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Walking a Gray Line: The “Color of Law” Test Governing Noncitizen Eligibility for Public Benefits

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The color of law standard appears in a wide array of public benefits statutes. This Article analyzes the color of law standard in determining eligibility of noncitizens for public benefits. It also outlines the impact of the Immigration Reform and Control Act of 1986 on benefit eligibility. After reviewing legislative history and judicial construction of the standard, the author proposes a working definition of “permanently residing... under color of law” that would include those aliens with implied or express permission to remain in the country but exclude undocumented aliens and those who are temporarily present.

INTRODUCTION

The eligibility standard governing noncitizen participation in various public benefit programs has become the subject of intense debate and litigation during the past few years. Generally, under this standard, a noncitizen must demonstrate that she is permanently residing in the United States under color of law. Proponents for narrowly construing the standard contend that the availability of benefits is a lure for “illegal aliens” to enter this country. Others dispute that...
contention, and urge a more expansive construction to protect persons permitted to remain in the United States from being denied the means to subsist.

The eligibility of noncitizens who have been "lawfully admitted for permanent residence" is not in dispute. These persons are statutorily eligible for most public benefits. Rather, this Article focuses on the eligibility of noncitizens who have not yet attained permanent status but are in the process of securing legal status from the Immigration and Naturalization Service (INS).

The current debate over alienage restrictions in public benefit programs was precipitated in 1971 by the Supreme Court's decision in *Graham v. Richardson.* *Graham* held that a state law denying welfare benefits to resident aliens violated the equal protection clause. To implement *Graham,* various laws and regulations governing benefit eligibility were proposed that would provide for nondiscrimination on the basis of alien status. Concern arose that these provisions would permit "illegal aliens" to establish eligibility. As a result, Congress adopted the "color of law" language to limit benefits to those persons present with the knowledge and permission of the INS.

The phrase "color of law" first appeared in our jurisprudence in the Civil Rights Act of 1871, also known as the "Ku Klux Klan Act." While the legislative debates on the Act in 1871 are not illuminating for present purposes, the language did appear, shortly thereafter, in a Supreme Court opinion: "'Color of law' does not mean actual law. 'Color,' as a modifier, in legal parlance, means 'appearance as distinguished from reality.' Color of law means 'mere semblance of legal right'." 

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   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

5. McCain v. Des Moines, 174 U.S. 168, 175 (1899) (annexation of property held lawful because municipal government was acting under color of law). *Black's Law Dictionary* similarly defines the term as the "appearance or semblance, without the sub-
This historical background, although arising in a different context, provides some early clues to the meaning of "color of law." The language is clearly intended to include actions not covered by specific authorizations of law. "It embraces not only situations within the body of the law, but also others enfolded by a colorable imitation." 6

This Article analyzes the manner in which the courts presently construe the color of law standard in the context of noncitizen eligibility for public benefits. 7 It reviews the relevant legislative history of these alienage restrictions as well as the impact of the recently enacted Immigration Reform and Control Act of 1986. The Article concludes that the "color of law" language is intended to prohibit temporarily present aliens and "undocumented aliens" 8 from participating in the benefit programs. Restricting eligibility for other categories of aliens could result in the denial of subsistence benefits to persons with implied or express permission to remain in this country. Any such construction would be an improper reading of the subject phrase and contrary to congressional purposes. Finally, the Article proposes a working definition of "permanently residing . . . under color of law" that can be applied without resort to complex analyses of various provisions of immigration law and is sufficiently flexible to accommodate subsequent developments in the law.

LEGISLATIVE HISTORY OF "PERMANENTLY RESIDING UNDER COLOR OF LAW"

Congress addressed the color of law standard on several occasions, when it considered enactment of alienage restrictions for the Supplemental Security Income (SSI), Aid to Families with Dependent Children (AFDC), Unemployment Insurance, Medicaid, and Food Stamp programs. This legislative history reveals a common theme. The subject language was employed for the purpose of excluding two classes — "illegal aliens" and temporarily present aliens, such as

7. The primary focus will be on eligibility for Aid to Families With Dependent Children, Medicaid, Unemployment Insurance, and Supplemental Security Income, all of which employ the color of law test.
8. "Undocumented alien" is used to identify a person who either entered the country without inspection or overstayed a validly issued visa and who is not in the process of securing documentation from INS. Although it is not a connotation favored by the author, the undocumented are often referred to as "illegal aliens." The term is a misnomer as it erroneously suggests that persons referred to as such have committed a criminal offense.
tourists, students and temporary workers.

Other than excluding these two classes, Congress' earliest concern, expressed in the SSI debates, in establishing benefit eligibility for persons under color of law was to provide for the needs of persons fleeing persecution. These were not persons who already had been granted legal refugee status but rather applicants seeking to attain such status. In employing the color of law standard, Congress intended that a humanitarian approach be taken toward the transitional needs of noncitizens, particularly those fleeing persecution, who are permitted to remain in this country while seeking to legalize their status.

SSI

The color of law test for noncitizen eligibility was initially adopted in 1972 as part of the SSI program of cash benefits to the aged, blind, and disabled. For eligible persons, the SSI benefit may provide a total monthly income or supplement a low monthly income. In addition to cash payments, SSI recipients are automatically covered by Medicaid and may be eligible for In-Home Supportive Services (for example, housework or personal care).

To be eligible for SSI, a person must be either a citizen, a permanent resident alien or "otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 1153 (a)(7) or section 1182 (d)(5) of Title 8)." Congress specifically provides that the term "including" when used in a definition . . . shall not be deemed to exclude other things otherwise within the meaning of the term defined." Moreover, the courts have consistently found that "the categories listed in the parenthetical are illustrative rather than definitive." Thus, color of law

10. Id.
11. When section 1382c(a)(1)(B)(ii) of Title 42 was enacted in 1972, section 1153(a)(7) of title 8 provided in pertinent part: "Conditional entries shall . . . be made available by the Attorney General . . . to aliens who . . . because of persecution or fear of persecution on account of race, religion, or political opinion . . . have fled [certain designated areas] . . .; or . . . are persons uprooted by catastrophic natural calamity . . . ." INA § 203(a)(7), 8 U.S.C. § 1153(a)(7).
12. When section 1382c(a)(1)(B)(ii) was enacted, section 1182(d)(5) of Title 8 provided in pertinent part: "The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States . . . ." INA § 212(d)(5), 8 U.S.C. § 1182(d)(5).
status is not limited to the examples set forth in the parenthetical.

As originally proposed by the House, SSI eligibility was limited only to aliens who were lawfully admitted for permanent residence.\(^6\) Concern was expressed, however, regarding the eligibility of Cuban parolees and conditional entrants who were not admitted as permanent residents. During the Senate deliberations on the bill, therefore, Senator Chiles of Florida proposed an amendment (on behalf of himself and Senator Gurney) which would require the use of the color of law standard in establishing alien eligibility.\(^7\) Senator Gurney explained the purpose of imposing the standard:

MR. GURNEY: Mr. President, these amendments which we are introducing at this time are designed to prevent a great and unintended economic hardship being placed upon the people of Dade County, Fla. . . . Florida has about 12,000 refugees from Communist Cuba within its borders who are either over 65 years of age, blind, or disabled. At my request, HEW has provided an estimate that the payments for these individuals are about $18 million per year. . . . Mr. President, the Cuban refugee program is one of federal responsibility and the State of Florida should not be required to bear the cost of that commitment alone. The categories of eligibility must, in all fairness, be amended to include these political refugees. . . . Moreover, under international protocols of general application, the United States has agreed to accord refugees staying in its territory equal treatment. If these amendments are not approved, the State of Florida, and Dade County will be forced to pay for programs which ought to be supported by the Federal Government. I am sure that this is not what the Members of this body want.\(^8\)

In agreeing to the amendment en bloc, the Senate thereby accepted federal responsibility for providing welfare benefits to noncitizens seeking refuge in the United States as a result of a program established by the federal government. By inserting the subject phrase into the statute defining alien eligibility for SSI benefits, the full Senate implicitly adopted the principle enunciated by Senator Gurney: whenever the federal government is responsible for inviting or permitting the presence of aliens in this country, the federal government should bear the costs of providing subsistence benefits to these needy aliens.

**AFDC**

The AFDC program is a creation of the Social Security Act of 1935 and is funded jointly by the state and federal governments. Its


\(^7\) 118 CONG. REC. 33,959 (1972).

\(^8\) Id. (emphasis added).
The purpose is to provide subsistence benefits to needy children who are living in the home of a parent or certain relatives, or are under foster care. Caretaker relatives are included in the program if they meet the eligibility requirements. In addition to cash payments, AFDC recipients are automatically covered by Medicaid.\(^{19}\)

In order for a child to be eligible for AFDC or for a caretaker relative to be taken into account in calculating the amount of aid which the child will receive,\(^{20}\) the child or relative must be either a citizen, a permanent resident alien or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 1157(c)\(^{21}\) of Title 8 (or of section 1153(a)(7) of Title 8 prior to April 1, 1980), or as a result of the application of the provisions of section 1158\(^{22}\) or 1182(d)(5) of Title 8).\(^{23}\)

In 1973, the Department of Health, Education and Welfare (HEW) proposed to use the "color of law" phrase as a test of noncitizen eligibility for AFDC with the purpose of "implement[ing] the Supreme Court decision in Graham v. Richardson."\(^{24}\) The landmark decision in Graham\(^{25}\) proclaimed that state classifications based on alienage are inherently suspect and should be subjected to close judicial scrutiny.\(^{26}\) The Court in Graham thus struck down a state law which denied welfare benefits to aliens based on residency.

