

# The “ILLEGAL” Tax

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## I. INTRODUCTION – “THE TRUTH WILL SET YOU FREE.”<sup>1</sup>

“Illegals do NOT pay taxes.” As a law professor researching and writing about undocumented immigrants and their tax issues I see this comment in my email inbox and hear it during outreach efforts routinely. Every time I hear or read this or a similar comment, my whole body cringes. This short statement truly embodies the exploitation of the immigration debate.

While this statement is often delivered from mainstream individuals, its origin can be traced to extremist rhetoric. Anti-immigrant and anti-Latino extremists have used outright bigotry to frame the immigration debate to advance their own supremacist agenda. By positioning themselves as legitimate advocates against illegal immigration in America these groups have broadened their base and mainstreamed their message. These groups “are frequently quoted in the media, have been called to testify before Congress, and often hold meetings with lawmakers and other public figures.”<sup>2</sup> As a result, in many American communities immigrants live in fear and suffer a toxic environment in which hateful rhetoric targeting immigrants has become an acceptable part of daily news and discourse.<sup>3</sup> How long will hate and prejudice thrive in America?

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† Visiting Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. This Article is dedicated to expanding the community of everyday heroes among us that stand up for equality and justice for all by acting affirmatively against hateful acts of discrimination and intolerance. “Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it is the only thing that ever has.” Margaret Mead. *Si, se puede*. César Chávez and Dolores Huerta, everyday heroes and co-founders of the United Farm Workers of America. See Sanjuana Martinez, *Si se puede : el movimiento de los hispanos que cambiará a Estados Unidos* (Mexico, D.F. : Grijalbo 2006).

<sup>1</sup> *John* 8:32 (King James) (Jesus Christ in a conversation with his Jewish supporters) (“And ye shall know the truth, and the truth shall make you free.”). Others have stated the following about “the Truth;” “Truth is the breath of life to human society. It is the food of the immortal spirit.” Oliver Wendell Holmes, Sr., Address to the Medical Graduates of Harvard University (Mar. 10, 1858); *see also* Dr. Martin Luther King, Jr., Address at Grosse Pointe High School (Mar. 14, 1968) (“I still believe that freedom is the bonus you receive for telling the truth.”).

<sup>2</sup> *Immigrants Targeted: Extremists Move Into the Mainstream*, ANTI-DEFAMATION LEAGUE 1 (2007), [http://www.adl.org/civil\\_rights/anti\\_immigrant/Immigrants%20Targeted%20UPDATE\\_2008.pdf](http://www.adl.org/civil_rights/anti_immigrant/Immigrants%20Targeted%20UPDATE_2008.pdf).

<sup>3</sup> *See, e.g.*, Trip Gabriel & Edward Wyatt, *At Rallies, 2 Candidates Deliver Blistering Attacks on Illegal Immigration*, N.Y. TIMES, Oct. 15, 2011 (Herman Cain supporting the use of “real guns with real bullets” and an electrified killer fence to stop illegal immigration); Ali Ismail, *Draconian Anti-Immigrant Law Stokes Fear Among Alabama’s Undocumented Population*, WORLD SOCIALIST WEB SITE (Oct. 10, 2011), [www.wsws.org/articles/2011/oct2011/alab-o10.shtml](http://www.wsws.org/articles/2011/oct2011/alab-o10.shtml) (After the 2011 passage of anti-immigrant laws in the state of Alabama, University of California, Davis, Dean and Immigration Law Expert Kevin Johnson warned that “parents aren’t going to send students to schools because

Almost fifty years ago in 1965, on the steps of the State Capital in Montgomery, Alabama, Dr. Martin Luther King, Jr. asked a crowd of twenty-five thousand “How long will prejudice blind the visions of men, darken their understanding, and drive bright-eyed wisdom from her sacred throne?”<sup>4</sup> The crowd, celebrating the completion of the five-day, fifty-mile march from Selma to Montgomery and their First Amendment Rights, encouraged Dr. King to “speak, speak.” And he did answering his own question with poetry, faith and optimism, “How long? Not long, because the arc of the moral universe is long, but it bends toward justice.”<sup>5</sup> Following the many lessons of Dr. King’s passive resistance legacy, this Article confronts insidious vilification and arrant racism with facts, laws, and data.<sup>6</sup>

This Article will debunk the short, but maladroit statement that “illegals do NOT pay taxes.” First, calling a group of people “illegals” is hateful, “racially loaded, imprecise, and pejorative.”<sup>7</sup> Scholars, and children, understand that language and discourse can contribute to vile acts including crime, abuse and other social problems.<sup>8</sup> Historical and current

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they’re going to be afraid of getting deported and it will chill them from executing a constitutional right. I think undocumented immigrant communities feel vulnerable and threatened, and are very fearful of ending up in deportation proceedings.”); Rena Havner Philips, *After Immigration Ruling at Foley School with Hispanic Population, Students Cry, Withdraw, No-Show*, PRESS-REGISTER, Sept. 30, 2011, available at [http://blog.al.com/live/2011/09/foley\\_elementary\\_students\\_pare.html](http://blog.al.com/live/2011/09/foley_elementary_students_pare.html) (“Many of the 223 Hispanic students at Foley Elementary came to school Thursday crying and afraid, said Principal Bill Lawrence. Nineteen of them withdrew, and another 39 were absent, Lawrence said, the day after a federal judge upheld Alabama’s strict new immigration law.”); Cristina Costantini, *Anti-Latino Hate Crimes Rise As Immigration Debate Intensifies*, HUFFINGTON POST, Oct. 18, 2011, [www.huffingtonpost.com/2011/10/17/anti-latino-hate-crimes-rise-immigration\\_n\\_1015668.html](http://www.huffingtonpost.com/2011/10/17/anti-latino-hate-crimes-rise-immigration_n_1015668.html) (describing numerous violent hate crimes including several murders against Latinos); SOUTHERN POVERTY LAW CTR., CLIMATE OF FEAR, LATINO IMMIGRANTS IN SUFFOLK COUNTY, N.Y. 5, (Sept. 2009) (describing a growing national problem of violent hatred directed at all suspected undocumented immigrants, but especially Latinos); see also SOUTHERN POVERTY LAW CTR., UNDER SIEGE, LIFE FOR LOW-INCOME LATINOS IN THE SOUTH (2009) (describing hostility and discrimination as a staple for Latinos in the south).

<sup>4</sup> Dr. Martin Luther King, Jr., “Our God Is Marching On!” speech in Birmingham, Alabama (March 25, 1965) (transcript available at <http://www.mlkonline.net/ourgod.html>).

<sup>5</sup> *Id.*

<sup>6</sup> See Dr. Martin Luther King, Jr., “The Other America” speech at Grosse Point High School (March 14, 1968) (“And I do not see how we will ever solve the turbulent problem of race confronting our nation until there is an honest confrontation with it and a willing search for the truth and a willingness to admit the truth when we discover it.”) (transcript available at [www.gphistorical.org/mlk/mlkspeech/index.htm](http://www.gphistorical.org/mlk/mlkspeech/index.htm)); (“We shall overcome because Carlisle is right. ‘No lie can live forever.’ We shall overcome because William Cullen Bryant is right. ‘Truth crushed to earth will rise again.’”) *Id.*

<sup>7</sup> Beth Lyon, *When More “Security” Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 576 (2004).

<sup>8</sup> Carola Eyber, *Name-Calling Alienates Foreigners*, 2 CROSSINGS (S. Afr. Migration Project, Cape Town, South Africa), June 1998, available at <http://www.queensu.ca/samp/forms/crform.html>; see also Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263, 265–70 (1996–97); see also Irwin Colter, Op-Ed., *The Holocaust Did Not Begin In the Gas Chambers – It Began With Words*,

atrocities including the Holocaust, Darfur, and the murder of Matthew Shepard, are horrific examples of this intolerable truth. The term "illegals" is patently dehumanizing and inappropriate terminology, and its persistent use by extremists, as well as mainstream media and the general population, must stop now.<sup>9</sup>

Second, as a low-income taxpayer and human rights advocate, I understand that pervasive misunderstanding regarding undocumented immigrants evinces the frustration and fear that many Americans feel about the challenging state of the U.S. and global economies. Restrictionists feed this frustration and fear with inflammatory propaganda about undocumented immigrants and our tax systems. Because of overwhelming complexity and lack of transparency in these systems, it is easy to misrepresent and distort the facts, laws, and data. As a result, some Americans believe the absolutely irrational and self-delusional assertion that undocumented immigrants do not pay any taxes.<sup>10</sup> This gross

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JERUSALEM POST (Jan. 26, 2009), available at <http://www.jpost.com/Opinion/Op-EdContributors/Article.aspx?id=130741> (reaffirming that the lessons of the Holocaust are a commitment to never again be indifferent to racism, hate, injustice, or stand silently in the face of evil or ignorant to the plight of the vulnerable).

<sup>9</sup> On July 7, 2011, the Treasury Inspector General for Tax Administration, TIGTA issued a report describing \$4.2 billion of refundable tax child tax credits paid to "individuals who are not authorized to work in the United States." TREASURY INSPECTOR GEN. FOR TAX ADMIN., RECOVERY ACT: INDIVIDUALS WHO ARE NOT AUTHORIZED TO WORK IN THE UNITED STATES WERE PAID \$4.2 BILLION IN REFUNDABLE CREDITS 4 (2011), available at [www.treasury.gov/tigta/auditreports/2011reports/201141061fr.pdf](http://www.treasury.gov/tigta/auditreports/2011reports/201141061fr.pdf). Shortly after the report was released, it went "viral" and the Internet was burning with hateful comments about "illegals" pocketing or "stealing" billions of dollars of taxpayer money. On September 8<sup>th</sup>, 2011 I searched "illegals \$4.2 billion tax credits" and retrieved more than 30,000 hits, including main stream media (Fox News, ABC "The View", Baltimore Sun, The Examiner, San Diego Union, Drudge) using the terms "illegals," "illegal aliens," "illegal immigrants," "illegal workers," etc. although the report never describes the taxpayers in this manner.

The child tax credit provides an annual tax subsidy of \$52 billion for almost 35 million families raising children and only 10 percent of the total expenditure goes to the lowest quintile (cash income of \$12,000 and below) of families while 25 percent (cash income of above \$12,000 – \$23,000), 27 percent (cash income of above \$23,000 – \$39,000), 28 percent (cash income above \$39,000 – \$66,000) and 10 percent (cash incomes above \$66,000) go to the next four income quintiles. Elaine Maag et al., *A Reference Manual for Child Tax Benefits*, URBAN-BROOKINGS TAX POLICY CTR. (Apr. 2011), [www.taxpolicycenter.org/uploadedpdf/412329-child-tax-benefits.pdf](http://www.taxpolicycenter.org/uploadedpdf/412329-child-tax-benefits.pdf). I find it interesting that the fact that unauthorized workers pay more than three times that amount into Social Security and Medicare taxes each year, or the fact that the highest quintile income Americans received \$52 billion in tax subsidy to raise their children, did not similarly go "viral."

<sup>10</sup> See John Lantigua, *Illegal Immigrants Paying Taxes*, PALM BEACH POST (Apr. 25, 2010), <http://www.palmbeachpost.com/news/illegal-immigrants-paying-taxes-621300.html> (noting that frustrated and angry Americans commonly state that illegal aliens do not pay taxes despite paying billions of dollars in Social Security taxes every year); see also O'Reilly, *Dobbs Wrong That Undocumented Immigrants Don't Pay Taxes*, MEDIA MATTERS FOR AMERICA (Mar. 10, 2010), <http://mediamatters.org/research/201003100001> (Fox News' *The O'Reilly Factor* host Bill O'Reilly falsely asserted that the fact undocumented immigrants pay taxes is "crap" while his guest Lou Dobbs suggested they dodge taxes); *Quick Fact: Fox's Bolling Falsely Claims That "Illegals" Are "Not Paying Taxes"*, MEDIA MATTERS FOR AMERICA (May 2, 2010), <http://mediamatters.org/research/>

falsehood is counterproductive for the speaker, the subject, and the U.S. and global economies.

Finally, as a tax professor I am charged with teaching tax and these comments broadcast loudly and boldly how misinformed Americans are about our tax systems. The well-documented facts evidence that undocumented immigrants have paid hundreds of billions of dollars in taxes to date. In most cases undocumented immigrants pay more in tax each year than similarly situated U.S. citizens. This additional tax, which is exposed and labeled here as “the undocumented immigrant tax,” is the subject of this Article.

This Article will describe the depth and breadth of undocumented immigrants as a resource for tax payments made to government coffers across America. The depth and breadth will be evinced by describing the myriad of different federal, state, and local taxes undocumented immigrants are subject to and pay. Most notably, this Article will verify that undocumented immigrants not only pay the same taxes that U.S. citizens and documented residents pay, but in addition that they are subject to and pay what I am describing as “the undocumented immigrant tax.” The undocumented immigrant tax is effectively an additional tax burden, a surtax or tariff on undocumented immigrants and their families. As a result, not only do undocumented immigrants pay taxes, but they bear a greater tax burden than similarly situated U.S. citizens and documented residents.

#### *A. Across America Undocumented Immigrants are Paying Billions in Taxes Each Year*

The uncontroverted truth is that undocumented immigrants pay tens of billions of dollars in taxes each year to federal, state and local governments. These critical tax dollars are not paid to one government coffer, but rather to federal, state, and local government pocketbooks located across America. Undocumented immigrants reside in and pay taxes daily to state and local governments from Portland, Maine to San Diego, California and to countless state and local governments in the vast expanse of America in between.

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201005020006 (reporting and correcting the inaccurate statement made by Fox News host Eric Bolling on May 1, 2010); see also Lydia Saad, *Americans Closely Divided Over Immigration Reform Priority*, GALLUP (July 6, 2010), <http://www.gallup.com/poll/141113/americans-closely-divided-immigration-reform-priority.aspx> (finding that 78, 63 and 50 percent of Republicans, Independents and Democrats, respectively, believe that undocumented immigrants cost taxpayers more than they contribute on the tax rolls); see also Ruy Teixeira, *What the Public Really Wants on Immigration*, CTR. FOR AM. PROGRESS 2 (June 27, 2006), <http://www.americanprogress.org/kf/teixeirajunepool-final.pdf>. (70 percent of the polled public agreed with the statement that undocumented immigrants weaken the U.S. economy because they do not all pay taxes, but use public services.).

