ELDERLY IMMIGRANTS: WHAT SHOULD THEY EXPECT OF THE SOCIAL SAFETY NET?

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The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) terminated federal benefits to many immigrants. The Balanced Budget Act of 1997 (BBA) only partially restored these benefits to select immigrants who lawfully resided in the United States before August 22, 1996. Professor Francis discusses how these statutory provisions particularly devastate elderly immigrants.

Professor Francis questions the morality of the congressional policy to end immigrants' dependence on public welfare benefits by analyzing whether Congress's justifications, which rely on principles of self-sufficiency, nondependency, and nonencouragement, really apply to elderly immigrants. The author finds that the statutes' termination of federal benefits is immoral when applied to elderly immigrants first because it is unlikely to motivate the typical elderly immigrant to become self-sufficient. She then argues that PRWORA denies the legitimate expectations of elderly immigrants, their relatives, and their communities; PRWORA is unfeasible; it discriminates; and it is uncompassionate and unfair to elderly immigrants, their relatives, and their communities. The author argues that the BBA does not cure PRWORA's defects because it denies and does not accommodate the unforeseeable disasters that strike elderly immigrants. Professor Francis concludes that Congress

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should restore federal benefits to elderly immigrants, at least to the point of providing a safety net.

In 1996, many elderly legal immigrants in the United States nearly lost their entire social safety net. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)[1] would have ended federal means-tested benefits for most legal immigrants.[2] For the elderly, particularly the incompetent or ill, the most crucial losses would have been Supplemental Security Income (SSI) and Medicaid eligibility, including payment of nursing home charges. The Balanced Budget Act of 1997 (BBA)[3] restored the most important of these losses to immigrants already in the United States before August 22, 1996.[4] However, the BBA did not restore all losses, even for those immigrants in the United States before the cutoff date.[5] Immigrants who arrive in the United States after August 22, 1996, remain subject to the PRWORA restrictions.[6] Moreover, the period between the enactment of PRWORA and the enactment of the BBA was a time of frightening uncertainty for legal immigrants and a reminder of the fragility of their hold on social safety-net benefits.

This article begins by outlining the situation of elderly legal immigrants as it would have been had PRWORA continued to hold sway. It then outlines the current situation of partially restored benefits for these immigrants. I then examine and criticize arguments that were given in Congress for PRWORA's reduction of benefits. Next, I turn to the decision in the BBA to restore benefits to legal immigrants who arrived in the United States before PRWORA, but not to those who arrived afterwards. The principal reason offered for the distinction is that later arrivals are now on notice that they will be ineligible for federal means-tested benefits and that they therefore come to the United States with no legitimate expectations of safety-net support. I argue that this distinction cannot be justified and that safety-net benefits should be restored for all legal immigrants, including those arriving in the United States after August 22, 1996.

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1. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 [hereinafter PRWORA].

2. These provisions were enacted in PRWORA's Title IV, which was entitled "Restricting Welfare and Public Benefits for Aliens." *Id.* § 400, 110 Stat. at 2260.

3. Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997) [hereinafter BBA].

4. *See id.* § 5301, 111 Stat. at 597.

5. *See id.*

6. *See id.*

I. PRWORA and the Loss of Benefits for Legal Immigrants

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 was a far-reaching reform of the welfare system in the United States. The Act's overall goal was to move long-term welfare recipients into the work force and to transform welfare into a system of temporary support for those in crisis. Whatever judgment might be made about this overall approach, it is not a strategy that easily applies either to the very old (who have effectively left the work force) or to those who lack the cognitive or the physical capacities to work at any given time. Yet Congress decided in PRWORA to exclude legal immigrants from federal means-tested benefits apparently without attention to these concerns.[7]

The specifics of PRWORA were set out in some highly technical concepts. The first is that of a "qualified immigrant," an immigrant who has been admitted to the United States legally, for permanent residence, who has been granted asylum, who has been granted refugee status, or who has been permitted to stay in the United States under certain other limited bases.[8] "Qualified" immigrants are those who without PRWORA would have had benefits eligibility; it is important to emphasize that PRWORA's limitation of benefits applied to immigrants whose presence in the United States was both legal and for the long term. Nonetheless, PRWORA excluded nearly all of the qualified from benefits eligibility. There were a few, limited exceptions to the reach of PRWORA exclusion. First, legal immigrants would remain eligible if they had worked at least forty qualifying quarters, quarters in which they earned at least a minimum amount and did not receive any federal means-tested benefit.[9] The theory here may have been that ten years of paying taxes should vest eligibility for benefits paid from tax dollars. Legal immigrants could gain this eligibility vicariously through quarters worked by a spouse or a

7. Another consideration behind PRWORA was saving money, and the exclusion of legal immigrants was expected to yield a significant proportion of the overall savings. Much of the savings would have come from elderly immigrants: estimates were that 67% of the 500,000 who stood to lose SSI were over 65 years old, 41% were over 75 years old, and 39,000 were nursing home residents. *See* Memorandum from F. William McCalpin, Chair, Commission on Legal Problems of the Elderly, American Bar Association & Roger A. Clay, Jr., Chair, Commission on Homelessness & Poverty, American Bar Association, to the Commission on Mental and Physical Disability Law, et al. 2 (May 27, 1997) (on file with author).

8. *See* PRWORA § 431(b), 110 Stat. at 2274.