In response to Graham, HEW initially proposed an AFDC regulation which provided that a "[s]tate plan may not exclude an otherwise eligible individual solely on the basis that he is not a citizen, or

20. In Darces v. Woods, 35 Cal. 3d 871, 679 P.2d 458, 201 Cal. Rptr. 807 (1984), citizen children who were receiving AFDC benefits challenged a regulation that excluded undocumented alien children from being considered in calculating the needs of the family budget unit, thereby reducing the size of the total grant paid to a family composed of both eligible citizen children and ineligible alien children. The California Supreme Court held that the regulation violated the equal protection clause of the state constitution and that the needs of the undocumented alien children must be included in determining the AFDC benefit level.
21. Section 1157(c) relates to the discretionary power of the Attorney General to "admit any refugee [as defined under 8 U.S.C. § 1101(a)(42)(A)] who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible . . . as an immigrant under this Act." INA § 207(e)(1), 8 U.S.C. § 1157(e)(1).
22. Section 1158(a) requires the Attorney General to establish:
a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of [INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)].
INA § 208(a), 8 U.S.C. § 1158(a).
26. Id. at 376.
because of his alien status." The proposed regulation, however, brought opposition to granting aid to aliens not lawfully present in this country, that is, "illegal aliens." In response to this opposition, HEW proposed instead:

- to require that a State plan must include any otherwise eligible resident of the United States who is either a citizen or an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law; and must exclude any individual who is not lawfully in this country.

This new language was adopted and codified at 45 C.F.R. § 233.50.

In 1981, the regulatory language provided the basis for a statutory amendment to the Social Security Act. In addition to setting forth the color of law test for AFDC eligibility, the new statute made specific reference to the refugee and asylum provisions of 8 U.S.C. §§ 1157 and 1158. Any individual "lawfully present . . . as a result of the application of" either of these two provisions is to be considered "permanently residing . . . under color of law." References to the refugee and asylum statutes were added as a result of their enactment under the Refugee Act of 1980.

**Unemployment Insurance**

The Federal Unemployment Tax Act was designed to encourage a uniform system of unemployment compensation by the states. Its purpose is to assist in stabilization of employment conditions and to ameliorate conditions of unemployment. Unemployment insurance essentially involves the compulsory setting aside of funds to be used for a system that provides benefits for persons unemployed through

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29. Id. (emphasis added).
30. In adopting this regulatory language, the Secretary of HEW stated that "[n]othing in this regulation would preclude a State from adopting as an administrative procedure, the California method of certification followed by verification with Federal Immigration authorities to determine alien status." 38 Fed. Reg. 30,259 (1973). In California, an alien could certify that "he [was] not under order for deportation" and if the INS verified the certification, the alien was eligible to receive AFDC benefits. Former CAL. WELF. & INST. CODE § 11104 (West 1980). Thus, an alien certified as not under an order for deportation satisfied the test which the Secretary found acceptable for determining whether an alien was "permanently residing in the United States under . . . color of law."
32. 42 U.S.C. 602(a)(33).
In order for an alien to be eligible for unemployment compensation, the person must be an individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) [8 U.S.C. § 1153(a)(7)] or section 212(d)(5) [8 U.S.C. § 1182(d)(5)] of the Immigration and Nationality Act).

In addition to this federal requirement, many states require that the individual be “available for work” at the time benefits are sought. The so-called “able and available” provision has been interpreted by certain courts to require an alien to be authorized to work by the INS in order to receive unemployment benefits. The absence of work authorization, however, does not affect one’s ability to establish color of law status.

Congress employed the “color of law” language in the Federal Unemployment Compensation Amendments of 1976 “to prevent the payment of unemployment compensation to illegal aliens who work in the United States.” In establishing alien eligibility for unemployment compensation, the Senate wished “to make it clear that unemployment compensation will not be paid on the basis of services performed by aliens unless such services are performed by aliens during periods in which they were lawfully present in the United States.” Although Congress also considered a requirement that the noncitizen maintain a particular status at the time benefits were sought, the final language of the bill focused solely on immigration.

36. See, e.g., CAL. UNEMP. INS. CODE § 1253 (West 1986).
status at the time "such services were performed."\textsuperscript{42}

\textit{Medicaid}

Medicaid is a benefit program which pays for medical care for public assistance recipients and other low-income persons. It is jointly funded by the state and federal governments. AFDC and SSI recipients are automatically eligible for Medicaid. If individuals are otherwise eligible for AFDC or SSI, except that their income is slightly above the need standard, they still qualify for Medicaid.\textsuperscript{43}

Pursuant to a regulation promulgated in 1973, an individual seeking Medicaid benefits must be a United States citizen, a permanent resident alien or "permanently residing in the United States under color of law, including any alien who is lawfully present in the United States under section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act."\textsuperscript{44} Under the terms of the state-administered Medi-Cal program in California, a less restrictive standard is employed and benefits are to be provided to "any alien who is otherwise eligible for health care services . . . if the alien certifies under penalty of perjury that to the best of his knowledge he is in the country legally and is entitled to remain indefinitely, or if he certifies that he is not under order for deportation, or if he certifies that he is married to an individual not under order for deportation."\textsuperscript{45}

Unlike the other benefit programs in which Congress specifically imposed alienage restrictions, the Medicaid statute, until recently, was silent on the question of alien eligibility. Nonetheless, since 1973, the HEW (now, Department of Health and Human Services) has imposed alienage requirements by regulation.\textsuperscript{46} The Secretary has taken the position that the Medicaid statute incorporates by reference the alienage requirements explicitly set forth in both the AFDC and SSI statutes. As such, eligibility under the regulation has been limited to permanent resident aliens and those "permanently residing . . . under color of law."\textsuperscript{47}

A class of noncitizens recently challenged the Secretary’s authority to impose alienage restrictions in the Medicaid program. In \textit{Lewis}

\begin{footnotesize}
\begin{itemize}
\item 42. 26 U.S.C. § 3304(a)(14)(A).
\item 43. 42 U.S.C. § 1396(e).
\item 44. 42 C.F.R. § 435.402 (1986).
\item 46. 42 C.F.R. § 435.402 (1986).
\item 47. \textit{Id.}
\end{itemize}
\end{footnotesize}
v. Gross, a federal district court in New York held that the regulatory language had been promulgated without congressional authorization. "Congress . . . knew how to impose alienage requirements on social welfare programs when it intended, and its refusal to impose such a requirement on Medicaid should be respected." 49

In response to Lewis, a bill was immediately introduced and subsequently passed by Congress which effectively overruled this decision. 50 While statutorily mandating a color of law requirement for Medicaid, Congress also provided that, without regard to alienage, the treatment of an emergency medical condition "shall be covered by Medicaid if the patient otherwise meets the eligibility requirements for medical assistance under the State plan . . . ." 51 This provision clearly contemplates that undocumented aliens can establish Medicaid eligibility for emergency services.

Food Stamps

The Food Stamp program is a nutrition assistance program designed to allow low-income persons to purchase essential food items and improve their diets. The Department of Agriculture pays all costs of the food stamps themselves although the program is run by the states. Food stamps are available to households consisting of a single individual, or a group of people living together who buy food and prepare meals together. The household's income and resources must be within the program's financial eligibility standards. Food stamps may be used to purchase any food item except alcoholic beverages, tobacco, or pet food. 52

The alienage restrictions embodied in the food stamp program are the most restrictive of the public assistance programs. There is no color of law standard 53 but rather specific categories of eligible aliens. 54 Such categories include permanent resident aliens, refugees, asylees, aliens who have resided continuously in the United States since June 29, 1948, conditional entrants, parolees, and aliens granted withholding of deportation. 55

While discussing alien eligibility for food stamps during its debates on the Food and Agriculture Act of 1977, Congress considered

49. Id., slip op. at 54.
51. 42 U.S.C. § 1396b(v).
55. 7 C.F.R. § 273.4 (1986). These categories will have to be expanded to maintain consistency with the changes effected by Immigration Reform and Control Act of 1986. See infra notes 96-98 and accompanying text.
the meaning of color of law. Congressional understanding of the phrase expanded somewhat between 1972 and 1977. In 1972, Senator Gurney offered parolees and conditional entrants as examples.\(^5\) By 1977, Congress indicated that the following groups of aliens also met the color of law test: (1) permanent residents under color of law who have maintained continuous residence since before June 30, 1948; (2) aliens granted indefinite voluntary departure; (3) aliens granted an indefinite stay of deportation by INS “for humanitarian reasons or because of insuperable technical difficulties affecting their deportation.”\(^6\) In so doing, Congress reiterated its chief concern that the purpose of limiting noncitizen eligibility to aliens permanently residing under color of law was to exclude aliens temporarily present, such as “visitors, students, workers, diplomats, etc.” and aliens unlawfully present.\(^7\)

**General Assistance**

General Assistance (or General Relief) is a cash benefit program of “last resort;” that is, for persons not otherwise eligible for AFDC or SSI.\(^8\) Its requirements vary depending upon state or county requirements. In California, the state statute does not impose an alienage restriction, but instead requires the individual to be a “resident.”\(^9\)

**Implications of the Immigration Reform and Control Act on Color of Law**

In debating the major immigration reform bill last year, Congress addressed the color of law standard for the AFDC, SSI, Medicaid,

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56. See supra notes 17-18 and accompanying text.
58. Id. Congress similarly reaffirmed that its intent in 1972 in originally enacting the “color of law” test for the SSI program was to exclude “illegal and temporarily present aliens.” Id.
and Unemployment Insurance programs. Section 121(c) proposed to limit the definition of "permanently residing in the United States under color of law" to five specific categories of noncitizens. The enumerated classes essentially encompassed various "refugee" categories and persons who entered the United States prior to June 30, 1948.

