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The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*

Francine J. Lipman**

I. INTRODUCTION

Many Americans believe that undocumented immigrants are exploiting the United States economy.¹ The widespread belief is that “illegal

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** Associate Professor of Law, Chapman University School of Law. A draft of this Article was presented at the 2006 Conference of Western Law Professors of Color in San Diego, California and the 2006 Western Region American Accounting Association Meeting in Portland, Oregon. I thank Ernesto Hernández-López and numerous participants in the Low-Income Taxpayer Clinic listserv for their support and comments on a draft of this Article. I also thank Michelle Dalton ('05) and Sean M. Stegmaier ('06) for their expert tax research, skillful editing assistance, and valued camaraderie. I also gratefully acknowledge research support from Chapman University School of Law and my affiliation with the George L. Argyros School of Business and Economics. This Article is dedicated to my sister and muse, Dr. Wendy E. Lipman, whose boundless strength, wisdom, and patience only pale in comparison to her inexhaustible kindness.

¹ See KENNETH K. LEE, HUDDLED MASSES, MUDDLED LAWS: WHY CONTEMPORARY IMMIGRATION POLICY FAILS TO REFLECT PUBLIC OPINION 21, 27 (1998) (finding that sixty-one percent of Americans polled feared that immigrants would “take jobs away from Americans,” and fifty-nine percent said immigrants would “end up on welfare”); JULIAN L. SIMON, THE CATO INSTITUTE, IMMIGRATION: THE DEMOGRAPHIC & ECONOMIC FACTS 47 (1995) [hereinafter SIMON, IMMIGRATION] (finding that forty-seven percent of those polled by the *New York Times* believed that “most immigrants wind up on welfare,” and forty-nine percent of those polled by the *New York Times*/CBS News thought “[m]ost recent immigrants are here illegally”); Julian L. Simon, *Are There Grounds for Limiting Immigration?*, 13 J. LIBERTARIAN STUD. 137, 150 (1998) [hereinafter Simon, *Grounds*] (concluding that the consequence of immigration perceived as most worrisome is “the financial burden on the public fisc”); Ella Dlin, *The Anti-Terrorism and Effective Death Penalty Act of 1996: An Attempt to Quench Anti-Immigration Sentiments?*, 38 CATH. LAW. 49, 57 (1998) (stating that “anti-immigration feelings . . . have never before reached this heightened level”); Richard Sybert, *Population, Immigration and Growth in California*, 31 SAN DIEGO L. REV. 945, 995–1000 (1994) (citing numerous national, state, and local polls regarding immigration generally and undocumented immigrants specifically, noting that eighty-nine percent of Californians believe immigration is a major burden on California’s economy, and that sixty-four percent of Americans said that immigrants “mostly hurt” the economy); Kristina M. Owen, *The Immigrant First as Human: International Human Rights Principles and Catholic Doctrine as New Moral Guidelines for U.S. Immigration Policy*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 499, 502–09 (1999) (describing the reasoning behind anti-immigrant sentiment and the widespread American belief “that immigrants are an economic detriment, even the inevitable downfall, of the United States”); Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law Into the Breach Once More*, 21 N.M. L. REV. 219, 241–42 (1991) (stating that the “net drain” argument is commonly used to support restrictions of public assistance for undocumented immigrants); *A Symposium on Proposition 187*, 23 W.

aliens”² cost more in government services than they contribute to the economy.³ This belief is demonstrably false. “[E]very empirical study of illegals’ economic impact demonstrates the opposite . . . : undocumented actually contribute more to public coffers in taxes than they cost in social services.”⁴

ST. U.L. REV. 1, 2–4 (1995) (quoting Richard Halvorson, who cited a Rice University finding that the cost of illegal immigration to the United States has been \$51 billion); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT’L L. 217, 220, 227–34 (1994–1995) (describing the twisted analysis of data to support the false conclusion that undocumented immigrants “drain-the-fisc”).

² The term “illegal aliens” “is racially loaded, ambiguous, imprecise, and pejorative.” 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 (Spring 2004) (citations excluded). In her article, Professor Lyon presents a comprehensive analysis of the appropriate terminology for non-U.S. citizens and their immigration status. *Id.* at 573–82. Consistent with her conclusion, I 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).” *Id.* at 581. The term “unauthorized workers” will be used to describe people who are forbidden under the immigration laws to work for pay. *Id.* at 582. As Professor Lyon describes, the distinction between these terms “is important because although the two groups overlap numerically, personally, and politically, they are not coterminous. . . . [I]mmigrants who are unauthorized to work are not all undocumented and those who are undocumented did not all enter the country illegally.” *Id.* Professor Lyon prefers these terms because they are commonly used, relatively uncontroversial, “accurately convey the legal situation of the groups described,” and create a meaningful distinction. *Id.*

³ George Skelton, *The Times Poll; Americans Give High Marks to Quality of Life*, L.A. TIMES, Jan. 1, 1990, at A1 (finding that most Americans felt that undocumented immigrants take more from the United States economy than they contribute through taxes); JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* 294–95 (1989) (discussing the perception that undocumented immigrants are a net cost versus net benefit on the U.S. economy); Olivas, *supra* note 1, at 227–34 (describing the manipulation of data used to support the erroneous conclusion that undocumented immigrants cost more in government benefits than they pay in taxes and concluding that the cost/benefits question is “more than an arithmetic issue”).

⁴ Reich, *supra* note 1, at 243, 244–46 (discussing the voluminous empirical literature supporting the “net economic benefit” of undocumented immigrants on the federal, state, and local economies); see also Alan O. Sykes, *The Welfare Economics of Immigration Law: A Theoretical Survey with an Analysis of U.S. Policy*, in JUSTICE IN IMMIGRATION, 158, 191 (Warren F. Schwartz ed., 1995) (stating that “[t]here is no clear evidence that undocumented aliens as a group are a net drain on the public treasury once their contributions to tax revenues are taken into account.”); Simon, *supra* note 3, at 296 (noting that “[o]n balance . . . natives exploit illegal immigrants through the public coffers by taking much more from the illegals in taxes than is spent on them in public expenditures.”); Simon, IMMIGRATION, *supra* note 1, at Chapter 7 (concluding that “illegals are more than paying their own way and are contributing to the public coffers”); Olivas, *supra* note 1, at 232 (concluding that “[v]irtually all the thorough and non-partisan studies show the same result” and corroborate the conclusion that tax revenues from undocumented immigrants exceed the cost of government services); Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1197 (1997) (noting that “[g]iven that undocumented immigrants have little access to public entitlements, they may make a positive contribution to public coffers even under current fiscal policies”); LOUISE AUERHAHN & BOB BROWNSTEIN, WORKING PARTNERSHIPS USA, *THE ECONOMIC EFFECTS OF IMMIGRATION IN SANTA CLARA COUNTY AND CALIFORNIA* 12 (2004), available at http://wpusa.org/publications/complete/wpusa_immig.pdf (finding that “undocumented immigrants more than pay their way”); Larry J. Obhof, *The Irrationality of Enforcement? An Economic Analysis of U.S. Immigration Law*, 12 KAN. J.L. & PUB. POL’Y 163, 175–76 (2002–2003) (describing the net economic benefit of undocumented immigrants

Moreover, undocumented immigrants contribute to the U.S. economy by investing and consuming goods and services;⁵ filling millions of “essential worker” positions resulting in subsidiary job creation, increased productivity and lower costs of goods and services;⁶ and making unrequited contributions to Social Security, Medicare and unemployment insurance

given that approximately seventy-five percent have income and payroll taxes withheld and less than a third file for refunds); Sidney Weintraub, *Illegal Immigrants in Texas: Impact on Social Services and Related Considerations*, 18 INT'L. MIG. REV. 733 (1984) (showing a substantial net gain of revenues over expenses from undocumented persons in Texas); Sidney Weintraub & Gilberto Cardenas, *The Use of Public Services by Undocumented Aliens in Texas: A Study of State Costs and Revenues* 87–88 (Public Policy Research Report 60, LBJ School of Public Affairs, 1984) (estimating annual revenues of \$157–277 million and costs of only \$50–97 million even though revenues were biased downward and costs were biased upward); DEMETRIOS G. PAPADEMETRIOU & NICHOLAS DiMARZIO, UNDOCUMENTED ALIENS IN THE NEW YORK METROPOLITAN AREA 105–06, 109 (1986) (finding that undocumented immigrants created a fiscal gain in New York); COMMUNITY RESEARCH ASSOCIATES, UNDOCUMENTED IMMIGRANTS: THEIR IMPACT ON THE COUNTY OF SAN DIEGO (May 1980) (discovering that illegal workers and their employers contribute \$16–31 million annually, while the fiscal costs were only \$11–22 million); Plyler v. Doe, 457 U.S. 202, 228 (1982) (recognizing the efficacy of the cost-benefit argument for undocumented immigrants by stating that “[t]here is no evidence in the record suggesting that illegal entrants impose any significant burden on the State’s economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc.”).

⁵ See Pia Orrenius & Madeline Zavodny, *Immigration Policy: What are the Consequences for an Amnesty for Undocumented Immigrants?*, 9 GEO. PUB. POL’Y REV. 21, 24–25 (Spring 2004) (citing a study indicating that, while most undocumented immigrants’ earnings are consumed, about 6.5% are applied to productive uses such as investment); AM. IMMIGR. LAW FOUND., *THE ECONOMIC CONSENSUS ON IMMIGRATION: DO IMMIGRANTS TAKE JOBS FROM NATIVE-BORN AMERICANS?* (1996), available at http://www.aifl.org/ipc/policy_reports_1996_pr9604.htm (finding that immigration likely creates jobs through immigrant demand for investments and goods and services); OVEN, *supra* note 1, at 508–09 (noting that each immigrant is a consumer, as well as a worker, expanding the economy with consumption of food, shelter, and other products and services); AUERHAHN & BROWNSTEIN, *supra* note 4, at 29 (noting that immigrants are consumers, thereby increasing the demand for goods and services).

⁶ AM. IMMIGR. LAW FOUND., *supra* note 5 (finding that immigrants filling vital low-skill jobs may create subsidiary job opportunities and economies of scale in production and market growth); Rob Paral, *Mexican Immigrant Workers and the U.S. Economy*, 1 IMMIGR. POL’Y FOCUS 1, 5–6 (Sept. 2002), available at <http://www.aifl.org/ipc/ipf0902.pdf> (finding that immigrant workers are essential to fill the 24.7 million jobs that will be created by 2010 for persons with minimal education, while education levels are rising for non-immigrant workers); Orrenius & Zavodny, *supra* note 5, at 26–27 (finding that undocumented immigrants allow high-skilled workers to become more productive and increase their income); Marisa Ann Tostado, *Alienation: Congressional Authorization of State Discrimination Against Immigrants*, 31 LOY. L. REV. 1033, 1068–69 (Apr. 1998) (noting that undocumented workers provide essential services for low wages); AUERHAHN & BROWNSTEIN, *supra* note 4, at 19 (finding that the immigrant workforce is “essential to economic growth in California and the United States”); George J. Borjas, *Does Immigration Grease the Wheels of the Labor Market?*, BROOKINGS PAPERS ON ECON. ACTIVITY, 1:2001, 69, 77 (finding that labor market efficiency gains accruing to U.S. non-immigrants from immigration is approximately 0.1% of Gross Domestic Product, or roughly \$10 billion annually); Simon, *Grounds*, *supra* note 1, at 151 (finding that overall immigration causes a positive effect on the labor market); Jenifer M. Bosco, *Undocumented Immigrants, Economic Justice, and Welfare Reform in California*, 8 GEO. IMMIGR. L.J. 71, 80 (Winter 1994) (noting that the low cost of labor is passed on to American consumers through their purchase of goods and use of services).

programs.⁷ Eighty-five percent of eminent economists surveyed have concluded that undocumented immigrants have had a positive (seventy-four percent) or neutral (eleven percent) impact on the U.S. economy.⁸

Documented and undocumented immigrants have played a vital role in this country's economy and development since colonial times.⁹ Immigrants "voted in the United States and even held public office from the Colonial Era through the 1920s."¹⁰ "[N]either the Constitution nor common law jurisprudence present a bar" to extending voting rights to noncitizens, and principles of democracy and equal protection actually support it.¹¹ For many years, the right to vote was based upon property ownership rather than citizenship, reflecting the rationale that "property owners, including noncitizens, pay taxes and thus they too should have the right to vote."¹²

Undocumented immigrants, like all citizens and residents of the United States, are required to pay taxes.¹³ Despite the historic and strong Ameri-

⁷ See Paula N. Singer & Linda Dodd-Major, *Identification Numbers and U.S. Government Compliance Initiatives*, 104 TAX NOTES 1429, 1433 (Sept. 20, 2004) (discovering that in 2003 the SBA reported unposted earnings of \$421 billion, due to mismatches of Social Security numbers and names, likely from undocumented workers, as well as some clerical errors, representing \$64.4 billion of employee and employer contributions to Social Security and Medicare trust funds, including approximately \$14 billion for 2003); AM. IMMIGR. LAW FOUND., *THE VALUE OF UNDOCUMENTED WORKERS* (Apr. 2002), available at http://www.aifl.org/ipc/policy_reports_2002_value.asp (citing Urban Institute Report finding that undocumented immigrants contributed \$2.7 billion to Social Security and another \$168 million to unemployment insurance taxes in 1990, programs that will never provide them with any benefit); AUERHAHN & BROWNSTEIN, *supra* note 4, at 12 (noting that many undocumented immigrants have Social Security taxes withheld from their paychecks, yet they are not eligible for any retirement Social Security or Medicare benefits).