Since they first arrived in this country, undocumented immigrants have paid and are expected to continue to pay hundreds of billions, perhaps trillions, of dollars in federal, state, and local taxes. Indeed our tax and social services systems, and American citizens, rely on undocumented immigrants for revenue and fiscal support. The Inspector General of the Social Security Administration has determined that undocumented immigrants and their employers have paid between \$120 and \$240 billion in Social Security taxes<sup>11</sup> in addition to Medicare and unemployment taxes on at least \$1,107.5 billion of unauthorized inflation adjusted wages (including \$533.5 billion in the eight year period from 2000 through 2007).<sup>12</sup> "Over the next 75 years, new immigrants will provide a net benefit of approximately \$611 billion in present value to the Social Security system."<sup>13</sup> The Commissioner of the Internal Revenue Service recently estimated that undocumented immigrants have paid \$50 billion in federal income taxes in the eight year period from 1996 through 2003.<sup>14</sup> Therefore, undocumented immigrants have paid hundreds of billions to the federal government just for federal income and wage taxes.

While these dollar amounts are significant, tax payments from undocumented immigrants have been and are continuing to increase. In the last decade, Social Security and Medicare taxes paid to the Social Security Administration by undocumented immigrants have more than tripled.<sup>15</sup> In 2007, undocumented immigrants paid more than \$12 billion in Social Security and Medicare taxes.<sup>16</sup> Holders of individual taxpayer identification numbers ("ITIN"), the number used by individuals, including undocumented immigrants and many foreign investors, who do not qualify

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<sup>11</sup> Edward Schumacher-Matos, *How Illegal Immigrants Are Helping Social Security*, WASH. POST, Sept. 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/02/AR2010090202673.html> ("[B]y 2007, the Social Security trust fund had received a net benefit of somewhere between \$120 billion and \$240 billion from unauthorized immigrants.")

<sup>12</sup> If adjusted for inflation the cumulative wages represented \$835.3 billion would grow to \$1,107.5 billion by 2011. Mary Johnson, *The Growing Cost of Illegal Immigration to Social Security: Unprecedented Growth in Social Security's "Earnings Suspense File"*, THE SENIOR CITIZENS LEAGUE 3 (June 2010), [http://www.seniorsleague.org/images/earnings\\_suspense\\_report.pdf](http://www.seniorsleague.org/images/earnings_suspense_report.pdf).

<sup>13</sup> *Proposal to Strip Workers of Social Security Earnings Based on Prior Employment Status: Bad for the System and an Affront to Our Values*, NAT'L IMMIGR. L. CTR., (2007), [http://www.nilc.org/immlawpolicy/CIR/ensign\\_ss\\_amdmt\\_2007-02-28.pdf](http://www.nilc.org/immlawpolicy/CIR/ensign_ss_amdmt_2007-02-28.pdf); see also THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 297-354 (James P. Smith & Barry Edmondston eds., 1997) (noting that all immigrants in the United States pay on average \$80,000 more in taxes per capita than they receive during their lifetime).

<sup>14</sup> Miriam Jordan, *Even Workers in U.S. Illegally Pay Tax Man*, WALL ST. J., Apr. 4, 2007, [http://www.azeir.org/pdf/2007\\_0404\\_wsj\\_immigration-taxes.pdf](http://www.azeir.org/pdf/2007_0404_wsj_immigration-taxes.pdf).

<sup>15</sup> Alan Zarembo, *Garment Laborers Say Bush Guest-Worker Plan an Ill Fit*, L.A. TIMES, Feb. 8, 2004, <http://articles.latimes.com/2004/feb/08/local/me-immigrants8>.

<sup>16</sup> See Schumacher-Matos, *supra* note 11, ("[B]y 2007, the Social Security trust fund had received a net benefit of somewhere between \$120 billion and \$240 billion from unauthorized immigrants."); *At Tax Time, Illegal Immigrants Are Paying Too*, ASSOCIATED PRESS, Apr. 10, 2008, [http://www.msnbc.msn.com/id/24054024/ns/business-personal\\_finance/t/tax-time-illegal-immigrants-are-paying-too/](http://www.msnbc.msn.com/id/24054024/ns/business-personal_finance/t/tax-time-illegal-immigrants-are-paying-too/) (stating that the amount was \$9 billion in 2005).

for Social Security numbers (“SSN”), filed more than three million tax returns in 2010.<sup>17</sup> Moreover, in 2010 the Internal Revenue Service received more than 1.6 million new ITIN applications.<sup>18</sup> A 30 percent increase in ITINs issued to undocumented immigrants from 2005 to 2006 arguably resulted in significant federal revenue growth.<sup>19</sup>

### *B. Many Types of Taxes Paid by Undocumented Immigrants*

Undocumented immigrants pay taxes everyday across America for the benefit of federal, state and local governments. In America taxes are assessed on transactions, income, property and on accumulated wealth. Most Americans are very familiar with many of these transaction taxes because they witness and engage in these transactions daily. When one purchases goods, sales taxes often apply to the transaction and the consumer pays the taxes assessed to the seller. These taxes are assessed by state and local governments. Some goods and services, like alcohol, cigarettes, gasoline, tires, and utilities are also subject to excise taxes, which can be imposed by state, local and federal governments.

#### *1. Federal, State and Local Consumption Taxes*

Undocumented immigrants, who live, work, eat and shop in America, engage in consumption routinely. Not surprisingly, undocumented immigrants are not exempt from consumption taxes. As a result, undocumented immigrants, similar to American citizens and documented residents, are subject to and pay sales, use, and excises taxes when they purchase or use American goods and services. When an undocumented immigrant purchases food, clothing, books, shoes, gasoline, alcohol, and cigarettes she must pay any and all applicable federal, state and local sales, use, and excise taxes. In addition, undocumented immigrants are subject to and pay state and local property taxes.<sup>20</sup> These transactions, whether made by U.S. citizens, documented residents, or undocumented immigrants, are subject to taxes and require payments that enhance the pocketbooks of local, state, and federal governments.

There are more than ten million undocumented immigrants in this

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<sup>17</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 9, at 20 (setting forth filing statistics on ITIN tax returns for 2005–2010).

<sup>18</sup> NAT'L TAXPAYER ADVOCATE, 2010 ANNUAL REPORT TO CONGRESS 319 (DEC. 31, 2010), <http://www.irs.gov/pub/irs-pdf/p2104.pdf>; *see also Illegal Immigrants Filing Taxes More Than Ever*, ASSOCIATED PRESS, Apr. 13, 2007, [http://www.msnbc.msn.com/id/18077009/ns/business-tax\\_tactics/](http://www.msnbc.msn.com/id/18077009/ns/business-tax_tactics/) [hereinafter *Illegal Immigrants Filing Taxes*].

<sup>19</sup> *Illegal Immigrants Filing Taxes*, *supra* note 18. In 2006, the IRS issued 1.5 million new ITINs, the number used for federal income tax reporting by undocumented immigrants in lieu of a Social Security number, a 30 percent increase over 2005.

<sup>20</sup> *See* Randolph Capps & Michael E. Fix, *Undocumented Immigrants: Myths and Reality*, URBAN INST. (2005), [http://www.urban.org/UploadedPDF/900898\\_undocumented\\_immigrants.pdf](http://www.urban.org/UploadedPDF/900898_undocumented_immigrants.pdf).

country<sup>21</sup> comprising nearly seven million families with average family earnings in 2007 of \$36,000 (\$50,000 for U.S. born families).<sup>22</sup> Because undocumented immigrants generally tend to have low levels of income and receive little government support, they spend most, if not all, of their income on goods that are often subject to consumption taxes.<sup>23</sup> Undocumented immigrant families, therefore, pay a higher percentage of their income in consumption taxes than U.S. citizens whose income tends to be higher.<sup>24</sup> As you have witnessed and can extrapolate from these numbers, undocumented immigrants have paid and will continue to pay billions of dollars in sales, use, excise, and property taxes as they consume goods and services across America.

## 2. Federal, State, and Local Income Taxes

In addition to paying federal, state, and local consumption taxes, undocumented immigrants, like American citizens and documented residents, are subject to and pay federal and any applicable state and local income taxes. The federal government has subjected non-U.S. citizens residing in the United States (with or without documents) to income tax since its enactment through the Revenue Act of 1913.<sup>25</sup> Undocumented

<sup>21</sup> MICHAEL HOEFER ET AL., DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION IN THE UNITED STATES: JANUARY 2009, 1 (2009), available at [www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf). The figure has decreased from approximately 12 million in March 2006 to 11.1 million in March 2010. Compare CONG. BUDGET OFFICE, *Preface to THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS* (2007), available at <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf>, with Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, PEW HISPANIC CTR. 1 (2011), <http://pewhispanic.org/reports/report.php?ReportID=133.pdf>.

<sup>22</sup> Jeffrey S. Passel & D'Vera Cohn, *A Portrait of Unauthorized immigrants in the United States*, PEW HISPANIC CTR. 16 (2009), <http://pewhispanic.org/files/reports/107.pdf>.

<sup>23</sup> *Id.* at iv-v (the 2007 median household income of unauthorized immigrants was \$36,000, well below the \$50,000 median household income for U.S.-born residents. In contrast to other immigrants, undocumented immigrants do not attain markedly higher incomes the longer they live in the United States. A third of the children of unauthorized immigrants and a fifth of adult unauthorized immigrants lives in poverty. This is nearly double the poverty rate for children of U.S.-born parents (18 percent) or for U.S.-born adults (10 percent). More than half of adult unauthorized immigrants (59 percent) had no health insurance during all of 2007. Among their children, nearly half of those who are unauthorized immigrants (45 percent) were uninsured and 25 percent of those who were born in the U.S. were uninsured); DEP'T OF HEALTH AND HUMAN SERVS., INFORMATION ON POVERTY AND INCOME STATISTICS: A SUMMARY OF 2011 CURRENT POPULATION DATA 5 (2011), available at <http://aspe.hhs.gov/poverty/11/ib.pdf> (developed more than 40 years ago, the official poverty measure is a specific dollar amount that varies by family size but is the same across the continental U.S. According to the 2011 federal poverty guidelines, the poverty level is \$22,314 for a family of four); see NANCY K. CAUTHEN & SARAH FASS, NAT'L CTR. FOR CHILDREN IN POVERTY, MEASURING POVERTY IN THE UNITED STATES (2008), available at [http://www.nccp.org/publications/pub\\_825.html](http://www.nccp.org/publications/pub_825.html) (describing the poverty threshold as the basic amount needed to make ends meet, that is, that at the poverty level of income all income must be spent on basic goods and services necessary for survival).

<sup>24</sup> *The Numbers*, TAX POLICY CENTER. URBAN-BROOKINGS TAX POLICY CTR. (NOV. 10, 2009), <http://www.taxpolicycenter.org/numbers/displayatab.cfm?DocID=2478>.

<sup>25</sup> Thomas St.G. Bissell, 907-3rd Tax Management, *U.S. Income Taxation of Nonresident Alien Individuals* A1, A3 (2010).

immigrants are also subject to applicable state and local income taxes similar to U.S. citizens and documented immigrants if they reside in or earn income in a jurisdiction with such taxes.<sup>26</sup>

While undocumented immigrants are subject to the same consumption and property tax rates as U.S. citizens and documented immigrants, this Article will also demonstrate that undocumented immigrants are subject to federal income taxes at a higher effective tax rate than similarly situated citizens and documented residents. Despite the shibboleth that undocumented immigrants are not subject to and do not pay income taxes, the truth is that they are and often at a higher effective tax rate than similarly situated U.S. citizens and documented immigrants.

Congress uses its plenary power to tax under the Constitution to write tax laws.<sup>27</sup> The higher effective tax rate suffered by undocumented immigrants is a direct result of tax laws written by members of Congress. This additional tax burden is a surtax or tariff borne by these taxpayers because of their immigration status.<sup>28</sup>

Undocumented immigrants are subject to income taxes at a higher effective tax rate for a number of reasons. For example, undocumented immigrants (and their American citizen or documented spouses and children) do not qualify for the refundable earned income tax credit (“EITC”). This bipartisan supported annual credit, which for 2011 will be as great as \$5,751, is targeted to working poor families.<sup>29</sup> Even though most undocumented immigrant families are in this targeted group, they are statutorily denied this tax credit because of their immigration status.<sup>30</sup> Members of Congress deny this credit to working poor families who do not qualify for a SSN because they do not want to encourage unauthorized

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<sup>26</sup> STATE OF CAL. FRANCHISE TAX BD., GUIDELINES FOR DETERMINING RESIDENT STATUS 2009 2–4 (2009) (a resident subject to California income tax is any individual who is present in California for other than a temporary or transitory period of time or who is domiciled in California, but temporarily or transitorily away). State income taxes, like federal income taxes, are imposed generally on individuals who are physically present in the region for a long enough period of time to be deemed “residents” under state law. *Id.* For example, in California, where approximately 2.6 million undocumented immigrants reside, or 25 percent of all undocumented immigrants in the United States. See Teresa Watanabe, *Illegal Immigrant Numbers Plunge*, L.A. TIMES, Feb. 10, 2011, <http://articles.latimes.com/2010/feb/11/local/la-me-immig11-2010feb11>.

<sup>27</sup> U.S. Const. art. I, § 8.

<sup>28</sup> See MAURICE SCHIFF, THE WORLD BANK DEV. RESEARCH GRP., LOVE THY NEIGHBOR: TRADE, MIGRATION AND SOCIAL CAPITAL 19–22 (2000), available at <http://www.netamericas.net/researchpapers/documents/schiff/schiff2.pdf> (discussion of optimal immigration theory presenting a model that incorporates an immigration tax).

<sup>29</sup> See *Preview of 2011 EITC Income Limits, Maximum Credit Amounts and Tax Law Updates*, INTERNAL REVENUE SERV. (last updated Jan. 3, 2011), <http://www.irs.gov/individuals/article/0,,id=233839,00.html>; I.R.S. Publ’n 596, Earned Income Credit (2010), available at <http://www.irs.gov/pub/irs-pdf/p596.pdf> (this 2010 figure is the maximum allowed for “three or more qualifying children”).