The major impact of such legislation would have been a definitive listing of persons satisfying the color of law standard. Under the existing statutes and regulations for AFDC, SSI, Medicaid, and Unemployment Insurance programs, the listing of eligible aliens is prefaced by the term "including." General rules of statutory construction and judicial interpretation have affirmed that the categories following "including" must be viewed as examples and not as an exhaustive list. Under the proposed legislation, however, the listing of eligible aliens was preceded by the clause: "only the following aliens shall be considered to be aliens permanently residing in the United States under color of law." By providing for a definitive listing, this language would have foreclosed any further development of the common law in construing the color of law test.

After intense lobbying, the House Judiciary Committee removed this language from the bill. The final version, passed on November 6, 1986, contains no such limited definition. Thus, while enactment of the Immigration Reform and Control Act (IRCA) has some implications for the interpretation of "permanently residing under color of law," this standard will apparently maintain the elasticity that allows it to be interpreted over time in accord with developments in immigration law and practice.

In enacting IRCA, Congress employed an alternative approach to analyzing the standard of "permanently residing under color of law." Under the legalization provisions, IRCA creates a new immigration status — "Lawful Temporary Resident" (LTR). Instead of determining whether an LTR is under color of law, however, IRCA ap-

62. Id. The categories consisted of: (1) aliens who entered the United States prior to June 30, 1948; (2) aliens admitted as refugees pursuant to INA § 207, 8 U.S.C. § 1157, granted asylum pursuant to INA § 208, 8 U.S.C. § 1158, or who entered on a conditional basis before April 1, 1980 pursuant to INA § 203(a)(7), 8 U.S.C. § 1153(a)(7) (as in effect before such date); (3) aliens paroled for a period of at least five years pursuant to INA § 212(d)(5), 8 U.S.C. § 1182(d)(5); (4) aliens granted withholding of deportation pursuant to INA § 243(h), 8 U.S.C. § 1253(h); and (5) aliens granted deferred action status pursuant to INS operations instructions.
63. See supra notes 13, 23, 35, 44 and accompanying text.
64. See supra notes 14-15 and accompanying text.
plies varying standards of program eligibility dependent upon the specific public benefit sought. Furthermore, while IRCA leaves open the question of whether LTRs are under color of law for purposes of federal law, it resorts to an ad hoc approach to state-funded program eligibility. This does little to clarify the color of law’s standard.

LTR status may be granted under three different sections of IRCA: the legalization provisions,68 the special agricultural worker (SAW) provisions,69 and the additional special or replenishment agricultural worker (RAW) provisions.70 Though the vehicle for securing LTR status may vary, the status, once obtained, satisfies the author’s proposed “color of law” test71 requiring evidence of an INS policy or practice to allow a noncitizen to remain in the United States.

Indicia of color of law status are found in various sections of IRCA which evidence a governmental policy to allow LTRs to remain lawfully in the United States so long as they maintain such status. Noncitizens who have been granted LTR status may not be deported unless their status is terminated.72 Furthermore, they are authorized to be employed in the United States and may travel abroad without jeopardizing this status.73 Even aliens apprehended prior to the legalization application period will receive a temporary stay of deportation/exclusion and temporary work authorization if they present a prima facie application (when they seek legalization), or a nonfrivolous application (when they seek SAW status) to the INS.74 IRCA contains still stronger language which considers legalized SAWs and RAWs to be “lawful permanent residents” unless expressly provided otherwise.75 Thus, they should receive benefits, if otherwise eligible, without regard to color of law status.

Consistent with its refusal to limit color of law status to only cer-

68. IRCA § 201(a), 100 Stat. at 3394 (amending/adding INA § 245A).
69. Id. § 302(a), 100 Stat. at 3417 (amending/adding INA § 210).
70. Id. § 303(a), 100 Stat. at 3422 (amending/adding INA § 210A).
71. For the proposed definition, see infra notes 230-40 and accompanying text.
72. IRCA § 201(a), 100 Stat. at 3396 (amending/adding INA § 245A(b)(2) (legalization provision); id. § 302(a), 100 Stat. at 3421 (amending/adding INA § 210(a)(3)) (SAW provision); id. § 303(a), 100 Stat. at 3428 (amending/adding INA § 210A(d)(2) (RAW provision).
73. Id. § 201(a), 100 Stat. at 3396-97 (amending/adding INA § 245A(b)(3)) (legalization); id. § 302(a), 100 Stat. at 3418 (amending/adding INA § 210(a)(4)) (SAW); id. § 303(a), 100 Stat. at 3428 (amending/adding INA § 210A(d)(3)) (RAW).
74. Id. § 201(a), 100 Stat. at 3399 (amending/adding INA § 245A(e)) (legalization); id. § 302(a), 100 Stat. at 3421 (amending/adding INA § 210(d)) (SAW).
75. Id. § 302(a), 100 Stat. at 3418 (amending/adding INA § 210(a)(5)) (SAW); id. § 303a, 100 Stat. at 3429 (amending/adding INA § 210A(d)(4)) (RAW).
tain categories of aliens, Congress placed no restrictions in IRCA regarding whether legalization LTRs are under color of law for purposes of federal law. Therefore, under traditional color of law analysis, they should be recognized as meeting the standard. IRCA does provide, however, that other than for enumerated exceptions (discussed below), legalization LTRs are \textit{not} to be considered “permanently residing . . . under color of law” for purposes of state-funded financial assistance programs.\textsuperscript{76}

Finally, all three categories of LTRs are disqualified from certain federal financial assistance for a five-year period beginning on the date the alien obtained such status.\textsuperscript{77} Although LTRs may adjust their status to that of an alien “lawfully admitted for permanent residence” within this period,\textsuperscript{78} the disqualification continues for the full five years.\textsuperscript{79}

\textit{SSI}

The provisions governing the federal SSI program contain the most straightforward standards of eligibility for assistance programs under IRCA. The five-year disqualification does not apply. And because legalization LTRs meet the color of law standard and SAW and RAW LTRs are to be considered “lawful permanent residents,” all three categories should be eligible for SSI.\textsuperscript{80}

\textsuperscript{76.} \textit{Id.} § 201(a), 100 Stat. at 3401 (amending/adding INA § 245A(h)(1)).

\textsuperscript{77.} \textit{Id.}, 100 Stat. at 3401 (amending/adding INA § 245A(h)) (legalization); \textit{Id.} § 302(a), 100 Stat. at 3422 (amending/adding INA § 210(f)) (SAW); \textit{Id.} § 303a, 100 Stat. at 3429 (amending/adding INA § 210A(d)(6)) (RAW).

\textsuperscript{78.} \textit{Id.} § 201(a), 100 Stat. at 3395 (amending/adding INA § 245A(b)) (legalization); \textit{Id.} § 302(a), 100 Stat. at 3417 (amending/adding INA § 210(a)(2)) (SAW); \textit{Id.} § 303(a), 100 Stat. at 3428 (amending/adding INA § 210A(d)(1)) (RAW).

\textsuperscript{79.} In those instances in which a LTR establishes eligibility for a benefit program during this five-year period, the alien might become subject to the “public charge” exclusion. The “public charge” exclusion provision applies generally to aliens seeking to immigrate and provides that they shall be excluded from admission if they “are likely at any time to become public charges.” INA § 212(a), 8 U.S.C. § 1182(a)(15). Under IRCA, there is a special rule for determination of public charge which allows the alien to avoid this ground of inadmissibility “if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.” IRCA § 201(a), 100 Stat. at 3399 (amending/adding INA § 245A(d)(2)(B)(iii)) (legalization); \textit{Id.} § 302(a), 100 Stat. at 3420 (amending/adding INA § 210(c)(2)(C)) (SAW); \textit{Id.} § 303(a), 100 Stat. at 3429 (amending/adding INA § 210A(e)(2)(C)) (RAW). Thus, receipt of public benefits could jeopardize an alien’s ability to obtain legal status generally or pursuant to the IRCA provisions.

\textsuperscript{80.} IRCA § 201(a), 100 Stat. at 3401-02 (amending/adding INA § 245A(h)(2)(b)) (legalization); \textit{Id.} § 302(a), 100 Stat. at 3422 (amending/adding INA § 210(f)) (SAW); \textit{Id.} § 303(a), 100 Stat. at 3429 (amending/adding INA § 210A(d)(6)) (RAW).
AFDC

All three categories of LTRs are disqualified from receiving AFDC benefits.81 The only exception to the five-year ineligibility period is for Cuban/Haitian entrants who adjust to LTR status; they are eligible to receive AFDC benefits.82

Unemployment Insurance

IRCA does not specifically refer to eligibility for unemployment insurance. Unemployment insurance programs generally do employ color of law standards, however, and because legalization LTRs are not under color of law for purposes of state financial assistance, they may be ineligible for such state-funded benefits. But, to the degree these benefits are considered a form of insurance and not a program of financial assistance, this restriction would not apply. In either case, legalization LTRs are eligible to adjust their status to that of a lawful permanent resident after eighteen months.83 Moreover, upon adjustment, they are no longer subject to the statutory limitation on being considered under color of law, which applies only while one is in LTR status.84 No such restrictions on those legalized under the SAW and RAW programs exist, and because they are to be considered “lawful permanent residents,” they should be eligible for unemployment insurance.

Any person granted LTR status will also have been granted employment authorization.85 That person, therefore, should satisfy the “able and available”86 requirement imposed under most unemployment insurance programs. Thus, subject to the color of law limitations set out above, these individuals should be eligible for unemployment insurance.