9. PRWORA § 402(a)(2)(B), 110 Stat. at 2262. The minimum amount for a qualifying quarter in 1997 was $670. *Id.*

parent,[10] but there are significant gaps in this vicarious eligibility. Divorced spouses could no longer claim quarters vicariously, even for those quarters accumulated before the time of the divorce.[11] Children could only lay vicarious claim to quarters worked by a parent before the child's eighteenth birthday;[12] thus disabled children who might never be able to work but who arrived in the United States over the age of eight were effectively precluded from vicarious eligibility, even if their parents worked every quarter after the date of their arrival.

PRWORA's second exception to denial of benefits eligibility for qualified immigrants applies to legal immigrants on active military duty[13] or honorably discharged from the military.[14] These immigrants would remain eligible for benefits as would spouses and unmarried dependent children who could vicariously benefit from the military status exception.[15] Finally, refugees to whom the government granted asylum or withheld deportation would also remain eligible for benefits for five more years.[16]

PRWORA exclusions would have been particularly devastating for elderly immigrants for several reasons. Although immigrants could attribute their sponsors' income to the income eligibility determination, PRWORA did not provide that immigrants could attribute their children's quarters to their forty-quarter requirement. Therefore, immigrants entering the United States past retirement age, such as parents joining their children, would be unable to obtain eligibility from their children's work or military service. In addition, elderly immigrant spouses would lose their benefits upon divorce if they originally had become eligible for the benefits vicariously, whether or not they had desired the divorce. Imagine the difficult choice faced by an elderly person with a permanently demented spouse, who would like to divorce and remarry but recognizes that the cost will be the demented spouse's loss of safety-net benefits.

To be sure, PRWORA left one infallible way for legal immigrants to remain eligible for federal benefits: become citizens. This way too, however, poses particular difficulties for the elderly. Becoming a citi-

10. *See id.* § 435(1), 110 Stat. at 2275.
11. *See id.* § 435(2), 110 Stat. at 2275.
12. *See id.* § 435(1), 110 Stat. at 2275.
13. *See id.* § 402(a)(2)(C)(ii), 110 Stat. at 2263.
14. *See id.* § 402(a)(2)(C)(i), 110 Stat. at 2263.
15. *See id.* § 402(b)(2)(C)(iii), 110 Stat. at 2265.
16. *See id.* § 402(b)(2)(A), 110 Stat. at 2264.

zen, in addition to meeting residency and character requirements,[17] requires passing a citizenship test in English and swearing an oath.[18] In 1994, Congress amended the Immigration and Naturalization Act[19] to permit persons with disabilities to apply for a waiver of the English and citizenship requirements.[20] In July of 1997, the INS promulgated regulations implementing the disability waiver.[21] Only persons with disabilities may apply for the waivers; elderly persons whose ability to learn English or civics is complicated by Alzheimer's disease would be a perfect example. Being elderly itself, however, is not a disability; and to the extent that elderly noncitizens, for whatever non-disability-based reasons, face barriers to learning English, they will not be eligible for waivers. In addition, designated locations for the test may be difficult to reach for people who lack transportation or who have limited mobility. Distant locations may also seem remote and frightening for elderly persons who are not used to moving around American cities on their own; this remoteness may be compounded by the requirement at some centers that people coming for the test enter the testing center alone and without any support persons. Although at least some INS centers have demonstrated willingness to make accommodations for disabled persons with respect to the citizenship test, absolutely no waivers are allowed for the requirement that the applicant for citizenship be able to swear a meaningful oath.[22] The result is that elderly persons who are too demented to understand and swear the citizenship oath are foreclosed from obtaining eligibility through the citizenship process.[23]

The list of benefits that would have been lost under PRWORA is significant. PRWORA would have denied nonqualified immigrants, such as students lawfully in the United States but not on a permanent

17. *See* 8 U.S.C. § 1423(a)(1), (2) (1994).

18. *See* 8 C.F.R. § 301.1(b) (1997).

19. 8 U.S.C. § 1423(b).

20. *See* Immigration and Nationality Technical Corrections Act of 1994, 8 U.S.C. §§ 1101, 1423(b)(1) (as amended by Pub. L. No. 103-416, tit. I, § 108(a), 108 Stat. 4306, 4309-10).

21. 8 C.F.R. § 3.12.1(b)(3).

22. *See* 8 C.F.R. § 301.1. See Note, *The Functionality of Citizenship*, 110 HARV. L. REV. 1814 (1997), for a defense of the oath requirement as necessary to "meaningful" citizenship.

23. For stories describing the oath requirement's impact on persons with disabilities such as cerebral palsy or Alzheimer's disease, see Yvette Cabrera, *Disabled Immigrants Gain Citizenship Chance*, L.A. DAILY NEWS, July 4, 1997, at N1; Miguel Perez, *Citizenship Hurdle Absurd for Many Elderly, Disabled*, THE RECORD, Mar. 23, 1997, Review & Outlook, at 4.

basis, nearly all benefits. Nonqualified immigrants would be ineligible for *any* federal public benefits, including:

> (A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriate funds of the United States; and (B) and retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.[24]

The only benefits for which nonqualified immigrants would have remained eligible were immunizations—medical care that benefits others—and emergency medical and disaster relief.[25]

Qualified immigrants did not face a much better situation with respect to benefits lost. Qualified immigrants would have been categorically ineligible for "specified federal programs," such as food stamps and SSI.[26] The federal government provides SSI to aged and disabled persons who are indigent but ineligible for Social Security benefits. PRWORA left to the states' discretion qualified immigrants' eligibility for "designated federal programs," including Medicaid, Title XX block grant programs, and Temporary Assistance for Needy Families (TANF).[27] However, PRWORA still placed significant limits on states' determination of eligibility for federal benefits. Qualified immigrants remained categorically ineligible for any "means-tested federal public benefits" for five years after arriving in the United States.[28] Thereafter, the income of their sponsors and their spouse was to be "deemed" income of the immigrant for the purpose of eligibility determinations for means-tested benefits.[29] Interim INS regulations enforcing this provision provide for contractual enforcement of sponsorship support obligations by the federal government.[30]