<sup>30</sup> I.R.C. § 32(e) (2006).

work.<sup>31</sup>

Another reason undocumented immigrants were subject to a higher income tax rate in 2008 was that undocumented immigrants (who were not married to members of the military) did not qualify for the 2008 economic stimulus tax credit. This refundable tax credit was up to \$600 per qualifying individual and \$300 per qualifying child. The tax credit was designed for low and middle-income working families, most senior citizens and certain veterans because they would be likely to spend the tax refund and stimulate the stalling U.S. economy. While the tax credit was basically a temporary tax rate cut, undocumented immigrants were specifically excluded as a result of Congressional response to last minute anti-immigrant outcries.<sup>32</sup>

In addition to these two statutory exclusions, undocumented immigrants may be subject to a higher effective income tax rate because of more challenging reporting requirements. Many undocumented immigrants, like many U.S. citizens, pay their federal and state income taxes through wage withholding. Therefore, to receive a refund of any overpayment of their federal and state income taxes they are required to file tax returns requesting refunds. However, undocumented immigrants must file their tax returns with an ITIN because they do not qualify for a SSN. Because of the misperception of abuse of this number, obtaining an ITIN is not a simple task. Whereas a SSN is issued to all U.S. citizens immediately at birth, an ITIN must be obtained through an onerous application process requiring original identification documents, which might not be readily accessible.<sup>33</sup> In addition, because of lack of access to and intimidation by federal state and local income tax systems and government officials, millions of undocumented immigrants do not file tax returns. Therefore, these taxpayers have very likely overpaid their federal and state tax liabilities.<sup>34</sup>

While the government can assess a tax deficiency (together with interest and penalties) at any time if a taxpayer has not filed her return,<sup>35</sup> tax refund claims generally must be filed within three years from the date

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<sup>31</sup> See DEPARTMENT OF TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2005 REVENUE PROPOSAL 88 (2004), available at <http://www.treasury.gov/resource-center/tax-policy/Documents/bluebk04.pdf>. Congressional intent is evinced in its enactment of the requirement for a SSN specifically valid for work. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 451, 110 Stat. 2105, 2276 (1996) (codified at I.R.C. § 32(c)).

<sup>32</sup> Martin Kady II, *Lou Dobbs Alert: Illegal Immigrants May Get Rebates*, POLITICO (Jan. 30, 2008, 12:47 PM), [http://www.politico.com/blogs/thecrypt/0108/Lou\\_Dobbs\\_alert\\_Illegal\\_immigrants\\_may\\_get\\_rebates.html#](http://www.politico.com/blogs/thecrypt/0108/Lou_Dobbs_alert_Illegal_immigrants_may_get_rebates.html#).

<sup>33</sup> Francine J. Lipman, *Bearing Witness to Economic Injustices of Undocumented Immigrant Families: A New Class of "Undeserving" Poor*, 7 Nev. L.J. 736, 747 (Summer 2007).

<sup>34</sup> See I.R.S. Publ'n 1304, 6 (2011), available at <http://www.irs.gov/pub/irs-soi/09inalcr.pdf> (setting forth the number of individual income tax returns that were overpaid).

<sup>35</sup> I.R.C. § 6501(c)(3) (2006).

of the filing deadline.<sup>36</sup> The government will deny tax refund claims made after the statute of limitations has expired.<sup>37</sup> Therefore, undocumented immigrant families who suffer numerous barriers to filing too often find themselves filing late and losing precious tax refunds.<sup>38</sup> If a past tax liability is owed, it will accrue interest and applicable penalties from the due date of the return. Time barred refunds cannot offset any tax, penalties and interest owed.<sup>39</sup> As a result of their lack of access to tax resources, undocumented immigrant families are more likely to lose tax refunds and be subject to interest and penalties on any tax deficiencies.

While the statutes of limitation bar any taxpayer refund claims after three years and do not bar the government's assessment of tax deficiencies at any time if a taxpayer fails to file her tax return, these rules apply to U.S. citizens as well as documented and undocumented immigrants. However, proposed immigration reform in 2006 would have denied undocumented immigrants from receiving any tax benefit from any overpayment of back taxes.<sup>40</sup> These tax overpayments could not even have been applied to any underpayment of back taxes. Moreover, the proposal would have denied undocumented immigrants from any tax benefit from any otherwise available tax credits.<sup>41</sup> The denial of any tax credit or refund is unprecedented and irrational. This proposal if enacted would have dramatically raised the effective income tax rate for undocumented immigrants. These existing and proposed tax laws increase the effective tax rate for undocumented immigrants as compared to similarly situated U.S. citizens or documented immigrants. Therefore, not only are undocumented immigrant families subject to and paying federal and state income taxes, but many are paying income taxes at a notably higher effective tax rate.

### 3. *Employment and Self-Employment Taxes*

In addition to paying consumption and income taxes, unauthorized workers and their employers are subject to and pay Social Security and Medicare taxes and other federal and state employment taxes (e.g., unemployment, disability, etc.) on their wages and self-employment income. Unauthorized workers and their employers must each pay Social Security and Medicare taxes of 7.65 percent on all wages (Social Security tax is subject to a wage cap, but the cap of \$106,800 in 2011 well exceeds

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<sup>36</sup> I.R.C. § 6511(a) (2006).

<sup>37</sup> I.R.C. § 6511(b)(1) (2006).

<sup>38</sup> See *infra* Parts II,E.2.-5.

<sup>39</sup> I.R.C. § 6511(h)(1) (2006) (stating that if the taxpayer can prove that they were financially disabled then during such period the statute of limitations would lapse); Rev. Proc. 99-21 (1999), available at <http://www.unclefed.com/Tax-Bulls/1999/rp99-21.pdf>.

<sup>40</sup> Comprehensive Immigration Reform Act of 2006, S. 2611, 109<sup>th</sup> Cong. § 245B(a)(1)(E)(i) (2006).

<sup>41</sup> *Id.*

the average wages for unauthorized workers) for an aggregate tax rate of 15.3 percent.<sup>42</sup> Most economists believe that the burden of payroll taxes paid by employers is born by employees.<sup>43</sup> All workers who are self-employed must pay the employer's and the employee's Social Security and Medicare taxes for an aggregate tax rate of 15.3 percent. Therefore, unauthorized workers, like all workers residing and working in the U.S., are subject to a 15.3 percent effective wage tax rate.

The Social Security Administration noted several years ago that approximately 75 percent of unauthorized workers and their employers pay Social Security and Medicare taxes.<sup>44</sup> Given the recent government focus on employer compliance with immigration laws, the current payroll tax compliance percentage most likely is greater than 75 percent. Therefore, most unauthorized workers are subject to and pay through automatic withholding a wage tax totaling approximately \$12 billion in 2007.<sup>45</sup>

Wage taxes, like Social Security and Medicare taxes, are regressive as compared to income taxes which are generally progressive. Progressive tax rates generally increase with the level of income because the marginal value of a dollar at the higher level of income is less valuable than a dollar of poverty level income. Because Social Security taxes are imposed on wages and not interest, dividends, or capital gains, they are capped at a threshold wage base (\$106,800 in 2011; Medicare tax is uncapped for 2.9 percent of the aggregate tax of 15.3 percent),<sup>46</sup> wage taxes represent a greater percentage of income for lower income earners than higher income earners. As a result, the effective Social Security and Medicare tax rate for many undocumented immigrant families whose income is comprised only of wages is 15.3 percent. However, for a high-income family with wages above the threshold and interest, dividend and capital gain income their effective Social Security and Medicare tax rate would be significantly lower.

While Social Security and Medicare taxes are regressive, Social

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<sup>42</sup> In 2011 Congress reduced the Social Security rate temporarily (for one year) for employees by 2 percent. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296, 3309 (2010).

<sup>43</sup> JOHN A. BRITTAIN, BROOKINGS INST., *THE PAYROLL TAX FOR SOCIAL SECURITY* 13 (Brookings Inst. eds., 1972); JONATHAN BARRY FORMAN, *MAKING AMERICA WORK* 67-68 (Urban Inst. Press eds., 2006).

<sup>44</sup> 152 Cong. Rec. S4742 (daily ed. May 18, 2006) (statement of Sen. Cornyn quoting Steven Gross, Social Security's chief actuary); HENRY LOPEZ ET AL., *CTR. FOR COMPARATIVE IMMIGRATION STUDIES, IMPACTS OF BORDER ENFORCEMENT ON MEXICAN MIGRATION: THE VIEW FROM SENDING COMMUNITIES* 89 (Wayne A. Cornelius & Jessica M. Lewis eds., 2007).

<sup>45</sup> See Schumacher-Matos, *supra* note 11 ("by 2007, the Social Security trust fund had received a net benefit of somewhere between \$120 billion and \$240 billion from unauthorized immigrants"); *At Tax Time, Illegal Immigrants Are Paying Too*, *supra* note 16 (stating that the amount was \$9 billion in 2005).

<sup>46</sup> See *Contribution and Benefit Base*, SOCIAL SECURITY ONLINE <http://www.ssa.gov/oact/cola/cbb.html> (last visited Nov. 11, 2011).

Security and Medicare benefits are notably progressive.<sup>47</sup> The Social Security system is designed to provide a safety net for retirement for low and middle-income workers and their families. To provide this safety net, the Social Security benefit formula redistributes financial resources from higher wage earners to lower wage earners. As a result, the Social Security benefit formula provides a higher return on wage tax contributions to lower wage earners than higher wage earners.<sup>48</sup> Moreover, every Social Security benefit qualifying recipient irrespective of their wage level receives health care insurance coverage through Medicare. Arguably, this health care coverage is more valuable to lower income retirees than higher income retirees who have or could pay for alternative coverage. Therefore, while Social Security and Medicare taxes are notably regressive resulting in higher effective tax rates for lower individuals than higher income individuals, the Social Security and Medicare benefits package corresponding to the tax payments is progressive.

However, unauthorized workers, who have paid between \$120 and \$240 billion in Social Security taxes through 2007 and who currently pay and are projected to pay even more in the future, will never qualify for these critical benefits unless they obtain work authorization and are legally present in the United States.<sup>49</sup> While U.S. citizens and authorized workers are subject to the same regressive taxes, they qualify for the priceless progressive benefits of a secure and inflation-adjusted retirement income and a lifetime of health insurance coverage starting at age 65. Undocumented immigrants who pay these taxes at the same regressive tax rate, however, do not receive any Social Security benefits or Medicare health benefits.<sup>50</sup> Therefore, undocumented immigrants effectively are

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<sup>47</sup> See Francine J. Lipman & James E. Williamson, *Social Security Benefits Formula 101* ORANGE COUNTY LAWYER, May 2011 at 10; See Cong. Budget Office, *Is Social Security Progressive?* ECONOMIC AND BUDGET ISSUE BRIEF, Dec. 2006 at 1; NAT'L COUNCIL OF LA RAZA, *THE SOCIAL SECURITY PROGRAM AND REFORM: A LATINO PERSPECTIVE* 3 (2005).

<sup>48</sup> NAT'L COUNCIL OF LA RAZA, *supra* note 47, at 3.

<sup>49</sup> See FRANCINE LIPMAN, FRANCINE LIPMAN ON SOCIAL SECURITY RETIREMENT BENEFITS AND IMMIGRANTS 3 (Matthew Bender & Company, Inc. eds., 2007) (discussing the restrictions workers both eligible and ineligible face when attempting to receive monthly benefits).

<sup>50</sup> President Bush signed the Social Security Protection Act of 2004 into law in March 2004. Under the Act a noncitizen who files for Social Security retirement benefits based on an SSN assigned on or after January 1, 2004, is required to have work authorization at the time the SSN is assigned or at some later time to attain insured status. Only if the individual receives work authorization may she apply for Social Security benefits. If a retiree obtains work authorization, her filing will be based on all Social Security-covered earnings regardless of work status during the earnings period. But if an individual never receives authorization to work, none of her Social Security-covered earnings count toward eligibility for any benefits. A noncitizen who applies for Social Security retirement benefits based upon an SSN assigned before January 1, 2004, is not subject to the work-authorization requirement. All of the noncitizens Social Security-covered earnings count toward eligibility regardless of her work-authorization status. However, as indicated above, no monthly benefit can be paid for any month during which the retiree is not lawfully present in the United States or has been residing outside of the United States for more than six consecutive months.

subject to a significantly higher payroll tax burden than similarly situated U.S. citizens and authorized workers.

*C. Undocumented Immigrants are a Fiscal Windfall to Americans from Sea to Shining Sea*

There is no doubt that undocumented immigrants have paid, are paying and will continue to pay billions of dollars in federal, state and local income, sales, use, property, payroll and excise taxes every year.<sup>51</sup> Because of increased compliance efforts by the government and an increasing number of immigrants, the magnitude of these payments has been increasing dramatically over the recent decades. While undocumented immigrants undeniably contribute billions of dollars to government coffers annually, they do not qualify for almost any federal public assistance programs.<sup>52</sup> Generally, the only benefits federally required for undocumented immigrants are emergency medical care—which is subject to financial and category eligibility—and primary and secondary public education for children.<sup>53</sup> Even these minimal benefits are offset to some extent because most undocumented immigrants are adults who come to America to work and have already received their own primary and secondary education paid for by their home country. Therefore, even the costs of primary and secondary education, as required by the Supreme Court's decision in *Plyler v. Doe*<sup>54</sup>, is arguably offset to some extent by the windfall of undocumented children's parents' educated status.

Some economists believe that immigrants are not the problem, but

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Even if the foregoing hurdles are jumped, a retiree has the burden of proving her earnings history, and only wages that are reported to the SSA, not paid under the table, count toward the required forty quarters of earnings to qualify for Social Security benefits. Because unauthorized workers usually do not have an SSN, the SSA will not have an accurate record of their earnings history. Accordingly, retirees with unauthorized work must provide satisfactory documentation to the SSA of their annual earnings history. Currently, the SSA has a policy of assisting, and not prosecuting, these workers, because the SSA is charged with maintaining correct earnings records. However, this policy can be changed at any time. It is a felony to falsely use an SSN, carrying a penalty of up to \$5,000 and five years in prison.