81. Id. § 201(a), 100 Stat. at 3401 (amending/adding INA § 245A(b)(1)(A)(i)) (legalization); id. § 302(a), 100 Stat. at 3422 (amending/adding INA § 210(j)) (SAW); id. § 303(a), 100 Stat. at 3429 (amending/adding § 210A(d)(6)) (RAW).
82. Id. § 201(a), 100 Stat. at 3401 (amending/adding INA § 245A(h)(2)(A)).
83. Id., 100 Stat. at 3395 (amending/adding INA § 245A(b)(1)(A)).
84. Id., 100 Stat. at 3401 (amending/adding INA § 245A(h)(1)).
85. Id. § 201(a), 100 Stat. at 3399 (amending/adding INA § 245A(e)) (legalization); id. § 302(a), 100 Stat. at 3418 (amending/adding INA § 210(a)(4)) (SAW); id. § 303(a), 100 Stat. at 3428 (amending/adding INA § 210A(d)(3)) (RAW).
86. The impact of the IRCA employer sanctions provisions on aliens without work authorization and on the “able and available” requirement is more fully discussed infra notes 206-28 and accompanying text.
Medicaid

Legalization LTRs are subject generally to the five-year disqualification for Medicaid eligibility. There are five categories of LTRs, however, who are Medicaid-eligible: Cuban/Haitian entrants, persons who are aged, blind, or disabled (that is, SSI recipients), children under 18, pregnant women, and persons needing emergency services. For these categories, the general restriction on LTRs being considered under color of law does not apply and for purposes of Medicaid, these persons are to be considered under color of law.

The Medicaid provisions for RAW LTRs apply in the same manner as for legalization LTRs. For SAW LTRs, who would be eligible for AFDC but for the general disqualification, the Medicaid provisions also apply as set out above. For SAWs not otherwise eligible for AFDC, Medicaid benefits should be provided in the same manner as for other persons “lawfully admitted for permanent residence.”

Food Stamps

The general food stamp statute does not employ a color of law requirement. Instead, it sets forth an exhaustive list of specific categories of noncitizens who are eligible. IRCA creates new categories of noncitizens who should be added to the list.

Legalization LTRs are expressly ineligible to receive food stamps for five years. Individuals who obtain LTR status through the SAW provisions are eligible for food stamps because they are to be considered aliens “lawfully admitted for permanent residence.” Finally, IRCA specifically provides that LTRs granted legalization under the RAW provisions are eligible to receive food stamps. To achieve consistency between IRCA and the food stamp statute, Con-

87. IRCA § 201(a), 100 Stat. at 3401 (amending/adding INA § 245A(h)(1)(A)(ii)).
88. Id., 100 Stat. at 3402 (amending/adding INA § 245A(h)(3)(B)(ii)).
89. Id. (amending/adding INA § 245A(h)(3)(B)(i)).
90. Id., 100 Stat. at 3401 (amending/adding INA § 245A(h)(1)). Recognizing the heightened importance of health services for indigent persons, Congress provided that this limitation on color of law status for LTRs applies only to a program of “financial assistance” and not “medical assistance” as defined in the IRCA. Id., 100 Stat. at 3402 (amending/adding INA § 245A(h)(3)(C)).
91. Id., 100 Stat. at 3401 (amending/adding INA § 245A(h)(3)(A)(iii)).
92. Id. § 303(a), 100 Stat. at 3429 (amending/adding INA § 210A(d)(6)).
93. Id. § 302(a), 100 Stat. at 3422 (amending/adding INA § 210(f)).
94. Id. (amending/adding INA § 210(g)).
96. IRCA § 201(a), 100 Stat. at 3401 (amending/adding INA § 245A(h)(1)(A)(iii)).
97. Id. § 302(a), 100 Stat. at 3422 (amending/adding INA § 210(g)); see also supra notes 54-55 and accompanying text.
98. Id. § 302(a), 100 Stat. at 3429 (amending/adding INA § 210A(d)(6)).
gress should amend the latter to include the categories outlined above.

Congress, through its arbitrary categorizations in IRCA, has clouded the doctrinal development of color of law. While perhaps politically expedient, Congress’ use of internally inconsistent criteria dependent upon the benefit sought does little to clarify its purpose in employing the color of law standard. It remains incumbent on the courts, therefore, to reconcile the conflicting signals sent by Congress and construe “color of law” in a manner allowing for flexible application over time.

**JUDICIAL CONSTRUCTION OF “PERMANENTLY RESIDING UNDER COLOR OF LAW”**

Over the past fifteen years, Congress has passed laws restricting noncitizen eligibility for governmental benefits. It has declined to delineate, however, the precise categories of aliens who are to be considered “permanently residing . . . under color of law.” Without explicit guidance from Congress, administrative agencies may adopt their own laws and regulations to comply with the federal statutes.99 Judicial review of these implementing policies is the subject of this section.100

Color of law litigation traditionally focuses on the eligibility of various categories of noncitizens who have applied for and are awaiting adjudication of a change in their immigration status.101 For many of these individuals, the INS is prohibited by law, policy or practice from enforcing their departure while they remain in such applicant status. For others, the INS has simply “acquiesced” to their continu-

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100. Under traditional equal protection analysis, state laws disadvantaging aliens are subjected to heightened scrutiny and must generally be supported by a compelling governmental interest, (see Graham v. Richardson, 403 U.S. 365 (1971)), while similar federal laws are valid unless “wholly irrational.” Mathews v. Diaz, 426 U.S. 67, 83 (1976). One court has held, however, that when a state employs the federal “color of law” classification, it is reviewable under the relaxed scrutiny standard. Sudomir v. McMahon, 767 F.2d 1456, 1464-67 (9th Cir. 1985). **But see** Plyler v. Doe, 457 U.S. 202, 226 (1981) (although a state “may borrow the federal classification”, it must be “reasonably adapted to the purposes for which the state desires to use it.”). This Article does not attempt to resolve this constitutional question, but instead focuses on the proper statutory construction of “color of law.”
101. For example, applicants for adjustment of status to that of permanent resident through an immediate relative (INA § 201, 8 U.S.C. § 1151) or a “preference status” (INA § 203, 8 U.S.C. § 1153); applicants for asylum (INA § 208, 8 U.S.C. § 1158); and applicants for suspension of deportation (INA § 244, 8 U.S.C. § 1254).
ued presence. Thus, the point of contention is whether a particular applicant status satisfies the "color of law" standard.

This Article surveys twenty reported state and federal court decisions that considered the meaning of the subject phrase. Fifteen decisions held that aliens in various applicant statuses met the color of law test, three decisions found opposite results, and two cases were remanded with strong suggestions that the individuals satisfied the standard. Twelve of the twenty decisions involved claims for unemployment insurance, a context in which courts have taken a particularly expansive approach in considering color of law claims. The Colorado state court system, for example, has issued four decisions recognizing color of law status in the unemployment insurance area.

Given that sixteen of the reported decisions were rendered since 1984, it is still somewhat early to discern doctrinal trends. Nonetheless, the following analysis highlights some of the common factors relied upon by the courts in construing the color of law standard and suggests a general direction in which the common law appears to be developing. Structurally, the analysis examines the subject phrase as two concepts: "permanently residing" and "under color of law."

"Permanently Residing"

Unlike "under color of law," which is not defined in the Immigration and Nationality Act (INA), the term "permanently residing" is more easily construed by reference to the INA. "Permanent" is defined at section 101(a)(31): "The term 'permanent' means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law."\(^{102}\)

"Residence" is defined in the same section of the INA: "The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent."\(^{103}\)

The most careful analysis of "permanently residing" is found in a Second Circuit decision, Holley v. Lavine.\(^{104}\) In Holley, a Canadian citizen who overstayed her temporary student visa (and was therefore illegally in the United States) was informed by the INS that it did "not contemplate enforcing her departure from the United States at this time."\(^{105}\) The INS assured her that she would not be deported at least until her children, who were United States citizens, were no

\(^{103}\) Id. § 101(a)(33), 8 U.S.C. 1101(a)(33).
\(^{105}\) Id. at 849.
longer dependent upon her. She applied for AFDC benefits for her children as an indigent mother. As an “ineligible” alien caretaker relative, however, she was excluded from the AFDC grant. Yet, although she was “unlawfully residing in the United States” and subject to deportation, the court held that she was “permanently residing in the United States under color of law” and entitled to AFDC benefits, because the INS allowed her to remain here at least for the time that her children were dependent upon her.

The Holley court found more interpretive assistance by looking to the examples in the applicable regulation outlining which aliens are permanently residing in the United States: conditional entrants under 8 U.S.C. § 1153(a)(7), and temporary parolees under 8 U.S.C. § 1182(d)(5). The court stated that “[t]hose sections are themselves instances where the alien is permitted to stay in the United States not necessarily forever, but only so long as he is in a particular condition.” Manifestly, a “conditional” entrant and a “temporary” parolee are not residing permanently in the United States if that term is to be narrowly construed. In Holley, the alien thus permanently was residing in the United States because she was permitted to stay while she was in that “particular condition” — as long as her children remained dependent upon her.

The next court to construe “permanently residing” took a decidedly different approach. In Sudomir v. McMahon, the Ninth Circuit addressed the issue in the context of applicants for political asylum. Upon plaintiffs’ application for asylum, the INS, by policy, “stayed the institution of deportation proceedings pending the disposition of [the] application.” Asylum applicants typically wait “from three to six years” for their asylum applications to be finally adjudicated. Nonetheless, the court concluded that asylum applicants “reside temporarily” because “the alien’s continued presence is solely dependent on the possibility of having his application for

106. Id. at 847.
107. Id. at 850-51. The AFDC statutory restriction, 42 U.S.C. § 602(a)(33), was not enacted until 1981, subsequent to the decision in Holley.
108. See 45 C.F.R. § 233.50.
109. Holley, 553 F.2d at 851 (emphasis added).
110. Id.
111. 767 F.2d 1456 (9th Cir. 1985).
112. See INA § 208, 8 U.S.C. § 1158.
113. Sudomir, 767 F.2d at 1458; see INS Form I-589 ¶ 4 (Request for Asylum in the United States) (“You may remain in the United States until a final decision is made on your case . . . “); 8 C.F.R. § 208.8(e)(4).
114. Sudomir, 767 F.2d at 1467 (Canby, J., dissenting).
asylum acted upon favorably.” 115

In so holding, the court appears to misapply the definition of “permanent” contained in the INA. 116 The residence of asylum applicants in this country is, in accordance with the statutory definition, “of continuing or lasting nature.” 117 Such residency will last at least three to six years and much longer for those ultimately granted asylum. “Most important, plaintiffs’ status is easily ‘distinguished from temporary’ as the statute specifies.” 118

Section 1101(a) of the INA uses “temporary” to refer to certain classes of aliens who have “a residence in a foreign country which [they have] no intention of abandoning.” 119 “The common characteristics of all these temporary relationships is that they exist for a defined purpose with a defined end, and there is never any intention of abandoning the country of origin as a home.” 120 By contrast, applicants for asylum are necessarily “unable or unwilling to return” 121 to their countries. Thus, they clearly have expressed their intention of abandoning their foreign residence. “[Asylum applicants] are here in an indefinite status awaiting a ruling on their application . . . .” 122 Their continued presence has no fixed duration and thus, cannot be considered “temporary.”