This structure of benefit loss, like the structure of exclusions, would have hit the elderly particularly hard. Medicaid is a major

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24. PRWORA § 401(c)(1)(A), (B), 110 Stat. at 2262.
25. *See id.*
26. *See* PRWORA § 402(a)(3), 110 Stat. at 2264.
27. *See id.* § 402(b)(3), 110 Stat. at 2265.
28. *Id.* § 403(a), 110 Stat. at 2265.
29. *See id.* § 421(a), 110 Stat. at 2270.
30. The interim rules also require that the sponsor demonstrate income above 125% of the federal poverty guidelines for family size, that the sponsor's family size include the sponsored immigrant(s), and that family members whose income is counted toward the 125% be contractually obligated for support. *See* Affidavits of Support on Behalf of Immigrants, 62 Fed. Reg. 54,346 (1997) (to be codified at 8 C.F.R. pt. 213a).

payor of nursing home care.[31] After PRWORA, some nursing homes refused admission to elderly noncitizens whether or not they risked losing benefits eligibility.[32] Elderly immigrants who do not meet the requirement of forty credited quarters are not eligible for Medicare, moreover, and may need to turn to Medicaid for access to health care more generally. Although PRWORA allowed states the option to open Medicaid eligibility to qualified immigrants residing in the country for at least five years,[33] it limited the program funds in a fixed federal block grant.[34] After Congress enacted PRWORA, states gave mixed signals about their willingness to open Medicaid programs to qualified immigrants. SSI and food stamps are also programs that are particularly important to the support of elderly immigrants living in poverty who have not met the Social Security requirement of forty qualifying quarters.[35] It is important to note as well that many elderly immigrants who fail to meet the forty-quarter requirement were in the work force, but in job sectors where the requirement that employers report income and pay FICA was unevenly enforced: job areas such as domestic work, child care, or agricultural labor.

One of the most significant problems for the states was the sheer ability to assume the expenses of extending Medicaid benefits without additional federal dollars.[36] The numbers of qualified immigrants, especially elderly qualified immigrants, are heavily concentrated in some districts, particularly in California, New York, and Florida. Dade County, Florida, alone would have faced a burden of 54,000 newly ineligible immigrants who had been receiving benefits[37]—ten

31. Approximately one-half of the Medicaid budget is spent on nursing home care for indigent elderly people. *See* Valentine M. Villa et al., *Economic Diversity and an Aging Population: The Impact of Public Policy and Economic Trends*, GENERATIONS, Summer 1997, at 13, 15.

32. *See Legal Immigrants Denied NH Admission*, BROWN U LONG-TERM CARE QUALITY ADVISOR, July 14, 1997, at 5.

33. *See* PRWORA § 403(a), 110 Stat. at 2265.

34. *See id.* §§ 401-403, 110 Stat. at 2261-67.

35. Although immigrants who have lived in the United States for a long time are not more likely to use public benefits than citizens, elderly immigrants are more likely to depend on Medicaid and food stamps than elderly citizens (99% of whom receive Medicare). *See* Nancy San Martin, *Immigrants Arrive Poor, Then Thrive, Study Shows*, SUN-SENTINEL (Fort Lauderdale, Fla.), Apr. 9, 1997, at 1A.

36. For a description of the anticipated squeeze in Hawaii, a state with a significant immigrant population and the longest life expectancy in the nation, see Lucy Joikel, *Sink or Swim: Hawaii's Multibillion Dollar HealthCare Industry Faces a Sea of Change*, HAW. BUS., Sept. 1996, at 10.

37. *See* Jim Oliphant, *Unlikely Team Rises to Aid of Immigrants*, BROWARD DAILY BUS. REV., May 30, 1997, at A6.

percent of the estimated national total of one-half million.[38] New York City estimated a new burden of 110,000 newly ineligible immigrants—twenty percent of the estimated national total.[39]

PRWORA, therefore, caused legal immigrants great concern about their uncertain futures in the United States. Appeals from many directions led Congress to pass the Balanced Budget Act of 1997, which amended PRWORA only a month before its eligibility limitations were to begin effect.

II. The Balanced Budget Act of 1997 and the Partial Restoration of Benefits to Legal Immigrants

The BBA partially repaired the safety net of benefits to some qualified legal immigrants. Immigrants who either received SSI or resided lawfully in the country before PRWORA's original enactment (August 22, 1996) remained eligible for SSI.[40] In addition, immigrants who received SSI were derivatively eligible for Medicaid, but not derivatively eligible for food stamps.[41] The benefits restored by the BBA, even if incomplete, were important to immigrants lawfully residing in the country before PRWORA's enactment.

The BBA did not change PRWORA's impact on immigrants arriving in this country after PRWORA's enactment.[42] Thus, immigrants arriving after PRWORA's enactment remain ineligible for SSI or food stamps. Their eligibility for designated federal programs such as Medicaid and TANF under the state block grants program depends upon the states in which they live.[43] They are ineligible for all means-tested federal public benefits for five years; thereafter, their sponsors' and spouses' incomes are deemed to be theirs.[44] These deeming provisions will be enforced contractually by the federal government; the government will seek restitution from the sponsor for any means-tested federal benefit received by a sponsored immigrant.[45]

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38. *See Test Waivers for Citizenship Won't Stop Lawsuit, Disability Advocates Say*, IMMIGR. ADVISOR, May 1997, *available in* LEXIS, News Library, ASAP II file.
39. *See id.*
40. *See* BBA §§ 5301(a)-(b), 111 Stat. at 597-98.
41. *See id.* § 5305(b), 111 Stat. at 597-98.
42. *See id.* § 5301, 111 Stat. at 597.
43. *See* PRWORA § 402, 110 Stat. at 2262.
44. *See id.* §§ 403(a), 421(a), 110 Stat. at 2265, 2270.
45. *See id.* § 421(c), 110 Stat. at 2270.