*Id.* at 3.

<sup>51</sup> Michele Waslin, *Assessing the Economic Impact of Immigration at the State and Local Level*, IMMIGR. POL'Y CTR., (2008), [http://www.fiscalpolicy.org/publishedarticles2008/IPC\\_StateStudiesImmigration2007.pdf](http://www.fiscalpolicy.org/publishedarticles2008/IPC_StateStudiesImmigration2007.pdf).

<sup>52</sup> See Tanya Broder, *Immigrant Eligibility for Public Benefits*, in IMMIGRATION AND NATIONALITY LAW HANDBOOK (Gregory P. Adam, et al. eds., 2005).

<sup>53</sup> See generally Elizabeth R. Chesler, *Denying Undocumented Immigrants Access to Medicaid: A Denial of Their Equal Protection Rights?*, 17 B.U. PUB. INT. L.J. 255 (2008). Undocumented immigrants do not qualify for Social Security benefits, Medicare, Medicaid, Temporary Assistance for Needy Families, federal housing programs, food stamps, Supplemental Security Income, unemployment insurance, the EITC and most recently the Economic Stimulus Tax Credit.

<sup>54</sup> 457 U.S. 202 (1982).

rather are the solution to many domestic economic problems.<sup>55</sup> Julian Simon, renowned economist, has noted that “every study that provides dollar estimates shows that when the sum of the tax contributions to city, state and federal government are allowed for, those tax payments vastly exceed the cost of the services used, by a factor of perhaps five, ten or more.”<sup>56</sup> The denial of nearly all federal, state and local benefits, with the imposition of all federal, state and local taxes as well as additional tax burdens specifically imposed on undocumented immigrants because of their status makes undocumented immigrants a fiscal windfall.<sup>57</sup>

#### D. *No Simple Answers*

“The trouble about man is twofold. He cannot learn truths which are too complicated; he forgets truths which are too simple.”<sup>58</sup>

Despite decades of observable evidence to the contrary, 70 percent of Americans agreed with the statement that undocumented immigrants weaken our economy because they don’t all pay taxes, but use public services.<sup>59</sup> As a result of persistent propaganda casting “illegal aliens” as the scapegoat for all of the nation’s problems, most Americans believe they are bearing the burden of undocumented immigrants rather than enjoying the benefits of a low-cost, taxpaying labor force.

Because of increasing complexity and lack of transparency in our tax, immigration and other government systems, the public is increasingly more vulnerable to the persistent litany of misinformation by restrictionists.<sup>60</sup> In challenging times simple “sound-bite” answers are more palatable than truthfully complex multi-faceted responses. As our world becomes more and more complicated we must work harder and harder to understand these intricate interdisciplinary issues and educate ourselves and others. We must resist the temptation to accept the easy, but irrational answer. I fear we are losing this battle. Most Americans, many of whom are descendants of immigrants, believe illogically and against their own best interest that immigrants are the adversary and not the ally.

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<sup>55</sup> See DOWELL MYERS, IMMIGRANTS AND BOOMERS: FORGING A NEW SOCIAL CONTRACT FOR THE FUTURE OF AMERICA 6–7 (2007).

<sup>56</sup> JULIAN L. SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION 295 (1989).

<sup>57</sup> Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law Into the Breach Once More*, 21 N.M. L. REV. 219, 244–46 (1991).

<sup>58</sup> Rebecca West Quotation, BRAINYQUOTE.COM, <http://www.brainyquote.com/quotes/quotes/r/rebeccawes108172.html> (last visited Oct. 15, 2011).

<sup>59</sup> TEIXEIRA, *supra* note 10.

<sup>60</sup> See SOUTHERN POVERTY LAW CTR, UNDER SIEGE, LIFE FOR LOW-INCOME LATINOS IN THE SOUTH, *supra* note 3 (noting that the toxic immigration debate has “transformed the perception of Latino immigrants from that of valuable workers eager to help transform the city into a major financial center to a destructive force that has infiltrated the city”).

*E. Exposure and Education Are the First Step*

Alarmist propaganda must be countered with persistent education and dissemination of accurate and accessible information. In this Article, I plan to expose and explain the "undocumented immigrant tax." As described, undocumented immigrants are subject to and pay taxes just like U.S. citizens and documented immigrants. However, undocumented immigrants are subject to and pay a greater amount of taxes because Congress has imposed financial penalties on certain U.S. residents because they do not have documents that support their current residency status.

Section II of this Article will describe the composition of "the undocumented immigrant income tax." The additional income taxes as described briefly above include the denial of the EITC, a bipartisan supported refundable tax credit that rewards work for low-income families, and the denial of the 2008 economic stimulus tax credit for all undocumented immigrants (unless they are a current member of the armed forces or married to one). Another additional income tax was proposed by former Senator John Ensign of Nevada as part of comprehensive immigration reform. His proposal was to retroactively deny all otherwise available tax credits including tax overpayments to any undocumented immigrant requesting documents.<sup>61</sup> While this additional income tax is the most significant and onerous it has fortunately not yet been passed into law. However, there is little doubt that this or similar concepts will be reintroduced when immigration reform is addressed in the future.

The final issue resulting in additional income tax burden for undocumented immigrants is procedural, but the procedure is required by statute. Undocumented immigrant families are overpaying their federal and state income tax liabilities because they have limited access to the requisite information needed for filing their tax returns. In addition, because of fear of deportation, undocumented immigrants are intimidated by government agencies and limit their interactions with them, especially when the interaction requires disclosure that makes them even more vulnerable.<sup>62</sup> As a result, millions of undocumented immigrants do not prepare and file tax returns, thereby significantly overpaying their federal and state income taxes. Moreover, once they do get access to the resources necessary to file their tax returns their tax refunds may be barred by the statute of limitations, but any outstanding tax liabilities will be assessed together with interest and penalties; thereby, increasing their effective tax burden because of limited access to financial justice.

Section III of this Article will discuss the enormously regressive burden of employment, including self-employment, taxes on

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<sup>61</sup> *Proposal to Strip Workers of Social Security Earnings Based on Prior Immigration Status*, NAT'L IMMIGRATION LAW CTR. (Feb. 28, 2007), <http://www.nilc.org/ss-workers.html>.

<sup>62</sup> See *infra* Part II.E.

undocumented immigrants. Undocumented immigrants have paid between \$120 and \$240 billion in Social Security, Medicare, unemployment, and disability wage taxes to federal and state governments to date, yet they do not qualify for any benefits under any of these critical safety net systems. This section will describe the current state of this regressive burden as well as recent proposals by former Senator John Ensign to increase this already onerous encumbrance for undocumented immigrants. Section IV of this Article will summarize these economic injustices so that one can better understand these issues and respond rationally and thoughtfully to those that misunderstand them, and so that one can make informed decisions regarding forthcoming immigration, tax and social justice reform for all.

As Dr. King wrote so passionately to his fellow clergymen from the confines of the Birmingham City Jail:

Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly. Never again can we afford to live with the narrow, provincial 'outside agitator' idea. Anyone who lives in the United States can never be considered an outsider anywhere in this country.<sup>63</sup>

## II. THE "ILLEGAL" TAX

### A. *A Constructive and Instructive Tax Analysis*

Immigration, tax and financial justice reform will demand constructive debates of the facts and issues. Debate demands words and instructive, rather than destructive, terminology. Because human history evinces that hateful words lead to hateful acts, this Article will use terms that are informative and further, rather than undermine, the discussion.<sup>64</sup> It will use the term "undocumented immigrants" to refer to "people who presently possess no proof of any right to be present in the United States, whether or not they have been declared deportable by the U.S. government (and the vast majority have not)."<sup>65</sup> This Article will use the term "unauthorized workers" to describe people who are forbidden under immigration laws to work for pay, which does not necessarily mean they are residing in the United States without documents. For purposes of this Article a family

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<sup>63</sup> DR. MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM CITY JAIL, IN A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 289, 290 (James M. Washington ed., 1986).

<sup>64</sup> MILTON MELTZER, NEVER TO FORGET: THE JEWS OF THE HOLOCAUST 45 (1976); MICHAEL BERENBAUM, THE WORLD MUST KNOW: THE HISTORY OF THE HOLOCAUST AS TOLD IN THE UNITED STATES HOLOCAUST MEMORIAL MUSEUM 18-25 (1993).

<sup>65</sup> Lyon, *supra* note 7, at 581.

residing in the United States long enough to be subject to U.S. federal income taxes and in which not every member has a valid SSN will be described as an "undocumented immigrant family."

*B. The Denial of the EITC*

Similar to U.S. citizens, undocumented immigrant families are subject to federal, state, and local income taxes. However, consistent with U.S. financial justice policy the federal income tax system, and many state income tax systems, are designed to encourage work by providing that poverty level working families receive antipoverty relief, which offsets their income and other tax burdens, through tax credits.<sup>66</sup> Undocumented immigrant families are excluded statutorily from the most significant component of this antipoverty relief. As a result, undocumented immigrant families bear a greater income tax burden than similarly situated U.S. citizens and documented residents.

*1. Antipoverty Relief for Certain Working Poor Families under the EITC*

In 1972, then-Governor Ronald Reagan, testifying before Congress regarding a workfare approach to government assistance, "suggested that the federal government should exempt low income families from income taxes and give them a rebate for their Social Security taxes."<sup>67</sup> Several years later, Senator Russell Long, the conservative Democrat chairman of the Senate Finance Committee, and Congressman Al Ullman, the moderate chairman of the House Ways and Means Committee, packaged the idea in a refundable tax credit and won liberal support for the EITC. Since it was developed and established in 1975 by conservative forces, the EITC has enjoyed bipartisan support for encouraging work.<sup>68</sup>

The EITC, completely administered through the tax system, is the largest cash assistance and most successful antipoverty program in America for working poor families reaching more individuals than more traditional financial justice programs.<sup>69</sup> "Research strongly confirms that the EITC has played a critical role in bringing more single mothers into the

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<sup>66</sup> William Safire, *The 25% Solution*, N.Y. TIMES, Apr. 20, 1995, <http://www.nytimes.com/1995/04/20/opinion/essay-the-25-solution.html>.

<sup>67</sup> SAUL D. HOFFMAN & LAURENCE S. SEIDMAN, W.E. UPJOHN INST. FOR EMP'T RESEARCH, HELPING WORKING FAMILIES: THE EARNED INCOME TAX CREDIT 12 (2003).

<sup>68</sup> Dorothy A. Brown, *The Tax Treatment of Children: Separate But Unequal*, 54 EMORY L.J. 755, 801 (2005).

<sup>69</sup> See ELAINE MAAG & ADAM CARASSO, TAX POLICY CTR., TAXATION AND THE FAMILY: WHAT IS THE EARNED INCOME TAX CREDIT? (2010), available at <http://taxpolicycenter.org/briefing-book/key-elements/family/eitc.cfm>; see LEONARD E. BURMAN & DEBORAH I. KOBES, TAX POLICY CTR., TAX NOTES: EITC REACHES MORE ELIGIBLE FAMILIES THAN TANF, FOOD STAMPS, (2003), available at <http://www.urban.org/publications/1000467.html>.

workforce.”<sup>70</sup> The EITC lifts millions of families out of poverty, including millions of children, each year.<sup>71</sup> Without the EITC, the number of children living in poverty would increase by one-third.<sup>72</sup>

The EITC is a refundable tax credit that provides cash payments of up to \$5,751 (for 2011) to ensure that working poor families pay little or no income or payroll taxes.<sup>73</sup> While initially designed to offset the burdens of income and payroll taxes, the EITC in some cases provides a meaningful wage subsidy for low-income working families.<sup>74</sup> The EITC provides critical cash refunds for basic necessities like housing, utilities, food, and basic household appliances.<sup>75</sup> In 2010, approximately 20.1 million households with children received an average EITC credit of \$2,661, an excess of \$53 billion.<sup>76</sup>

#### a. Qualifying for the EITC

The EITC was designed by Congress to encourage low-income families to work. Accordingly, to qualify for the EITC an individual and her spouse, if married, must have earned income within certain lower-earned income ranges. The EITC and the earned income ranges are indexed for inflation annually and vary meaningfully with the number of qualifying children. For eligible individuals with three or more qualifying children, the maximum 2011 EITC is \$5,751 for income levels of less than \$43,998 (\$49,078 for “married filing jointly”).<sup>77</sup> Because the EITC is targeted for families, the maximum EITC benefits decrease for eligible individuals with two qualifying children (\$5,112), one qualifying child (\$3,094) and most significantly for taxpayers with no qualifying children (\$464).<sup>78</sup> Married taxpayers, with or without children, who file their tax return separately will not receive any EITC although they may have

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<sup>70</sup> STEVE HOLT, THE EARNED INCOME TAX CREDIT AT AGE 30: WHAT WE KNOW, BROOKINGS INST., 1, 14 (2006), available at [http://www.brookings.edu/~media/Files/rc/reports/2006/02childrenfamilies\\_holt/20060209\\_Holt.pdf](http://www.brookings.edu/~media/Files/rc/reports/2006/02childrenfamilies_holt/20060209_Holt.pdf).

<sup>71</sup> CTR. ON BUDGET AND POLICY PRIORITIES, POLICY BASICS: THE EARNED INCOME TAX CREDIT (2011), available at <http://www.cbpp.org/cms/index.cfm?fa=view&id=2505> (stating that roughly 6 million people, including 3 million children, were lifted out of poverty by the EITC in 2009); MAAG ET AL., *supra* note 69 (stating that roughly 4 million people were lifted out of poverty by the EITC in 2006); ALAN BERUBE, THE NEW SAFETY NET: HOW THE TAX CODE HELPED LOW-INCOME WORKING FAMILIES DURING THE EARLY 2000S, BROOKINGS INST., 2–3 (2006), available at [http://www.brookings.edu/~media/Files/rc/reports/2006/02childrenfamilies\\_berube/20060209\\_newsafety.pdf](http://www.brookings.edu/~media/Files/rc/reports/2006/02childrenfamilies_berube/20060209_newsafety.pdf).

<sup>72</sup> CTR. ON BUDGET AND POLICY PRIORITIES, *supra* note 71.