As Sudomir departed from Holley, two more recent decisions stand in direct contradiction to Sudomir. Consistent with Holley and the statutory definition, these decisions take a more expansive view of the term “permanent.” In Gillar v. Employment Division, 123 for example, the Oregon Supreme Court also confronted the question in the context of asylum applicants. The court acknowledged the Ninth Circuit’s holding in Sudomir and flatly rejected it. Borrowing from Judge Canby’s analysis in his Sudomir dissent, the Oregon Supreme Court held: “An alien awaiting action on an asylum application is present in the United States with no defined end or defined purpose. Thus, an asylum applicant fits within the statutory definition of ‘permanent’ rather than within the statutory use of ‘temporary.’” 124

The court in Gillar also based its finding of “permanent” presence on the fact that the status of an asylum applicant is analagous to

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115. Id. at 1462.
117. Id.
118. Sudomir, 767 F.2d at 1467 (Canby, J., dissenting).
120. Sudomir, 767 F.2d at 1467 (Canby, J., dissenting).
122. Sudomir, 767 F.2d at 1468 (Canby, J., dissenting).
123. 300 Or. 672, 717 P.2d 131 (1986).
124. Id. at 682, 717 P.2d at 138.
that of a temporary parolee.\textsuperscript{128} The court noted that prior to the enactment of the asylum statute in 1980,\textsuperscript{126} temporary parole was used to permit large groups of aliens to enter the country pending determination of their admissibility. "[The asylum statute], enacted as part of the 1980 Refugee Act," the court stated, "replaced the provisions allowing the wholesale parole of aliens with a system allowing aliens within the country to apply for asylum."\textsuperscript{127} Thus, because their status is so nearly identical to that of the pre-1980 parolees, the court deemed asylum applicants to be "permanently residing."\textsuperscript{128}

The Second Circuit similarly has taken an expansive approach to interpreting the word "permanently." \textit{Berger v. Heckler}\textsuperscript{129} involved judicial construction of a consent decree which entitled certain noncitizens to SSI benefits. The Secretary argued that the consent decree exceeded the scope of the SSI statute in that several of the categories included "mere applicants" for various forms of immigration relief.\textsuperscript{130} Noting that those categories are limited to aliens "whose departure the INS does not contemplate enforcing," the court found that this "qualification satisfactorily reflects and enforces the 'permanently residing' requirement of the statute."\textsuperscript{131}

The court also pointed out that the Secretary's restrictive interpretation of "permanently" was inconsistent with the government's position as set forth in its opposition to a petition for certiorari in \textit{Holley}. The government had filed an amicus brief on behalf of respondent Holley, urging affirmance of the Second Circuit's decision.\textsuperscript{132} In its brief, the government observed that the listing of the two examples — conditional entrants and temporary parolees — "obviously forbid any narrow reading" of "permanently,"\textsuperscript{133} Thus, the Second Circuit rejected the Secretary's argument that an expansive reading of "permanently residing" would bring the consent de-
cree “into conflict with the underlying statute.”134

Although Berger did not involve asylum applicants, its reasoning is directly applicable. Simply stated, the INS cannot “contemplate enforcing the departure” of any asylum applicant until the asylum claim has been finally adjudicated. Application of this test mandates that an asylum applicant be considered “permanently residing.”135

By utilizing an overly restrictive interpretation, the majority in Sudomir wrongly denied benefits to asylum applicants. Contrary to the court’s assertion, an asylum applicant’s “continued presence” is not “dependent upon the possibility of having his application for asylum acted upon favorably.”136 “Continued presence” is ensured by INS policy. The court failed to focus on the individual’s status at the time of the eligibility determination. Instead, it refused to grant eligibility because the asylum claim might ultimately be denied in the future. The critical question, left unaddressed by the Ninth Circuit, is whether one’s existing status as asylum applicant is of a fixed, time-definite nature or whether it is of an indefinite nature during which time the INS cannot deport the applicant. Because their continued presence is guaranteed throughout the lengthy asylum process by INS policy, federal regulation,137 and international treaty obligations,138 asylum applicants must be deemed “permanently residing” within the meaning of the subject phrase.

Asylum applicants are but an example of various categories of noncitizens whose presence is to be considered “permanent” as they await a final adjudication of their application for a change of status. Others, such as applicants for “adjustment of status,” are similarly protected from deportation for an indefinite period during the pendency of their application.140 Inclusion of these categories of “applicants” within the meaning of the subject phrase underscores the point that “permanently” cannot be construed according to its common usage. Rather, its statutory meaning allows for an individual’s

134. Id.
135. Aside from the compelling legal arguments, color of law status should be conferred on asylum applicants based on policy considerations. Asylum applicants are permitted to remain in this country throughout the pendency of their asylum claim, a period lasting as long as six years. As Judge Canby notes in his dissent in Sudomir, denial of color of law status during this period will leave these persons without “the means to feed, clothe and house their families. I cannot ascribe to Congress, in passing the Refugee Act for clearly humanitarian purposes, an intent to require victims of persecution to run that kind of gauntlet.” Sudomir, 767 F.2d at 1468 (Canby, J., dissenting).
136. See id. at 1462.
137. See INS Form I-589 ¶ 4; see also supra note 113.
138. 8 C.F.R. § 208.8(e)(2) (1986).
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presence to be permanent "even though it is one that may be dissolved eventually..."141 This interpretation of "permanently residing" is not only consistent with the statutory definition but provides the needed flexibility for applying the term to the ever-evolving body of immigration law.

"Under Color of Law"

Not unlike the broad construction accorded the term "permanently residing," the second part of the subject phrase — "under color of law" — similarly "invites dynamic interpretation... in the light of developments in the country's immigration policy."142 Indeed, Congress recently reaffirmed its intent that "the Secretary and the States broadly interpret the phrase 'under color of law.'"143

As the Second Circuit observed in Holley:

The phrase obviously includes actions not covered by specific authorizations of law. It embraces not only situations within the body of the law, but also others enfolded by a colorable imitation. "Under color of law" means that which an official does by virtue of power, as well as what he does by virtue of right. The phrase encircles the law, its shadows and its penumbra. When an administrative agency or legislative body uses the phrase "under color of law" it deliberately sanctions the inclusion of cases that are, in strict terms, outside the law but are near the border.144

The court applied this definition to the facts of Holley. It found that the noncitizen was residing under color of law because, although technically here illegally, she was present with "the knowledge or permission of the Immigration and Naturalization Service."145

The INS was aware of Ms. Holley's presence, yet it chose to exercise its discretion not to deport her. The federal government conceded that her residence in the United States was "continued by virtue of official permission or acquiescence."146 The court, therefore, concluded that those individuals whose departure the INS "does not contemplate enforcing [are present] under color of law."147

Shortly after the Holley decision, two New York state court decisions adopted the same reasoning. Both cases involved individuals who entered the country as temporary nonimmigrants and subsequently applied for permanent resident status. In St. Francis Hospi-

142. Berger, 771 F.2d at 1571.
144. Holley, 553 F.2d at 849-50. (emphasis added).
145. Id. at 849.
146. See Memorandum for the United States, supra note 132, at 4.
147. Holley, 553 F.2d at 849.
tal v. D'Elia, the alien was informed after her nonimmigrant visa expired that there were delays in processing her immigrant visa application. She received no further communication regarding her application before she became ill and entered the hospital. Thereafter, she applied for medical assistance.

The social services agency denied the application for medical assistance and legal action ensued. The New York Supreme Court, Appellate Division, relied on several factors in making its color of law determination: her pending application for an immigrant visa; the consular service's correspondence with her after the expiration date of her nonimmigrant visa; and INS failure to deport her. The factors impelled the conclusion that "at the time of her admission to the hospital [she] was residing in this country under color of law." In the other New York state court case, Papadopoulos v. Shang, the alien suffered a stroke and was hospitalized while her application for adjustment of status was pending. Although that application was later denied, the INS considered "deferred action status on humanitarian grounds." The court reviewed Mrs. Papadopoulos' claim for Medicaid benefits. It held that because an application for adjustment of status was pending and, under INS Operating Instructions, the INS would not take any steps to effect the alien's deportation, she was present under color of law. Under the same reasoning, the court held that the alien was also here under color of law while she awaited a ruling on her "deferred status." During both periods, the court noted, "she was not subject to deportation either by reason of statute or regulation of the INS."