Perhaps the only cause for optimism for immigrants arriving after August 22, 1996, may be that the Department of Health and Human Services (DHHS) has announced a narrow construction of the statutory term "federal means-tested public benefit." The DHHS has construed "federal means-tested public benefit" to include only mandatory, means-tested programs, i.e., Medicaid and TANF.[46] Although PRWORA explicitly excludes certain programs such as school lunches,[47] the DHHS interpreted PRWORA also to exclude discretionary spending programs, such as child care assistance.[48]

The BBA thus creates a radical dichotomy between the treatment of immigrants who arrived in the United States before PRWORA's enactment and the treatment of immigrants who arrived after PRWORA's enactment. In the remainder of this article I argue, first, that the congressional rationale for the PRWORA restrictions cannot be defended morally and, second, that the reasons offered for limiting the BBA restorations to immigrants present in the United States before PRWORA cannot be sustained.

III. Arguments Offered in Support of the Restrictions: An Ethical Critique

As support for the PRWORA restrictions, Congress put forth the principle of self-sufficiency as what it took to be the basic philosophy of American immigration policy.[49] It understood two more specific policy objectives as corollaries to the basic principle of self-sufficiency. The first corollary might be called the principle of nondependency: immigrants should not depend on public welfare benefits to meet their needs. Instead, they should rely on their own efforts, the resources of their families and sponsors, and the assistance of private charitable agencies.[50] The second corollary might be called the nonencouragement principle: the availability of public benefits should not serve as an incentive for immigrants to come to the United

46. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996; Interpretation of "Federal Means-Tested Public Benefit," 62 Fed. Reg. 42,256 (1997).

47. *See* PRWORA § 422(b)(3), 110 Stat. at 2271.

48. *See* Interpretation of "Federal Means-Tested Public Benefit," 62 Fed. Reg. at 45,257.

49. *See* PRWORA § 400(1), 110 Stat. at 2260.

50. *See id.* § 400(2)(A), 110 Stat. at 2260.

States.[51] Congress asserted, however, that in its judgment current immigration policy was not assuring self-reliance and that immigrants were increasingly depending on public benefits for support.[52] Congress therefore concluded—no doubt in anticipation of potential equal protection challenges—that compelling federal interests supported the PRWORA restrictions.[53]

In this discussion, my principal focus will be the ethical rather than the empirical claims asserted in PRWORA's statement of congressional policy, but the fact that there are serious reasons to question the empirical claims should not go unremarked. Although elderly immigrants are somewhat more likely to depend on public benefits than elderly nonimmigrants, long-term immigrants are not more likely to depend on them overall.[54] The explanation for the modest difference in rates among the elderly may be that elderly immigrants are somewhat less likely than nonimmigrants to be eligible for other elements of the social safety net, Social Security and Medicare in particular. Congress offered no data in support of the claim that immigrants are drawn to the United States by generous public benefits. In any event, were this the concern, it could be addressed more directly by immigration policies such as emphasizing skills or sponsorship.

The ethical argument I develop here makes use of variations on a typical example of those who stand to lose benefits under PRWORA. As initially described, my case is a sympathetic one for those who oppose the termination of benefits. I will consider less sympathetic variations, as the argument progresses, in order to consider the factors that make a moral difference. I will call my exemplar Mrs. I. She is a woman because the majority of nursing home residents who depend on Medicaid are women. Mrs. I is an elderly noncitizen who came to the United States with her husband over forty years ago. She has not obtained the forty quarters needed to qualify for Social Security or Medicare or to be exempt from the PRWORA limits. Her husband died before working a full forty quarters. She supported herself for many years by working as a domestic. Although she paid income taxes, neither she nor her employer paid FICA on her earnings. When Mrs. I became too ill to work, she lived with an adult daughter for

51. *See id.* § 400(2)(A), (B), 110 Stat. at 2260.
52. *See id.* § 400(3), (4), 110 Stat. at 2260.
53. *See id.* § 400(5), (6), 110 Stat. at 2260.
54. *See* San Martin, *supra* note 35, at A1.

several years. Now in the advanced stages of Alzheimer's disease, Mrs. I lives in a nursing home; her only sources of support are SSI and Medicaid. Her Alzheimer's disease is too advanced for her to be able to take a meaningful oath and meet the requirements for citizenship. Because there are morally significant differences between the situations of those already here who would have lost their benefits under PRWORA and the situations of later comers who will be ineligible for benefits under the BBA, I begin with a critique of the PRWORA restrictions.

A. PRWORA and Legitimate Expectations

In its original form, PRWORA would have resulted in the termination of Mrs. I's SSI income and food stamps. PRWORA would also have ended her Medicaid and other means-tested federal benefits if her home state did not choose to include her in these programs. Congress's articulated principles in PRWORA, however, do not justify cutting these benefits for incompetent elder immigrants like Mrs. I. Consider first the nonencouragement principle. Mrs. I's decision to come to the United States was made many years ago; she is now incompetent and too ill to engage in any decision making about her status. Incentives are a thing of the past for her; they do not operate now.

