Health Care For Indigent Illegal Aliens: Whose Responsibility?

I. INTRODUCTION

The question of who bears responsibility for providing health care for indigent illegal aliens grows in importance as the number of illegal aliens[1] increases. Most illegal aliens come from Mexico[2] and are motivated by poverty to enter the United States illegally where even the lowest paying jobs offer an opportunity for a better life.[3] The opportunity vanishes, however, if an illegal alien becomes ill, injured, or for whatever other reason needs medical care. Illegal aliens usually lack sufficient means to pay for medical treatment.[4] Unlike other indigent people in need of medical care, illegal aliens are not eligible for government medical assistance programs.[5] Yet as a group they represent a proportionately larger demand for health care services, because of generally poorer health due to poverty, than that of the

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[1]Illegal aliens are those people who enter the United States surreptitiously or with false documents, or those persons otherwise deportable. 8 U.S.C. § 1251(a) (1970). In 1970 the number of illegal aliens apprehended in the United States was over 343,000. *Hearings on H.R. 982 before Subcommittee No. 1 of the House Committee on the Judiciary, A Study of Illegal Aliens*, 92d Cong., 1st and 2d Sess., at 5 (1971) [hereinafter cited as *Hearings on Illegal Aliens*]. Testimony of Raymond F. Farrell, Commissioner of the Immigration and Naturalization Service. By fiscal year 1973-74 the number of illegal aliens apprehended had grown to 780,991. Letter from Robert J. Seitz, Immigration and Naturalization Service [hereinafter referred to as INS], Public Information Officer for the Southwest Region, to author, October 1, 1974. One authority estimates that the number of illegal aliens apprehended represents as little as one-tenth of the total number of illegal aliens in the United States. Ortega, *Plight of the Mexican Wetback*, 58 A.B.A.J. 251 (1972).

[2]*Hearings on Illegal Aliens, supra* note 1, at 5. Testimony of Raymond F. Farrell, Commissioner of INS.

[3]Ortega, *Plight of the Mexican Wetback*, 58 A.B.A.J. 251 (1972).

[4]Atkins, *Sick and Illegal: It's a Problem for Everyone, Riverside Press Enterprise*, March 10, 1974, § B, at 1, col. 2.

[5]Under Title XIX (Medicaid) of the 1965 amendments to the Social Security Act an eligible recipient must be a 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. 45 C.F.R. § § 233.50, 248.50 (1974).

United States population as a whole.[6] Indeed, illegal aliens may pose a health hazard to the rest of the United States population because of their low level of immunization and general reluctance to seek medical care due to fear of deportation.[7] Thus, while it may seem paradoxical to speak of our responsibility to other countries' citizens, the plight of illegal aliens can be ignored no longer because it presents significant humanitarian, public health, and legal problems to the United States. This article will focus primarily on California[8] in examining the scope of the problem of providing health care for indigent illegal aliens, the shifting and ill-defined responsibility under existing law, and proposals to clarify responsibility for providing medical care for illegal aliens.

II. SCOPE OF THE PROBLEM

Providing medical care to illegal aliens presents two problems: 1) how to encourage fearful illegal aliens in need of care to seek treatment in order to minimize the public health threat and 2) how to pay for treatment, particularly emergency care. It is difficult to define the scope of the problem because no national study of the utilization of health care facilities and health care needs of illegal aliens has ever been undertaken. It is known, however, that the problem exists and is growing.[9]

The growth in numbers of illegal aliens implies that the potential health hazard is growing. Immunization among illegal aliens as a group is at a low level.[10] Further, illegal aliens, fearing deportation, tend to conceal illness and avoid medical care.[11] These conditions

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[6]*Hearings on Illegal Aliens, supra* note 1, at 304. Testimony of Dr. William T. Van Orman, Regional Director, U.S. Dept. HEW.

[7]*Hearings on Illegal Aliens, supra* note 1, at 392. Statement of Abelardo Delgado, Director, Colorado Migrant Council.

[8]The article will focus on California because INS figures demonstrate that the problem of illegal alien entrants to the United States is located almost exclusively in the Southwest. INS statistics for California show that 285,997 illegal aliens were apprehended in the state in fiscal year 1973-74. Letter from Robert J. Seitz, INS Public Information Officer for the Southwest Region, to author, October 1, 1974. In 1970, 97% of the illegal aliens apprehended by INS were Mexican nationals located in the Southwest. *Hearings on Illegal Aliens, supra* note 1, at 5. Testimony of Raymond F. Farrell, INS Commissioner.

[9]*See* note 1 and accompanying text concerning the increase in numbers of illegal aliens apprehended in the United States. In 1972 Raymond F. Farrell, INS Commissioner, estimated there were 1,013,000 illegal aliens in the United States. *Hearings on Illegal Aliens, supra* note 1, at 1323. A 1975 estimate suggests six or seven million persons illegally reside in the United States. U.S. NEWS & WORLD REPORT, vol. LXXVIII, no. 5, February 3, 1975, at 27.

[10]"Mexican Nationals pose yet another threat in that they conceivably represent a group in which immunization protection is at a low level and they could possibly be the originators of diptheria, measles, typhoid, and polio outbreaks." *Hearings on Illegal Aliens, supra* note 1, at 326. Testimony of Clifton D. Govan, M.D., Colorado Dept. of Health, Migrant Health Program.

[11]*Id.*

combined with the often crowded and unsanitary living situations illegal aliens are forced to endure[12] and the high incidence of illegal aliens found to be working in food handling jobs[13] produce a grave threat to community public health.[14] Illegal aliens with jobs as food processors, dishwashers, or the like, may be a source of many diseases such as hepatitis, tuberculosis, salmonellosis, shigellosis, amebiasis, and parasitic infections.[15] Health officials tend to describe this health threat as explosive[16] or catastrophic.[17]

Symptoms of the danger to public health are already apparent. When apprehended many illegal aliens are found to have tuberculosis or venereal disease.[18] A Riverside County, California, health official attributed recurrent outbreaks of tuberculosis in that county in part to the difficulty of reaching and treating illegal alien farmworkers.[19] The Los Angeles County health director predicted that Los Angeles may have a major problem in the near future sparked by the health problems of the large number of illegal aliens in the area.[20] It may be that if an effort to provide better health care for illegal aliens is not made, the result could be a greater incidence of communicable disease among citizens who are victims of epidemics spawned by the neglect of illegal aliens' health needs.