These two decisions do differ in one respect. In making its color of law finding, Papadopoulos relied on an actual INS regulation not to deport. The court in St. Francis Hospital, however, was satisfied by the mere acquiescence of the INS. Some courts have found this
distinction significant and require more than INS inaction in the face of an alien’s continued residence.\textsuperscript{157}

This may be a distinction without a difference — particularly when the acquiescence takes the form of the INS exercising its discretion not to deport. In \textit{Rubio v. Employment Division},\textsuperscript{160} for example, the facts closely parallel those in \textit{St. Francis Hospital}. The INS, aware of the alien’s presence while the application for permanent residence was pending, granted extensions of voluntary departure and “had no intention of initiating deportation proceedings against him.”\textsuperscript{161} In recognizing color of law status, the court characterized this “active acquiescence” in the following manner: “At least, INS exercised its discretion not to enforce the law; more accurately, it knowingly maintained the status quo pending the outcome of claimant’s application for permanent residence.”\textsuperscript{166}

The Utah Supreme Court employed similar reasoning in finding an applicant for suspension of deportation\textsuperscript{161} to be here under color of law. In \textit{Antillon v. Department of Employment Security},\textsuperscript{169} the court based its holding on the fact that the INS knew of the alien’s presence and “acquiesced in it by exercising its discretion not to enforce the law.”\textsuperscript{163} Quoting \textit{Holley}, the court added that “[t]here is no more common instance of action ‘under color of law’ than the determination of an official charged with enforcement of law that he, as a matter of public policy, will exercise his discretion not to enforce the letter of a statute or regulation . . .”\textsuperscript{164}

in the context of an alien seeking SSI benefits who had applied for suspension of deportation (INA § 244, 8 U.S.C. § 1254). No hearing had been scheduled by INS on her suspension application. The court remanded the matter to the Secretary for further administrative proceedings “to permit [the Secretary] to satisfy her burden of establishing that the Immigration and Naturalization Service (INS) in fact contemplates enforcing plaintiff’s departure from the United States.” \textit{Velasquez}, 581 F. Supp. at 17.

In placing the burden on the Secretary, the court noted the “unequal standing” of the parties:

The Secretary has far greater access to the type of proof sought and is in a position to establish procedures by which it can be obtained with little effort. The usual lack of representation and indigent status of most Social Security claimants similarly points in favor of placing the burden on the government agency, as do considerations of fairness and social policy.

\textit{Id.} at 18.

159. \textit{Id.} at 527, 674 P.2d at 1202.
160. \textit{Id.} at 529-30, 674 P.2d at 1203.
161. See INA § 244, 8 U.S.C. § 1254.
163. \textit{Id.} at 459.
164. \textit{Id.} at 458 (citation omitted).
In sharp contrast, a federal district court firmly rejected the “ac-
quiescence” test for determining color of law status. In *Esparza v. Valdez*, an action involving unemployment insurance benefits, the court reasoned that adoption of such an approach “would seriously erode the government’s ability to deal with the problem of illegal aliens.”\(^\text{165}\) The court was also concerned that “any alien, without regard to the legality of his entry, . . . [could] make his presence known to the INS by the filing of some application, and, in the absence of deportation, claim that his residence was ‘under color of law.’”\(^\text{166}\) The court assumed that frivolous applications would be encouraged. This argument, however, ignores a basic reality: an undocumented alien, without any claim to legal status, whose presence is unknown to the INS, is highly unlikely to expose himself to the INS and thereby risk deportation solely for the purpose of obtaining unemployment insurance benefits.

Nonetheless, basing its holding on these flawed premises, the court in *Esparza* concluded that color of law makes eligible “those aliens who, after review of their particular factual circumstances pursuant to a specific statutory or regulatory procedure, have been granted an immigration status which allows them to remain in the United States for an indefinite period of time.”\(^\text{167}\) To the degree that this standard requires the INS to affirmatively grant a particular status, it unreasonably narrows the scope of color of law. It is illogical to exclude from eligibility an individual who is protected from deportation not by an affirmative act of the INS but by a specific INS policy or regulation. When an INS regulation prohibits the deportation of an individual, additionally demanding affirmative action by the INS requires a superfluous act. Indeed, Congress has expressed its intent that the requisite broad interpretation of “color of law” is not limited to those instances in which the INS has affirmatively granted a particular status. Instead, it should “include all of the categories recognized by immigration law, policy, and practice.”\(^\text{168}\)

Other than in *Esparza*, only two courts\(^\text{169}\) have refused to recognize the status of “permanently residing . . . under color of law” for individuals specifically covered by an INS policy prohibiting deportation during the pendency of their applications. Significantly, in both cases, one member of the three-judge panels expressed disagreement with the majority analyses and urged that such persons are

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\(^{165}\) *Esparza v. Valdez*, 612 F. Supp. 241, 244 (D. Colo. 1985). This argument, however, has been rejected by the Supreme Court. See supra note 1.

\(^{166}\) *Esparza*, 612 F. Supp. at 244.

\(^{167}\) *Id.*


\(^{169}\) Sudomir v. McMahon, 767 F.2d 1456 (9th Cir. 1985); Zurmati v. McMahon, 180 Cal. App. 3d 164, 225 Cal Rptr. 374 (1986).
“permanently residing . . . under color of law.” In fact, in *Sudomir*, the court conceded that the plaintiffs, applicants for asylum, were present “under color of law” and denied benefits solely on the basis that they were not “permanently residing.”

In *Zurmati v. McMahon*, a California court of appeal relied heavily on the Ninth Circuit decision in *Sudomir*. Ignoring the clear INS policy not to deport asylum applicants, the court refused to recognize color of law status because the claimant’s presence was not “the result of any affirmative admission or grant of status.” One of the members of the three-judge panel, however, filed a separate opinion in which he stated: “I find the reasoning of Circuit Judge Canby’s dissent in *Sudomir* to be extremely persuasive and more closely associated with the views to which I subscribe.” Of the twenty decisions surveyed, only *Zurmati, Sudomir,* and *Esparza* have required an affirmative grant of status by the INS in order for a noncitizen to establish that she is “permanently residing . . . under color of law.”

A sounder approach, and perhaps somewhat of a middle ground between *St. Francis Hospital’s “mere acquiescence” and Esparza’s “affirmative grant of status,”* was recently enunciated by the Oregon Supreme Court. In *Gillar v. Employment Division,* the court addressed the color of law issue in the context of an asylum applicant pursuing his claim before an immigration judge. The court clearly required more affirmative action than mere acquiescence. Relying on the asylum and withholding of deportation statutes and regulations, the court determined that the individual could not be deported during the pendency of the asylum request. Therefore, the court

170. *Sudomir,* 767 F.2d at 1467 (Canby, J., dissenting); *Zurmati,* 180 Cal. App. 3d at 177, 225 Cal. Rptr. at 382 (Lui, J., concurring).
171. *Sudomir,* 767 F.2d at 1461.
172. *Id.* at 1461-64.
174. See *supra* note 113 and accompanying text.
175. *Zurmati,* 180 Cal. App. 3d at 175, 225 Cal. Rptr. at 381; see also *Sudomir,* 767 F.2d at 1462 (“[presence] has not been legitimated by any affirmative act”).
176. See *supra* notes 118-22 and accompanying text.
177. *Zurmati,* 180 Cal. App. 3d at 177, 225 Cal. Rptr. at 382 (Lui, J., concurring).
178. *Gillar,* 300 Or. at 679-81, 717 P.2d at 136-37.
concluded:

Rather than base our decision on INS inaction we believe that in order to provide a particular individual with "color of law", the INS must take some affirmative action or must have a policy prohibiting deportation.

[S]uch a policy is apparent in the interrelationship of the 1980 Refugee Act and the corresponding INS regulations.\(^{182}\)

One further issue regarding asylum applicants should be addressed at this point. The Ninth Circuit in the *Sudomir* case suggested that an asylum applicant is not "permanently residing . . . under color of law" because his presence is "illegal" until asylum is granted.\(^{183}\) This position is inconsistent with congressional intent. In its deliberations on the color of law standard, Congress considered aliens granted indefinite voluntary departure or an indefinite stay of deportation as satisfying such a standard.\(^{184}\) Yet both of these groups are deportable aliens under 8 U.S.C. § 1251 and, technically, illegally present in the United States.\(^{185}\) Nonetheless, Congress conferred color of law status because these aliens reside here with permission of the INS. The same rationale applies with equal force to asylum applicants who are protected from deportation, whether they entered the country legally or illegally. Indeed, acknowledging the conditions under which an alien flees persecution, Congress clearly contemplated that the manner of entry might be illegal. Thus, the statutory protections are afforded "irrespective of such alien's status."\(^{186}\)

Some of the more creative approaches to color of law analysis have arisen in the context of unemployment insurance benefits. Despite identical language in the various benefit programs, courts appear to be applying a particularly liberal construction. One court explicitly stated that different analyses might be appropriate for unemployment claims versus more traditional welfare benefits: "Unlike the AFDC claimant, one who files for unemployment has worked and paid into an account with the expectation that insurance

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\(^{182}\) Id. at 679, 717 P.2d at 136 (emphasis added).

\(^{183}\) In *Sudomir*, the court relied on the fact that the asylum applicants had "entered or remained in the United States illegally and then applied for asylum." 767 F.2d at 1462.

\(^{184}\) See note 57 and accompanying text. See also 20 C.F.R. § 416.1618(a)(5), (6) (1986) (conferring "color of law" status on these two groups and deeming them eligible for SSI benefits).

\(^{185}\) See *Nunez v. Boldin*, 537 F. Supp. 578, 585 (S.D. Tex.), appeal dismissed without published opinion, 692 F.2d 755 (5th Cir. 1982) ("The Attorney General is authorized to allow certain classes of deportable aliens to voluntarily depart from the United States. *An alien in this instance admits to being in this country illegally . . .*"") (emphasis added) (citations omitted). The status of aliens covered by an indefinite stay of deportation or an indefinite voluntary departure is also akin to that of an asylum applicant in that they "may remain in the country until, and only until, the INS takes action to end their indefinite stays." *Sudomir*, 767 F.2d at 1468 (Canby, J., dissenting).