⁸ Simon, *IMMIGRATION*, *supra* note 1, at 47–48 (reporting additionally that ninety-three percent of surveyed economists believe the same or a greater number of immigrants would have the most favorable impact on the U.S. standard of living, and eighty percent of economists stated that twentieth-century immigration had a "very" favorable effect on U.S. economic growth).

⁹ See Dennis J. Aigner, *The Economics of Legal Immigration in California*, 8 LA RAZA L.J. 90, 91 (1995) (stating that "[h]istorically, immigrants have clearly played a predominant role in the development and success of this country"); Virginia Harper Ho, *Noncitizen Voting Rights: The History, the Law, and Current Prospects for Change*, 18 LAW & INEQ. J. 271, 273–83 (Summer 2000) (recounting the history of immigrant voting rights).

¹⁰ Ho, *supra* note 9, at 271.

¹¹ See Ho, *supra* note 9, at 305 (concluding that there is not a ban under the Constitution for extending voting rights to noncitizens, and arguing that there is support for it under broadly accepted democratic and equal protection principles); see also Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977) (also arguing that the Constitution does not prohibit voting rights for noncitizens).

¹² Ho, *supra* note 9, at 279 (noting that while neither women nor blacks could own property or vote, white immigrant males could vote because they were stakeholders, defined as property owners and taxpayers).

¹³ See *Sixth Annual Harvard Latino Law and Policy Conference: Latino Leadership and Collective Power*, 7 HARV. LATINO L. REV. 75, 97 (Spring 2004) (quoting Massachusetts State Senator Jarrett Barrios commenting that most people are shocked when he notes that undocumented immigrants pay taxes); Thomas St. G. Bissell, *U.S. Income Taxation of Non-resident Alien Individuals*, 907-2d TAX MGMT FOREIGN INCOME PORTFOLIOS (BNA) at A-1 to -3 (2005) (recounting the history of taxation of resident aliens and U.S. citizens on one hand, and nonresidents on the other hand, since at least 1913); Ho, *supra* note 9, at

can opposition to taxation without representation, undocumented immigrants (except in rare cases) have not enjoyed the right to vote on any local, state or federal tax or other matter for almost eighty years.¹⁴ Nevertheless, each year undocumented immigrants add billions of dollars in sales, excise, property, income, and payroll taxes, including Social Security, Medicare and unemployment taxes, to federal, state and local coffers.¹⁵ Hundreds of thousands of undocumented immigrants go out of their way to file annual federal and state income tax returns.¹⁶

Yet undocumented immigrants are barred from almost all government benefits,¹⁷ including food stamps,¹⁸ Temporary Assistance for Needy Families, Medicaid, federal housing programs,¹⁹ Supplemental Security Income,

295–96 (noting that immigration laws actually require five years of proof of paying taxes prior to obtaining citizenship); *see also* JEFFREY S. PASSEL & REBECCA L. CLARK, THE URBAN INSTITUTE, IMMIGRANTS IN NEW YORK: THEIR LEGAL STATUS, INCOMES, AND TAXES (1998) (finding that the bulk of the research on the fiscal impact of immigrants focuses on the cost rather than the benefit side of the analysis, often failing to mention the tax contributions of immigrants).

¹⁴ The election of 1928 was the first national election in which no immigrant had the right to vote in any national, state or local election. *See* Ho, *supra* note 9, at 282–85 (describing the fierce opposition to granting voting rights to undocumented and documented immigrants, and finding the rare cases in which undocumented immigrants can vote in certain elections, including school board elections in New York, and city tax matters in Takoma Park, Maryland). “[M]ost scholars advocate extending the franchise [voting rights] to permanent residents who have met relevant residency requirements for the jurisdiction.” *Id.* at 306.

¹⁵ AUERHAHN & BROWNSTEIN, *supra* note 4, at 12 (stating that undocumented immigrants pay sales, income and payroll taxes each year, including almost \$3 billion annually in Social Security and unemployment insurance); PASSEL & CLARK, *supra* note 13 (finding that even assuming only a fifty percent compliance rate for nonmandatory taxes, 540,000 undocumented immigrants in New York pay in excess of \$1.1 billion in federal, state and local taxes each year); JEFFREY S. PASSEL & REBECCA L. CLARK, THE URBAN INSTITUTE, TAXES PAID BY IMMIGRANTS IN ILLINOIS 34–35 (January 1996) (finding that undocumented immigrants in Illinois pay more than \$1.2 billion in federal, state and local taxes annually); REBECCA L. CLARK & JEFFREY S. PASSEL, THE URBAN INSTITUTE, HOW MUCH DO IMMIGRANTS PAY IN TAXES? EVIDENCE FROM LOS ANGELES COUNTY 4 (August 1993) (determining that immigrants who entered the United States between 1980 and 1990 contributed \$3.7 billion in Federal and state income taxes, property tax, FICA, and unemployment insurance in 1990); REBECCA L. CLARK ET AL., THE URBAN INSTITUTE, FISCAL IMPACTS OF UNDOCUMENTED ALIENS: SELECTED ESTIMATES FOR SEVEN STATES 132 (September 1994) (finding that in seven states, representing eighty-six percent of the undocumented immigrant population, \$1.9 billion in sales, property and state income taxes were collected, which represented only about forty percent of the state and local tax revenue for 1992).

¹⁶ *See* Ho, *supra* note 9, at 295–96 (noting that undocumented immigrants go out of their way to pay taxes, even forgoing tax refunds, because proof of tax payments is required for naturalization); *see also* Singer & Dodd-Major, *supra* note 7, at 1434 (describing the more than 500,000 tax returns filed by immigrants “with U.S. addresses who were not authorized to work or even to be in the United States.”).

¹⁷ The primary and most costly social services that undocumented immigrants are not barred from are public elementary and secondary education, and emergency medical services under Medicaid. The state cost of these services for approximately eighty-six percent of undocumented immigrants in 1993 was \$3.1 billion for education, and a rough estimate of \$210–450 million for emergency Medicaid. *See* CLARK ET AL., *supra* note 15, at i–v, 13.

¹⁸ *See* 7 U.S.C.A. § 2015(f) (limiting the eligibility of aliens for food stamps).

¹⁹ *See* 8 U.S.C.A. §§ 1611, 1641 (2006) (limiting the eligibility for federal benefits to “qualified aliens,” a term which excludes undocumented immigrants, among others).

Unemployment Insurance,²⁰ Social Security, Medicare,²¹ and the Earned Income Tax Credit (EITC).²² Generally, the only benefits federally required for undocumented immigrants are emergency medical care, subject to financial and category eligibility,²³ and elementary and secondary public education.²⁴ Many undocumented immigrants will not even access these few critical government services because of their ever-present fear of government officials and deportation.²⁵

²⁰ See 26 U.S.C.A. § 3304(a)(14)(A) (2006) (excluding undocumented aliens from unemployment insurance, which consists of state compensation administered under federal guidelines).

²¹ See 42 U.S.C.A. §§ 401–404, 405(c)(2)(B)(i) (2006) (limiting Social Security benefits, after 1974, to elderly and disabled workers other than undocumented aliens); 42 U.S.C. § 1395(c) (providing health insurance for the elderly and disabled, excluding undocumented immigrants); see also 8 U.S.C.A. §§ 1611(a), 1611(c)(1) (2006) (excluding undocumented aliens from any Federal public benefit including “any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided . . . by an agency of the United States or by appropriated funds of the United States.”). The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996), also prohibits states from providing “any State or local public benefit” to undocumented aliens unless the state enacts a law affirmatively providing for such eligibility. *Id.* at Sec. 411, 110 Stat. at 2268–69 (codified at 8 U.S.C. § 1621). See also DAWN NUSCHLER & ALISON SISKIN, SOCIAL SECURITY BENEFITS FOR NONCITIZENS: CURRENT POLICY AND LEGISLATION, CRS 7–8 (Congressional Research Service Report for Congress, 2005) (describing the Social Security benefit payment rules for noncitizens); George J. Borjas, *Welfare Reform and Immigrant Participation in Welfare Programs*, 36 INT’L MIGRATION REV. 1093, 1099 (Winter 2002) (setting forth a table with alien eligibility for means-tested federal programs).

²² Personal Responsibility and Work Opportunity Reconciliation Act of 1996, sec. 451, 110 Stat. at 2276–77 (codified at 26 U.S.C. § 32(c)(1)(F)) (denying the earned income tax credit to aliens who are not authorized to work in the United States).

²³ Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509 100 Stat. 1874 (Oct. 21, 1986).

²⁴ See *Plyler*, *supra* note 4, at 222 (ruling that undocumented immigrant children may not be barred from public elementary and secondary schools). Notably, California’s Proposition 187 (denying all public social services, including public education and health care, to undocumented immigrants) passed by a majority of voters in November 1994. See *A Symposium on Proposition 187*, *supra* note 1, at 1 (discussion of scholars and activists regarding Proposition 187); Robert I. Correales, *Workers’ Compensation and Vocational Rehabilitation Benefits for Undocumented Workers: Reconciling the Purported Conflicts Between State Law, Federal Immigration Law, and Equal Protection to Prevent the Creation of a Disposable Workforce*, 81 DENV. U.L. REV. 347, 387, 403–05 (2003) (discussing Proposition 187 as an example of the vulnerability of undocumented immigrants, and perhaps the most egregious example of state-sponsored discrimination in modern times). Fortunately, Proposition 187 was enjoined in *Gregorio T. v. Wilson*, 59 F.3d 1002, 1005 (9th Cir. 1995) and ruled preempted by federal law and in conflict with *Plyler* in *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 771, 785 (S.D. Cal. 1995).