<sup>73</sup> Rev. Proc. 2011-2, 2011-2 I.R.B. 299.

<sup>74</sup> See Robert Greenstein, *The Earned Income Tax Credit: Boosting Employment, Aiding the Working Poor*, CTR. ON BUDGET AND POLICY PRIORITIES (Aug. 17, 2005), <http://www.cbpp.org/archiveSite/7-19-05eic.pdf>.

<sup>75</sup> DAVID K. SHIPLER, THE WORKING POOR: INVISIBLE IN AMERICA 13 (2004).

<sup>76</sup> MAAG et al., *supra* note 9; see CENTER ON BUDGET AND POLICY PRIORITIES *supra* note 71.

<sup>77</sup> Rev. Proc. 2011-2, *supra* note 73.

<sup>78</sup> *Id.*

otherwise qualified for thousands of dollars.<sup>79</sup> The EITC is not intended to benefit low wage earners with above average investments so eligible individuals cannot have investment income in excess of \$3,150 per year.<sup>80</sup>

b. Congress Tries to Limit EITC Relief for Authorized Work Only

In 1996, Congress enacted and President Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act,<sup>81</sup> which included unprecedented restrictions on federal benefits for many immigrants. Among the long list of benefit restrictions, Congress decided that "individuals who are not authorized to work in the United States" should be denied EITC benefits.<sup>82</sup> To accomplish this goal, Congress amended the Internal Revenue Code to require that any taxpayer (and, if married, her spouse) and each qualified child must provide a valid SSN (issued to individuals authorized to work in the United States) to receive EITC benefits.<sup>83</sup>

SSNs have been issued to workers since the implementation of the 1935 Social Security Act. The SSN numbering system was designed to provide a method for employers to report and the U.S. government to track Social Security earnings for purposes of payroll tax and retirement benefit calculations. In the 1960s computerization caused the Internal Revenue Service ("IRS") and private businesses to rely on SSNs as a method of accumulating, sorting, and tracking information relating to individuals.

For sixty years, the federal government issued SSNs to workers irrespective of their immigration status. As a result, there are numerous undocumented immigrants and unauthorized workers with valid SSNs that were issued to them by the Social Security Administration ("SSA"). Through the early 1980s the government only kept internal records regarding an unauthorized worker's immigration status. Beginning in 1982 Social Security cards issued to unauthorized workers were marked "Not Valid for Employment" and temporarily authorized workers received cards marked "Valid Only with INS Authorization."<sup>84</sup>

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<sup>79</sup> See I.R.S. Pub. 501, Filing Status, Married Filing Separately, Special Rules, [http://www.irs.gov/publications/p501/ar02.html#en\\_US\\_2011\\_publink1000220762](http://www.irs.gov/publications/p501/ar02.html#en_US_2011_publink1000220762) (last visited Dec. 27, 2011).

<sup>80</sup> I.R.C. § 32(2)(i)(1) (2006) (describing the disqualifying investment income as interest, dividends, net capital gains, net rents, net royalties and net passive income).

<sup>81</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105.

<sup>82</sup> STAFF OF J. COMM. ON TAXATION, 104TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 104TH CONGRESS 394 (Comm. Print 1996).

<sup>83</sup> I.R.C. § 32(c) (2006).

<sup>84</sup> Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 21 (2006).

In an effort to stop unauthorized workers from being hired, Congress enacted the Immigration Reform and Control Act of 1986. This Act, among other things, required employers to have all new employees prove their identity and work authorization with specific documents.<sup>85</sup> Congress listed a Social Security card as an acceptable document evidencing proof of work authorization.<sup>86</sup> As a result of this requirement, there has been widespread use of counterfeit Social Security cards among unauthorized workers making it “more common and easier than ever for [unauthorized] workers to enter and function in the U.S. labor market.”<sup>87</sup>

As late as 1996, the SSA began limiting its issuance of SSNs to individuals who were U.S. citizens and immigrants authorized for employment in the United States. This limitation caused a problem for individuals who needed a taxpayer identification number for filing tax returns (for example, foreign investors). In response to this need, the IRS introduced a new taxpayer identification number for use by individuals who are not citizens or nationals of the United States and are not eligible for SSNs.<sup>88</sup> After December 31, 1996, individuals who do not qualify for a SSN, but have a tax filing requirement must apply for and use their ITIN on all their tax filings.<sup>89</sup> The ITIN, like a SSN, is a unique nine-digit number. The number is intended to be used for tax purposes only and does not affect immigration status, authorize work in the United States, or provide eligibility for Social Security benefits. Undocumented immigrants are not authorized to work in the United States and, therefore, are not eligible for a SSN. Unauthorized workers and undocumented immigrants must obtain an ITIN to file any required tax returns or to be listed as a dependent or spouse on any tax return.

### c. Congress’ Denial of EITC Benefits for Unauthorized Work is Designed Poorly and Overbroad in its Application

The enactment of immigration reform in 1996 was intended to deny most federal benefits to undocumented immigrants including federal benefits for unauthorized work. The EITC, deemed a federal tax benefit, was amended to provide that every individual listed on a tax return had to have a valid SSN to qualify for any EITC relief.<sup>90</sup>

This requirement is poorly designed as it denies EITC benefits to legally present and legally working immigrant families. Consistent with Congress’ intent, the SSN requirement will in most cases deny EITC

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<sup>85</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §101(b)(1) (1986).

<sup>86</sup> *Id.* at §101(b)(C)(1).

<sup>87</sup> Paula N. Singer & Linda Dodd-Major, *Identification Numbers and U.S. Government Compliance Initiatives*, 104 TAX NOTES 1429, 1431 (2004).

<sup>88</sup> Lipman, *supra* note 84, at 21.

<sup>89</sup> *Id.* at 21–22.

<sup>90</sup> I.R.C. § 32(e)(i) (2006).

benefits for unauthorized work; but, because it requires an SSN for both working and nonworking spouses if a taxpayer is married, it is overbroad. For example, the SSN requirement denies EITC benefits to U.S. citizens or authorized workers whose nonworking spouses have valid ITINs, but no SSN. The spouse could be legally present in the United States or a resident of another country. Even if the couple has one or more qualifying children who are U.S. citizens with SSNs, this legally present and working family will not qualify for any EITC benefits.<sup>91</sup>

If the family decides to file a married filing separate return so that all individuals on the tax return have SSNs, they will not qualify for any EITC. Married taxpayers cannot qualify for the EITC with a married filing separate tax return.<sup>92</sup> Only if the couple ends their marriage or never enters into marriage, will crucial EITC benefits be available.<sup>93</sup> As a result, undocumented immigrants are faced with an effective federal income tax rate that is higher than the tax rate for a U.S. citizen family with the same characteristics.

### C. *The Denial of the 2008 Economic Stimulus Tax Credit*

#### 1. *How the 2008 Economic Stimulus Tax Credit Works*

The denial of EITC benefits meaningfully increases the effective income tax rate for undocumented immigrants and their families. In 2008 this relatively higher effective tax rate was even more pronounced due to the denial of the economic stimulus tax credit for undocumented immigrants. The 2008 economic stimulus tax credit was part of a \$170 billion bipartisan package passed by Congress in February 2008 with the intention of stimulating the stalling U.S. economy.<sup>94</sup> The \$600 per taxpayer one time tax credit was targeted to low and middle-income taxpayers. After weeks of debate the Democrats convinced the Republicans to extend the credit to certain non-taxpayers including the working poor, senior citizens collecting Social Security benefits, and disabled veterans collecting Veteran Administration benefits. However, anti-immigrant politicians and groups, including Federation for American Immigration Reform, former Congressman Tom Tancredo, and former Senator John Ensign convinced Congress to deny the credit to all undocumented immigrants and their families.<sup>95</sup>

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<sup>91</sup> See *supra* notes 29–31 and accompanying text.

<sup>92</sup> I.R.C. § 32(d) (2006) (setting forth the requirement that married taxpayers must file as married filing jointly to qualify for EITC benefits).

<sup>93</sup> See Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 87 (2005).

<sup>94</sup> Economic Stimulus Act of 2008, H.R. 5140, 110<sup>th</sup> Cong. (2008) (enacted); see Dawn Kopecki, *Bernanke Backs Calls for Quick Action*, BLOOMBERG BUSINESSWEEK, Jan. 17, 2008, [http://www.businessweek.com/bwdaily/dnflash/content/jan2008/db20080117\\_873508.htm](http://www.businessweek.com/bwdaily/dnflash/content/jan2008/db20080117_873508.htm).

<sup>95</sup> FEDERATION FOR AMERICAN IMMIGRATION REFORM, *American Public Rejects Tax Rebates for*

The basic concept of the economic stimulus was a tax rate reduction in the lowest tax bracket thereby benefiting all taxpayers.<sup>96</sup> To achieve this goal, Congress effectively reduced the 10 percent income tax rate to zero for up to \$6,000 of taxable income for every taxpayer.<sup>97</sup> To achieve this rate reduction the stimulus was designed as a tax credit, a dollar for dollar tax reduction up to 10 percent of taxable income, or \$600, (\$6,000 x 10%) per taxpayer.<sup>98</sup> In addition to the basic tax credit, the package provided an additional tax credit of \$300 per qualifying child. The tax credit was designed for low- and middle-income taxpayers, and it phased out for higher income taxpayers (\$75,000 or more of adjusted gross income or \$150,000 or more, if married filing jointly) by 5 percent for any amount above these thresholds.<sup>99</sup>

The economic stimulus package was targeted to low- and middle-income families because their economic circumstances would cause them to use these tax refunds promptly to purchase goods and services to stimulate the failing U.S. economy.<sup>100</sup> Congress designed the credit to be partially refundable to get the credit into the hands of needy senior citizens and the working poor who had insufficient income to generate any taxable income. Any individual with at least \$3,000 of any combination of earned income, Social Security benefits, and certain veterans' benefits qualified for a 10 percent, or \$300, refundable tax credit.<sup>101</sup>

Congress desperately wanted the tax credit to stimulate the economy as quickly as possible. To expedite the distribution of the 2008 tax credit, the credit was payable as soon as practicable in 2008 based upon filed 2007 tax returns.<sup>102</sup> Those individuals who did not receive the full tax credit based upon their filed 2007 tax returns qualified for any remaining tax credit when they filed their 2008 tax return in 2009.<sup>103</sup> However, Congress voted to deny this tax rate reduction for undocumented immigrant working families based solely upon their immigration status.<sup>104</sup> Like the EITC, a legally working and present family could be denied the 2008 tax rate cut.

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*Illegal Aliens* (Mar. 2008), [www.fairus.org/site/DocServer/March08\\_NL.pdf?docID=5905](http://www.fairus.org/site/DocServer/March08_NL.pdf?docID=5905).

<sup>96</sup> See *I.R.C.* § 6428 (2006).

<sup>97</sup> \$6,000 x 2 = \$12,000 of taxable income for married filing joint taxpayers.

<sup>98</sup> \$1,200 (for married filing jointly taxpayers) = \$12,000 x 10 percent.

<sup>99</sup> I.R.S., *Facts about the 2008 Stimulus Payments* (Feb. 15, 2008), <http://www.irs.gov/newsroom/article/0,,id=179095,00.html>.

<sup>100</sup> See *Options for Responding to Short-Term Economic Weakness: Hearing Before the Senate Comm. on Finance*, 110th Cong. 15 (2008) (statement of Peter R. Orszag, Director Congressional Budget Office), available at <http://www.cbo.gov/ftpdocs/89xx/doc8932/1-22-TestimonyEconStimulus.htm>.

<sup>101</sup> (\$3,000 x 10% = \$300).

<sup>102</sup> See *Facts about the 2008 Stimulus Payments*, *supra* note 99.

<sup>103</sup> *Id.*

<sup>104</sup> 154 Cong. Rec. H495 (daily ed. Jan. 29, 2008) (statement of Rep. Campbell).

## 2. *How the 2008 Economic Stimulus Tax Credit Does Not Work*

To preclude undocumented immigrants from receiving the tax credit, Congress required that only individuals with a SSN would be eligible for the credit.<sup>105</sup> Similar to the EITC, married couples filing jointly had to provide a SSN for each spouse to qualify for any amount of credit. In addition, qualifying children had to have SSNs. ITINs were not acceptable in any circumstance to qualify for the tax credit. Similar to the SSN requirement under the EITC, Congress' requirement of a SSN denied the tax credit for most undocumented immigrants.<sup>106</sup>

As a result of the SSN requirement, undocumented immigrants as well as their U.S. citizen spouses and children did not qualify for the 2008 economic stimulus tax credit unless they filed "married filing separately." While "married filing separately" filing status provided the opportunity for an economic stimulus tax credit for U.S. citizen and documented resident spouses and children who held a SSN this filing status would have under certain circumstances caused an aggregate tax increase for the family as well as any additional costs for preparing and filing two tax returns. However, this result in many cases was better than the absolute denial of the EITC for married filing separately tax filings.

After the SSN requirement was announced immigrant advocate groups noted that this requirement also disqualified hundreds of thousands of U.S. military personnel, foreign high-tech workers and other U.S. citizens and documented immigrants that were legally present or married to legally present spouses who did not hold SSNs because they were not eligible to work and were not working.<sup>107</sup> As a result, Congress acted to remedy this overzealous exclusion of undocumented immigrants, but only for a very select group of individuals ironically allowing this federal benefit for certain undocumented immigrants.

In June 2008, President Bush signed into law the Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART 2008").<sup>108</sup> This law included a provision that exempts married taxpayers who file a joint tax return from the SSN requirement for the 2008 economic stimulus tax credit if at least one of the filers was a current member of the Armed Forces.<sup>109</sup> Therefore, every member of the Armed Forces qualified for the 2008

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<sup>105</sup> See Facts about the 2008 Stimulus Payments, *supra* note 99.

<sup>106</sup> *Id.*

<sup>107</sup> Teri Weaver and John Vandiver, *ITIN Ineligible for Special Rebate*, STARS AND STRIPES (Mar. 29, 2008), <http://www.military.com/news/article/itin-ineligible-for-special-rebate.html> (describing the denial of the 2008 advance economic stimulus payment for military families when one spouse does not have a SSN); Juliana Barbassa, *Rebate Excludes Many Taxpayers with Foreign Spouses*, USA TODAY (May 11, 2008), [http://www.usatoday.com/money/economy/2008-05-11-3454211334\\_x.htm](http://www.usatoday.com/money/economy/2008-05-11-3454211334_x.htm).