If Mrs. I were competent, by contrast, the nonencouragement principle might seem relevant. Incentives might operate, depending on her physical condition: the knowledge that she was at risk of losing her benefits might lead her to reconsider whether she should stay in the United States or attempt to return to her country of origin. The incentives, however, are unlikely to encourage her to become self-sufficient in the United States. Because she is not a recent arrival, and because all of her family and her connections are in the United States, it is far more likely that the incentive created for the competent elderly would have been the incentive to become citizens. Indeed, the rush of citizenship applications in the wake of PRWORA indicates that this was exactly the impact of PRWORA on those able to take advantage of the citizenship option.[55] These cases suggest that the real target of nonencouragement under PRWORA was people who had not yet arrived in the United States, the group still targeted for the loss of benefits under the BBA. The situation of this group is addressed below.

55. *See* Cabrera, *supra* note 23.

The principle of nondependency poses a somewhat more complicated question with respect to incompetent patients such as Mrs. I. Mrs. I's situation is what it is; planning for nondependency is not an option for her. Her options may be very limited. Certainly, she cannot be expected to become self-sufficient if she has advanced Alzheimer's disease. She may no longer have family or sponsors with resources to help out; indeed, she may have outlived these possible sources of support. Her only source for replacement of the loss of SSI and Medicaid funds, as well as other federal benefits, would be private charity. If she is significantly demented, however, she will be unable to make these arrangements on her own. The upshot of PRWORA in these cases, then, would be to rely on the hope that families, communities, or private charities would step in and take up support for the Mrs. Is of our world who can no longer rely on the federal government. This shift would impose a major new burden on private charities, one that they may not have the resources to meet and certainly would not have a legal obligation to meet. Thus, Mrs. I would have no assurance that her Medicaid bills would continue to be paid. Nursing homes, in the wake of PRWORA, raised concerns about where patients like Mrs. I were to go.

Suppose, on the other hand, that Mrs. I were competent, or that her sponsor, spouse, or family were available. A proponent of the principle of nondependency might argue that it would be justifiable to require Mrs. I to figure out how to provide for herself or to rely on her available sources of support. As to Mrs. I herself, there are several reasons why it would be wrong to interpret the principle of nondependency to require her to provide for herself. The first reason is that to do so would be a radical change in the long-standing rules that applied to her. I have argued elsewhere that legitimate expectations of a benefit are independent moral reasons for providing that benefit.[56] That is, the fact that someone has come to count on a benefit, such as Medicaid or Medicare, legitimately is a special, moral reason for providing that benefit. Expectations are legitimate when they are reasonable, when they have been encouraged by existing rules or policies, and when they are long-standing. Their importance is heightened when they also relate to means for respecting the basic needs and integrity of persons, and when they are supported by other

56. *See* Leslie Pickering Francis, *Consumer Expectations and Access to Health Care*, 140 U. PA. L. REV. 1881 (1992).

moral claims, such as claims of justice. Mrs. I's expectations of the availability of SSI and Medicaid are particularly powerful examples of legitimate expectations. They were reasonable and encouraged in light of the long-standing federal commitment to these programs. The unevenness of federal enforcement policy with respect to FICA, and Mrs. I's own acceptance of her employer's failure to pay, occurred when SSI and Medicaid were last resort forms of support for elderly immigrants who failed to qualify for Social Security or Medicare. Finally, their legitimacy is enhanced by their importance to Mrs. I and by claims of justice. The availability of SSI and Medicaid are crucial to Mrs. I's ability to pay for basic and unpredictable necessities of life. Mrs. I cannot anticipate whether she will suffer catastrophic health needs or whether she will become disabled and unable to work. In this unpredictability, the case for the legitimacy of Mrs. I's expectations of SSI and Medicaid are arguably even stronger than the legitimacy of her expectations of food stamps: although food is a basic necessity of life, food needs are relatively stable and predictable. On at least those views of justice that hold that there is a social responsibility to provide for basic health needs of those who cannot provide them for themselves, it would be unjust to deny Mrs. I basic health care for which she is unable to pay. Mrs. I's legitimate expectations of the safety net that had been in place for many years for people such as herself are thus one reason why it would be wrong to apply the principle of nondependency to her situation.

A second reason why it would be wrong to apply the principle of nondependency to require Mrs. I to provide for her own needs is that even in the best case scenario it is unlikely that she will be able to do so. Applying the principle of nondependency to Mrs. I herself would require her to go back to work. The likely range of jobs available to a woman of her age and skills is limited—perhaps domestic, child care worker, or server at a fast food establishment. From these jobs, she might be able to earn enough to pay for her basic living expenses, but it is much more questionable whether she would be able to find a job that would provide her with health insurance or the possibility of retirement benefits. At best, Mrs. I can be expected to use work to make up the loss of benefits such as food stamps or subsidized housing. If Mrs. I has health needs—and, of course, if she becomes disabled—the goal of requiring her to be self-sufficient will simply be unmet. Once again, Mrs. I will be dependent on private charity to make up the gap.