²⁵ See Peter L. Reich, *Jurisprudential Tradition and Undocumented Alien Entitlements*, 6 GEO. IMMIGR. L.J. 1, 4 (Mar. 1992) (stating that undocumented immigrants do not seek necessary medical care and other public assistance because they fear government officials); Borjas, *supra* note 21, at 1108–09 (describing the chilling effect that enactment of Proposition 187 by fifty-nine percent of California voters had on applications for government assistance); David Reyes, *Prop. 187 Ruling Awaited With Confusion and Angst*, L.A. TIMES, Dec. 31, 1994, at 1 (describing chilling effect of Proposition 187 on undocumented immigrants seeking government benefits); Correales, *supra* note 24, at 354 (noting that, despite ineligibility for public benefits and fear of contact with most state agencies, undocumented

Undocumented immigrants living in the United States are subject to the same income tax laws as documented immigrants and U.S. citizens.²⁶ However, because of their status most unauthorized workers pay a higher effective tax rate than similarly situated documented immigrants or U.S. citizens. Yet these workers and their families use fewer government services than similarly situated documented immigrants or U.S. citizens.²⁷ Moreover, unauthorized workers have been denied remedies under the National Labor Relations Act by the U.S. Supreme Court,²⁸ and they may be challenged to receive protection under wage and hour, anti-discrimination and workers' compensation laws.²⁹ As a result of all these factors, undocumented immigrants provide a fiscal windfall, and may be the most fiscally beneficial of all immigrants.³⁰

immigrants are vilified as welfare abusers).

²⁶ See I.R.C. §§ 7701(b), 7701(a)(30), 1(a), (b), (c), (d), 63, 61 (taken together, stating that resident aliens, that is, individuals who are present in the United States for at least 31 days during the current year, and at least 183 days during the current year and previous two years, are subject to the same federal income tax laws as citizens of the United States, and are subject to tax on their worldwide income); RUTH WASEM, IMMIGRATION AND NATURALIZATION FUNDAMENTALS, CRS-3 (Congressional Research Service, Report for Congress, 2003) (stating that resident aliens are subject to the same federal income tax laws as U.S. citizens, including tax deductions, credits, withholding and tax rates); Bissell, *supra* note 13, at A-1 n.3 (noting that the structure of the Internal Revenue Code of 1986, as amended, is to exclude nonresident aliens in section 871, rather than to specifically include U.S. citizens and residents in its broad taxation of income under sections 61 and 1).

²⁷ While 1996 welfare laws made many legal immigrants ineligible for most means-tested federal assistance, undocumented immigrants use fewer government services than either legal immigrants or U.S. citizens. See LEIGHTON KU ET AL., NONCITIZENS' USE OF PUBLIC BENEFITS HAS DECLINED SINCE 1996: RECENT REPORT PAINTS MISLEADING PICTURE OF IMPACT OF ELIGIBILITY RESTRICTIONS ON IMMIGRANT FAMILIES (Center on Budget and Policy Priorities, 2003), at <http://www.cbpp.org/4-14-03wel.htm> (see discussion of food stamp usage for documented versus undocumented immigrants, and use of government services by documented immigrants as compared to U.S. citizens).

²⁸ See *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd.*, 535 U.S. 137, 150–52 (2002); see also Lyon, *supra* note 2, at 597–602 (describing the *Hoffman* case and its ramifications).

²⁹ See Lyon, *supra* note 2, at 595–604 (describing the reluctance of unauthorized workers to enforce their legal rights because of fear of deportation and loss of critical income); Sharon M. Dietrich, *When Working Isn't Enough: Low-Wage Workers Struggle to Survive*, 6 U. PA. J. LAB. & EMP. L. 613, 618–19 (Spring 2004) (describing briefly the Supreme Court's decision in *Hoffman* and resulting court activity); Correales, *supra* note 24, at 411–12 (discussing the Supreme Court's decision in *Hoffman* and subsequent lower court decisions); Robert I. Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103 (2003) (discussing *Hoffman* and its impact on unauthorized workers).

³⁰ See Simon, *supra* note 3, at 320 (concluding that undocumented immigrants are a national fiscal asset after reviewing “every study that provides dollar estimates show[ing] 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.”); Michael J. Rosenfeld & Marta Tienda, *Impacts of Migration: Labor Market Implications of Scale, Innovation, and Entrepreneurship*, in MIGRATION BETWEEN MEXICO AND THE UNITED STATES—BINATIONAL STUDY 1049, 1059 (concluding that, because undocumented immigrants use few social services, but pay taxes, they “are essentially a fiscal windfall for employers and also for state and national coffers” and “may be the most fiscally beneficial of migrants”); Obhof, *supra* note 4, at 175 (concluding that

Despite their net positive contribution to public coffers, hundreds of thousands of immigrants enter the United States each year without documents because of impracticable quota and labor certification requirements.³¹ These immigration restrictions, combined with the additional tax or “tariff” on undocumented immigrants, are inconsistent with economically efficient immigration policy.³² Moreover, the high effective tax rate imposed on the poorest undocumented working families relative to their less unfortunate friends and neighbors is inconsistent with fundamental tax policy. This Article will describe and analyze the separate, unequal, and unrepresented federal taxation of undocumented immigrants.

Part II of the Article provides a brief description of the demographics of undocumented immigrants. This description provides a foundation for the tax analysis. Part III of the Article describes the tax issues most commonly experienced by typical undocumented immigrants and their families. The tax analysis includes a description of the separate, unequal, and complex treatment of undocumented immigrants under the EITC and the Child Tax Credit (CTC). In addition, Part III includes a description of the new uniform definition of a child, and its implications for undocumented immigrants for the 2005 calendar year and thereafter. While this new definition for a “qualifying child” simplifies the application of the dependency exemption deduction, the EITC, and the CTC, it comes at a significant cost for some undocumented families.

In Part IV, the Article presents the inconsistencies of the separate and unequal treatment of undocumented immigrants with fundamental tax and immigration policies. Finally, Part V of the Article explains the Author’s proposed amendments to the tax system. The proposed amendments make the tax treatment of undocumented immigrant families more consistent with fundamental tax policies and economically efficient immigration policy, and, perhaps most importantly, true to “[t]he principles of human dignity and human solidarity”³³

“unskilled *illegal* immigration may actually provide a larger net surplus than unskilled *legal* immigration”) [emphasis added]; Correales, *supra* note 24, at 347 (finding that unauthorized workers are attractive employees because they are willing to work for low wages at unpleasant jobs, and possess a superior work ethic).

³¹ See Howard F. Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 UCLA J. INT’L L. & FOREIGN AFF. 371, 395–99 (discussing the inefficiency and failure of U.S. immigration policy with respect to the hundreds of thousands of undocumented immigrants entering the United States every year).

³² See *id.* at 377–78 (concluding that, to optimize immigration policy for the economic benefit of U.S. non-immigrants, all quotas and “labor certification” requirements would be eliminated and “optimal tariffs” would be devised to ensure that all new immigrants effected a net positive contribution to the public coffers).

³³ See Bishop Anthony M. Pilla, *Love One Another As I Love You* (June 1996), available at <http://www.usccb.org/mrs/pilla.shtml> (quoting Leviticus 19:33–34 in his recommendation to Congress in shaping U.S. immigration policies).

II. FACTS AND FIGURES FOR UNDOCUMENTED IMMIGRANTS

A. *How Many, from Where and When Did They Arrive?*

About eleven million undocumented immigrants live in the United States today.³⁴ This number increases by approximately 500,000 per year,³⁵ and has more than doubled in the last decade.³⁶ Since 1995, the average number of undocumented immigrants arriving in the United States every year has exceeded the average number of arrivals of documented immigrants.³⁷

The majority of undocumented immigrants, 57–70%, continue to originate from the United States' southern-border neighbor, Mexico.³⁸ Undocumented immigrants also originate from Latin America (23–24%), Asia (9–10%), Europe, and Canada (5–6% combined).³⁹ More than three million undocumented immigrants, approximately 30% of the current population, arrived in the United States between 2000 and 2004.⁴⁰ Another 3.6 million

³⁴ See JEFFREY S. PASSEL, PEW HISPANIC CENTER, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS (June 14, 2005) [hereinafter PASSEL, MIGRANTS], available at <http://pewhispanic.org/files/reports/46.pdf> (determining that the number of undocumented immigrants is about 10.3 million as of March 2004); URBAN INSTITUTE, CROSSING BORDERS: THE IMPACT OF IMMIGRATION (Feb. 3, 2004), <http://www.urban.org/publications/900680.html> (quoting Jeffrey Passel, Urban Institute, as stating that in early 2004, there were about 10 million undocumented immigrants in the United States, with at least a 500,000 increase per year); see also B. LINDSAY LOWELL & ROBERTO SURO, PEW HISPANIC CENTER, HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.-MEXICO MIGRATION TALKS 4 (Mar. 21, 2002), available at <http://pewhispanic.org/files/reports/6.pdf> (calculating that as of 2000, the undocumented population in the United States was between 7.8 and 8.7 million); Jeffrey S. Passel et al., *Undocumented Immigrants: Facts and Figures* (Jan. 12, 2004), http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf (estimating that as of March 2002, there were 9.3 undocumented immigrants in the United States, representing twenty-six percent of the total foreign-born U.S. population).

³⁵ See PASSEL, MIGRANTS, *supra* note 34, at 10 (stating that for the entire 1990s, the annual growth averaged about 500,000, and from 2000–04, the average annual increase was 485,000); JEFFREY S. PASSEL, PEW HISPANIC CENTER, ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION 3 (Mar. 21, 2005) [hereinafter PASSEL, ESTIMATES] (determining that the annual net growth of undocumented immigrants has averaged roughly 500,000 since 1990 due to annual increases of 700,000–800,000, with decreases due to departures, deaths, and conversion to legal status); URBAN INSTITUTE, *supra* note 34; Orrenius & Zavodny, *supra* note 5, at 23 (noting that the U.S. Census Bureau estimates the average annual increase at about 500,000 per year, while the Immigration and Naturalization Service estimates the average annual increase at only 350,000).

³⁶ LOWELL & SURO, *supra* note 34, at 4; see PASSEL, MIGRANTS, *supra* note 34, at 10.

³⁷ PASSEL, MIGRANTS, *supra* note 34, at 6.

³⁸ See PASSEL, ESTIMATES, *supra* note 35, at 7 (discovering that the number of undocumented immigrants from Mexico is 5.9 million, or fifty-seven percent of the aggregate number as of March 2004, a percentage that has remained constant for the last decade); Orrenius & Zavodny, *supra* note 5, at 23 (finding that Mexico, the primary source country for undocumented immigrants, accounts for almost seventy percent of undocumented immigrants in 2000); Passel et al., *supra* note 34 (determining that Mexicans make up about fifty-seven percent of undocumented immigrants in 2002); LOWELL & SURO, *supra* note 34, at 6 (noting that Mexicans have a long history of immigration to the United States).

³⁹ See *id.*; PASSEL, ESTIMATES, *supra* note 35, at 2.

⁴⁰ PASSEL, ESTIMATES, *supra* note 35, at 8 (estimating that thirty percent of the unauthor-

undocumented immigrants arrived between 1995 and 1999, and the balance of the population, or 3.5 million immigrants, arrived between 1980 and 1994.⁴¹ Thus, about 65% of all undocumented immigrants have been in the United States for less than a decade.⁴²

B. How Do They Arrive?

In southern California, neon yellow highway signs depicting a family on the run warn freeway drivers to be cautious of what appears to be fleeing undocumented immigrants. While the majority of undocumented immigrants enter the United States without documents, 25–40% of undocumented immigrants arrive in the United States with documents, such as student, visitor, or temporary employee visas, and fail to leave or properly extend their documents.⁴³ “Visa overstayers” originate from a variety of countries. They include most of the undocumented immigrants from Europe, Canada, and Asia, as well as a share from Central America and a small number from Mexico each year.⁴⁴

Undocumented immigrants that enter the United States without authorization are primarily Mexicans and Central Americans that cross into the United States from Mexico.⁴⁵ Between 70 and 85% of Mexican immigrants that entered the United States since 1990 did not have valid documentation in 2004.⁴⁶ From 1995 to 2004, the number of undocumented immigrants entering the United States each year averaged 400,000 to 485,000. As a result, there are almost nine million undocumented immigrants in the United States today who were born in Mexico or Latin America.⁴⁷

Because so many undocumented aliens cross over the border from Mexico, they have concentrated historically in U.S.-Mexico border states such as California and Texas.⁴⁸ More recently, the undocumented population in California, Texas, and other traditional settlement states such as New York, New Jersey, Florida, and Illinois has remained static, while the population outside these states has increased dramatically.⁴⁹

ized population, or 700,000 per year, arrived from 2000–04); *see also* LOWELL & SURO, *supra* note 34, at 6 (noting that a quarter of the unauthorized arrived within the last five years).