<sup>108</sup> Heroes Earnings Assistance and Relief Tax Act of 2008, H.R. 6081, 110<sup>th</sup> Cong. (2008) (enacted).

<sup>109</sup> I.R.C. § 6428(h)(3) (2006).

economic stimulus tax credit irrespective of their or their spouses' immigration status. Accordingly, undocumented immigrants married to members of the Armed Forces qualified for the tax credit. But legally present and nonworking immigrants who did not qualify for a SSN because they were not allowed to work did not qualify for the tax credit. Moreover, their U.S. citizen or legally present and working immigrant spouses had to file separate tax returns to qualify for the tax credit.

3. *The Denial of 2008 Economic Stimulus Tax Credit to Undocumented Immigrants is a Terrible and Unjust Precedent*

The denial of the 2008 economic stimulus tax credit was the first time that Congress denied a broad-based tax rate cut to U.S. residents based upon their immigration status.<sup>110</sup> This statute is notably different than the denial of EITC benefits, which some might argue is a federal financial justice benefit paid through the income tax system. The 2008 tax credit was a one year tax rate cut. The denial of the tax cut for undocumented immigrants effectively introduced a tax surcharge or a stealth undocumented immigrant tax. This is a terrible and unjust precedent. Bishop John Wester, Chairman of the U.S. Conference of Catholic Bishops Committee on Migration, stated:

The decision to prohibit undocumented immigrants from receiving tax rebates in the stimulus bill highlights the injustice in our immigration system. It proves that these workers pay into the tax system and help support our economy. It also reveals the hypocrisy of our laws. With one hand our government attempts to deport these workers, but with the other it holds tight the taxes they pay into the system. . . . As a democratic and free nation protective of human rights, we cannot have it both ways.<sup>111</sup>

D. *The Ensign Retroactive Denial of All Tax Credits and Overpayments for Undocumented Immigrants*

While the denial of the 2008 economic stimulus tax credit was the first

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<sup>110</sup> Similar advance payments of tax cuts in 2001 and 2003 might not have been initially distributed to individuals who did not hold a Social Security number but these tax cuts were not statutorily limited to individuals with a Social Security number. As a result, qualifying undocumented immigrants could enjoy the benefits of the 2001 tax rate cut and the 2003 increased child tax credit on their 2001 and 2003 income tax returns.

<sup>111</sup> *US Bishops Ask ICE to Assist Families, Communities After Immigration Raids*, CATHOLIC NEWS AGENCY (Feb. 17, 2008), [www.catholicnewsagency.com/news/us\\_bishops\\_ask\\_ice\\_to\\_assist\\_families\\_communities\\_after\\_immigration\\_raids/](http://www.catholicnewsagency.com/news/us_bishops_ask_ice_to_assist_families_communities_after_immigration_raids/).

denial of a tax rate reduction for undocumented immigrants, anti-immigrant politicians have been proposing bills that include even more dramatic undocumented immigrant tax surcharges. Former Republican Senator John Ensign of Nevada has made several egregious undocumented immigrant tax proposals including a sweeping and intolerant proposal passed by the Senate in May 2006.<sup>112</sup>

Senator Ensign's amendment to the Comprehensive Immigration Reform Act of 2006 would have denied any tax credits or tax refunds to any undocumented immigrant and her family for any taxable year prior to 2006.<sup>113</sup> This denial effectively would have created a significant retroactive tax surcharge for undocumented immigrant families potentially amounting to thousands of dollars per family. As a result of this provision undocumented immigrants would be denied ALL tax credits that have been and would continue to be allowed to all U.S. citizens and documented residents including, without limitation, the child tax credit (presently up to \$1,000 per qualifying child), the child and dependent care credit (presently up to \$2,100 for two qualifying children), the American Opportunity tax credit (presently up to \$2,500 per student), the lifetime learning tax credit (presently up to \$2,000 per taxpayer), retirement savings tax credit (presently up to \$2,000 for married filing jointly), the adoption tax credit (presently up to \$13,170 per child) and the foreign tax credit. In addition, any tax refund of federal income tax withheld (potentially up to thousands of dollars) could never be refunded. Moreover, any overpayment or refund from one tax year could not be applied to a tax underpayment for another tax year.<sup>114</sup>

The proposed tax treatment of undocumented immigrants buried in the Comprehensive Immigration Reform Act of 2006 was unprecedented and grossly unjust. Congress created an egregious retroactive and irrational tax increase for millions of undocumented immigrants and their families. Fortunately, while these provisions made it into the bill they were not passed into law.

Given Congress' denial of the 2008 economic stimulus tax credit for undocumented immigrants, similarly devastating tax legislation may be passed into law in the future. Indeed, while not as comprehensive as the Ensign amendment, Congressman Sam Johnson (R-Texas) introduced H.R. 1956 in May 2011 to deny the child tax credit to "illegal immigrant" families because of their immigration status.<sup>115</sup> And despite the decade

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<sup>112</sup> S.AMDT. 4126, 109th Cong. (as submitted to the Senate, May 23, 2006 and passed on May 25, 2006 50-47).

<sup>113</sup> See *supra* text accompanying note 61.

<sup>114</sup> 152 CONG. REC. S5163 (daily ed. May 25, 2006) (statement of Sen. Ensign).

<sup>115</sup> *JCT: Johnson Bill to End Tax Credit to Illegal Immigrants to Save Billion\$*, CONGRESSMAN SAM JOHNSON, <http://www.samjohnson.house.gov/News/DocumentSingle.aspx?DocumentID=257390> (last visited Sept. 17, 2011).

long allowance of the Additional Child Tax Credit for all lower-income families with children, including undocumented immigrant families, U.S. Senator Orrin Hatch (R-Utah), ranking member of the Senate Finance Committee, announced in September 2011 that he would be examining certain refundable tax credits for “unauthorized workers.”<sup>116</sup> If undocumented immigrant families are denied the child tax credit, a subsidy for raising dependent children under age 17, millions of whom are U.S. citizens, their tax burden will increase by billions of dollars each year further increasing the undocumented immigrant tax.<sup>117</sup>

*E. Intimidation of Tax Systems and Government Causes Overpayment of Income Taxes*

Denials of the EITC and the economic stimulus tax credits have effectively created an undocumented immigrant income tax. Ensign’s proposed retroactive tax increases for undocumented immigrants applying for documents would have added significantly to this tax. Fortunately, if we are vigilant about future immigration reform and a just and rational tax system it will not be included in future immigration, tax, or financial justice reform. However in addition to the denials of the EITC and the 2008 economic stimulus tax credit, undocumented immigrants face another effective income tax increase. Because of an overly complex, intimidating and inaccessible tax system and a fear of the U.S. government, millions of undocumented immigrants do not file tax returns and, therefore, have overpaid their federal and state income tax liabilities. This inability to file for a refund meaningfully increases the undocumented immigrant income tax for millions of undocumented immigrants.

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<sup>116</sup> Bernie Becker, *Hatch: Let’s Look at Unauthorized Workers, Tax Credits*, ON THE MONEY: THE HILL’S FINANCE & ECONOMY BLOG (Sept. 2, 2011, 12:55 PM), <http://www.thehill.com/blogs/on-the-money/domestic-taxes/179397-hatch-lets-look-at-unauthorized-workers-tax-credits?tmpo=component&print=18page=> (quoting the IRS spokeswoman as stating that the law has been clear for more than a decade that these credits do not depend upon work authorization status).

<sup>117</sup> See TREASURY INSPECTOR GEN. FOR TAX ADMIN., INDIVIDUALS WHO ARE NOT AUTHORIZED TO WORK IN THE UNITED STATES WERE PAID \$4.2 BILLION IN REFUNDABLE CREDITS (2007), available at <http://www.treasury.gov/tigta/auditreports/2011reports/201141061fr.html>; see also Elaine Maag et al., *supra* note 9 (describing the child tax credit as a subsidy of \$52 billion for almost 35 million families raising children and demonstrating that only 10 percent of the total expenditures goes to the lowest quintile of families while 25 percent, 27 percent, 28 percent, and 10 percent go to the next four income quintiles).

Wage earners pay their federal and state income taxes through routine tax withholdings. For low-income wage earners with dependents this generally results in an overpayment of federal and state income taxes. To obtain a refund of the overpayment of income taxes paid, refund claims must be made by filing annual federal and state income tax returns. If a taxpayer fails to file a federal tax return within three years of the due date of the tax return she has relinquished her refund and has effectively overpaid her tax liabilities.<sup>118</sup> These forgone tax refunds cannot be offset against unpaid tax liabilities, which the government can assess, together with accrued interest and penalties, at anytime if the taxpayer does not file a tax return.<sup>119</sup>

Because of vulnerable circumstances millions of undocumented immigrants do not file their tax returns claiming their legitimate tax refunds thereby increasing their undocumented immigrant tax. The vulnerable circumstances that preclude undocumented immigrants from filing tax returns include lack of education, English language skills, access and fear of government officials because of increasing threats of deportation.<sup>120</sup>

#### 1. *Undocumented Immigrants Do Not File Because of Lack of Literacy Issues*

Lack of literacy seriously compromises any individual's capacity to file their tax return. Lack of literacy is a serious matter for undocumented immigrants. Forty-nine percent of undocumented immigrants have not completed high school and 32 percent have less than a ninth grade education.<sup>121</sup> Limited education often accompanies limited English proficiency. Most undocumented immigrants lack critical English language skills.<sup>122</sup> While the IRS has translated many of its tax forms and corresponding instructions into Spanish, tax preparation is challenging for most low-income individuals. Indeed, almost 70 percent of low-income EITC recipients use a paid tax preparer.<sup>123</sup>

<sup>118</sup> I.R.C. § 6511(a)–(b)(1) (2006).

<sup>119</sup> I.R.C. § 6501(c)(3) (2006).

<sup>120</sup> See Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics*, PEW HISPANIC CTR. 22–24 (2005), <http://pewhispanic.org/files/reports/46.pdf>.

<sup>121</sup> *Id.* at 23.

<sup>122</sup> Randy Capps et al., *A Profile of Low-Income Working Immigrant Families* 6, THE URBAN INST. (June 2005), [http://www.urban.org/UploadedPDF/311206\\_B-67.pdf](http://www.urban.org/UploadedPDF/311206_B-67.pdf) (legal status is also associated with limited English language skills and low education levels; undocumented immigrants are more likely to lack English proficiency).

<sup>123</sup> *Taxes and the Poor: Why do Low-Income Families Use Paid Tax Preparers?*, TAX POLICY CTR., <http://www.taxpolicycenter.org/briefing-book/key-elements/poor/paid-preparers.cfm> (last visited Sep. 16, 2011).

## 2. *Undocumented Immigrants Do Not File Because of Fear of Deportation*

Language barriers only enhance the high level of fear undocumented immigrants have of government officials and deportation. Because of fear of government officials and agencies, many undocumented immigrants do not access the very few available government benefits, including emergency medical care.<sup>124</sup> Similarly, the filing of a tax return which will necessarily include the provision of personal information such as a mailing address and Form W2s (wage information forms which include the name and address of any employers) with incorrect SSNs to the federal and state governments is a staggering exercise at best.

The IRS interprets the filing of a tax return with an ITIN and a Form W2 with an incorrect SSN as an admission that the wage-earner was not authorized to work in the United States.<sup>125</sup> Alternatively, if the undocumented immigrant uses the invalid SSN to file her tax return the undocumented immigrant is committing document fraud. Not surprisingly, millions of undocumented immigrants are chilled from filing their tax returns even though it costs them their tax refunds.

## 3. *Undocumented Immigrants Do Not File Because of Lack of Access*

Even if undocumented immigrants marshal the courage to file tax returns, access to ITINs, the number required for every undocumented immigrant on the tax return, as well as basic tax forms, and instructions and competent tax preparers are limited. While the IRS is providing more Spanish language tax forms and instructions, and there are many free tax assistance programs, these tools are predominately available online.

Seventy-five percent of individuals with income below \$15,000 and greater than 60 percent of individuals with incomes between \$15,000 and \$25,000 do not use the Internet.<sup>126</sup> The statistics for Internet use among undocumented immigrants are likely lower than these. Moreover, due to the high cost of paper and the growth of the Internet, fewer and fewer public facilities distribute paper tax forms and instructions. While paper tax forms and instructions are available in IRS offices, these offices are located in federal government buildings with security guards at every entrance.

Visiting an IRS office or any government building can be very

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<sup>124</sup> See Svetlana Lebedinski, *EMTALA: Treatment of Undocumented Aliens and the Financial Burden it Places on Hospitals*, 7 J. L. SOC'Y 146, 148 (2005).

<sup>125</sup> Cynthia Blum, *Rethinking Tax Compliance of Unauthorized Workers After Immigration Reform*, 21 GEO. IMMIGR. L.J. 595, 598 (Summer 2007).

<sup>126</sup> Letter from Jean Ann Fox, Consumer Federation of Am., Frank Torres, Consumers Union, Chi Chi Wu, Nat'l Consumer Law Ctr., & Edmund Mierzwinski, U.S. Pub. Interest Research Grp., to Paul J. Mamo, Internal Revenue Serv. (Sept. 4, 2002), available at <http://www.consumerfed.org/pdfs/irsletter090502.pdf>.

intimidating for undocumented immigrants. There have been isolated incidents where deportation proceedings were commenced for undocumented immigrants as a result of entering a federal building with an IRS office to apply for an ITIN.<sup>127</sup> Not surprisingly, these incidents, while isolated and loudly criticized by the National Taxpayer Advocate, do not encourage the ITIN application process. Undocumented immigrants cannot file a tax return without an ITIN.