\(^{186}\) INA § 208, 8 U.S.C. § 1158.
would be available if the need arose."\(^{187}\)

The issue of employment authorization\(^{188}\) has figured prominently in the unemployment compensation cases. Many courts, in fact, have granted color of law status on the principal basis of an individual's receipt of employment authorization. Utilizing such reasoning, a recent Florida court of appeals decision found Haitian aliens awaiting the initiation of deportation proceedings to be "permanently residing . . . under color of law."\(^{189}\) The court based its finding on the fact that "[a]lthough the five appellants are subject to being excluded or deported at some time in the future, if the government pursues and prevails, they have, nonetheless, been given alien identification cards and authorizations to work. . . ."\(^{190}\)

Four Colorado state court decisions\(^{191}\) similarly place great weight on the INS granting employment authorization to the individual claiming color of law status. Unlike the Florida case, however, each noncitizen applied for and was awaiting adjudication of either an application for asylum or for adjustment of status.

The first case, *Arteaga v. Industrial Commission*,\(^{192}\) involved an individual who entered the country illegally. During his period of employment, however, he applied for permanent residence and was covered by INS work authorization. The court recognized color of law status because the INS was "fully aware of his technically illegal presence and yet consented to it by suspending efforts to deport him and by authorizing him to work."\(^{193}\) Thus, *Arteaga* stands for the proposition that manner of entry into the country is irrelevant to color of law status. The court in *Yatribi v. Industrial Commission*,\(^{194}\) on the other hand, simply looked to the date on which the

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\(^{187}\) *Gillar*, 300 Or. at 685 n.13, 717 P.2d at 140 n.13.

\(^{188}\) See 8 C.F.R. § 109.1 (1986) (authorizing applicants for various forms of immigration relief to apply for and receive employment authorization).

\(^{189}\) *Alfred v. Florida Dep't of Labor and Employment Sec.*, 487 So. 2d 355, 357 (Fla. Dist. Ct. App. 1986).

\(^{190}\) *Id.* at 358-59 (emphasis in original).


\(^{193}\) *Arteaga*, 703 P.2d at 657. *Zanjani*, decided less than two months later by the same judge, employed identical reasoning. 703 P.2d at 654.

\(^{194}\) 700 P.2d 929 at 931 (Colo. App. 1985).
applicant for adjustment of status had been granted employment authorization and awarded unemployment benefits from that time.

In the third Colorado decision, *Division of Employment and Training v. Industrial Commission*, Polish asylum applicants sought unemployment benefits for periods when their asylum applications were pending. The court based its color of law finding on two factors: the INS grant of employment authorization, and the policy not to deport during the pendency of an asylum application. These factors demonstrated the agency's intent to allow asylum applicants to remain in the United States.

These cases reveal a doctrinal trend under which, at least in the unemployment insurance context, "color of law" status is recognized for persons with work authorization. A remaining question is whether the absence of work authorization is fatal to eligibility for unemployment compensation. This query was answered, for the moment, by the recent case of *Ibarra v. Texas Employment Commission*. If *Ibarra* stands for nothing else, however, it vividly demonstrates that the issue of color of law, particularly in the area of unemployment insurance, is producing a volatile body of law.

In *Ibarra*, a class of noncitizens challenged the state requirement that applicants for unemployment benefits must produce documents showing that the INS authorized them to work. The State of Texas required work authorization for the period of employment on which eligibility was based. During the course of litigation, the state reversed itself and announced that it would no longer require INS work authorization. Its change of position was attributed to an amicus brief submitted by the federal government. The brief stated that work authorization was not mandated by federal law or the Department of Labor (DOL). The parties then submitted a proposed final consent decree that defined "permanently residing in the United States under color of law" to mean "aliens of whose presence in the United States the Immigration and Naturalization Service (INS) is aware and with regard to whom there has been an affirmative case-specific or class specific determination that allows the alien to remain in the United States for an indefinite period of time." After the state conceded that it would no longer require INS work authorization, however, DOL shifted its position and insisted that

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198. Memorandum of Amicus Curiae, supra note 38, at 6-7; see also *Ibarra*, 645 F. Supp. at 1063-64. The federal government could no longer assert such a position given the enactment of employer sanctions under IRCA. IRCA § 101(a), 100 Stat. at 3360 (amending/adding INA § 274A).
the state could not waive its requirement that unemployment compensation claimants produce work authorization to prove "availability for work" while they received benefits. On this basis, the State of Texas sought to set aside the agreed upon consent decree.

The federal court viewed DOL's new position as an attempt to equate INS work authorization with an alien's legal availability for work. "Yet, the federal statute that the DOL is interpreting does not mention the availability for employment requirement, and the Texas statute does not have the word 'legal' modifying 'availability for work.' Furthermore, the court reasoned, the Supreme Court's decision in Sure-Tan v. United States was distinguishable because in Sure-Tan the "unavailable for work" finding was compelled by the undocumented workers' voluntary departure and return to Mexico. By contrast, the Ibarra court found that

thealiens covered by the consent decree are lawfully entitled to be present and employed in the United States. They are legally present because they are permanently residing in the United States under color of law, and they are legally entitled to employment because the United States and the State of Texas do not prohibit the employment of aliens.

200. In addition to the requirement that an alien be present "under color of law at the time such services were performed," the State of Texas, as do other states, requires that the unemployed individual be "available for work" at the time he or she seeks benefits. See Tex. Rev. Civ. Stat. Ann. art. 5221b-2(2) (1971). Thus, eligibility must be established at two points in time: (1) for the period of employment on which the claimant is basing eligibility and (2) at the time at which benefits are sought. The former requirement is mandated by federal law, 26 U.S.C. § 3304(a)(14)(A) (1982), while the latter is imposed at state option.

201. Ibarra, 645 F. Supp. at 1065.

202. 26 U.S.C. § 3304(1)(14)(A) focuses solely on the alien's status "at the time such services were performed." (emphasis added) Thus, any state's attempt to deny benefits on the basis of the alien's status "at the time benefits are sought" may be found inconsistent with congressional intent. Indeed, in enacting section 3304(a)(14)(A), Congress considered and rejected a version of the bill which would have conditioned eligibility for unemployment compensation on the alien's status "at the time the benefits are claimed." H.R. Conf. Rep. No. 158, 95th Cong. 1st Sess., reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 98, 103.


204. 467 U.S. 883 (1984) (denying backpay award under National Labor Relations Act to discharged alien employees who were not legally available for work).

205. Ibarra, 645 F. Supp. at 1071. See Local 512, Warehouse and Office Workers' Union v. NLRB, 795 F.2d 705 (9th Cir. 1986) (awarding backpay to undocumented alien employees, who remain in the United States and thus are "available for work," as a remedy for the employer's violation of the National Labor Relations Act). In Local 512, the court also noted that if benefits were denied to the alien employees, it would encourage "[u]nscrupulous employers" to exploit such workers due to the creation of "an environment relatively free of labor safeguards." Local 512, 795 F.2d at 719.
At the time, this reasoning was based on a sound analysis of the Supreme Court's approach in *Sure-Tan*. The *Sure-Tan* Court found that it was not "unlawful for an employer to hire an alien who is present and working in the United States without appropriate authorization. . . ."\(^{206}\) With the passage of employer sanctions in IRCA, however, it is now unlawful for an employer to hire an alien who does not have employment authorization.\(^{207}\) Thus, while the question of whether states can lawfully impose an "availability for work" requirement may remain a point of contention,\(^{208}\) the issue of whether an alien without employment authorization satisfies this requirement has been resolved. One cannot be considered "available for work" if it is illegal for one to be hired.

Regardless of the impact of employer sanctions or the absence of employment authorization on noncitizen eligibility for unemployment insurance, *Ibarra* significantly advances the doctrinal development of color of law. The court ultimately approved entry of a final consent decree that defined color of law in the same manner as the proposed decree.\(^{209}\) By including categories such as applicants for asylum and for adjustment of status within the color of law definition, the decree acknowledges that an INS policy prohibiting deportation is sufficient to confer color of law status. Such a definition is consistent with the *Gillar* case. The decree also specifically excludes persons who rest their claim solely upon the fact that the INS is aware of their presence and has yet to take steps to deport them,\(^{210}\) thereby rejecting the "mere acquiescence"\(^{211}\) rationale. In sum, the language of the consent decree comports with the view, initially expressed in *Holley*,\(^{212}\) that color of law includes those persons of whom the INS is aware and whose departure the INS does not contemplate enforcing.

Lending yet further support for this position, the Second Circuit decision in *Berger v. Heckler* demonstrates the continued vitality of *Holley*. In *Berger*, as noted in the discussion of "permanently residing,"\(^{213}\) the Secretary of Health and Human Services challenged a consent decree regarding the eligibility of certain aliens for SSI benefits. The original consent decree defined certain categories of aliens\(^{214}\) as under color of law but added: "Any other alien residing

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\(^{206}\) *Sure-Tan*, 467 U.S. at 892.


\(^{208}\) See supra note 202.

\(^{209}\) *Ibarra*, 645 F. Supp. at 1066 n.6.

\(^{210}\) Id.


\(^{212}\) *Holley*, 553 F.2d at 849-50.

\(^{213}\) See supra notes 129-34 and accompanying text.