A third reason why it would be wrong to apply the principle of nondependency to Mrs. I is that it would treat her very differently from the elderly who are citizens. Requiring that elderly immigrants go back to work to support themselves imposes a lifetime burden on them that is not imposed on citizens. This burden is especially unfair to those who were already elderly or disabled and in the United States at the time of the rules change, and thus unable to take the new rules into account in planning how to live without safety-net benefits. Consider the tragic example related by Representative Hinojosa of Texas, in arguing for restoration of the benefits taken away by PRWORA for those already in the United States:

> Mr. Rosendo Tijerina is a legal immigrant who has worked in Texas for eleven years. Last November he was involved in a serious auto accident. His legs and pelvis were crushed and his heart was injured as well. He is now totally disabled.
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> Yet under the welfare reform law, Mr. Tijerina is not eligible for supplemental security income. He has worked hard, paid his taxes, integrated himself and his family into his community and has been a contributor to our country's economy. He deserves better treatment than this.[57]

Imposing this burden on people such as my hypothetical Mrs. I or the all-too-real Mr. Tijerina also places significant strains on community bonds. The practical effect of imposing a self-sufficiency requirement on people like Mrs. I would be to require them to work, quite literally until they can work no longer—perhaps even into their eighties or later. The failure to extend a safety net to those of an advanced age shows a quite remarkable lack of compassion. Finally, the incentive that is likely to be created by the PRWORA cutoff for competent people in the situation of Mrs. I is to become citizens. Thus PRWORA is unlikely to accomplish the goal underlying the nondependency principle in any event.

Until this point, I have considered applying the principle of nondependency to require Mrs. I to pay for her own needs. What about interpreting nondependency to require Mrs. I's relatives or sponsor to come to her aid? This interpretation is found in a limited form in PRWORA's deeming requirement, which would attribute the income of Mrs. I's spouse or sponsor to her in the determination of her income eligibility for Medicaid.[58] Defenders of the deeming re-

57. 143 CONG. REC. H4379 (daily ed. June 25, 1997) (statement of Rep. Hinojosa).

58. *See* PRWORA § 421, 110 Stat. at 2270.

quirement might argue that it is fair to require her spouse and sponsor to come to her aid. Defenders of the cutoff more generally might argue that it is fair to require noncitizens to turn to their families, friends, and communities if they cannot provide for their own needs. The arguments offered against relying on Mrs. I to provide for her own needs also apply to requiring Mrs. I to turn to such sources for whatever support they have available.

First of all, even for spouses and for sponsors, the deeming requirements represent a major change in the rules of the game. The sponsorship of Mrs. I may have occurred many, many years ago, and the connection between Mrs. I and her sponsor may be attenuated or nonexistent. Like Mrs. I, her spouse may have legitimately expected that a safety net would be there for her and that, despite her need for nursing home care, he would be able to maintain independent living. Although children, other relatives, and close community members are not legally obligated to Mrs. I through the deeming requirements of PRWORA, they may have the need to come to her aid thrust upon them by her sudden loss of benefits. The result may be unanticipated, significant disruptions in their own lives. The expectations of a safety net for Mrs. I, on the part of her sponsor, spouse, or relatives, arguably meet the criteria for legitimate expectations: they may well have been long-standing and encouraged by policy, they may cut deeply into both Mrs. I's and her family's abilities to lead minimally decent lives, and they are supported by claims of justice.

Moreover, both those subject to the deeming requirements and others close to Mrs. I may be unable to do much to contribute to her support. They may quickly become impoverished themselves, facing the same restrictions as Mrs. I if they are noncitizens. If Mrs. I's family takes her in, one or more adult members may no longer be able to work. The costs of her home health care alone may derail even the most modest educational plans for children in the family.

Finally, significant issues of fairness are raised for her family or sponsors by Mrs. I's need to turn to them for support. Mrs. I's children, for example, may be the only persons for her to turn to when she loses her SSI and Medicaid benefits. They will be faced with the choice of continuing to pay for her nursing home care, if they can; taking her in; or leaving her destitute and incompetent, with nowhere to go. This burden is not imposed on any other Americans, citizen or noncitizen. Even those who favor distinguishing citizens from noncitizens should note that this burden may fall on citizens: Mrs. I's chil-

dren may have been born in the United States or have become naturalized, even though she has not. Thus the result of the application of the principle of nondependency to Mrs. I under PRWORA is the disappointment of legitimate expectations and the imposition of potentially devastating and unfair burdens on her spouse, other relatives, or local communities.

PRWORA, to be sure, applied both to immigrants who had been in the United States for a very long time and to those newly arriving after the date of its enactment. Much of the concern voiced over PRWORA rested on the application of its changes to those who were already in the United States, perhaps for a lengthy period of time. As I have argued, applying both the nonencouragement and the nondependency principle to immigrants of long-standing duration is particularly problematic.[59] The BBA, however, amended PRWORA to apply its restrictions only to those arriving after August 22, 1996.[60] Contractual enforcement of the deeming requirements applies only after the effective date of the interim deeming rule, December 19, 1997.[61] Sponsors of this approach argued that it is both reasonable and fair to treat immigrants differently once they are warned of the new restrictions. Arguing in support of the BBA changes, Senator Lautenberg contended:

> The conference report also restores a basic level of fairness for people who have come into this country legally, who have obeyed the law, paid their taxes, and then fate delivers them a disability whether through accident or just sickness. Last year the Congress pulled the rug out from under these people and eliminated their disability benefits; for some, the only provision that they have that enables them to get along. But today we are restoring that basic safety net. It is the right thing to do.[62]

But would restoring benefits to qualified immigrants arriving after August 22, 1996, also have been the right thing to do?

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59. *See supra* Part III.A.

60. *See* BBA § 5301, 111 Stat. at 597.

61. 62 Fed. Reg. 54,346 (1997) (to be codified at 8 C.F.R. pt. 213a).

62. 143 CONG. REC. S8319 (daily ed. July 30, 1997) (statement of Sen. Lautenberg).