Illegal aliens tend to delay or forego seeking medical care not only due to fear of discovery and deportation but also because of an inability to pay for needed medical care.[21] Job records show apprehended illegal aliens generally were concentrated in service, farm,

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[12] *Id.*

[13] According to an INS study of deportable Mexican aliens found employed in July-August, 1972, the following percentages were engaged in food handling occupations: San Diego, 80%; Los Angeles, 16%; San Antonio, 8%; Dallas, 12%; El Paso, 51%. *Hearings on Illegal Aliens, supra* note 1, at 27.

[14] *Hearings on Illegal Aliens, supra* note 1, at 327. Testimony of Clifton D. Govan, M.D., Colorado Dept. of Health, Migrant Health Program.

[15] *Id.* Another authority suggests "Diseases which can be transmitted from farmworker to farmworker include tuberculosis, hepatitis, syphilis, trench mouth, and dysentery. Diseases which can be transmitted to the consumer include amoebic dysentery, typhoid fever, and hepatitis." *Hearings on H.R. 5010 before the Subcommittee on Agricultural Labor of the House Committee on Education and Labor*, 92d Cong., 1st Sess., at 26 (1971). "Public Regulation of Working Conditions in Agriculture," a paper by Gary S. Goodpaster, former associate counsel to the Subcommittee on Agricultural Labor.

[16] *Hearings on Illegal Aliens, supra* note 1, at 326. Testimony of Clifton D. Govan, M.D., Colorado Dept. of Health, Migrant Health Program.

[17] Atkins, *Sick and Illegal: It's a Problem for Everyone, Riverside Press Enterprise*, March 10, 1974, § B, at 1, col. 2.

[18] *Hearings on Illegal Aliens, supra* note 1, at 293. Statement of John Todd, District Director of INS.

[19] Atkins, *Sick and Illegal: It's a Problem for Everyone, Riverside Press Enterprise*, March 10, 1974, § B, at 4, col. 3. Statement of Robert Shirley, program director of the Riverside County Lung Association.

[20] *Id.* Statement of L.A. Witherill, Los Angeles County Health Director.

[21] *Id.*

trade, and other low-wage industries.[22] In addition to receiving low wages, employed illegal aliens are usually denied fringe benefits such as health insurance.[23] This suggests that most illegal aliens cannot afford needed medical care.

The types of health care illegal aliens receive and the facilities providing such care can be described only in general terms because few if any statistics are available. Some individual hospitals and county governments have begun to compile statistics.[24] Since hospitals usually do not require that the alien give his status before receiving care, often the county or hospital can only guess how much treatment is given to illegal aliens.

Local health departments usually provide preventive care services such as immunization, diabetic screening, tuberculosis tests, and well-baby clinics.[25] Usually free care is provided to those in need with no formal eligibility determination.[26] Nevertheless, illegal aliens often do not take advantage of this care because of fear of discovery of their illegal status which could lead to deportation.[27]

The local health department also usually provides care for chronic illnesses such as tuberculosis, heart disease, or cancer.[28] Illegal aliens seeking this type of care are eventually discovered through an eligibility determination and are returned to their native country for long-term care.[29]

Illegal aliens in need of acute care for internal disorders, fevers, headaches, or diarrhea might seek care at a family health center or from a private physician.[30] If the illegal alien does not pay for the cost of this care, it must be absorbed by the health care facility.[31] An illegal alien able to pay for one episode of medical treatment may nevertheless be reluctant to seek care because of fear that his illegal status will be discovered.[32] Therefore, acute care is most often sup-

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[22] *Hearings on Illegal Aliens, supra* note 1, at 101. Statement of Joseph L. Flores, Regional Manpower Administrator, U.S. Dept. of Labor, Region IX, San Francisco.

[23] *Hearings on Illegal Aliens, supra* note 1, at 80. Statement of Leonard W. Gilman, INS Southwest Regional Commissioner.

[24] Atkins, *Sick and Illegal: It's a Problem for Everyone, Riverside Press Enterprise*, March 10, 1974, § B, at 4, col. 6. San Diego, Los Angeles, Riverside, Merced, Santa Clara, and other counties are trying to determine the annual county cost for medical treatment of illegal aliens. *Id.*

[25] *Hearings on Illegal Aliens, supra* note 1, at 523. Statement of Howard McMahon, Regional Director, Dept. of HEW, Dallas, Texas.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Hearings on Illegal Aliens, supra* note 1, at 326. Testimony of Clifton D. Govan, M.D., Colorado State Dept. of Health, Migrant Health Program.

plied to illegal aliens after their apprehension.[33] Generally, a county medical officer provides acute care at a facility whose function includes the treatment of prisoners.[34] Local authorities bear the cost.[35]

Local public or private hospitals provide emergency care for injuries suffered in car or train accidents, farm-machine accidents, or falls.[36] In nearly all cases involving illegal aliens the particular hospital absorbs the expenses incurred.[37] The local community bears the eventual cost in taxes for a county hospital or increased fees for a private hospital.[38] Emergency care is the greatest known expenditure in public funds for health care for illegal aliens.[39]

In summary, illegal aliens represent a growing potential public health threat as long as their health care needs continue to be ignored. Many illegal aliens avoid seeking care because they lack funds and fear their status would be discovered by an eligibility determination for medical assistance payments. The available illegal alien health care utilization statistics suggest illegal aliens receive treatment in either a haphazard manner or only in case of emergency. The plight of illegal aliens living on the fringes of our society, as well as concern for the health of our own citizens, indicates the need to analyze the current framework of government medical assistance to determine the responsibility to provide health care for indigent illegal aliens.