⁴¹ *See* PASSEL, ESTIMATES, *supra* note 35, at 8.

⁴² *Id.*

⁴³ PASSEL, MIGRANTS, *supra* note 34, at 9.

⁴⁴ Orrenius & Zavodny, *supra* note 5, at 22–23 (citing a 2003 study by the Immigration and Naturalization Service for 2000); PASSEL, MIGRANTS, *supra* note 34, at 9 (commenting that 25–40% is an approximation based on assumptions that the visa overstayer category includes a majority of undocumented immigrants from countries other than Mexico).

⁴⁵ Orrenius & Zavodny, *supra* note 5, at 22–23.

⁴⁶ *See* PASSEL, ESTIMATES, *supra* note 35, at Figure 4 (setting forth new flows from Mexico dominated by undocumented from 1980 to 2004).

⁴⁷ *Id.* at 2 (noting that as of March 2004, there were 8.4 million undocumented immigrants from Mexico and Central America).

⁴⁸ *Id.* at 9.

⁴⁹ *Id.* at 2–3 (describing a tenfold increase of undocumented immigrants, to approximately 3.9 million).

C. Where Do They Go and Why Do They Come?

Approximately 68% of undocumented immigrants reside in eight states, including California (24%), Texas (14%), Florida (9%), New York (7%), Arizona (5%), Illinois (4%), New Jersey (4%), and North Carolina (3%).⁵⁰ However, the undocumented immigrant population in certain states, particularly Arizona, North Carolina, Georgia, Tennessee and Colorado, has experienced unprecedented increases, in some cases more than tenfold since 1990.⁵¹ Notably, the undocumented immigrant population of approximately 2.4 million in California has remained static for about fifteen years.⁵² The more geographically diverse settlement pattern for undocumented immigrants is reflective of emerging locations for employment opportunities.⁵³

Undocumented immigrants primarily come to the United States for better employment opportunities.⁵⁴ While family reunification also drives undocumented immigration, many of these individuals are women and children joining their husband or father who emigrated previously for better wages.⁵⁵ All major home countries for undocumented immigrants have much lower average wages than the United States.⁵⁶ "Average wages in Mexico—the primary source of undocumented immigrants—are about one-ninth those in the United States."⁵⁷

While poor economic conditions drive immigrants from their countries,⁵⁸ the U.S. economy's growing demand for millions of essential workers lures them to our workforce.⁵⁹ As the U.S.-born workforce ages and be-

⁵⁰ *Id.* at 2.

⁵¹ See PASSEL, *MIGRANTS*, *supra* note 34, at 12 (noting that in 1990, only about 400,000 undocumented immigrants lived outside of the traditional six states of residence (California, Texas, New York, Illinois, Florida, and New Jersey) and by 2004, 3.9 million lived in the remaining states); Orrenius & Zavodny, *supra* note 5, at 23 (describing unprecedented increases in the undocumented immigrant population in Colorado, Georgia, and North Carolina).

⁵² See URBAN INSTITUTE, *supra* note 34 (quoting Jeffrey Passel, Urban Institute, on population trends for undocumented immigrants).

⁵³ See PASSEL, *MIGRANTS*, *supra* note 34, at 36.

⁵⁴ See Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 *GEO. MASON L. REV.* 669, 678 (Summer 1997) (concluding that most undocumented immigrants leave their homes for economic reasons, and hope to secure jobs, higher salaries, and an improved standard of living).

⁵⁵ Orrenius & Zavodny, *supra* note 5, at 25.

⁵⁶ *Id.* at 24.

⁵⁷ *Id.* (using the Bureau of Labor Statistics International Comparison of Hourly Compensation Costs for Production Workers in Manufacturing, 2002, and noting that the Mexican minimum wage is one-tenth of the minimum wage in the United States).

⁵⁸ See PASSEL, *MIGRANTS*, *supra* note 34, at 36 (noting that immigration outflows from Mexico respond more to worsening economic conditions in Mexico than to conditions in the United States).

⁵⁹ See BOSCO, *supra* note 6, at 71 (quoting Professor Carol Sanger as arguing that the United States recruits and facilitates the entry of unauthorized workers); AUERHAHN & BROWNSTEIN, *supra* note 4, at 21, 30 (estimating a shortage of 26 million workers over the next ten years, and recounting a case study of aggressive recruitment of migrant agricultural workers).

comes more educated, the demand for young, essential workers will continue to increase at levels “which the domestic workforce cannot or will not fill.”⁶⁰ In addition to filling jobs that are critical to economic growth, once in the U.S. labor force, young, working immigrants contribute significantly to the Social Security trust fund, providing a projected net benefit of “almost \$500 billion from 1998–2022.”⁶¹

Immigrant workers have long been an indispensable part of the U.S. labor force, compensating for shortfalls in numerous occupations and industrial sectors.⁶² Put simply, the supply of immigrants is driven by the economic need the United States has for workers.⁶³ This demand far exceeds the supply of green cards or opportunities for U.S. citizenship.⁶⁴ Consequently, undocumented immigration, especially from less-developed border countries such as Mexico, is a lucrative and foreseeable phenomenon for the United States and its source countries.⁶⁵

Because of this demand for essential workers, and the economic distress throughout the globe, about seven million undocumented immigrants

⁶⁰ AUERHAHN & BROWNSTEIN, *supra* note 4, at 22 (recounting that, despite the increase in the educational level of the domestic workforce, “[b]y 2010 the Bureau of Labor Statistics predicts that sixty-seven percent of jobs in the United States will require a high school diploma or less, and most of these will be low-paying.”); *see also* Lyon, *supra* note 2, at 593 (describing the significant economic windfall to employers hiring undocumented immigrants, because they are unlikely to pursue employment rights due to their undocumented status); ROB PARAL, *ESSENTIAL WORKERS: IMMIGRANTS ARE A NEEDED SUPPLEMENT TO THE NATIVE-BORN LABOR FORCE* 5 (2005) (concluding that U.S. immigration law limits are “insufficient to meet actual labor demand, resulting in high levels of undocumented migration,” and arguing that U.S. industries and non-immigrant and immigrant workers would be better off if a system were implemented to provide legal status and protections for these essential workers).

⁶¹ AUERHAHN & BROWNSTEIN, *supra* note 4, at 17 (projecting a future increase in the Social Security net benefit contribution from immigrant workers of \$2 trillion by 2072).

⁶² *See* PARAL, *supra* note 6, at 3–5 (finding that immigrant workers have been and are critical to the U.S. economy in numerous industries and occupations, and that they do not displace non-immigrant workers or drive wages down); PASSEL, *MIGRANTS*, *supra* note 34, at 37 (commenting that Mexicans have been coming to the United States for work since the nineteenth century).

⁶³ *See* AUERHAHN & BROWNSTEIN, *supra* note 4, at 31; PARAL, *supra* note 6 (presenting the necessity of Mexican workers to the United States’ economic growth in a broad-base of industries and geographic areas).

⁶⁴ PARAL, *supra* note 6 (noting that the inefficiency of U.S. immigration policies places pressure on individuals to enter the United States illegally); AUERHAHN & BROWNSTEIN, *supra* note 4, at 25–28, 41–42 (describing certain guest worker programs and green card shortages); Lyon, *supra* note 2, at 587–89 (describing the U.S. exclusion of laborers from the legal immigration system).

⁶⁵ *See* AUERHAHN & BROWNSTEIN, *supra* note 4, at iii (finding that, since about seventy percent of immigrants are adults, the United States receives an influx of working-age adults without having to spend the estimated \$1.43 trillion that would be needed to raise and educate them); *id.* at 41 (noting that cross-border labor flow, especially from Mexico, is a natural phenomenon); Orrenius & Zavodny, *supra* note 5, at 24–25 (reporting that estimated remittances to Latin America and the Caribbean in 2003 were about \$30 billion); Lyon, *supra* note 2, at 586 (describing the economic and legal structures in the United States that have resulted in such a large unauthorized worker population).

are currently working in the United States.⁶⁶ This group represents one out of every twenty workers in the U.S. labor force.⁶⁷ More than ninety percent of adult undocumented immigrant males and more than fifty percent of adult undocumented females are in the labor force.⁶⁸ Undocumented adult men and women tend to be young: statistics show that very few are over the age of forty.⁶⁹ They are therefore less likely to be disabled, retired, or in school, but more likely to be married and parents of young children.⁷⁰ As a result of these demographics, undocumented men are more likely to be employed than men who are documented immigrants or U.S. citizens.⁷¹ However, undocumented women are more likely than U.S. citizens to be at home caring for their young children.⁷²

⁶⁶ See PASSEL, ESTIMATES, *supra* note 35 (projecting about seven million unauthorized workers for 2004); PASSEL, MIGRANTS, *supra* note 34 (reporting that at least 6.3 million unauthorized workers were employed as of March 2004); Passel et al., *supra* note 34, at 1 (reporting 5.5 million unauthorized workers in March 2002).

⁶⁷ See PASSEL, ESTIMATES, *supra* note 35 (finding that undocumented workers represent five percent of the U.S. labor force).

⁶⁸ See Passel et al., *supra* note 34, at 1 (reporting that ninety-six percent of adult undocumented immigrant men, and sixty-two percent of adult undocumented immigrant women, were working in March 2002); PASSEL, MIGRANTS, *supra* note 34, at 25 (reporting that ninety-two percent of adult undocumented immigrant men and fifty-six percent of adult undocumented women work).

⁶⁹ See PASSEL, MIGRANTS, *supra* note 34, at 25 (reporting that only eleven percent of undocumented immigrants are over forty years old, and virtually none are over sixty-five); THE URBAN INSTITUTE, *supra* note 34, at 2.

⁷⁰ See Passel et al., *supra* note 34, at 1; RANDY CAPPs ET AL., IMMIGRANT FAMILIES AND WORKERS: A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE 6 (2003) (finding that undocumented immigrant women are more likely than documented immigrant women and U.S. citizens to be married with young children) available at http://www.urban.org/UploadedPDF/311206_B-67.pdf.

⁷¹ See CAPPs ET AL., *supra* note 70 n.11; PASSEL, MIGRANTS, *supra* note 34 (reporting that only eighty-three percent of non-immigrant men work); Passel et al., *supra* note 34, at 1; OVEN, *supra* note 1, at 522–23 (describing a “young, male immigrant who survives the border crossing and finds employment in the United States” as “the perfect worker,” a cheap source of labor, who is isolated by language, without social or legal recourse, who can demand nothing in return.”).

⁷² See RANDY CAPPs ET AL., THE HEALTH AND WELL-BEING OF YOUNG CHILDREN OF IMMIGRANTS 13, 29–33 (2004) available at http://www.urban.org/UploadedPDF/31139_ChildrenImmigrants.pdf (noting that, while children of immigrants are more likely to be in two-parent households than non-immigrant children, their mother is less likely to work, and more likely to care for her own children rather than use center-based child care); CAPPs ET AL., *supra* note 70 (concluding that the demographics of undocumented immigrants is logical given that undocumented men often come to the United States to work, and undocumented women often come to the United States to join their husbands).

D. Who Are Undocumented Immigrants?

1. Humanizing "Illegal Aliens"⁷³

Undocumented immigrants "tend to be strong, courageous, vigorous, entrepreneurial types who enrich our economy and civilization with their drive and creative powers."⁷⁴ Undocumented immigrants are gardeners, housekeepers, cooks, nannies, waiters, dishwashers, seamstresses, handy-men, facilities maintenance personnel, construction workers, factory workers, welders, and producers of low-priced food.⁷⁵ Yet, despite the hundreds of times every day undocumented immigrants across the United States interact with U.S. citizens as an unrecognized driving force in the economy, they are feared, hated, and misunderstood.⁷⁶

2. Household Composition: Gender, Size, and Age

Because of critical U.S. demand for manual labor and the physical challenges of crossing the border, undocumented immigrants are predominately adult men (48%).⁷⁷ High rates of marriage and childbirth (relative to U.S.