B. The Balanced Budget Amendment and Fair Treatment of Newly Arrived Immigrants

Senator Wellstone called August 22, 1996, "an arbitrary date on the calendar."[63] So it is, except for the fact that after that date immigrants considering coming to the United States were on notice that Congress had acted to end the social safety net for immigrants. Proponents of the continued imposition of restrictions on after-arrivers argue that it is supported by the principle of nonencouragement—because we do not want to encourage immigration by the potentially dependent—and by the principle of nondependency—because it is fair to expect later arrivals to know that they will need to count on their own resources or their sponsor's for support. For example, Daniel Stein, the Executive Director of the Federation for American Immigration Reform, argued on Talk of the Nation:

> To the extent that you are taking welfare benefits away from American citizens, Americans aren't getting quality public education and other services. The broader policy question is clear: should we have an immigration program that allows people to bring elderly parents who are essentially past their working years and have them retire and be supported at taxpayer expense?[64]

The efforts to put new arrivals on notice of the new requirements are intensified by the interim rule concerning affidavits of support. Immigrants arriving to join family members or to take up employment in a family enterprise must demonstrate that they are not likely to become a public charge.[65] To do this, the new immigrant must supply a sponsor, and the sponsor must file a support affidavit contractually obligating him to the federal government.[66] In addition, the sponsor must prove a household income exceeding 125% of the federal poverty line.[67] Notably, the affidavit also obligates the sponsor's spouse and any household members whom the household income calculation includes.[68] A sponsor may pledge assets rather than income, but the assets must sufficiently support the immigrant at 125% of the poverty line for at least five years (the minimum period of ineligibility for federal means-tested public benefits for qualified immigrants even

63. 143 CONG. REC. S6780 (daily ed. June 27, 1997) (statement of Sen. Wellstone).
64. *Talk of the Nation* (National Public Radio broadcast, Mar. 19, 1997).
65. *See* Affidavits of Support on Behalf of Immigrants, 62 Fed. Reg. 54,346 (1997) (to be codified at 8 C.F.R. pt. 213a).
66. *See id.*
67. *See id.* at 54,347.
68. *See id.*

if states choose to extend benefits afterwards).[69] Sponsors must also agree to notify both the state and the federal government of any changes of address.[70] Such sponsorship obligations cease only if the immigrant becomes naturalized, can be credited with forty quarters of work, or ceases to be a permanent resident of the United States. The sponsorship also ends when the immigrant or the sponsor dies.[71]

A crucial starting point for assessing the justifiability of continuing to exclude after-arrivers from benefits is whether the notice given by PRWORA makes a moral difference. In one way, it does. The announcement that they cannot count on a safety net should be clear to immigrants arriving after that date, as well as their sponsors and perhaps their families (although there is no guarantee of family knowledge unless families are involved in sponsorship). An immigrant's expectations of a safety net, then, would be neither reasonable nor encouraged. Indeed, this change is the very point of the nonencouragement principle as part of American immigration policy. Thus if encouragement and reasonableness are necessary for the legitimacy of expectations, after-arrivers would no longer have legitimate expectations of a safety net and this argument for providing them with a net would no longer hold. It does not follow, however, that other moral reasons for the safety net would also collapse, or even that expectations in any form would be irrelevant to the issue of the restoration of benefits. I shall argue that the other moral reasons given for the restoration of benefits to immigrants in the country before August 22, 1996, also apply to after-arrivers, at least to the extent of guaranteeing them safety-net protections for health needs and disabilities.

A major concern about excluding those already here from benefits was that the incentives sought to be created by PRWORA—nonencouragement and nondependency—were in fact unlikely to be created. There are similar questions about whether the new limits can be expected to discourage those who might have need of a safety net from coming to the United States. To be sure, after-arrivers have a new decision to make and new information with which to make it. Immigrants who know before arrival that they will have safety-net needs would rationally be discouraged by the PRWORA restrictions. These situations represent the intended goals of the new restrictions.

69. *See id.* at 54,349.
70. *See id.*
71. *See id.*

For example, Daniel Stein, Executive Director of the Federation for American Immigration Reform, articulated this goal on Talk of the Nation: "The system should not allow immigrants to bring elderly parents here over the age of fifty-five as a general rule."[72] Another unarticulated and perhaps unrecognized but discouraged group will be parents of disabled children over the age of eight, who will never be able to achieve the forty quarters required for vesting through their parents and who may not be able to work or attain citizenship on their own. Questions about the fairness of these goals will be raised shortly, but to the extent that these groups will be discouraged by the restrictions, the nonencouragement principle might be thought to be achieving its goal.

Nonetheless, the new restrictions sweep far beyond nonencouragement of those with known needs. Those immigrants who come to the United States intending and able to work are not the targets of PRWORA nonencouragement. Yet they may well become those in need of safety-net benefits if unexpected disease or disability strikes. The PRWORA incentives will not discourage them from coming to the United States unless they are so risk-averse that they would prefer keeping whatever safety nets are available in their countries of origin to coming to the United States without a safety net. Once here, they will not be able to prevent the need for benefits: disability or disease may strike without warning or control. PRWORA incentives may discourage immigration by the elderly and by parents of children with disabilities, but they will not prevent populations of newly arrived immigrants who suffer catastrophes after arrival.