\(^{214}\) These categories included: (1) aliens admitted as conditional entrants pursu-
in the United States with the knowledge and permission of the [INS] and whose departure from the United States the [INS] does not contemplate enforcing is also permanently residing in the United States under color of law . . . ."216

The district court later amended the decree to include eleven additional categories of eligible aliens as well as a general policy stating that an alien in a particular category will be considered as one whose departure the INS does not contemplate enforcing "if it is the policy or practice of the INS not to enforce the departure of aliens in such category."218 This amendment did not meet with the Secretary's approval. She challenged it principally on the ground that it is ultra vires because it conflicts with the underlying statute. She also argued that the amendment is ultra vires as exceeding the scope of the original decree.217 As to the latter argument, the Secretary maintained that the language of the original decree "is properly interpreted to cover only those aliens as to whom there has been an official determination or authorization, embodied in a letter, that the alien is legitimately present in the country for an indefinite period of time."218

The court dismissed, as having no merit whatsoever,219 the Secretary's attempt to restrict the decree's effect to Holley's limited facts.220 The court noted that Holley had been decided during the year before the consent decree was entered and that the federal gov-

ant to INA § 203(a)(7), 8 U.S.C. § 1153(a)(7); (2) aliens paroled pursuant to INA § 212(d)(5), 8 U.S.C. § 1182(d)(5); and (3) aliens residing in the United States pursuant to an order of supervision, indefinite stay of deportation, or indefinite voluntary departure. Berger, 771 F.2d at 1560.
216. Id. at 1576-77 n.33. The additional categories include, inter alia, persons awaiting INS adjudication of a change in status and whose departure the INS does not contemplate enforcing. Id.
217. Id. at 1570.
218. Id. at 1575.
219. Id. at 1576.
220. The Second Circuit previously has refused to limit its decision in Holley to the facts presented. On remand to the District Court, Holley v. Lavine, 464 F. Supp. 718 (W.D.N.Y. 1979), aff'd, 605 F.2d 638 (2d Cir.), cert. denied, Blum v. Holley, 446 U.S. 913 (1980), the Court denied the defendants' request to restrict declaratory and injunctive relief to the narrow facts of Ms. Holley's individual case. Holley, 464 F. Supp. at 721. The Court held that its determination that the state statute was inconsistent with the federal regulation required it to declare the New York statute "invalid insofar as it denies public assistance to New York residents permanently residing in the United States under color of law" and permanently enjoined the defendants from enforcing the statute. Id. On appeal, the Second Circuit specifically found that the scope of relief ordered by the district court was consistent with "[the Court of Appeal's] earlier mandate." Holley, 605 F.2d at 647.
ernment, in an amicus brief urging affirmance of the decision,\textsuperscript{221} had opposed the petition for certiorari.\textsuperscript{222} In its brief, the government argued that the phrase “‘residing under color of law’ includes, at least, residence continued by virtue of official permission or acquiescence.”\textsuperscript{223} The court thus concluded that “the government’s contemporaneous interpretation of Holley lends support to an expansive view of the consent decree, rather than a restrictive one.”\textsuperscript{224}

In rejecting the Secretary’s argument that the amended decree conflicts with the underlying statute, the Second Circuit characterized the phrase “under color of law” as “an open vessel — to be given substance by experience.”\textsuperscript{225} The Secretary argued that Congress intended the “color of law” language to confer eligibility only on refugees and those who entered the country prior to June 30, 1948.\textsuperscript{226} The court examined thoroughly the legislative history\textsuperscript{227} of the phrase and concluded that Congress never contemplated the restrictive interpretation preferred by the Secretary.\textsuperscript{228} Rather, the Berger court described the standard as “expansive and elastic” and inviting “dynamic interpretation . . . in the light of developments in the country’s immigration policy.”\textsuperscript{229}

**A PROPOSED GUIDELINE FOR APPLYING THE “PERMANENTLY RESIDING UNDER COLOR OF LAW” STANDARD**

Situations may exist in which either INS inaction regarding an alien’s application for lawful status\textsuperscript{230} or mere acquiescence in an alien’s presence\textsuperscript{231} are sufficient to establish that an individual is “permanently residing . . . under color of law.” Generally, however, an affirmative act by the INS permitting the individual to remain\textsuperscript{232} or a policy or practice prohibiting deportation during the pendency of an application for lawful status\textsuperscript{233} should be required.

\begin{itemize}
\item \textsuperscript{221} See supra note 132 and accompanying text.
\item \textsuperscript{222} Berger, 771 F.2d at 1575-76.
\item \textsuperscript{223} See Memorandum of Amicus Curiae for United States Department of Labor and United States Immigration and Naturalization Service, supra note 38, at 4.
\item \textsuperscript{224} Berger, 771 F.2d at 1576.
\item \textsuperscript{225} Id. at 1574.
\item \textsuperscript{226} Id. at 1572.
\item \textsuperscript{227} Id. at 1573-75.
\item \textsuperscript{228} Id.
\item \textsuperscript{229} Id. at 1571.
\item \textsuperscript{231} See Alfred v. Florida Dept’ of Labor and Employment Sec., 487 So. 2d at 355 (Fla. Dist. Ct. App. 1986).
\item \textsuperscript{233} See Gillar v. Employment Div., 300 Or. 672, 717 P.2d at 131 (1986); Ibarra v. Texas Employment Com’n, 598 F. Supp. 104 (E.D. Tex. 1986).
\end{itemize}
Most judicial constructions of the subject phrase discussed in this Article contain terminology requiring yet further definition to ascertain a precise meaning. Although perhaps workable in the context of particular facts, they may not be adaptable for general purposes. Use of the term “indefinite” in defining the duration of one’s status, for instance, can be ambiguous, since the INA does not define that term. Similarly, a determination of whether the INS “contemplates enforcing” an individual’s departure could require one to conjecture about subjective INS intent.

In an effort to avoid these pitfalls yet maintain sufficient flexibility in applying the subject phrase to an array of individualized fact situations, the following definition is proposed:

“Permanently residing under color of law” includes those persons not precluded by the INA (section 101(a)(15)) from establishing residence in the United States who, pursuant to INS policy or practice, are entitled to remain here so long as they continue in their current status.

Application of this definition will ensure continued adherence to congressional intent in enacting the color of law standard. That intent is to exclude from benefit eligibility those persons temporarily or not lawfully present.234 Furthermore, by utilizing the INA definition of “permanently,” this proposed guideline addresses the “permanently residing” concept in a legally precise and manageable manner. As previously discussed, “permanent” status is defined by distinguishing it from a temporary one.235 Persons with “no intention of abandoning” their foreign residences are enumerated in section 101(1)(15) of the INA as those classes of aliens who are temporarily present.236 If an individual does not fit one of the section 101(a)(15) categories and is thus “not precluded by the INA from establishing residence in the United States,” she is “permanently residing” within the meaning of the subject phrase. The Ninth Circuit in Sudomir237 would have undoubtedly reached a different conclusion and thereby avoided its tortured analysis of “permanent” by simply looking to the statutory definition.

The second part of the definition excludes undocumented aliens and limits color of law status to those persons who are present with the knowledge and permission of the INS. The language “pursuant to INS policy or practice” ensures that, consistent with congressional

234. See supra notes 57-58 and accompanying text.
235. See supra note 102 and accompanying text.
236. See supra notes 119-20 and accompanying text.
237. See supra notes 111-22 and accompanying text.
purposes, presence "under color of law" is not restricted to those instances in which the INS has affirmatively granted a particular status. Rather, it can include the following circumstances: (1) an individualized letter from the INS indicating an intent not to deport; (2) a specific case determination that the INS will not deport; or (3) an INS policy not to deport. Such policy can be based on statutes, regulations, operating instructions, or simply on practice.

The phrase "so long as they continue in their current status" addresses the issue of the appropriate time frame for examining one's immigration status. For instance, individuals cannot be denied color of law standing because, at some point in the future, their application for adjustment of status or asylum might be rejected by the INS. The focus must be on the "current status" and whether a policy or practice exists prohibiting deportation "so long as they continue" in that status. Failure to adhere to this approach could leave courts in the awkward position of making color of law determinations based on the likelihood of ultimate favorable action by the INS. Given the unpredictable and often arbitrary actions of the INS, this type of judicial "coin-flipping" is ill-advised.

CONCLUSION

The leading court to construe "permanently residing ... under color of law" has described the phrase as "adaptable and to be interpreted over time in accordance with experience, developments in the law, and the like. In this sense the phrase is organic and fluid, rather than prescriptive or formulaic." This description is a particularly fitting characterization that properly reflects congressional intent. Any attempt to narrowly construe the standard would frustrate these purposes and result in unwarranted denial of subsistence benefits to indigent aliens entitled to remain in the United States.

Congress has recently expressed interest in refining the color of law test. If Congress wants to provide the courts and administrative agencies with further guidance in interpreting the phrase, its interest would be best served by setting forth a definition with plain meaning rather than by exhaustive or internally inconsistent listings of categories of aliens. Any listing could prove to be underinclusive in that it necessarily excludes future categories of aliens that may be cre-

238. See supra note 168 and accompanying text.
239. Holley utilized the same approach by looking to whether INS "contemplated enforcing her departure from the United States at this time." Holley, 553 F.2d at 850 (emphasis in original).
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ated by our volatile immigration laws. Any effort to so restrict the phrase would thus leave insufficient flexibility to accommodate these subsequent changes in the law.

Finally, despite passage of IRCA and its planned effect on illegal immigration, Congress will undoubtedly remain under increasing pressure from certain special interest groups. These groups can be expected to take up the refrain that “illegal” immigrants are lured into this country by the availability of public benefits. Congress’ response to the serious and complex issue of controlling our borders must not be swayed by xenophobic hysteria. Neither should it come at the expense of the real needs of noncitizens in this country. Denial of subsistence benefits to individuals lawfully present would only create hardship and despair while undermining the fair and just application of our laws.

242. In only the past two years, Congress has considered, and in certain instances created, several new categories of aliens, including persons covered by various “legalization” programs and others accorded temporary relief from deportation. See, e.g., H.R. 3810, 99th Cong., 1st Sess., § 121(c) (1985); IRCA § 201(a), 100 Stat. at 3396 (amending/adding INA § 245A).