⁷³ See Lyon, *supra* note 2, at 576–77 (noting that the phrase "illegal alien" is "racially loaded, ambiguous, imprecise, and pejorative" (citations omitted) and popular understanding of the term "alien" is an extraterrestrial, "a patently dehumanizing word to utilize"). Using words such as "aliens" and "illegals" to describe a group of people contributes to crime, unemployment and other social problems: "Language and discourse have direct, physical effects. Words like the above dehumanize foreigners in much the same way that the apartheid regime dehumanized black South Africans." Carola Eyber, *Name-Calling Alienates Foreigners*, CROSSINGS 2(2) (S. African Migration Project, Ont., Can.), June 1998, available at <http://www.queensu.ca/samp/sampresources/samppublications/crossings/vol2no2/artic5.htm>.

⁷⁴ JULIAN L. SIMON, HOW DO IMMIGRANTS AFFECT US ECONOMICALLY 3 (1985); see Michael Easterbrook, *Illegal Immigrant Retrieves Buried Savings*, SAN DIEGO UNION-TRIB., July 24, 2005, at A21 (describing arrest and deportation of unauthorized worker, Cristobal Chavez Torres: "[A] vibrant, barrel-chested 66-year old, Chavez has lived in the United States on and off since 1970" and worked in construction and farm work in California, Texas, Florida, Kentucky and North Carolina for no more than \$7.25 per hour, but managed to save \$31,700 in seven years).

⁷⁵ See LOWELL & SURO, *supra* note 34, at 7–10 (describing the occupations of most undocumented workers by industry); AUERHAHN & BROWNSTEIN, *supra* note 4, at 21 (recounting that many occupations are almost entirely dependent upon immigrants); PASSEL, MIGRANTS, *supra* note 34, at 26–29 (finding that a quarter of all drywall and ceiling tile installers, meat and poultry workers, and dishwashers are unauthorized immigrants); PARAL, *supra* note 60, at 3–5 (reporting the depth and breadth of immigrant jobs); Bosco, *supra* note 6, at 68–69 (noting that even as immigrants are reviled, they are hired to mow lawns, trim trees, clean and paint homes, babysit, wash dishes, and cut vegetables).

⁷⁶ See Oven, *supra* note 1, at 502–05, 517–24; Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937, 948 (1994) (finding that the negative reaction to illegal immigration is fueled in part by the increasing number of immigrants of color); Chang, *supra* note 4, at 1210–11 (describing that restrictions on immigration seem "to derive from fear of (and distaste for) foreigners, especially foreigners of minority races or ethnic groups").

⁷⁷ See PASSEL, MIGRANTS, *supra* note 34, at 18 (reporting that as of March 2004, there were 10.3 million undocumented immigrants, including 4.9 million men, 3.9 million women,

citizens) contribute to the fact that 38% of all undocumented immigrants are adult women and the balance, or 14%, are children.⁷⁸ About 3.1 million children living with undocumented families (families in which the head of the household or the spouse is undocumented) were born in the United States.⁷⁹ That figure is twice as large as the number of undocumented children.⁸⁰

These 13.9 million people comprise more than six million undocumented families living in the United States.⁸¹ Undocumented immigrants tend to be very young, and so are less likely to be married with children when they arrive in the United States.⁸² Consequently, most of these households are single men (36%) or women (12%) or couples (9%) without any children.⁸³ The remaining households (41%) are families with only U.S.-born children (55%), with mixed status children (25%), or all undocumented children (20%).⁸⁴

Although larger than non-immigrant⁸⁵ families (averaging 1.96 family members), undocumented immigrant families tend to be smaller than other immigrant families, with an average family size of 2.29 (reflecting averages of 2.05 and 2.65 for undocumented families in the United States less than ten years and ten years and more, respectively).⁸⁶ However, this statistic may be misleading because of the large number of undocumented single person households included in this average.⁸⁷ Accordingly, the average family size for undocumented immigrant households with children is neces-

and 1.6 million children); Passel et al., *supra* note 34 (finding that in 2002, there were 4.5 million undocumented adult men, 3.2 million undocumented adult women, and 1.6 million undocumented children).

⁷⁸ See PASSEL, MIGRANTS, *supra* note 34, at 18.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 19.

⁸² *Id.* at 32.

⁸³ See PASSEL, MIGRANTS, *supra* note 34, at 19.

⁸⁴ *Id.*

⁸⁵ I will use the term “non-immigrant” rather than “native” in this Article generally to denote individuals that are U.S. citizens because they were born in the United States. Terminological issues are not simply word games. The use of certain descriptive terms in lieu of alternative terms serves important legal and social functions. See 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, 270 (Winter 1996–97). The term “native” may suggest anti-immigration and racist sentiments because of its “nativism” undertones. Nativism is a longstanding exclusionary response by Americans to fear and hatred of foreign people and their ideas as a result of economic jealousy and social disapproval. “The urgency of the nativist movement has increased along with the increased visibility (and color) of immigrants.” In his 1995 visit to the United States, the late Pope John Paul II “denounced the tide of nativism and urged that this great country continue its tradition of receiving the less fortunate with open arms.” Berta Esperanza Hernandez-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model For The Twenty-First Century*, 23 FORDHAM URB. L.J. 1075, 1095–99, 1135–36 (1996). The use of “non-immigrant” versus “native” is an attempt to denounce “nativism.”

⁸⁶ See PASSEL, MIGRANTS, *supra* note 34, at 30, 32 (finding an overall average family size of 2.29).

⁸⁷ See *id.* at 19 (estimating that the percentage of undocumented immigrant families without any children is fifty-nine percent).

sarily greater than these averages reflect.⁸⁸ Moreover, the children in undocumented immigrant households tend to be under the age of six and born in the United States.⁸⁹ Undocumented immigrants are young, able-bodied, hard-working solo adults, or married men with wives and one or more young children, who have been in the United States for less than ten years.⁹⁰

3. Education and Income Levels

Despite the high rate of employment and the presence of two-parent families, undocumented immigrant families are many times more likely to have family incomes below the poverty level.⁹¹ Marriage and work have not been an antidote for lack of education and English proficiency.⁹² Forty-nine percent of undocumented immigrants have not completed high school, although twenty-five percent do have some college education.⁹³ Notably, the education level of undocumented immigrants arriving more recently in the United States is higher than that of those who have been in the country for a decade or more.⁹⁴ Nevertheless, limited education often accompanies limited English proficiency.⁹⁵ Most undocumented immigrants lack critical English language skills.⁹⁶ Language barriers only enhance the constant level of fear undocumented immigrants have of job loss, deportation, or even retaliatory violence to them or their families if they assert any rights.⁹⁷

⁸⁸ See, e.g., *id.* at 38 (reporting that the estimated average lifetime fertility rate of a Mexican immigrant woman in the United States in 2000 was 3.3, an apparent sharp decline from historic estimates).

⁸⁹ CAPPS ET AL., *supra* note 70, at 6–8 (discussing that children of undocumented immigrants tend to be under age 6 and U.S.-born).

⁹⁰ See AUERHAHN & BROWNSTEIN, *supra* note 4, at 20 (discovering that the average age of a new immigrant is twenty-eight, and eighty-five percent of new immigrants in 2000–01 were working age); PASSEL, MIGRANTS, *supra* note 34, at 18, 19, 21, 25, 32, 42 (finding that almost ninety percent of undocumented immigrants are age forty or younger, and those of working age are nearly sixty percent male, and describing attributes of undocumented immigrants).

⁹¹ See PASSEL, MIGRANTS, *supra* note 34, at 34; see also CAPPS ET AL., *supra* note 70, at 15.

⁹² CAPPS ET AL., *supra* note 70, at 16.

⁹³ See PASSEL, MIGRANTS, *supra* note 34, at 23 (comparing the percent of non-immigrants (9%) and legal immigrants (25%) who have not completed high school, and noting that 32% have less than a ninth-grade education).

⁹⁴ *Id.* at 24 (comparing the percent of recent to longer-tenure undocumented immigrants who lack a high school degree (45% vs. 56%) and with some college education (19% vs. 10%).)

⁹⁵ See CAPPS ET AL., *supra* note 70, at 4.

⁹⁶ See *id.* at 17–20 (finding “that immigrants who lack English proficiency and have lower educational attainment earn lower wages” and that “[l]ack of English proficiency is also strongly associated with poverty, food insecurity, and other forms of economic hardship in immigrant families.”).

⁹⁷ See Lyon, *supra* note 2, at 595–97 (describing the constant level of fear that unauthorized workers experience in the workplace and in their daily lives).

As a result, millions of unauthorized workers toil for long days at poverty-level wages, with few benefits or civil rights.⁹⁸ Almost sixty-six percent of unauthorized workers earn less than twice the minimum wage and are categorized as low-wage workers.⁹⁹ Moreover, two million immigrant workers earn less than the minimum wage.¹⁰⁰ Full-time, annual employment at minimum wage provides a family of three with less than seventy percent of the Federal Poverty Income Guideline.¹⁰¹ The average income per person for undocumented families is only \$12,000, or less than fifty percent of the average for non-immigrants.¹⁰²

In 2003, the average *family* income for undocumented immigrants was \$27,400.¹⁰³ This income level is notably lower than average family income levels for legal immigrants (\$47,800) and U.S.-born families (\$47,700).¹⁰⁴ Not only do unauthorized workers earn low wages, they are unlikely to receive any employer-provided health benefits, paid leave or disability insurance.¹⁰⁵ More likely, unauthorized workers are vulnerable targets of sub-minimum wages, substandard working conditions, and physical and psychological abuse with little meaningful recourse.¹⁰⁶

Unauthorized workers are an inexpensive source of labor who “can demand nothing in return: ‘[they are] isolated by language, hidden from the government by employers who also are breaking the law, without social or legal recourse, and increasingly—and unfairly criminalized in the public mind by high-ranking officials of both political parties.’”¹⁰⁷ These hard working, “essential,” but unauthorized workers and their families are the growing population of the invisible working poor of America.¹⁰⁸ Never-

⁹⁸ See Randy Capps et al., *supra* note 70, at 3–5. Moreover, unauthorized workers have little meaningful recourse for illegal wages or actions by employers. See Lyon, *supra* note 2, at 597–603 (describing the U.S. Supreme Court’s decision to deny unauthorized workers rights under certain labor laws in *Hoffman*, and the legal ramifications from this recent decision).

⁹⁹ See CAPPS ET AL., *supra* note 70, at 1 (finding that two of every five low-wage immigrant workers is undocumented).

¹⁰⁰ *Id.* at 2.

¹⁰¹ See Dietrich, *supra* note 29, at 619 n.43 (finding that in 2003, the Federal Poverty Income Guideline for a family of three was \$15,260 and a minimum wage earner who worked full-time at \$5.15 per hour would earn \$10,609).

¹⁰² See PASSEL, MIGRANTS, *supra* note 34, at 30 (computing the incomes as of 2003 and family size as of 2004), 33 (noting that the income level actually decreases to \$11,300 for undocumented immigrants who have lived in the United States for ten years or more).

¹⁰³ See *id.* at 30.

¹⁰⁴ *Id.*

¹⁰⁵ See Dietrich, *supra* note 29, at 619–20; Orrenius & Zavodny, *supra* note 5, at 24; PASSEL, MIGRANTS, *supra* note 34, at 35 (finding that 59% of undocumented adults and 53% of undocumented children did not have any health insurance in 2004).

¹⁰⁶ See Oven, *supra* note 1, at 523 (citing Robert Kahn, *Operation Gatekeeper: Keeping Illegal Workers Male, Young and Fit*, L.A. TIMES, July 6, 1997, at M1).