III. LEGAL RESPONSIBILITY FOR PROVIDING HEALTH CARE TO ILLEGAL ALIENS

Just as the extent of the need for health care for indigent illegal aliens is difficult to determine, so is it difficult to establish the extent and source of legal responsibility for providing health care. While no one would favor denying treatment to a sick person, federal, state, and local governments readily deny financial responsibility for providing that care. No coherent government policy seems to exist. Health care received by an illegal alien is subject to the vagaries of the law. Considerations which might bear on the care an illegal alien receives include: 1) whether he has been apprehended by the INS or merely reported to them,[40] 2) whether he is a migrant farm labor-

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[33] *Hearings on Illegal Aliens, supra* note 1, at 523. Testimony of Howard McMahon, Regional Director, Dept. of HEW, Dallas, Texas.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 524.
[38] *Id.*
[39] *Id.* at 523.
[40] If an illegal alien is in INS custody the Service will obtain necessary medical care for a sick illegal alien. The INS, however, does not take custody of an illegal

er,[41] 3) whether the facility where he seeks care is a county or private hospital,[42] and 4) whether he has a life-threatening condition.[43] To the extent that the problem of providing health care for illegal aliens has been acknowledged, federal, state, and local governments have demonstrated a distinct lack of cooperation.[44]

A. FEDERAL GOVERNMENT

The first consideration listed above, the illegal alien's custody status, determines the extent of direct federal government involvement. Federal law requires that persons who discover that an immigrant is in the country illegally must report him or face felony charges of concealing an illegal alien.[45] This means that medical personnel treating an illegal alien whose status is known or is subsequently discovered must report the individual to the INS. The INS does not take custody of the illegal alien during his course of treatment. Existing law provides that at the request of the INS any alien detained by the Service may be treated and cared for by the Public Health Service in its medical treatment facilities.[46] But the policy of the INS is to request such care only if the alien is injured or otherwise in need of medical care while he is actually detained and physically in the hands of the INS.[47] If he is in the hands of others, INS will not assume jurisdiction over the alien until he is well enough to

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alien who has been hospitalized until he is released and is well enough to travel. Letter from Congressman B.F. Sisk to author, Oct. 16, 1974. *See* text accompanying note 47.

[41] Migrant farm laborers who are illegal aliens might seek care provided by the Migrant Health Program if they think their illegal status will not be discovered. *See* text accompanying note 50.

[42] An illegal alien in need of medical care may not be provided with care in a county that has no county facility unless he presents a life-threatening emergency at a private hospital which chooses to render aid to avoid potential tort liability under CAL. HEALTH & SAFETY CODE § 1407.5 (West 1970). *See* text accompanying note 85.

[43] California law requires that any general hospital, county or private, that has an emergency room must provide emergency care regardless of a person's status. CAL. HEALTH & SAFETY CODE § 1407.5 (West 1970).

[44] The federal agency, the INS, claims to have no money to pay for illegal aliens' medical care. Letter from B.F. Sisk to author, Oct. 16, 1974. In a 1973 California Social Welfare Board position statement the state indicated it did not consider illegal aliens its responsibility. Calif. Health & Welfare Agency, Dept. of Social Welfare, State Social Welfare Board Position Statement, ISSUE: ALIENS IN CALIFORNIA, 32-36 (Jan., 1973). Finally, local authorities deny responsibility. The Los Angeles County Board of Supervisors is threatening to sue the federal government to recover funds spent by the county for medical care for illegal aliens. *Los Angeles Daily Journal*, Nov. 27, 1974, vol. 87, no. 238, at 15, col. 6.

[45] 8 U.S.C. § 1324 (1970).

[46] 42 U.S.C. § 249(c) (1970).

[47] Letter from Congressman B.F. Sisk to author, Oct. 16, 1973, with enclosed copy of a letter from the Office of the Commissioner, INS (file no. CO 703.667).

be returned to his own country.[48] The INS claims to have neither the authority nor the funds to pay for the medical care illegal aliens receive.[49]

B. FEDERAL-STATE FUNDED HEALTH PROGRAMS

1. MIGRANT HEALTH PROGRAM

The type of health care an illegal alien might receive may also be determined by his occupation. Some illegal aliens who are migrant farm laborers have received care provided under the Migrant Health program established in 1963.[50] The status of illegal aliens receiving care under this program was either ignored or unknown, and therefore statistics are unreliable or lacking. In testimony before 1971 Congressional hearings dispensers of health care under the Migrant Health program estimated that one-fifth to one-sixth of Colorado's migrant health funds were spent on illegal aliens and that 25 to 30% of patients seen at a Chicago migrant health clinic were illegal aliens.[51]

2. MEDICAID

Most indigents are treated in county hospitals. When a critically ill illegal alien arrives at a county hospital, medical personnel render treatment immediately and determine eligibility later. Medicaid, authorized by Title XIX of the Social Security Amendments of 1965, provides health care payments for categorical assistance recipients and persons determined to be "medically needy."[52] Illegal aliens, however, are not entitled to Medicaid.[53]

a. Eligibility before 1973: State Discretion

Medicaid originally left eligibility determination to a large extent to the states.[54] In order to qualify for federal matching funds, a

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[48] *Id.*
[49] *Id.*
[50] The Migrant Health Act provided funding for the establishment and operation of family health service clinics for migratory farmworkers. Migrant Health Act 42 U.S.C. § 242(h) (1970).
[51] *Hearings on Illegal Aliens, supra* note 1, at 326, 823. Statements of Clifton D. Govan, M.D., Colo. Dept. of Health, Migrant Health Program, and Jorge Prieto, M.D., Director of Community Medicine, Cabrini Health Center, Cabrini Hospital, Chicago, Ill.
[52] Title XIX, Medicaid, extended medical assistance to all recipients of categorical public assistance including Old Age Assistance, Aid to Families with Dependent Children, Aid to the Blind, and Aid to the Permanently and Totally Disabled. It combined the separate public assistance medical vendor programs for aid recipients into a single program. California began its Medicaid program, called Medi-Cal, in March, 1966. Medicaid, 42 U.S.C. § § 1396 *et seq.* (1970). Medi-Cal, Chapter 4, Statutes of 1965, Second Extraordinary Session.
[53] 38 Fed. Reg. 16911 (1973). *See* text accompanying note 60.
[54] R.J. MYERS, MEDICARE, at 268 (1970).

