfare costs of illegal aliens are slight. Several studies have found that very few illegal aliens collect unemployment, go on welfare, receive foodstamps or use medicaid."[62] These conclusions seem logical in light of the fact that undocumented aliens are deportable, know they are deportable, and will therefore keep as low a profile as possible while in the United States.

The Social Security Act provides that supplemental security income to an individual who has attained the age of 65 or is blind or disabled is only available if that person is "a resident of the United States, and is either (i) a citizen or (ii) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law."[63] Health insurance for the aged and disabled,[64] Medicaid,[65] AFDC,[66] and food stamps[67] are also limited to citizens or lawfully admitted aliens.

A recent case decided by the United States Court of Appeals for the Second Circuit carved out a narrow exception to the above limitations. In *Holley v. Lavine,*[68] the plaintiff, an undocumented alien mother of six children, all of whom were born in the United States and, therefore, American citizens, sought restoration of her AFDC benefits. Defendant, the administrator of the New York Social Services Law, had cut off her payments because New York law provided that an alien who is unlawfully residing in the United States was not eligible for AFDC. The applicable federal law, however, stated that AFDC was available to aliens lawfully admitted for permanent residence or "otherwise permanently residing in the United States under color of law."[69] INS had not instituted a deportation hearing because of humanitarian reasons. The plaintiff's six

61. Comptroller General Report, No. B-125051 (1977).
62. Fogel, *Illegal Aliens: Economic Aspects and Public Policy Alternatives,* 15 San Diego L. Rev. 63, 67 (1977).
63. 42 U.S.C. § 1382c(a)(1)(B) (1976).
64. 42 U.S.C. § 1395O(2) (1976).
65. 42 C.F.R. § 448.50 (1977).
66. 45 C.F.R. § 233.50 (1977).
67. 7 C.F.R. § 271.1(e) (1978).
68. 553 F.2d 845 (1977).
69. *Id.* at 849.

American children would be deprived of their mother's support and supervision if she were deported. Thus, the narrow question presented to the court was whether the plaintiff was residing in the United States under "color of law." In ordering the defendant to reinstate her AFDC payments, the court reasoned that those charged with the power to deport were permitting plaintiff, as a parent of American citizens, to remain in the United States and, therefore, she was here under "color of law." This is clearly a narrow exception to the flat prohibition against undocumented aliens receiving public assistance under any federal programs.

Once again, the issue arises of whether agencies administering public assistance programs report or are required to report to INS undocumented aliens who apply or are found to be receiving welfare. Until three months ago, the United States Department of Agriculture required state agencies which administered the food stamp program to report undocumented aliens to INS. But as the result of an unreported Texas case, *Rodriguez v. Texas State Department of Welfare,*[70] the Agriculture Department has dropped this requirement. There are no similar requirements for agencies which administer other welfare programs.[71]

In *Rodriguez,* the plaintiff was a U.S. citizen who had had her food stamps cut off when she refused to give information concerning undocumented aliens who were allegedly residing in her house. Ms. Rodriguez challenged the regulations of both the Department of Agriculture and Texas which required agencies administering the food stamp program to report to INS undocumented aliens who came to their attention. She alleged that the Privacy Act of 1974[72] prohibits federal agencies from disclosing information on individuals to other agencies and that the Social Security Act and the Food Stamp Act specifically restrict disclosure of information on individuals to purposes directly connected with the administration of those programs.[73] An out-of-court settlement resulted in both the Texas State Department of Welfare and the United States Department of Agriculture eliminating their regulations which required the reporting of undocumented aliens to INS.

70. Rodriguez v. Texas Department of Public Welfare, No. A-76CA57 (D. Tex., filed Mar. 1, 1976) settled out of court in the spring of 1978.

71. In fact, HEW, which administers the other federal public assistance programs, was opposed to the Department of Agriculture's position on this issue for a long time. From conversation with a lawyer at Travis County Legal Aid, Austin, Texas, who handled the *Rodriguez* case in March, 1978.

72. 5 U.S.C. § 552a (1976).

73. 42 U.S.C. § 602(a)(9) (1976); 7 U.S.C. § 2019(e)(3) (1976). The disclosure clause in the Social Security Act applies to the state plans under the various federal welfare programs which include AFDC, Medicaid, Medicare, and Food Stamps.

The Human Services Department (HSD) is the agency which administers the various public assistance programs here in New Mexico.[74] Officials at HSD stated that, since *Rodriguez,* they do not report undocumented aliens who come to their attention in connection with the food stamp program, and that they never reported aliens in connection with other welfare programs.[75] An official at INS, however, stated that they still receive such reports from HSD.[76]

In summary, every federally funded public assistance program has been assumed to be available only to American citizens or lawfully admitted aliens. The Second Circuit, however, has construed the federal provision limiting food stamp recipients to those aliens who are "permanently residing in the United States under color of law" to include an undocumented alien who had not been deported by INS because of her American-born children. The statutes which provide for other federal public assistance programs contain this provision as well and, presumably, this construction could be applied to them. Under both the Privacy Act and the Social Security Act, the disclosure of information about individuals is restricted. This prohibition applies not only to federal agencies, but also to state agencies administering federal welfare programs.

CONCLUSION

Courts are only beginning to address the question of whether undocumented alien children have the right to a public education. Only one court has held that an undocumented alien is entitled to receive unemployment compensation, despite the fact that, generally, both the federal and state governments tacitly approve their employment. Most public assistance programs are limited to citizens and lawfully admitted aliens. Overriding this already dismal picture is the fact that undocumented aliens must constantly face the possibility of being reported to INS and subsequently deported.

Undocumented aliens are clearly a sub-class of people in terms of the rights, benefits and services most Americans enjoy. Whatever one's feelings are on the issue, clarification of the rights of undocumented aliens while they are in the United States is desirable.

ANDREA SMITH

---

74. N.M. Stat. Ann. § 27-1-2 (1978).

75. From conversations with a number of case workers at the Albuquerque office of the New Mexico Health and Social Services Department in March, 1978.

76. From conversations with Owen Oates, chief officer of the Albuquerque office of INS in March, 1978.