¹⁰⁷ *Id.*

¹⁰⁸ Two out of three unauthorized workers are low-income. However, statistically, these workers and their undocumented family members are not counted, but rather are invisible, or even villainized, when the United States reaches out to assist the working poor. See Oven, *supra* note 1, at 533, 534–40 (noting that the Catholic Church has criticized U.S. immigration policy “for its betrayal of the poorest and neediest members of the human race,” and

theless, they receive virtually no government assistance¹⁰⁹ and cannot vote, but bear disproportionately high effective federal, state and local excise, sales, property, payroll and income tax rates.¹¹⁰

III. THE TAX TREATMENT OF UNDOCUMENTED IMMIGRANTS AND THEIR FAMILIES

A. *The Classification of Undocumented Immigrants Under the Internal Revenue Code of 1986, as Amended ("the Code")*¹¹¹

1. *Resident Alien Versus Nonresident Alien Classification*

Since the enactment of the Revenue Act of 1913, the federal government has subjected non-U.S. citizens residing in the United States (with or without documents) to income tax in the same manner as U.S. citizens.¹¹² Non-U.S. citizens residing outside of the United States are subject to tax under a separate and different set of rules.¹¹³ Thus, for federal income and employment tax purposes, non-U.S. citizens, or "aliens" under the Code, are subject to tax based upon their residency status.¹¹⁴

If a non-U.S. citizen is a U.S. resident, under the Code, she will be characterized as a "resident alien" for tax purposes.¹¹⁵ A resident alien is subject to the same income, employment tax and tax withholding laws as a U.S. citizen.¹¹⁶ Accordingly, a resident alien is subject to federal income tax on her worldwide income regardless of its source.¹¹⁷

If a non-U.S. citizen is not a U.S. resident, under the Code, she will be characterized as a "nonresident alien."¹¹⁸ As a result, she will generally only

arguing that U.S. immigration policy must be reformed using international human rights principles and Catholic doctrine as moral guidelines).

¹⁰⁹ See CAPPS ET AL., *supra* note 72, at 22 (noting that "[d]espite higher poverty and greater hardship, young children of immigrants are less likely to receive public benefits," and noting that undocumented immigrants are ineligible for Temporary Assistance for Needy Families, including tangential child care benefits and food stamps).

¹¹⁰ While this Article will not describe the specifics of the federal and state excise, sales, and property taxation of undocumented immigrants, the payment of these taxes is not complicated. Rather, it traditionally occurs in everyday transactions, with direct payments to vendors in addition to the purchase price for various goods and services (*e.g.*, gas, tires, cigarettes, alcohol, rent, various retail goods and services).

¹¹¹ See I.R.C. § 7701(a)(29) (defining the "Internal Revenue Code of 1986" as Title 26 of the United States Code, as amended).

¹¹² See Bissell, *supra* note 13, at A-1 to -3.

¹¹³ See I.R.C. §§ 2(d), 871, 877 (setting forth the taxation of nonresident alien individuals).

¹¹⁴ See I.R.C. § 7701(b)(1)(B) (defining "nonresident alien" as a non-U.S. citizen and non-U.S. resident).

¹¹⁵ I.R.C. § 7701(b)(1)(A) (setting forth the definition of resident alien for tax purposes).

¹¹⁶ See NUSCHLER & SISKIN, *supra* note 21, at CRS-8; WASEM, *supra* note 26, at CRS-6.

¹¹⁷ See I.R.C. §§ 1, 61 (subjecting all income from all sources for all individuals to taxation unless specifically excluded and thereby including resident aliens in this broad casting of its net because they are not specifically excluded).

¹¹⁸ See I.R.C. § 7701(b)(1)(B).

be subject to federal income tax on her U.S.-source income, e.g., wages for services performed in the United States, rents from U.S. real property, and income effectively connected with a U.S. trade or business.¹¹⁹ The tax rates and allowable deductions from which a nonresident alien's U.S. income tax liability is derived vary depending upon the nature of the income.¹²⁰

In general, an individual is classified as a "resident alien" for tax purposes if she meets the qualifications under either of two residency tests.¹²¹ If an individual does not satisfy the requirements of either test, or qualifies for an exception to these tests, she will be classified as a "non-resident alien."¹²² The first test classifies any alien that is a "lawful permanent resident" of the United States at any time during the calendar year as a resident alien.¹²³ An alien is a "lawful permanent resident" under the Code if she has been granted permanent residence status under the immigration laws that has not been revoked or abandoned.¹²⁴ Undocumented immigrants do not satisfy the requirements under this test.

The second test is the "substantial presence test."¹²⁵ Under this test, if an individual is physically present in the United States for at least 31 days during the current year, and at least 183 days during the current year and prior two years, she will be classified as a resident alien.¹²⁶ To calculate the days of physical presence for the current tax year, an individual must count all days present in the current year, one-third of the days present in the prior year, and one-sixth of the days present in the second preceding year.¹²⁷ While there are several exceptions to this general rule,¹²⁸ most undocumented immigrants residing in the United States will be classified as "resident aliens" for tax purposes. This classification begins on the first day of physical presence in the United States, and will continue until an individual becomes a U.S. citizen or leaves the United States for a period of time long enough to fail the substantial presence test.¹²⁹

¹¹⁹ See Bissell, *supra* note 13, at A-27 to -40 (describing the income taxation of non-resident aliens).

¹²⁰ See *id.*; see also NUSCHLER & SISKIN, *supra* note 21, at CRS-8 to -9.

¹²¹ I.R.C. § 7701(b)(1)(A).

¹²² I.R.C. § 7701(b)(1)(B).

¹²³ I.R.C. § 7701(b)(1)(A)(i).

¹²⁴ I.R.C. § 7701(b)(6); see Bissell, *supra* note 13, at A-6 (describing this test as the "green card" test and noting that "an individual who holds a 'green card' is classified as a resident alien, whether [s]he lives in the United States or abroad").

¹²⁵ I.R.C. § 7701(b)(1)(A)(ii), (b)(3)(A) (setting forth the substantial presence test).

¹²⁶ I.R.C. § 7701(b)(3)(A) (describing the mechanics of the test).

¹²⁷ I.R.C. § 7701(b)(3)(A)(ii).

¹²⁸ For example, an individual will be classified as a nonresident if she is in the United States for fewer than 183 days during the current year and has a closer connection to and a tax home in a foreign country. I.R.C. § 7701(b)(3)(B). In addition, regular commuters from Canada or Mexico, aliens with debilitating medical conditions, employees of foreign governments or international organizations, and certain visa holders can be classified as non-resident aliens versus resident aliens despite their physical presence in the United States. See I.R.C. § 7701(b)(7), (b)(3)(D), (b)(5). For a comprehensive discussion of these exceptions, see Bissell, *supra* note 13, at A-10 to -17.

¹²⁹ I.R.C. § 7701(b)(2)(A)(iii). As a result of the timing of the resident versus nonresi-

2. *Undocumented Immigrants Are Resident Aliens Under the Code*

Under the Code, a resident alien is subject to the same tax laws as a U.S. citizen.¹³⁰ However, even though undocumented immigrants are classified as resident aliens for tax purposes because of their undocumented status, they are treated less favorably under the Code than similarly situated resident aliens and U.S. citizens. The next Section will describe the separate, unequal, and “unrepresented” federal income tax treatment of undocumented immigrants.

B. Taxing Undocumented Immigrants

1. The IRS Individual Taxpayer Identification Number (ITIN)

a. The IRS Requires a Taxpayer Identification Number (TIN)

Because the U.S. government classifies undocumented immigrants as resident aliens, they are subject to the same federal income and employment taxes and filing and withholding requirements as U.S. citizens. Under the Code, every taxpayer must have a unique and permanent number.¹³¹ Consequently, undocumented immigrants must obtain a TIN.¹³² The IRS has used a TIN system to improve its “ability to identify and access database records; to match information provided on tax and information returns, statements, and other documents with the proper taxpayers; and to provide better customer service to taxpayers.”¹³³ For most non-business taxpayers, Social Security numbers (SSNs) serve as taxpayer identification numbers.¹³⁴ However, because undocumented immigrants are not eligible to work in the United States, they cannot obtain valid SSNs.¹³⁵

dent classification, an undocumented immigrant could be a nonresident alien for the first part of a calendar year, and a resident alien for the second part of the tax year and thereafter until she left the United States and failed the physical presence test, or became a U.S. citizen. Generally, to fail the substantial presence test an undocumented immigrant would have to leave the United States for 334 days of a calendar year. *See* I.R.C. § 7701(b)(3).

¹³⁰ *See* I.R.C. §§ 1, 61.

¹³¹ *See* I.R.C. § 6109(a) (requiring taxpayers to furnish an identifying number to the IRS on tax filings, and to other persons such as employers).

¹³² *See* Taxpayer Identifying Numbers (TIN), Prop. Treas. Reg. § 301.6109-1, 60 Fed. Reg. 30,211, 30,212 (Dep’t of the Treasury June 8, 1995); *see also* I.R.C. § 6109(a); Treas. Reg. § 301.6109-1(g).

¹³³ Taxpayer Identifying Numbers (TIN), Prop. Treas. Reg. § 301.6109-1, 60 Fed. Reg. at 30,211 (explaining generally the reason for implementation of the new-IRS ITIN).

¹³⁴ Treas. Reg. § 301.6109-1(a)(1)(ii)(A) (setting forth qualifying taxpayer identification numbers as the social security number for all taxpayers other than those ineligible for a social security number, and employers or taxpayers engaged in a trade or business who must use an employer identification number).

¹³⁵ *See* 20 C.F.R. § 422.104(a)(2) (2005) (setting forth that SSNs are assigned to non-citizens who have lawful permanent resident status, or under other authority permitting them to work in the United States); Dept. of Treasury, Internal Revenue Service, Taxpayer Identifying Numbers (TINs), 61 Fed. Reg. 26,788 (Dep’t of the Treasury May 29, 1996)

b. The Problem: Unauthorized Workers Are Not Eligible To Obtain SSNs

SSNs have been issued to workers since the implementation of the 1935 Social Security Act.¹³⁶ The initial purpose of the number was to provide employers and the U.S. government the means to report or track Social Security earnings for purposes of payroll tax and retirement benefits calculations.¹³⁷ In the 1960s, computerization allowed the IRS and private businesses to rely on SSNs as a method of accumulating, sorting, and tracking information.¹³⁸ Despite persistent Congressional concern about unauthorized workers, the government issued Social Security cards to unauthorized workers until the early 1980s, and kept only internal records regarding their unauthorized status.¹³⁹ Beginning in 1982 and 1984, 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.”¹⁴⁰

In an effort to stop unauthorized workers from being hired, Congress enacted the Immigration Reform and Control Act of 1986.¹⁴¹ This Act, among other things, required employers to have all new employees prove their identity and work authorization with specific documents.¹⁴² Congress listed the Social Security card as an acceptable document evidencing proof of work authorization.¹⁴³ As a result of this mandatory obligation, there is now widespread use of counterfeit Social Security cards among unauthorized workers, making “it more common and easier than ever for undocumented workers to enter and function in the U.S. labor market.”¹⁴⁴

In 1996, the Social Security Administration (SSA) began limiting its issuance of SSNs to individuals who are U.S. citizens, and alien individuals legally admitted for permanent residence or under another immigration category authorized for employment in the United States.¹⁴⁵ In response to this void, the IRS introduced a new taxpayer identification number for use by individuals who are not citizens or nationals of the United States and

(describing ineligibility for SSNs of certain resident aliens)

¹³⁶ See Singer & Dodd-Major, *supra* note 7, at 1430.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1431.

¹³⁹ *Id.*

¹⁴⁰ *Id.* (noting that with the replacement of the INS with the Department of Homeland Security, the new annotation is “Valid for Work Only with DHS Authorization”).

¹⁴¹ *Id.*; see Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

¹⁴² See Singer & Dodd-Major, *supra* note 7, at 1431.

¹⁴³ *Id.*

¹⁴⁴ *Id.*; see Lyon, *supra* note 2, at 590 (finding that purchased or borrowed SSNs are easily obtained throughout the country, and employers look the other way).