state plan could not include either state residency requirements or federal citizenship requirements.[55] This provision was originally interpreted to mean that states that wished to include non-citizens could establish a United States durational residence requirement in lieu of citizenship. As of 1970 eight states had citizenship requirements.[56] Five of these required, as an alternative to citizenship, residence in the United States for a period ranging from ten to twenty-five years.[57]

b. Eligibility after 1973: No Entitlement for Illegal Aliens

In October, 1971, the Supreme Court in *Graham v. Richardson* struck down two states' (Pennsylvania's and Arizona's) durational residency requirements.[58] *Graham* followed a line of cases interpreting the definition of the Fourteenth Amendment "person" to apply only to lawfully admitted resident aliens.[59] The case held that state statutes which deny welfare benefits to resident aliens or to aliens who have not resided in the United States for a specified number of years violate the equal protection clause and encroach upon the exclusive federal power over the entrance and residence of aliens.

To implement *Graham*, HEW revised federal eligibility provisions concerning citizenship and alienage. Under new regulations for state plan approval under Title XIX (Medicaid), a state is required to include an 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.[60] Because these regulations exclude any individual not lawfully within this country an illegal alien cannot be given care under Medicaid.

At the time the regulations to implement *Graham* were proposed, HEW received comments from fifty-nine persons, fifty of whom were in favor of denying Medicaid assistance to aliens not lawfully admitted to this country.[61] The commentators supported their view with three basic arguments. First, they contended that the *Graham* decision striking down durational residency requirements for resident aliens and the equal protection clause of the Constitution are not

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[55] Medicaid, 42 U.S.C. § 1396(a)(1970).
[56] 38 Fed. Reg. 16911 (1973).
[57] *Id.*
[58] 403 U.S. 365 (1971).
[59] Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Truax v. Raich, 239 U.S. 33 (1915).
[60] 38 Fed. Reg. 16911 (1973); 45 C.F.R. § § 233.50, 248.50. These regulations became effective Jan. 1, 1974.
[61] 38 Fed. Reg. 16911 (1973).

applicable to aliens not lawfully admitted to the United States.[62] Second, they feared that extending assistance to illegal aliens would raise caseloads beyond a state's fiscal abilities and result in a reduction of aid to citizens and resident aliens.[63] Finally, they argued that if any assistance is to be provided to illegal aliens, it should be financed entirely from federal funds, since the federal government has responsibility for immigration and naturalization.[64] The underlying assumption common to these arguments is that illegal aliens have no claim of right to Medicaid, and therefore if illegal aliens are to receive any governmental medical assistance, it should be granted as a federal charity program and not at the expense of those otherwise entitled to Medicaid.[65]

c. Eligibility in California

California was one of the states which required that non-citizens meet a durational residence requirement to qualify for medical benefits. In 1972, in light of *Graham*, a three-judge district court in *Yuan Jen Cuk v. Brian*[66] struck down the five-year residence requirement for aliens contained in California's Medically Indigent Law. The current eligibility regulation, in conforming with the federal requirement, excludes illegal aliens by requiring that the recipient be "a citizen of the United States," or be "legally present in the United States."[67]

The California 1971 Welfare Reform Act changed the burden of proof required for a determination of when an alien is legally present. Although a good deal of publicity was given to the possibility that illegal aliens might be receiving welfare, testimony before the Senate Health and Welfare Committee revealed that the problem was not one of keeping illegal aliens, who rarely seek aid for fear of being discovered, off the rolls, but of allowing legal aliens to receive health and welfare benefits if they were otherwise eligible.[68] Under the 1971 law an applicant or recipient who is not a United States citizen must establish his residence by one of the following: 1) a certificate signed by the alien under penalty of perjury that to the best of his knowledge he is in the country legally and is entitled to remain

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[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* The public response to the proposed HEW regulations advocating a denial of Medicaid to illegal aliens coincided with Congressional action to exclude illegal aliens from the Supplemental Security Income program (which superceded Old Age Assistance, Aid to the Blind, and Aid to the Permanently and Totally Disabled).
[66] 355 F. Supp. 133 (N.D. Cal. 1972).
[67] CAL. WELF. & INST. CODE § 140056(a)(3) (West Supp. 1974).
[68] Beilenson and Agran, *The Welfare Reform Act of 1971*, 3 PACIFIC L.J. 475, 487 (1972).

indefinitely; 2) a certificate under penalty of perjury that the alien is not under order for deportation; 3) a certificate under penalty of perjury that, if married, the spouse is not under order for deportation; 4) affidavits of two United States citizens attesting to the alien's continuous residence in the United States for five years or more.[69] Under any of the four alternatives, aid must be granted or continued pending verification from the INS.

In summary, changes in the law since 1973 affecting citizenship and residency requirements for health and welfare benefits have aided legal aliens to obtain medical treatment, but have eliminated any ambiguities that might have previously allowed illegal aliens to obtain medical benefits under Medicaid.

C. LOCAL/COUNTY HEALTH CARE RESPONSIBILITY

1. COST OF CARE PROVIDED BY LOCAL/COUNTY FACILITIES

Although federal and state regulations effectively preclude illegal aliens from participating in federal-state Medicaid programs, local or county health care facilities do provide health services for many illegal aliens. In doing so, these local or county facilities incur large medical debts that go uncollected.[70] Presently, a majority of Califor-

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[69] CAL. STATE DEPT. OF SOCIAL WELFARE MANUAL OF ELIGIBILITY ASSISTANCE STANDARDS § 42-407. The procedure for eligibility determination described above has been subjected to recent court challenge. A Sacramento Superior Court judge ruled that aliens need not prove that they are legally admitted, only that they are not under order for deportation in order to qualify for welfare benefits. This litigation is not expected to result in any large increase in illegal aliens receiving welfare payments because it is unlikely illegal aliens will apply since they should know they would be investigated and deported as soon as their status became known. *Sacramento Bee, Aliens May Get Aid Without Proving in State Legally*, Dec. 25, 1974, § B at 1, col. 3, and *Sacramento Bee, Judge Says Order on Illegal Alien Aid Prompts Rash of Hate Mail*, Feb. 6, 1975, § A at 9, col. 4.