#### 4. *Undocumented Immigrants Do Not File Because of Difficulty of Obtaining an ITIN*

Even without considering the fear of deportation the ITIN application process is not simple. Because of public concern over the abuse of this identification number it has become an even slower and more cumbersome process. Qualifying taxpayers, spouses and each of their dependents must apply for an ITIN using Form W-7, Application for Individual Taxpayer Identification Number, which together with its instructions are eight pages long. The Form W-7 requires personal information including the individual's name, address, foreign tax identification number (if any), and specific reason for obtaining the ITIN. In addition, the IRS requires that applicants provide documentary evidence to establish their non-citizen status and identity. Acceptable documentary evidence for this purpose may include items such as an original (or a certified copy of the original) passport, driver's license, birth certificate, certain identity cards, or immigration documentation. Many undocumented immigrants are not able to obtain state driver's licenses or other picture identification because of their immigration status. Therefore, the only acceptable identification documents are often original passports and birth certificates, which most individuals are not going to relinquish through the mail.<sup>128</sup>

To better focus the application process to tax filing, ITIN applications must generally be accompanied by a tax return. Therefore, ITIN applications are typically filed during tax season through a paper return. As a result, the IRS processing offices suffer a significant bottleneck from the labor-intensive demands of processing paper returns. The National Taxpayer Advocate has recognized this issue in her annual report to Congress in 2008 and 2010, noting that in 2010 the IRS received 1.6 million ITIN applications with 960,000 tax returns.<sup>129</sup> After an application is received the IRS requires four to six weeks or longer for processing the information. Indeed, the National Taxpayer Advocate has recognized that these returns represented \$500 million of refunds that were unduly

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<sup>127</sup> Lipman, *supra* note 84, at 26 n.184.

<sup>128</sup> See generally, INTERNAL REVENUE SERVICE, UNDERSTANDING YOUR IRS: INDIVIDUAL TAXPAYER IDENTIFICATION (2010), available at <http://www.irs.gov/pub/irs-pdf/p1915.pdf>.

<sup>129</sup> NAT'L TAXPAYER ADVOCATE, 2010 ANNUAL REPORT TO CONGRESS 319 (Dec. 31, 2010), available at <http://www.irs.gov/pub/irs-pdf/p2104.pdf>.

delayed, up to eight months, by an inexplicably inadequate process.<sup>130</sup>

The ITIN application process alone, requiring original documents or certified copies of original documents for each person listed on the tax return, increases the complexity for the first tax filing, which may undermine or even realistically preclude the opportunity to file a tax return. Given these onerous hurdles it is actually surprising that any undocumented immigrants are able to file income tax returns. However, it is not surprising that millions do not and instead overpay their federal and state tax liabilities and increase their undocumented immigrant income tax.<sup>131</sup>

### III. THE UNDOCUMENTED IMMIGRANT WAGE TAXES

In addition to the undocumented immigrant income tax, undocumented immigrants bear an undocumented immigrant wage tax. This wage tax is due to the denial of any Social Security, Medicare, unemployment, and disability benefits, both federal and state, despite the onerous obligation to pay Social Security, Medicare and all other federal and state payroll taxes. In addition in 2009 and 2010 Congress enacted a Social Security tax rate cut that was not available to many undocumented immigrants.

#### A. *Bearing the Fiscal Burden of Social Security and Medicare Taxes*

Unauthorized workers and their employers must each pay Social Security taxes of 7.65 percent on all wages and net profits from self-employment for an aggregate tax of 15.3 percent. “Most economists believe that the burden of most payroll taxes paid by employers falls on the employees themselves.”<sup>132</sup> Therefore, undocumented immigrant working families likely bear an effective wage tax rate of at least 15.3 percent. Higher income families will bear a significantly lower effective marginal wage tax rate because their wages above \$106,800 (in 2011) and investment income are not subject to Social Security tax. Accordingly, payroll taxes are particularly regressive.

“When both income and payroll taxes are considered, the effective marginal tax rates on earned income can be extraordinarily high, especially on low-income workers with children. . . . [s]ome of the very highest marginal effective tax rates are imposed on couples earning around \$30,000 a year.”<sup>133</sup> Effective marginal tax rates as high as 45 percent (and likely even higher if state and federal sales, excise, property and income

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<sup>130</sup> *Id.*; see also NAT'L TAXPAYER ADVOCATE, 2008 ANNUAL REPORT TO CONGRESS 126–135 (Dec. 31, 2008), available at [http://www.irs.gov/pub/irs-utl/08\\_tas\\_arc\\_intro\\_toc\\_msp.pdf](http://www.irs.gov/pub/irs-utl/08_tas_arc_intro_toc_msp.pdf).

<sup>131</sup> Larry J. Obhof, *The Irrationality of Enforcement? An Economic Analysis of U.S. Immigration Law*, 12 KAN. J.L. & PUB. POL'Y 163, 175 (2002–2003).

<sup>132</sup> JONATHAN BARRY FORMAN, *MAKING AMERICA WORK* 67 (2006).

<sup>133</sup> *Id.* at 69.

taxes are added into the analysis) on hard-working, low-income families are an onerous and unjust economic burden to bear.<sup>134</sup>

The amount of Social Security taxes paid by unauthorized workers and their employers has steadily increased, and is now in the billions of dollars.<sup>135</sup> While some of the mismatches are due to clerical errors, most exist because unauthorized workers do not qualify for a SSN.<sup>136</sup>

*B. Unauthorized Workers and their Families Do Not Qualify for Critically Progressive Social Security and Medicare Benefits*

Social Security is the largest and most successful financial justice program in the United States. For more than seventy five years Social Security has provided critical financial benefits to tens of millions of individuals every month. Social Security presently pays out \$782 billion to 62 million individuals with average benefits of almost \$14,000 per year.<sup>137</sup> While not means-tested, Social Security presently lifts more than thirteen million senior citizens and one million children out of poverty.<sup>138</sup> Without Social Security, almost one-half of all senior citizens would live in poverty.<sup>139</sup> For 55 percent of all seniors Social Security benefits comprise the majority of their income and for 26 percent of all seniors Social Security benefits comprise 90 percent or more of their income.<sup>140</sup>

Senior citizens of color are less likely than white senior citizen to receive Social Security benefits or to have other income from private pensions or assets. Only about 75 percent of Hispanics age sixty-five or older receive Social Security benefits.<sup>141</sup> Of the Hispanic seniors receiving Social Security benefits, 76 percent rely on Social Security for more than one-half of their retirement income and almost 50 percent rely on Social

<sup>134</sup> *Id.*

<sup>135</sup> See *supra* note 11 and accompanying text.

<sup>136</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, SOCIAL SECURITY: BETTER COORDINATION AMONG FEDERAL AGENCIES COULD REDUCE UNIDENTIFIED EARNINGS REPORTS 20–21 (2005), available at <http://www.gao.gov/new.items/d05154.pdf>; NAT'L COUNCIL OF LA RAZA, *supra* note 47, at 3.

<sup>137</sup> The total number of people drawing social security benefits is 62 million. See Press Release, Rep. Sam Johnson, Johnson Takes the Ways and Means Social Security Helm (Jan. 6, 2011), <http://www.samjohnson.house.gov/News/DocumentSingle.aspx?DocumentID=219185>. See also *Average Monthly Social Security Benefit for a Retired Worker*, SOCIAL SECURITY ONLINE., [http://ssa-custhelp.ssa.gov/app/answers/detail/a\\_id/13/~/average-monthly-social-security-benefit-for-a-retired-worker](http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/13/~/average-monthly-social-security-benefit-for-a-retired-worker) (last visited Sept. 19, 2011) (the average monthly benefit is \$1,177).

<sup>138</sup> Paul N. Van de Water & Arloc Sherman, *Social Security Keeps 20 Million Americans Out of Poverty: A State-By-State Analysis*, CTR. ON BUDGET & POLICY PRIORITIES 1, 1–2 (2009), <http://www.cbpp.org/files/8-11-10socsec.pdf> (exact figures are 1.1 million of children and 13.4 million of seniors).

<sup>139</sup> *Policy Basics: Top Ten Facts about Social Security on the Program's 75th Anniversary*, CTR. ON BUDGET & POLICY PRIORITIES (Aug. 13, 2010), [http://www.cbpp.org/files/PolicyBasics\\_SocSec-TopTen.pdf](http://www.cbpp.org/files/PolicyBasics_SocSec-TopTen.pdf).

<sup>140</sup> *Id.*

<sup>141</sup> Richard Fry et al., *Hispanics and the Social Security Debate*, PEW HISPANIC CTR., (March 16, 2005), <http://pewhispanic.org/files/reports/43.pdf>.

Security for most of their retirement income.<sup>142</sup> Without Social Security benefits 50 percent of all Hispanic seniors would live in poverty.<sup>143</sup>

While Social Security taxes are terribly regressive, Social Security benefits are notably progressive. The Social Security system is designed to redistribute meaningful financial resources from high wage earners to lower wage earners. The redistribution occurs through a very complicated and opaque benefits formula. The lack of transparency may be one secret to the Social Security system's long-time success and overwhelming public support. Although Social Security is not means tested, it is a phenomenally successful antipoverty government assistance program that bears none of the oppressive stigma of welfare.

Any and all workers over the age of 62 generally are entitled to Social Security retirement benefits if they have worked in covered employment for at least forty quarters (ten years).<sup>144</sup> A retiree's monthly benefit is based upon her thirty-five year earnings history (up to the maximum annual earnings cap, which is \$106,800 for 2011) adjusted for wage inflation. The highest thirty-five years of wage-inflation adjusted annual earnings are combined and divided by 420 (12 months x 35 years) to derive an inflation adjusted monthly amount.

This monthly amount is then put into a formula to derive the retiree's monthly retirement benefit at full retirement age. Presently, the retirement age is 66, but is increasing to age 67 for those born in 1960 or later.<sup>145</sup> The benefits formula is progressive.<sup>146</sup> For a worker turning 62 in 2011, the monthly benefit equals 90 percent of the first \$749, plus 32 percent of the next \$3,768 (if any) plus 15 percent of any remaining amount. This monthly amount is decreased if a retiree starts her benefits before her full retirement age or increased if a retiree continues to work beyond her full retirement age.<sup>147</sup>

In addition to retiree benefits, the Social Security system provides monthly benefits for a retiree's spouse, dependents, and survivors. A retiree's nonworking spouse can retire and receive a benefit derived solely from her spouse's benefit. This benefit is equal to 50 percent of the worker's benefit. If the retiree dies leaving a surviving spouse, she is entitled to a monthly benefit equal to 100 percent of the retiree's benefit

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<sup>142</sup> *Id.* at 7.

<sup>143</sup> *Id.* at 9.

<sup>144</sup> See Prajna Tuladhar, *There's Something About Mexico: Exploring the Controversy, Costs, and Benefits of a Social Security Totalization Agreement with Our Neighbor to the South*, 15 ELDER L.J. 581, 585 (2007).

<sup>145</sup> See Soc. Sec. Admin., *The Full Retirement Age is Increasing*, available at <http://ssa.gov/pubs/ageincrease.htm>.

<sup>146</sup> NAT'L COUNCIL OF LA RAZA, *supra* note 47, at 3.

<sup>147</sup> For a comprehensive review of the Social Security benefits formula, see Francine J. Lipman & James E. Williamson, *Social Security Benefits 101*, ORANGE COUNTY LAWYER May 2011 at 11, available at <http://ssrn.com/abstract=1826404>.

for her lifetime and any dependents will also receive monthly benefits through age eighteen.<sup>148</sup>

The Social Security benefit formula ensures that lower-wage workers and their families will receive a critically higher return on their contributions than higher wage workers. The current Social Security system particularly favors married one-worker large families with low lifetime earnings. Immigrants benefit substantially from this formula because, on average, they have lower incomes, a higher incidence of disability, more children per family, and longer life expectancies.<sup>149</sup> One study by Harvard economists found that Hispanics enjoy a Social Security rate of return that is 35–60 percent higher than the rate of return for the general population.<sup>150</sup>

A lower-wage worker, earning \$24,000 average annual earnings for the last thirty-five years, retiring at full retirement at age 66 in 2011 would receive tax-free Social Security benefits of \$12,888 per year for the rest of her life. If she were married to a nonworking spouse, upon his retirement at full retirement age they would receive tax-free Social Security benefits of \$19,332 per year or more than 80 percent of their pre-retirement income. This critical antipoverty relief, which is contingent upon thirty-five years of hard-work and steady payment of regressive Social Security taxes, is not available to unauthorized workers and their families.

Unauthorized workers who pay more than \$12 billion dollars of Social Security taxes each year on tens of billions of dollars of wages (more than \$835 billion through 2007) will never qualify for these retirement benefits or Medicare unless they are legally present in the United States and obtain work authorization. For decades, only individuals who were legally present in the United States could qualify for Social Security benefits. Since 2004, it has become even more difficult to qualify for Social Security benefits. After President Bush signed the Social Security Protection Act of 2004 into law, a noncitizen who files for Social Security benefits based on a SSN assigned on or after January 1, 2004, is required to have work authorization at the time the SSN is assigned or at some later time.<sup>151</sup> Therefore, in addition to being legally present undocumented immigrants with 2004 or later issued SSNs must receive work authorization to qualify for Social Security benefits.

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<sup>148</sup> See generally, *Survivor Planner*, SOCIAL SECURITY ONLINE, <http://ssa.gov/survivorplan/onyourown.htm> (last reviewed or modified Jan. 3, 2012).

<sup>149</sup> Fernando Torres-Gil et al., *The Importance of Social Security to the Hispanic Community*, CTR. ON BUDGET & POLICY PRIORITIES, (June 28, 2005), <http://www.cbpp.org/files/6-28-05socsec3.pdf>.

<sup>150</sup> Jason Furman, *Top Ten Facts on Social Security's 70th Anniversary*, CTR. ON BUDGET & POLICY PRIORITIES (Aug. 11, 2005), <http://www.cbpp.org/files/8-11-05socsec.pdf>.

<sup>151</sup> Social Security Act of 2004, Pub. L. No. 108-203, § 211, 118 Stat. 493, 518 (2004).

Only if all of these requirements are satisfied will a former undocumented immigrant qualify for Social Security benefits. If a former undocumented immigrant qualifies for Social Security benefits, they will be based on all Social Security-covered earnings regardless of their work status during the earning period.<sup>152</sup> However, the retiree has the burden of proving her earnings history and only wages that are reported to the SSA, and not paid “under the table,” count toward the required forty quarters of earnings to qualify for Social Security benefits and Medicare.