¹⁴⁵ See Taxpayer Identifying Numbers (TIN), Prop. Treas. Reg. § 301.6109-1, 60 Fed. Reg. at 30,212.

are not eligible for SSNs.¹⁴⁶ Qualifying individuals must apply for and use the newly created TIN on all their tax returns.¹⁴⁷

c. The Solution: The IRS-ITIN

The new IRS-ITIN is intended to provide taxpayers with a unique TIN to be used as identification on all tax returns (including income, gift, estate tax, amended, and refund) filed after December 31, 1996.¹⁴⁸ The ITIN is a nine-digit number resembling a SSN, but starting with the number "9" and having the number "7" or "8" as the fourth digit.¹⁴⁹ Qualifying taxpayers must apply for an ITIN using a Form W-7 Application for Individual Taxpayer Identification Number, which requires taxpayer information, including the individual's name, address, foreign tax identification number (if any), and specific reason for obtaining the ITIN.¹⁵⁰ In addition, the IRS may prescribe that an applicant provide documentary evidence to establish her alien status and identity.¹⁵¹ "Examples of 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, identity card, or immigration documentation."¹⁵² Notably, the ITIN is "for tax purposes only and [does not] affect immigration status, authorize work in the United States or provide eligibility for Social Security benefits"¹⁵³

d. ITIN and/or SSN: A Mismatch Made in Hell

Undocumented immigrants are not authorized to work in the United States, and therefore are not eligible for SSNs.¹⁵⁴ As a result, any undocu-

¹⁴⁶ Singer & Dodd-Major, *supra* note 7, at 1432; see Treas. Reg. § 301.6109-1(d)(3) (noting that the ITIN is for use by alien individuals who do not qualify for a social security number); Taxpayer Identifying Numbers (TINs), 61 Fed. Reg. at 26,789 (noting that the IRS, rather than the SSA, the INS or the U.S. consulate office, was the best government agency to issue the number because the number is for tax purposes only).

¹⁴⁷ See Treas. Reg. § 301.6109-1(d)(3).

¹⁴⁸ See I.R.C. § 6109(a); Taxpayer Identifying Numbers (TINs), 61 Fed. Reg. at 26,789.

¹⁴⁹ See Singer & Dodd-Major, *supra* note 7, at 1432.

¹⁵⁰ See Treas. Reg. § 301.6109-1(d)(3)(ii) (setting forth the general rules for obtaining an ITIN); I.R.S. News Release IR-2003-49, 2003 I.R.B. LEXIS 141, *ITIN Applicants Must Use New Form Starting April 15* (Apr. 10, 2003) (describing new W-7 and methods to access the new form in English or Spanish via the IRS website, <http://www.irs.gov/pub/irs-pdf/fw7.pdf>, or <http://www.irs.gov/pub/irs-pdf/fw7sp.pdf>).

¹⁵¹ See Treas. Reg. § 301.6109-1(d)(3)(iii) (setting forth the general rules for assigning the ITIN number).

¹⁵² *Id.* Code Section 6103 mandates strict confidentiality of tax returns and return information, and prohibits disclosure of information obtained by the IRS through the W-7 application to other government agencies, private entities, or citizens. See Taxpayer Identifying Numbers (TIN), Prop. Treas. Reg. § 301.6109-1, 60 Fed. Reg. at 30,213.

¹⁵³ See I.R.S. News Release IR-2003-49, 2003 I.R.B. LEXIS 141, *ITIN Applicants Must Use New Form Starting April 15* (Apr. 10, 2003).

¹⁵⁴ See Singer & Dodd-Major, *supra* note 7, at 1430.

mented immigrant required to file a U.S. tax return must obtain an ITIN for tax reporting and filing purposes.¹⁵⁵ However, an ITIN does not authorize work in the United States, and cannot be used for employment tax or SSA purposes.¹⁵⁶ Nevertheless, employers are required to pay employment taxes and provide a SSN to the IRS and the SSA for wages paid to each employee.¹⁵⁷ Unauthorized workers and their employers cannot use ITINs for employment tax or SSA purposes, and they are not eligible for SSNs because they are not authorized to work in the United States.¹⁵⁸ Employers desperate for workers and undocumented immigrants desperate for wages either avoid the system completely through unreported wages, or comply with fraudulently obtained SSNs.

Predictably, there has been an explosion of counterfeit Social Security cards and false use of SSNs by unauthorized workers and their employers.¹⁵⁹ Each year, hundreds of thousands of tax returns are filed with ITINs and Forms W-2 with invalid SSNs attached.¹⁶⁰ In the year 2000, 353,000 resident aliens who were not authorized to work in the United States filed tax returns with ITINs, and seventy-five percent of these returns included Forms W-2 with invalid SSNs.¹⁶¹ In such cases, the IRS recommends using the ITIN as the TIN, but interprets the filing as an admission that the wage-earner was not authorized to work in the United States.¹⁶² Alternatively, if the taxpayer uses the invalid SSN, the taxpayer is perpetuating her violation of U.S. tax laws and the Social Security Act.¹⁶³

If the taxpayer uses her ITIN and attaches an invalid SSN to her W-2, the IRS will process the return under the ITIN.¹⁶⁴ In response to the filing, the IRS will notify the taxpayer in writing that a corrected W-2 must be filed with the ITIN.¹⁶⁵ While this request cannot be properly imple-

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*; see I.R.S. News Release IR-2003-49, 2003 I.R.B. LEXIS 141, *ITIN Applicants Must Use New Form Starting April 15* (Apr. 10, 2003).

¹⁵⁷ See NUSCHLER & SISKIN, *supra* note 21, at CRS-2 (noting that, for social security taxes to be withheld, a social security number must be provided, and that unauthorized workers may have obtained a number that is no longer valid, or by fraudulent means); Singer and Dodd-Major, *supra* note 7, at 1431-34.

¹⁵⁸ See text accompanying note 151 (demonstrating the circuitous conundrum facing undocumented immigrants regarding this taxing issue).

¹⁵⁹ Singer & Dodd-Major, *supra* note 7, at 1431-34 (reporting that the ITIN and SSN filing problem has become an increasingly common scenario).

¹⁶⁰ *Id.* at 1433-34 (reporting that more than 500,000 individual tax returns were filed with ITINs by non-U.S. citizens or nationals with U.S. addresses who were not authorized to work or even be in the United States).

¹⁶¹ *Id.*

¹⁶² *Id.* at 1433.

¹⁶³ *Id.* at 1431, 1433; see 8 U.S.C.A. § 1324c (2006) (criminal penalties for document fraud); 18 U.S.C.A. § 1546(b) (2006) (criminalizing the presentation of false documents to obtain employment).

¹⁶⁴ Singer & Dodd-Major, *supra* note 7, at 1433; I.R.S. Tech. Mem. 2002-12 (June 13, 2002) (answering the question of how a return is filed with an ITIN, and a W-2 with an erroneous social security number processed by the IRS).

¹⁶⁵ I.R.S. Tech. Mem. 2002-12 (June 13, 2002).

mented because an ITIN is not a valid TIN for a W-2, once the IRS resolves the mismatch of the ITIN and the SSN by verifying that the taxpayer's information is presented on the W-2, it may process the return and assess the tax liability, or issue the refund.¹⁶⁶

The magnitude and administrative cost of mismatched Forms W-2 and ITINs are staggering and exploding.¹⁶⁷ "The IRS has estimated that of the approximately 130 million individual income tax returns filed each year, about six million are filed by undocumented workers."¹⁶⁸ Returns with mismatched TINs cannot be filed electronically and must be processed through a more expensive, time-consuming, and labor-intensive process.¹⁶⁹ In addition, the SSA reports that about twenty million, or five to ten percent, of the Forms W-2 filed each year contain a mismatch between the name and SSN.¹⁷⁰ The cost of trying to resolve each mismatch averages over \$300, whereas the cost of a normal posting is less than fifty cents.¹⁷¹ Thus, the SSA's administrative cost of these mismatches is more than \$5 billion each year. The earnings listed on the mismatched Forms W-2 must be posted to an earnings suspense file, which as of 2001 had a balance of \$421 billion, unless and until they can be allocated to the proper worker.¹⁷² In the case of an unauthorized worker's earnings that are posted to the suspense file because she does not possess a valid SSN, there cannot be a reallocation unless and until the worker obtains a valid SSN.¹⁷³

Unauthorized workers and their employers must pay Social Security payroll taxes.¹⁷⁴ The amount of Social Security taxes paid by unauthorized workers and their employers has been increasing steadily, and is now in the billions of dollars. In 2003, the government collected an estimated \$7 billion in Social Security taxes, or approximately one percent of overall revenue, from 7.5 million workers with mismatched SSNs, and their employers.¹⁷⁵ This dollar amount has more than tripled in the last decade.¹⁷⁶ While some of the mismatches are due to clerical errors, many can be

¹⁶⁶ *Id.*

¹⁶⁷ See Singer & Dodd-Major, *supra* note 7, at 1433.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1433, 1435 n.9 (noting that in 2003, in an attempt to fix this problem, but increasing the reconciliation costs, the "SSA sent 126,250 mismatch letters to employers with substantial numbers of mismatched name/SSN combinations and 9.5 million mismatch letters to employees.").

¹⁷² *Id.*; NUSCHLER & SISKIN, *supra* note 21, at CRS-2 to -3 (finding that this balance includes undocumented worker earnings and clerical errors).

¹⁷³ See Singer & Dodd-Major, *supra* note 7, at 1433; NUSCHLER & SISKIN, *supra* note 21, at CRS-2 to -3.

¹⁷⁴ NUSCHLER & SISKIN, *supra* note 21, at Summary.

¹⁷⁵ See Alan Zarembo, *Garment Laborers Say Bush Guest-Worker Plan an Ill Fit*, L.A. TIMES, Feb. 8, 2004, at A1; see also Singer & Dodd-Major, *supra* note 7, at 1435 n.9 (reporting \$7 billion in Social Security payroll taxes and \$56.1 billion in wages in 2001 added to suspense accounts).

¹⁷⁶ See Zarembo, *supra* note 175, at A1.

traced to unauthorized workers.¹⁷⁷ Unauthorized workers who pay Social Security taxes through withholding will not receive any Social Security retirement benefits with respect to their payments as long as they are not authorized to work in the United States.¹⁷⁸

One remedy to this nightmare is that employers may choose to pay unauthorized workers cash “under the table,” forgoing sending tax payments or information to the IRS or SSA.¹⁷⁹ This alternative also comes at a significant cost to the U.S. government. In her 2003 annual report to Congress, the National Taxpayer Advocate warned, “a change in the tax compliance of even 1 percentage point equates to an annual loss of more than \$20 billion of revenue to the federal government.”¹⁸⁰ Fortunately, unauthorized workers are motivated to file annual income tax returns because they understand it is an important step toward naturalization.¹⁸¹ In addition, if they do achieve lawful status, work authorization and a valid SSN, they may then apply for Social Security benefits based on all Social Security–covered earnings regardless of their work status during the earning period.¹⁸² Only wages that are reported to the SSA, and not paid “under the table,” count toward the forty quarters of earnings required to qualify for Social Security retirement benefits.

As a result of a convergence of mutually exclusive requirements, undocumented immigrants are in an impossible situation.¹⁸³ First, undocumented immigrants are required to use ITINs, a separate and distinct TIN for tax filing and reporting purposes. The government created ITINs specifically to identify and distinguish unauthorized aliens from other taxpayers. However, ITINs cannot be used for reporting wages or paying payroll taxes to the SSA or IRS. Yet unauthorized workers and their employers are subject to, and must pay, Social Security taxes. Consequently, billions of dollars each year are paid to the SSA with invalid SSNs because properly obtained ITINs cannot be used. Similarly, each year hundreds of thou-

¹⁷⁷ See NUSCHLER & SISKIN, *supra* note 21, at CRS-7 to -8 (noting that, unless contrary to a totalization agreement or Section 202(t) of the Social Security Act (the alien nonpayment provision) noncitizens not lawfully present in the United States during any month may not receive social security benefits for such month).