It is likely that illegal status would be discovered because Medi-Cal won't accept or pay a claim for reimbursement without an eligibility determination. An eligibility determination may take time, however, and the court ruling requires that aid must be given until it can be proven the individual is not eligible. This creates a dilemma for county hospitals: the hospital gives care to a person with an unknown status and then the state refuses to reimburse the hospital from Medi-Cal funds because the person turns out to be an illegal alien.

[70] Los Angeles County, the most populous county of the state, estimated that it had unreimbursed costs of $8,153,804 in fiscal year 1973-74 for care provided to illegal aliens. Letter from Congressman B.F. Sick to author, Oct. 16, 1974. San Diego County estimated its cost during the same period at $1.9 million. Letter from Robert J. Seitz, INS Public Information Officer for Southwest Region to author, Oct. 1, 1974. While urban counties constitute the largest portion of the cost in California, rural counties also bear a substantial burden. In the San Joaquin Valley, Fresno County's hospital facility spends $800,000 annually caring for illegal aliens. Kern County General Hospital officials reported a $475,000 annual cost, and Tulare County officials estimated a $250,000 cost. *Fresno Bee*, Sept. 20, 1974, § A, at 1, col. 1. Merced County paid $113,000 for

nia counties absorb the cost of the care provided to illegal aliens through the county hospital budget.[71] The rising costs of such care, particularly emergency hospital treatment for illegal aliens, has drawn growing public attention to the overall problem of providing health care for illegal aliens.[72]

While most counties pay the costs of medical care for illegal aliens out of the county hospital budget, a serious problem arises in those counties with no county hospital. In one of these counties, Kings County, indigent patients now receive care at private facilities with the county indemnifying the hospitals for certain losses.[73] Because of this financial arrangement, Kings County contends it cannot estimate its cost of providing care to illegal aliens.[74] In Madera County, which also has no county hospital, the Madera Community Hospital, a private facility, reports losses of $36,000 annually in caring for illegal aliens.[75] The county has reportedly refused to reimburse the local hospital for such losses.[76]

Because of rising county health care costs, the California County Supervisors Association and the California State Department of Health conducted a survey to identify some of the factors contributing to the increase.[77] The study revealed that one factor was the large number of aliens (who may or may not have been illegal aliens since no identification concerning status was made) who were not eligible for government medical assistance payments. The alien category comprised the largest number of people who were ineligible for medical benefits.[78] The estimated yearly cost for alien ineligibles is $10,468,640.[79] The increasing burden to the counties of health care costs generated by indigent illegal aliens is a symptom of the larger problem of providing health care for illegal aliens. This economic burden serves as yet another reason, in addition to humani-

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treatment of illegal aliens in fiscal 1972-73, while Modesto County estimated its annual cost to be $100,000. Atkins, *Sick and Illegal: It's a Problem for Everyone, Riverside Press Enterprise*, March 10, 1974 § B, at 4, col. 6.

[71] Atkins, *Sick and Illegal: It's a Problem for Everyone, Riverside Press Enterprise*, March 10, 1974, § B, at 4, col. 6.

[72] A triggering event in California was the May, 1972, Merced County auto accident in which an illegal alien was critically injured. After five months of medical treatment the INS took custody of the illegal alien and deported him but Merced County was left with a bill of more than $75,000. *Id.*

[73] Letter from Congressman B.F. Sisk to author, Oct. 16, 1974.

[74] *Id.*

[75] *Fresno Bee*, Sept. 20, 1974, § A, at 6, col. 1.

[76] Letter from Congressman B.F. Sisk to author, Oct. 16, 1974.

[77] The study included fifteen counties containing 82% of the state's population in a survey of patients in county facilities over a two-week sample period. County Supervisors Association of California and the California State Dept. of Health, RESULTS AND ANALYSIS OF COUNTY HOSPITAL SURVEY, Sept., 1974.

[78] *Id.* at 10. Aliens represented 34.8% of the ineligibles at an unreimbursed cost of $207,562 to the county hospitals during the two-week sample period. *Id.*

[79] *Id.* at 23.

tarian and public health reasons, why the problems can no longer be ignored.

2. SHOULD COUNTIES BEAR THE BURDEN?

An argument could be made that in California the county is the governmental unit charged with responsibility for providing medical care to indigents, and that therefore illegal aliens should be entitled to medical treatment provided at county expense. An examination of California statutes reveals vestiges of local responsibility for the general health and welfare from the pre-Medicaid period which might serve as justification for placing the responsibility for illegal aliens' health care at the local level.

California law provides for county aid and relief to indigents. Welfare & Institutions Code §10000 states the fundamental purpose of this legislation:

> [T]o provide for protection, care, and assistance to the people of the state in need thereof, and to promote the welfare and happiness of all the people of the state by providing appropriate aid and services to all of its needy and distressed.[80]

Welfare & Institutions Code §17000 implements this purpose by placing responsibility for care with each county. According to §17000 every county must relieve and support all indigent persons "and those incapacitated by age, disease, or accident, lawfully resident therein."[81] The residence requirement of §17000 would exclude illegal aliens, but the general purpose cited in §10000 is very broadly stated. The question is which statute is determinative. Advocates of local responsibility would cite §10000 as justification for placing responsibility at the county level, yet statutory construction requires a preference for the specific over the general. The California Attorney General has ruled that the operation of Medi-Cal (California's implementation of Medicaid) has not abrogated the duty of the counties prescribed in these statutes to provide medical care to indigents not eligible for Medi-Cal.[82] Furthermore, illegal aliens can be found within the class of indigents not eligible for Medi-Cal. The Attorney General has not affirmatively ruled, however, that counties have a duty to provide care for illegal aliens.