Another central concern raised about the PRWORA exclusions was their unfairness. The exclusions that continue in the BBA are also unfair for the same reasons. A way to begin to see the unfairness of the continued exclusions in the BBA is to consider the situation of people who bring their parents over, sponsor them, and believe they have the resources to care for them, but then suffer catastrophic medical events themselves. Suppose, for example, that Mrs. I's children arrived in the United States a number of years ago and have become reasonably prosperous citizens. (Indeed, they may even have been born in the United States during a time of Mrs. I's former residency.) Suppose also that it has become increasingly difficult for Mrs. I to care for herself at home in her country of origin and that most of her rela-

72. *Talk of the Nation, supra* note 64.

tives and friends there have died. She faces the prospect of a lonely old age with whatever safety net exists in her country of origin or the prospect of an old age cared for by her daughter but without any chance of receiving safety-net benefits. The only difference between the situation of Mrs. I and her daughter and the situation of countless other Americans and their aged parents is that Mrs. I has neither attained citizenship nor met the PRWORA exemption requirements. Mrs. I had the bad luck to have catastrophe strike too soon, while others did not. To have bad timing affect the lives of both Mrs. I and her family in such devastating ways, while it does not affect the lives of others similarly situated, is deeply unfair.

Similarly unpredictable, moreover, is whether the catastrophes of disease or disability occur before or after arrival in the United States. To be sure, those who know that they are already in need of support before arrival know that the United States will not extend safety-net benefits to them. They will be discouraged from coming. But the consequences will be that families of the already disabled will be discouraged from reuniting, while families of those who do not yet know their needs will not be discouraged. Once again, whether families suffer in this way is an arbitrary matter of timing and thus arguably unfair.

In these situations, the goal of ordinary support for Mrs. I is attainable from her family or sponsors. Such ordinary support, I would argue, is the appropriate scope of the principle of nondependency. Providing for Mrs. I's ordinary living expenses is something that her relatives or community can plan in a controllable way. What may well be beyond their reach, however, is catastrophe. Suppose Mrs. I's daughter becomes seriously ill herself and is unable to care for Mrs. I, or Mrs. I has expensive medical needs, or Mrs. I becomes demented (before she can herself qualify for citizenship) and so difficult that home care is impossible. The burdens any of these accidents might impose on Mrs. I's family are unpredictable and far beyond the ordinary expenses of care. Imposing obligations of support up to 125% of the poverty line on sponsoring communities or families is thus arguably fair, whereas categorical exclusions from SSI or Medicaid are not.

Such unforeseen disasters, moreover, are possibilities for the general immigrant population, including immigrants arriving ready to work, as indeed they are for any American citizen. Celia Munoz, Deputy Vice President for Policy, National Council of La Raza, framed the argument this way:

> [Immigrants are] not superhuman . . . . Some of them have accidents. Some of them have illnesses. I think the fundamental question is, are we as taxpayers gonna support our immigrant neighbors who are also taxpayers, or are—have we chosen to treat them in a much, much different fashion. And the sad truth of it is that we are treating them in a very unfair fashion.[73]

Similarly, Representative Hinojosa's example of a legal immigrant disabled in an accident just before reaching the forty quarters required for exemption[74] could be any working American.

The issue raised by such unforeseen disasters is whether it is fair to conceive of the principle of nondependency for immigrants as covering all contingencies, no matter how unpredictable or catastrophic. An arguably fairer alternative would be to understand nondependency as responsibility for the ordinary necessities of life over a working life span to the extent that the ability to work remains. On this alternative, those aspects of the safety net that cover unpredictable and catastrophic needs should remain available, particularly SSI and Medicaid. Sponsorship obligations could similarly be construed to encompass maintenance up to 125% of the poverty level, but not to include a contractual obligation to reimburse the federal government for receipt of means-tested benefits that cover any catastrophic events, such as unexpected disability or health expenses. This alternative is arguably fairer because it extends a safety net to those contingencies people cannot control, plan for, or save for. As it now stands, however, luck determines the difference between an immigrant who becomes eligible for benefits by obtaining citizenship or working forty quarters and an immigrant who remains eligible for benefits because of a disability.

There is an argument to be made from expectations here, too. Immigrants who come to the United States ready and able to work legitimately expect to be able to provide for themselves. They have no reason to believe that the contingencies that give rise to dependency will occur to them—that they will have a severely disabled child, that they will be hit by a truck, or that they will suffer from breast cancer. They do not expect to bear catastrophic costs, because they have a reasonable expectation that life will go on without catastrophe. These are not, to be sure, expectations that the U.S. government has encouraged by long-standing policy. But they are expectations that a

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73. *Id.*
74. *See supra* note 57 and accompanying text.

decent community would arguably encourage, at least to the extent the community is able. Decent communities cannot prevent catastrophes, but they can provide a safety net to cushion the effects of catastrophe. Immigrants newly arrived in the United States now face exclusion from this safety net.

IV. Conclusion

PRWORA threatened to exclude over one-half million legal immigrants in the United States, and all newly arriving immigrants, from the social safety net of SSI, food stamps, Medicaid, and other means-tested federal benefits. The BBA restored some of these benefits (but not food stamps) to immigrants in the country before August 22, 1996. Immigrants arriving after this date remain subject to PRWORA restrictions. These policies were justified by Congress in terms of the principles of nonencouragement and nondependency. I have argued, to the contrary, that there are good moral reasons for not understanding nonencouragement and nondependency to justify the exclusions. Legitimate expectations are an important reason for objecting to the reach of the PRWORA cuts. Fairness and ineffectiveness are two other reasons that tell against PRWORA. Although legitimate expectations do not provide an argument in quite the same way against the exclusion of after-arrivers from benefits, fairness and ineffectiveness do. The rules to be enforced under the BBA will neither prevent catastrophes from happening to people who are new to the United States nor provide them with the means to help themselves. On the other hand, it is fair—if less than compassionate—to expect immigrants or their sponsors to bear the controllable and expected costs of basic life maintenance, perhaps up to 125% of federal poverty guidelines. Congress should act to restore safety-net benefits at least to this extent. Perhaps the next step would be to reconsider whether a more compassionate society would insist on sponsorship requirements in the first place.