Because unauthorized workers do not have a SSN the SSA will not have an accurate record of their earnings history. Accordingly, unauthorized workers must provide satisfactory documentation to the SSA evidencing their annual earnings history. Currently, the SSA has a policy of assisting, and not prosecuting these workers because the SSA is charged with maintaining correct earnings records.<sup>153</sup> However, this policy is subject to change immediately. It is a felony to falsely use a SSN carrying a penalty of up to \$5,000 and five years in prison.<sup>154</sup> Even if unauthorized workers become documented residents with work authorization many are too afraid to risk coming forward even to receive life-changing Social Security credits for decades of work.

Because of complexity and lack of transparency in the Social Security system, most U.S. citizens do not understand how their benefits accrue. Unauthorized workers, who often lack critical English language skills, an education, and any familiarity with the U.S. tax and retirement systems are likely unaware that this substantial benefit is available to them.<sup>155</sup> If they have ten years of covered wages, are lawfully present and obtain work authorization, they have a lifetime of meaningful, antipoverty family benefits awaiting them amounting to hundreds of thousands of dollars. However, some members of Congress are trying to deny any possibility of Social Security benefits with respect to unauthorized work despite the requirement to pay Social Security taxes on these wages.

### *C. Congress Narrowly Defeats a Provision to Deny Social Security Benefits to Otherwise Eligible Lawfully Present Immigrant Workers*

In May 2006, the Senate narrowly defeated (50–49) former Senator John Ensign’s amendment to deny Social Security quarterly credits to

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<sup>152</sup> Dawn Nuschler & Alison Siskin, *Social Security Benefits for Noncitizens: Current Policy and Legislation* CRS REPORT FOR CONG. (May 11, 2005), <http://fpc.state.gov/documents/organization/46681.pdf>.

<sup>153</sup> OFFICE OF THE INSPECTOR GENERAL, CONGRESSIONAL RESPONSE REPORT: SOCIAL SECURITY ADMINISTRATION BENEFITS RELATED TO UNAUTHORIZED WORK 4–5 (2003), available at <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-03-03-23053.pdf>.

<sup>154</sup> 42 U.S.C. § 408(a) (2006). *But see* Flores-Figueroa v. United States, 556 U.S. 646 (2009).

<sup>155</sup> See Randy Capps et al., *The Health and Well-Being of Young Children of Immigrants*, URBAN INST. (2004), [http://www.urban.org/UploadedPDF/311139\\_Childrenimmigrants.pdf](http://www.urban.org/UploadedPDF/311139_Childrenimmigrants.pdf).

legally present immigrant workers for work performed while the workers did not have a SSN authorizing employment, but upon which the worker and her employer paid Social Security and Medicare taxes.<sup>156</sup> This is not the first time this economic injustice has been proposed nor will it be the last. In 2003, the Senate Finance Committee considered a similar proposal, but the then SSA Commissioner stated that the proposal was not practicable. The Commissioner stated in writing that the information regarding the immigration status necessary to implement any accurate adjudication of benefits under this proposal did not exist.<sup>157</sup> In February 2008, the now head of the House Ways and Means Subcommittee Social Security proposed a similar bill (H.R. 5515, 110<sup>th</sup> Congress).<sup>158</sup>

Denying Social Security benefits for work upon which taxes were paid would deter tax compliance for the millions of unauthorized workers and their employers. According to the SSA's Chief Actuary three-quarters of unauthorized workers pay payroll taxes.<sup>159</sup> If this proposal were implemented, employers may choose to pay unauthorized workers cash "under the table" and forgo sending tax payments or any information to the IRS or SSA.

This unjust strategy comes at a significant cost to the U.S. government. The National Taxpayer Advocate Nina Olson has warned, "a change in tax compliance of even one percentage point equates to an annual loss of more than \$20 billion of revenue to the federal government."<sup>160</sup> Moreover, "[o]ver the next 75 years, new immigrants will provide a net benefit of approximately \$611 billion in present value to the Social Security system."<sup>161</sup> In short, this proposal is not only fundamentally unjust and un-American it is poor fiscal policy that could undermine the continuation of the most successful financial justice program for qualifying retirees and their families.

The denial of life-changing Social Security and Medicare benefits for undocumented immigrant families coupled with the requirement to pay all employment taxes (and in 2009 and 2010 in many cases at a higher tax rate than similarly situated U.S. citizens and legally working residents) results in an oppressive undocumented immigrant wage tax. The Social Security

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<sup>156</sup> 152 CONG. REC. S4746-47 (daily ed. May 18, 2006) (statement of Sen. Leahy & vote results).

<sup>157</sup> Jonathan Blazer, *Immigration Reform and Access to Public Benefits: The Return of an Uneasy Coupling*, NAT'L IMMIGRATION CTR. (May 15, 2006), [http://www.nilc.org/immlawpolicy/cir/cirandbenefits\\_2006-5-15.pdf](http://www.nilc.org/immlawpolicy/cir/cirandbenefits_2006-5-15.pdf).

<sup>158</sup> 154 CONG. REC. H2168-69 (daily ed. Apr. 10, 2008) (statement of Rep. Johnson).

<sup>159</sup> 152 CONG. REC. S4742 (daily ed. May 18, 2006) (statement of Sen. Cornyn).

<sup>160</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GA-06-100, OPTIONS EXIST TO ENABLE DATA SHARING BETWEEN IRS AND USCIS BUT EACH PRESENTS CHALLENGES 31 (2005).

<sup>161</sup> *Proposal to Strip Workers of Social Security Earnings Based on Prior Employment Status: Bad for the System and an Affront to Our Values*, NAT'L IMMIGRATION LAW CENTER (2007), [http://www.nilc.org/immlawpolicy/CIR/ensign\\_ss\\_amdmt\\_2007-02-28.pdf](http://www.nilc.org/immlawpolicy/CIR/ensign_ss_amdmt_2007-02-28.pdf).

tax rate for undocumented immigrants was higher than for similarly situated U.S. citizens and legally working residents in 2009 and 2010 because of the Making Work Pay tax credit.

*D. Making Work Pay (Social Security Tax Rate Cut) Tax Credit in 2009 and 2010*

When Congress passed, and President Obama signed into law, The American Recovery and Reinvestment Act of 2009 (ARRA) they put into effect an exclusion from employee Social Security taxes (6.2 percent tax rate cut) on up to \$6,451 of earned income (\$12,903 of earned income for married filing jointly taxpayers).<sup>162</sup> The exclusion was implemented through the income tax system as the Making Work Pay tax credit, a refundable income tax credit of up to \$400 ( $\$6,451 \times .062$ ) for single taxpayers or \$800 ( $\$12,903 \times .062$ ) for married filing jointly taxpayers.<sup>163</sup> The Making Work Pay tax credit was the centerpiece of the tax reduction provisions of the ARRA. President Obama strongly pursued its inclusion in the legislation because it would put money back into the pockets of workers.

Nevertheless not all workers in America qualified for the credit. Because the credit was targeted to lower and middle wage earners it phased-out above modified adjusted gross income levels of \$95,000 (\$190,000 for married filing jointly taxpayers). In addition, a SSN is required for the credit. Therefore, undocumented immigrants and their families do not qualify for this credit. However, in an interesting departure from the 2008 economic stimulus tax credit and somewhat consistent with the HEART 2008 amendments, married filing jointly taxpayers only need one SSN to qualify for the full credit.<sup>164</sup> This relaxation of the Social Security requirement is irrespective of the couples' military status (so broader than the HEART 2008 amendment). Moreover, the SSN does not have to belong to the working spouse. As a result, if an undocumented immigrant is married to an individual who qualifies for a SSN the couple can qualify for the tax credit in 2009 and 2010. Nevertheless, Congress' SSN requirement denies the 2009 and 2010 Social Security tax rate cut to millions of unauthorized workers who cannot file with a spouse with a Social Security number and as a result are paying Social Security taxes at a higher tax rate.

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<sup>162</sup> See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 § 1001, 123 Stat. 115, 309 (2009).

<sup>163</sup> *Id.*

<sup>164</sup> See *Most Workers Need to File New Schedule M; Making Work Pay Credit Offers Tax Savings Up to \$800*, INTERNAL REVENUE SERV. (last reviewed or updated Mar. 8, 2011), <http://www.irs.gov/newsroom/article/0,,id=217793,00.html>

*E. Social Security Tax Rate Cut for ALL Workers in 2011*

In 2011, Congress enacted and President Obama signed into law the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010.<sup>165</sup> The 2010 Act cut the employees' Social Security tax rate from 6.2 percent to 4.2 percent on all wages and self-employment income.<sup>166</sup> This one-year 2 percent tax cut on up to \$106,800 of wages is projected to generate up to \$2,136 tax savings per worker or \$110 billion.<sup>167</sup> Unlike the 2009 and 2010 Making Work Pay tax credits this tax rate cut is not phased out for higher wage earners, but is capped at the maximum amount of wages subject to Social Security taxes. Because of its design more than 40 percent of the \$110 billion in tax savings goes to households with income levels at or above \$100,000. Twenty-five percent of the tax savings goes to households with income under \$50,000. By contrast, more than half of the 2009 and 2010 Making Work Pay tax credit went to households making less than \$50,000 and just one-sixth to those with income over \$100,000.<sup>168</sup>

However, because the Social Security tax rate cut is implemented through the payroll tax system and not the income tax system all workers in the payroll tax system receive the tax rate cut including all unauthorized workers. Accordingly, while these workers do not qualify for Social Security benefits or Medicare, at least in 2011 as compared to 2009 and 2010, they are not paying a higher Social Security tax rate than similarly situated U.S. citizens and authorized workers.

Undocumented immigrants are subject to and pay all payroll taxes even though they do not qualify for the benefits provided by the Social Security, Medicare, disability, unemployment, and other worker benefit systems. Undocumented immigrant wage taxes are in addition to the requirement to pay all federal, state, and local sales, use, excise, property, and income taxes.

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<sup>165</sup> Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, Pub. L. No. 111-312, § 601, 124 Stat. 3296, 3297 (2010).

<sup>166</sup> *Id.* (reducing the payroll tax rate by 2.0 percent).

<sup>167</sup> Emily Brandon, *6 Ways to Spend Your Social Security Payroll Tax Cut*, U.S. NEWS & WORLD REPORT'S PLANNING TO RETIRE BLOG (Mar. 10, 2011), <http://money.usnews.com/money/blogs/planning-to-retire/2011/03/10/6-ways-to-spend-your-social-security-payroll-tax-cut>.

<sup>168</sup> Robertson Williams, *The Paradox of Thrift, or What to do With My Payroll Tax Cut?*, TAX POLICY CENTER. URBAN-BROOKINGS TAX POLICY CTR. (Feb. 9, 2011), <http://taxvox.taxpolicycenter.org/2011/02/09/the-paradox-of-thrift-or-what-to-do-with-my-payroll-tax-cut/>.

IV. THE UNDOCUMENTED IMMIGRANT TAX: AN ECONOMIC  
REDISTRIBUTION FROM WORKING POOR UNDOCUMENTED IMMIGRANT  
FAMILIES TO AMERICANS FROM SEA TO SHINING SEA

As a great American once said nothing is as certain as taxes.<sup>169</sup> I hope that this Article has made certain the truth of the statement that “undocumented immigrants pay taxes.”<sup>170</sup> Indeed, undocumented immigrants have paid, are paying, and will continue to pay billions of dollars in taxes every year to federal, state, and local governments across this great nation. These direct tax payments are equal to hundreds of billions of dollars and indirectly enrich all Americans from sea to shining sea.

The undocumented immigrant tax described in this Article includes both additional income taxes and wage tax burdens. The undocumented immigrant income tax, which includes the denial of the EITC, was increased in 2008 with the even more problematic denial of the 2008 economic stimulus tax credit. In addition, because of challenging filing requirements and lack of literacy and access, millions of undocumented immigrants overpay their federal and state income tax liabilities because they are not able to file for tax refunds. Moreover, millions of undocumented immigrants pay billions of dollars in Social Security (at a higher rate in 2009 and 2010 than U.S. citizens and other authorized workers because of the denial of the Making Work Pay tax credit) and Medicare taxes as well as disability and unemployment taxes every year without any corresponding benefits. More recently, former Republican Senator John Ensign of Nevada has proposed amendments to comprehensive immigration reform acts that have threatened to increase retroactively “the undocumented immigrant tax” even more significantly. Consequently, undocumented immigrants are subject to greater tax burdens than U.S. citizens in the same circumstances even though they do not qualify for the broad safety net of government benefits (other than emergency medical care and primary and secondary education, which they sometimes reject because of fear and vulnerability) or have the right to vote.<sup>171</sup>

Without the opportunity to vote or even to be heard in any meaningful sense undocumented immigrants have little or no recourse for injustices. As a result, they suffer daily. Their suffering translates into lower prices

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<sup>169</sup> The full quote attributed to Benjamin Franklin is “Our Constitution is in actual operation; everything appears to promise that it will last; but nothing in this world is certain but death and taxes.” Jeffery L. Yablon, As *Certain as Death: Quotations About Taxes (2010 Edition)*, TAX ANALYSTS (2009), <http://taxprof.typepad.com/files/yablon.pdf>.

<sup>170</sup> *Undocumented Immigrants as Taxpayers*, IMMIGRATION POLICY CTR. (Nov. 1, 2007), <http://www.immigrationpolicy.org/just-facts/undocumented-immigrants-taxpayers>.

<sup>171</sup> See Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and the Current Prospects for Change*, 18 LAW & INEQ. 271, 282–85 (2000).

for countless goods and services and lower taxes in America. As Americans we have an obligation to speak out for those without a voice. You have a voice and a vote; exercise them with this knowledge and the goal of financial justice for all.

How long will hate and prejudice thrive in America? As Dr. King said almost fifty years ago:

The battle is in our hands. And we can answer with creative nonviolence the call to higher ground to which the new directions of our struggle summons us. The road ahead is not altogether a smooth one. There are no broad highways that lead us easily and inevitably to quick solutions. But we must keep going.<sup>172</sup>

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<sup>172</sup> King, *supra* note 4.