California law also mandates a system of local public hospitals to care for the indigent sick. The County Medical Facilities Act, originally enacted in 1929, establishes the power of county boards of supervisors to build and operate county hospitals and the responsibility of county boards of supervisors to care for the indigent

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[80] CAL. WELF. & INST. CODE §10000 (West 1970).
[81] CAL. WELF. & INST. CODE §17000 (West 1970).
[82] 56 OPS. CAL. ATTY. GEN. 12 (1973).

sick.[83] Finally, California law requires that any general hospital, county or private, that has an emergency room must provide emergency care regardless of a person's status.[84] Some commentators believe that this type of statute creates a duty of the hospital to admit a patient in an emergency and that failure to provide care could result in tort liability.[85]

The California statutes discussed above, when seen in relation to each other, constitute a system for providing health care to indigents which is not necessarily limited to indigent residents. Although the responsibility is not clearly defined, arguably the local or county government should bear the burden of providing care to indigent illegal aliens.

3. DENIAL OF RESPONSIBILITY BY COUNTIES

Statistics gathered by the County Supervisors Association of California and the California State Department of Health indicate that counties probably are currently bearing a major share of the burden of providing health care to indigent illegal aliens.[86] Nevertheless, the counties are not willing nor, they contend, able to assume this ill-defined and burdensome responsibility.

Many county officials believe the federal government should reimburse their costs of caring for illegal aliens.[87] For example, the Los Angeles County Board of Supervisors has made several attempts to recover from the federal government costs for services provided to illegal aliens in county health facilities. In June, 1974, the Board submitted a claim for $7 million to Leonard Chapman, Jr., Commissioner of INS, which was denied.[88] In August, 1974, a request for repayment was refused by Casper Weinberger, Secretary of HEW.[89] The Board of Supervisors has recently directed the County Counsel to study the possibility of filing suit against the federal government.[90] San Diego County Supervisors are also seeking reimbursement for treatment of illegal aliens. The county has filed a claim with HEW requesting reimbursement for $578,307 expended in providing medical care to illegal aliens.[91]

Financial constraints inherent in Medi-Cal are behind the attempts

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[83] CAL. HEALTH & SAFETY CODE § §1440, 1441, 1445 (West 1970).
[84] CAL. HEALTH & SAFETY CODE § 1407.5 (West 1970).
[85] Silver, *Medical Care Delivery Systems and the Poor: New Challenges for Poverty Lawyers*, 1970 WISC. L. REV. 644, 662.
[86] County Supervisors Assoc. of Cal. and Cal. State Dept. Health, RESULTS AND ANALYSIS OF COUNTY HOSPITAL SURVEY, Sept., 1974.
[87] Zeman, *Refund for Illegal Alien Medical Care Sought, Los Angeles Times*, June 26, 1974, Part II, at 1, col. 5.
[88] *Id.*
[89] *Los Angeles Daily Journal*, Nov. 27, 1974, vol. 87, no. 238, at 15, col. 6.
[90] *Id.*
[91] *Id.*

of the counties to obtain reimbursement. Funding changes for Medi-Cal, instituted in 1971, coupled with legislation that essentially froze county property tax levels in 1972 and 1973, created severe financial problems for county hospitals.[92] When Medi-Cal was proposed in 1965, amendments were made to the original proposal to protect the counties from increased costs via the county option plan.[93]

The Medi-Cal Reform Program, effective October 1, 1971, eliminated the county option.[94] This program shifted the cost from the state to the counties.[95] The county share was based on each county's adjusted 1970-71 Medi-Cal contribution plus the county medically indigent (non-Medi-Cal qualified) costs for the year.[96] The county was put back in the role of primary health care provider with no guarantee or subsidy from the state regarding those individuals who might not meet Medi-Cal eligibility requirements. Thus, the county totally and directly bears the cost of medical care for illegal aliens or aliens who do not otherwise qualify for Medi-Cal.

The administrative and fiscal problems that the counties have experienced in relation to Medi-Cal have led to closure of several county hospitals, and in some counties to closure of the single county hospital.[97] Those counties which no longer operate their own facilities continue to pay their Medi-Cal share to the state, but they seldom have any other health care costs except where they contract with private hospitals for treatment of jail inmates, juveniles, and some emergency care costs. As a result of this situation, an illegal alien will not receive medical care in such counties unless he presents a life-threatening condition at a private hospital which chooses to render aid to avoid potential tort liability.[98]

D. SUMMARY

There is no specific assignment of responsibility for providing

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[92] REPORT OF THE CALIFORNIA LEGISLATIVE ANALYST TO THE JOINT LEGISLATIVE BUDGET COMM., fiscal year July 1, 1974 to June 30, 1975, at 630.

[93] A county was offered an option to receive a guarantee from the state that its future medical cost would not exceed that of its 1964-65 fiscal year, adjusted upward for population increases. Option counties paid 100% of the amount of the 1964-65 county cost of health care with the state guaranteeing payment of all costs over the 1964-65 cost. Standard counties (those which did not elect the option) paid 90% of the 1964-65 county costs of health care plus a specified amount that increased each year by the percentage change in population. The effect of the option plan, selected by the larger counties in anticipation of cost increases, was that funds provided by the state replaced costs that otherwise would have been borne by counties through increased property taxes. REPORT OF THE CAL. LEGISLATIVE ANALYST TO THE JOINT LEGIS. BUDGET COMM., fiscal year July 1, 1974 to June 30, 1975, at 629.

[94] *Id.* at 627-28.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 629.

[98] *See* text accompanying notes 84 to 85.

medical care to illegal aliens, and illegal aliens often fall outside the present systems of government health care assistance. The federal government through the INS avoids responsibility for health needs of illegal aliens by declining to take custody until an illegal alien is healthy enough to be deported. Medicaid, the federal-state financed medical assistance program, excludes illegal aliens from qualifying for benefits by means of federal and state eligibility requirements. California statutes place responsibility for the health and welfare of indigents with the counties, but it is unclear whether that responsibility extends to illegal aliens. Even if it did so once, the implementation of Medi-Cal has so changed the health care situation that counties presently have an inability due to lack of funds and facilities to meet such a responsibility. The failure of illegal aliens to receive necessary health care is at least partially attributable to the failure of any governmental level to take responsibility for providing care.

IV. POLICY RECOMMENDATIONS

A. LIMITS TO ANY SOLUTION

The present state of health care for illegal aliens demands a clarification of legal responsibility and a confrontation of the humanitarian, public health, and legal problems involved. A fresh examination of the problems and a search for new methods of dealing with them is in order. Any solution will necessarily have to take into account the reality of an immigration law which requires that illegal aliens must be deported. Thus, fear of deportation cannot be entirely eliminated as a circumstance that deters aliens from seeking medical care. The present situation can be reformed, however, to enable indigent illegal aliens to obtain medical care despite their inability to pay. The inclusion of illegal aliens within the framework of governmental medical assistance will promote better medical care for illegal aliens with a concommitant enhancement of community health standards. The attainment of these goals will largely depend on legislative action. It is appropriate, therefore, to examine the legal ramifications of legislative proposals dealing with this problem of providing health care for illegal aliens.

B. LEGAL RAMIFICATIONS

It has been shown that local, state, and federal laws do not clearly define responsibility for providing medical assistance to illegal aliens. If illegal aliens are to be medically provided for, the responsibility for medical care must be expressly assumed by one of the government levels. Chiefly because illegal aliens have no claim of right to government assistance, no compelling legal grounds exist on which to base the obligation of any one government level to provide medical care

for illegal aliens.[99] The federal government as a result of the *Graham* decision has more clearly indicated that Medicaid benefits will be denied to illegal aliens.[100] State governments complied with the Medicaid eligibility regulations in order to receive federal matching funds for state health care programs. The problem of providing health care to illegal aliens has fallen to local government by default. Where counties have withdrawn as direct health care providers by closing the county hospital, the burden has fallen on the private sector.[101]

C. ANALYSIS OF POSSIBLE SOLUTIONS

The fiscal pressures arising from the burden placed on county and private hospitals have stimulated a debate as to which level of government should assume the obligation of financing health care for illegal aliens. Such a debate ignores to a large extent the legal issue of entitlement, *i.e.*, whether to act, in preference for a more pragmatic approach of who should act.[102] Criteria for making the policy choice should include, in addition to the entitlement issue, considerations of administrative and fiscal capabilities and the effect upon national immigration policy.

1. LOCAL GOVERNMENT RESPONSIBILITY

One possible solution is for local government to assume the responsibility of financing health care for illegal aliens. Despite the fact that the problem of medical care for illegal aliens first arises and has its greatest impact at the local or county level and might be most efficiently dealt with at that level, placing responsibility at the local or county level is not a viable solution. First, unless legislation were enacted dealing with the issue of entitlement, the duty to illegal aliens might not be enforceable due to the lack of clear definition of county responsibility under the pertinent Welfare & Institutions Code sections.[103] It seems unlikely that the counties would willingly accord medical care to illegal aliens as a claim of right.[104] Second, the closure of many county hospitals[105] and the fiscal constraints operative under Medi-Cal[106] indicate the impracticality of limiting action to a county by county approach. Treating the health care needs of illegal aliens as a local concern would be favoring an approach that

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[99] *See* text accompanying notes 60 to 65.
[100] *Id.*
[101] *See* text accompanying notes 75 to 76.
[102] *See* discussion of the entitlement issue in text accompanying notes 60 to 65.
[103] *See* text accompanying notes 80 to 81.
[104] *See* text accompanying note 110. The state has denied responsibility to illegal aliens, and would not, therefore, be likely to require that the state's counties assume responsibility.
[105] *See* text accompanying note 97.
[106] *See* text accompanying notes 92 to 97.

would yield results similar to the status quo in ignorance of the growing potential health hazards posed by illegal aliens.[107]

2. STATE GOVERNMENT RESPONSIBILITY

Another possible solution is state assumption of responsibility for illegal aliens' health care, but this too could give rise to legal conflicts. State medical assistance programs are financed by federal state matching funds under Medicaid.[108] In order to qualify for their federal share of funds states must comply with certain federal regulations, one of which is that recipients must be citizens or lawfully admitted aliens.[109] Thus, if California wished to assume responsibility for the health care of illegal aliens to maintain a better public health standard for the state, California would have to establish and administer a separate program of state medical assistance benefits for illegal aliens. Such a prospect is unlikely because it would entail expense and duplication of effort. Furthermore, the California Social Welfare Board has denied responsibility for health care for illegal aliens on the ground that if illegal aliens are entitled to care they should be cared for with federal rather than state funds.[110]

The federal government, of course, has the authority to change Medicaid regulations to permit states to include illegal aliens. Such an action was considered and rejected in October, 1973, when the current federal regulation excluding illegal aliens was approved.[111] HEW officials concluded that requiring the inclusion of illegal aliens under Medicaid or leaving the matter as a state option would be inconsistent with the federal program for Supplemental Security Income for the Aged, Blind, and Disabled (SSI) that excluded aliens not lawfully residing in the United States.[112] The federal government did not want to give illegal aliens a basis for claiming legal entitlement to all types of welfare benefits.[113] In summary, the legal issues of a lack of an enforceable duty against the state and a lack of entitlement would confound any state-mandated solution.

3. FEDERAL GOVERNMENT RESPONSIBILITY

The suggestion of placing responsibility for illegal aliens' health care with the federal government is not a new one. As the problem of providing health care to illegal aliens has grown, the states have made

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[107] *See* text accompanying notes 92 to 98.
[108] *See* text accompanying note 55.
[109] *See* text accompanying note 60.
[110] Calif. Health & Welfare Agency, Dept. of Social Welfare, State Social Welfare Board Position Statement, ISSUE: ALIENS IN CALIFORNIA, 32-36 (Jan., 1973).
[111] 38 Fed. Reg. 30259 (1973).
[112] *Id.*
[113] *Id.*

efforts to place responsibility with the federal government. In Congressional hearings in 1971 New York welfare officials urged action to place the entire welfare burden for aliens on the federal government because only the federal government could regulate the alien status determination essential to establish eligibility for benefits.[114] Recent litigation in California has emphasized the states' problems of status determination.[115]

California officials began advocating federal assumption of welfare support of aliens in 1972. In February, 1972, Governor Ronald Reagan proposed an amendment to H.R. 1, the Nixon Administration welfare reform bill, to provide for total federal funding of public assistance payments to aliens.[116] Although that suggestion was not acted upon, a later State Social Welfare Board position statement indicated that the state did not consider aliens its responsibility.[117] The State Social Welfare Board noted that illegal and temporary aliens represented a potential for sizeable impact on state and local tax-supported programs.[118] Focusing on medical care needs of illegal or temporary aliens, the Board recommended that the United States Department of State should negotiate reciprocal treaties with foreign governments to provide for reimbursement of the costs of emergency care, hospitalization, and the prompt return of visitors and illegal aliens to their native countries.[119] The federal government could assume responsibility for illegal aliens' health care as an extension of federal immigration policy. Illegal aliens derive their status from United States immigration law. Immigration is an area of the law reserved to the federal government by the constitutional provision enabling the federal government "to establish a uniform rule of Naturalization."[120] As well as establishing a uniform system of immigration law, the federal government has also provided protection to the states from aliens immigrating solely to become public charges.[121] Paupers, beggars, or vagrants are excluded from this country, as are other aliens likely to become public charges.[122] Any alien who becomes a public charge due to a condition existent upon entry and up to five years after the date of entry is subject to

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[114] *Hearings on Illegal Aliens, supra* note 1, at 1066-67. Statement of George F. Berlinger, New York State Welfare Inspector General.
[115] *See* note 69 and accompanying text.
[116] *Hearings on H.R. 1*, 92d Cong., 2d Sess., 1931 (1972). Document submitted by Gov. Ronald Reagan, Feb. 1, 1972.
[117] Cal. Health & Welf. Agency, Dept. of Social Welfare, State Social Welfare Board Position Statement, ISSUE: ALIENS IN CALIFORNIA, at 32-36 (Jan., 1973).
[118] *Id.*, at 35.
[119] *Id.*, at 36.
[120] U.S. CONST., Art. I, § 8, cl. 4.
[121] Graham v. Richardson, 403 U.S. 365, 377 (1971).
[122] 8 U.S.C. § 1182(a)(8) and (15) (1970).

deportation.[123] If the United States immigration policy has as a purpose the protection of the states from the dependence of aliens, then a logical extension of the policy is protection of state and local governments from the burden of illegal aliens' health care costs.

Legislation to place responsibility for illegal aliens' health care with the federal government has been proposed. Beginning in 1972, California Congressman B.F. Sisk has introduced legislation in each session of Congress to provide for the reimbursement of medical treatment facilities for emergency medical treatment given to illegal aliens in the United States.[124] This legislation would give the INS the authority to pay for medical treatment needed by illegal aliens and require the INS to assume jurisdiction over illegal aliens receiving medical care.[125] The INS would be required to request treatment in Public Health Service facilities (if reasonably available) for illegal aliens in custody or to reimburse public or private health care facilities which may be called upon to furnish treatment.[126] Congressman Sisk is hopeful that there will be favorable action on the measure during this Congress. He anticipates support from members from all areas of the country.[127] While this measure does not represent a comprehensive solution to the problem of providing health care for illegal aliens, it would meet the need of financing emergency treatment, and it would set a precedent for at least limited federal assumption of responsibility for illegal aliens' health care.

Congressman Sisk's bill will have serious obstacles to overcome. First, the legal issue of the lack of entitlement of illegal aliens to aid will encounter opponents who, even if in sympathy with the public health and humanitarian concerns, might doubt the wisdom of establishing a precedent of providing government aid to illegal aliens. Second, the financial and administrative resources required to carry out the Sisk reimbursement scheme would raise fears of creating a new bureaucracy to deal with the myriad questions which might arise relating to proof or certification of illegal status and timing and extent of reimbursement. Third, there will be those who will fear opening up a floodgate of illegal aliens seeking free medical care for non-emergency conditions in the United States.

The Sisk bill comes to grips with the legal issue of responsibility by creating a duty of the federal government to finance the costs of emergency care, but by taking a limited, pragmatic approach to the problem of providing health care for illegal aliens does not deal with

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[123] 8 U.S.C. § 1251(a)(8) (1970).
[124] Letter from Congressman B.F. Sisk to author, Oct. 16, 1974; H.R. 5307, 93d Cong., 2d Sess. (1974); H.R. 2159, 94th Cong., 1st Sess. (1975).
[125] *Id.*
[126] *Id.*
[127] *Id.*

the entitlement issue. On balance, the Sisk bill is a worthy but piecemeal solution.

V. CONCLUSION

The growing number of illegal aliens in the United States represents a potential health hazard if health care needs of illegal aliens are not met. Humanitarian concern for the plight of the illegal alien lends urgency to the search for a solution to the problem of providing medical care for indigent illegal aliens. Yet this problem has been ignored because the respective levels of government, federal, state, and local, deny responsibility. Illegal aliens are not eligible for federal-state funded government medical assistance because of their status, and local governments have found that the expense is too great to write off care for illegal aliens as a humanitarian gesture financed out of local revenues. The administrative and fiscal problems inherent in the current health care finance structure, as well as the unavoidable inequities from one county to the next, militate against local responsibility for health care for indigent illegal aliens. California has declined to accept responsibility for providing medical care to illegal aliens, preferring instead to call upon the federal government to deal with the problem. The federal agency charged with responsibility, the INS, claims to have neither the authority nor the funds with which to provide medical care for illegal aliens.

The problem of providing medical care for illegal aliens in the United States can no longer be ignored. Humanitarian and public health concerns demand a solution to the problem, while intergovernmental friction engendered by attempts to pass the buck on the responsibility issue hinders any expedient resolution. One of the governmental levels must accept responsibility. Although the Sisk bill is a good start, more is needed, particularly provision for nonemergency and preventive medical services. Before this part of the problem can be reached, however, the threshhold question of whose responsibility it is to provide health care for indigent illegal aliens must be supplied by comprehensive legislation.

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