¹⁷⁸ *Id.*

¹⁷⁹ See Singer & Dodd-Major, *supra* note 7, at 1432.

¹⁸⁰ *Id.* at 1432–33.

¹⁸¹ Ho, *supra* note 9, at 295–98 (noting that immigration laws actually require five years of proof of paying taxes prior to obtaining citizenship).

¹⁸² NUSCHLER & SISKIN, *supra* note 21, at CRS-3 to -4. After President Bush signed the Social Security Protection Act of 2004, Pub. L. No. 108-203, 118 Stat. 493 (2004), into law, a noncitizen who files a Social Security benefits application 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. If the worker receives authorization at some point, all of her Social Security–covered earnings would count toward her forty quarters of earnings of at least \$900 or \$3,600 per year (in 2004) insured status requirement. *Id.* at CRS-1, CRS-3 to -4.

¹⁸³ See *supra* text accompanying notes 147–53 (setting forth the circuitous nature of this problem).

sands of annual income tax returns are filed with valid ITINs and invalid SSNs. The SSA and IRS spend billions of taxpayer dollars each year trying to reconcile earnings and tax payments to wage earners who cannot exist (but do by the tens of millions and growing) because they are unauthorized. Undocumented immigrants will never have their Social Security-covered earnings credited to their ITINs because ITINs cannot be used for this purpose. As a result, unless an unauthorized worker becomes authorized, she will not realize any benefit from these Social Security-covered earnings and tax payments. While confusing and obscure, this treatment is clearly separate and unequal.

2. *The Tax Formula*

Irrespective of the nightmare of complying with TIN requirements,¹⁸⁴ undocumented immigrants, classified as resident aliens, are subject to federal income tax using the same general tax formula that applies to U.S. citizens and documented immigrants. Understanding this tax formula is critical to an understanding of the substantive tax differences facing undocumented immigrants. The next Section will present the tax formula and apply it to a hypothetical undocumented immigrant taxpayer.

a. How the Tax Formula Works

Under the Code, undocumented and documented immigrants and U.S. citizens compute their annual tax liability by calculating their taxable income and applying the appropriate tax rates.¹⁸⁵ Taxable income is derived by reducing gross income by allowable deductions.¹⁸⁶ Gross income is broadly defined and includes “all income from whatever source derived, in-

¹⁸⁴ Part of the nightmare for undocumented immigrants includes the ever-present fear of deportation. While the IRS has repeatedly stated that it will not provide ITIN application information for purposes of immigration status matters, numerous incidents have occurred that undermine taxpayer confidence in this commitment. For example, on February 21, 2006, two separate and unrelated taxpayers went to the IRS walk-in center, located in a federal office building in downtown Portland, Oregon, to have documents verified to apply for an ITIN for tax filing purposes. One taxpayer did not have a photo ID and the second had an expired foreign passport. In both cases, security guards, who were not IRS employees, stopped and questioned the taxpayers about their legal status, and also called the Immigration and Customs Enforcement (ICE) office. ICE agents arrived, and detained the two taxpayers for deportation proceedings. See Letter from Nathan Teske, Assistant Program Manager and LITC Program Director El Programa Hispano-Catholic Charities, Feb. 23, 2006, sent by e-mail to Low-Income Taxpayer Clinic listserv (noting that IRS employees and local Taxpayer Advocate Center had repeatedly stated that the clinic should encourage taxpayers to go to the IRS’s walk-in center for these services to achieve the IRS’s stated goal of having all taxpayers report their taxable income and file tax returns) (Feb. 23, 2006) (on file with Author).

¹⁸⁵ See I.R.C. § 1 (setting forth the tax rate schedules to be applied to a taxpayer’s taxable income).

¹⁸⁶ See I.R.C. § 63(a) (defining “taxable income”).

cluding (but not limited to)" compensation for services, interest, rents, dividends, income derived from business, and dealings in property.¹⁸⁷ For most undocumented immigrants and their families, gross income will include wages from desperately sought U.S. jobs. According to the demographics presented above, undocumented immigrants average about \$12,000 in annual compensation per person, or \$26,000 per household.

Deductions from gross income include a "standard deduction" or certain itemized deductions; the "deduction for personal exemptions";¹⁸⁸ and certain other listed deductions.¹⁸⁹ For most low-income taxpayers, the only applicable deductions against their gross income are the standard deduction and personal exemptions. The amount of the standard deduction is dependent on a taxpayer's filing status, and is indexed annually for inflation.¹⁹⁰ In 2005, the standard deduction amount was \$5,000 for an unmarried taxpayer or a married filing separately taxpayer, \$7,300 for a head of household taxpayer, and \$10,000 for married filing jointly taxpayers.¹⁹¹ The personal and dependency exemption amount in 2005 was \$3,200 for each exemption.¹⁹²

b. Application of Tax Formula to Abe Adams, A Hypothetical, Unauthorized Worker, and His Nonworking, Undocumented Immigrant Spouse, Abigail, and Their Young, U.S.-Citizen Daughter, Ariel

A hypothetical unauthorized worker named Abe is an industrious man of twenty-eight years. Abe is one of seven million unauthorized workers in the United States and one of the eleven million undocumented immigrants. He came to the United States with his wife, Abigail, by crossing over the border from Mexico. Abe, Abigail and their U.S.-born daughter, Ariel, now live in Santa Ana, California. Abe works as an employee at a hotel very near what some call the "happiest place on earth." In accordance

¹⁸⁷ See I.R.C. § 61(a) (defining "gross income").

¹⁸⁸ See I.R.C. § 63(b) (defining "taxable income" for individuals who do not itemize their deductions as "adjusted gross income" minus the standard deduction and the deduction for personal exemptions). While taxpayers can make an election to itemize their deductions in lieu of the standard deduction, approximately seventy percent of all taxpayers, including almost all low-income taxpayers, use the standard deduction. See EUGENE WILLIS, ET AL., WEST FEDERAL TAXATION, COMPREHENSIVE VOLUME 2-7 (2005 ed. 2005); I.R.C. § 63(e) (setting forth election to itemize deductions in lieu of taking the standard deduction).

¹⁸⁹ See I.R.C. § 62 (describing the deductions allowed from gross income to derive adjusted gross income).

¹⁹⁰ See I.R.C. § 63(c)(2) (describing the basic standard deduction for joint returns, head of households, and all other cases); I.R.C. § 63(c)(4) (describing the annual inflation adjustment calculation).

¹⁹¹ See Rev. Proc. 2004-71, 2004-50 I.R.B. 970.

¹⁹² See *id.*; I.R.C. § 151 (describing that taxpayers receive an exemption of the exemption amount for the taxpayer and for the spouse of the taxpayer if a joint return is filed, and for each dependent).

with his employer's hiring requirements, Abe produced a SSN card. Abe had obtained the SSN card for sixty dollars from a gentleman who stands outside of the local grocery store. In accordance with federal law, the government issued Ariel a SSN shortly after she was born.

Abe works hard, long hours, and in 2005, earns \$15,000. While his employer pays him the minimum wage in California, he does not receive an increase in his hourly rate of \$7.50 per hour as required for any overtime hours. Abe is classified as a low-wage worker because he earns less than twice the federal minimum wage. Nevertheless, Abe is happy to have a steady job and an income many times higher than he could ever hope for in Mexico. Abigail stays at home with Ariel because Ariel is not yet in school, and the family cannot afford the available day care facilities in their neighborhood.

To compute their taxable income, the Adams family reduces their gross income of \$15,000 by the married filing jointly standard deduction of \$10,000 and an aggregate personal and dependency exemption deduction for three individuals of \$9,600.¹⁹³ The federal taxable income is \$0.¹⁹⁴ The federal income tax liability is also \$0 before consideration of any tax credits.¹⁹⁵

Abe is subject to Social Security payroll taxes on his wages of \$15,000. His share of Social Security payroll taxes is 7.65% of \$15,000, or \$1,148. His employer's contribution on his behalf is also 7.65% of his wages paid of \$15,000, or \$1,148.¹⁹⁶ However, because Abe is an unauthorized worker, he does not have a valid SSN, so the SSA posts his Social Security-covered wages of \$15,000 to the earnings suspense file. The Social Security trust fund is still increased by an unsuspended amount of \$2,296. Abe's total tax liability of \$1,148¹⁹⁷ on \$15,000 of household gross income generates an effective tax rate of 7.65%, or the Social Security payroll tax rate on wage earners.¹⁹⁸ Abe will not realize any benefit from his Social Security-covered earnings and tax payments because his contribution cannot be credited to his ITIN, even though his contribution increases the Social Security trust fund. Because of the standard deduction and personal and dependency exemption deductions, many low-income undocumented immigrants do not pay federal income tax, but they are subject to and pay So-

¹⁹³ See I.R.C. § 63 (providing definition of taxable income as including gross income minus the standard deduction and deduction for personal exemptions).

¹⁹⁴ Taxable income under these circumstances would be reduced to, but not below, zero.

¹⁹⁵ See I.R.C. § 1(a), (i) (setting forth tax rate schedule for married filing jointly individuals including the rate reduction to ten percent). As this Article will demonstrate, the Adams family should qualify for a refundable Child Tax Credit that would provide a cash refund to offset the Social Security payroll taxes paid.

¹⁹⁶ See I.R.C. §§ 3101, 3201.

¹⁹⁷ Before any applicable tax credits to be discussed in subsequent Sections of the Article.

¹⁹⁸ The 7.65% is computed by adding the federal income tax of \$0 to his payroll taxes of \$1,148 to derive his total tax expense of \$1,148/his gross income of \$15,000.

cial Security payroll taxes on every dollar of reported wages yielding an effective tax rate of 7.65%.

The application of the tax formula to the Adams family assumes that the Adams file their tax return using the married filing jointly filing status. Since undocumented immigrant families are often split apart because of economic and immigration challenges, the appropriate filing status may not be married filing jointly. A taxpayer's filing status does have meaningful implications on her tax rates, standard deduction amount, and other substantive tax matters.¹⁹⁹ The filing status generally depends upon the taxpayer's personal circumstances.²⁰⁰

3. *The Issues of Filing Statuses and Dependents*

Individual taxpayers are grouped into four different classifications, including: married filing jointly, head of household, unmarried individual, and married filing separately.²⁰¹ Classification of an individual into one or more of these categories depends upon various facts and circumstances of the taxpayer and her family for each tax year.²⁰² For many undocumented immigrants who are married, but live apart from their spouse and children due to economic and other circumstances, this classification is more complicated than whether the taxpayer is married.²⁰³ Under the Code, a taxpayer's spouse and children who are not U.S. citizens and do not reside in the United States are classified as nonresident aliens.²⁰⁴ This combination of varying tax classifications, a resident alien taxpayer, a nonresident alien spouse, and nonresident alien children, adds potentially adverse tax consequences to the tax formula.

a. Married Filing Jointly

Taxpayers who are married as of December 31 of the relevant tax year may generally elect to file a joint income tax return for the entire tax year.²⁰⁵

¹⁹⁹ See I.R.C. §§ 1 (setting forth the rate schedules for various filing statuses); 63(c) (describing the standard deduction amount as it varies with filing statuses).

²⁰⁰ JAMES J. FREELAND ET AL., *FUNDAMENTALS OF FEDERAL INCOME TAXATION* 915-16 (13th ed. 2004) (noting that taxpayers are classified into different filing statuses based upon their personal circumstances).

²⁰¹ See I.R.C. § 1(a), (b), (c), (d) (setting forth the tax rate schedule for these classifications of individual taxpayers respectively).

²⁰² See, e.g., I.R.C. §§ 2(b) (setting forth requirements for head of household filing status); 6013(a) (setting forth requirements for married filing jointly filing status); 7703 (setting forth determination of marital status).

²⁰³ See I.R.C. § 7703 (setting forth determination of marital status for purposes of determining filing status).

²⁰⁴ See I.R.C. § 7701(b)(1)(B) (defining nonresident alien as a non-U.S. citizen and resident).

²⁰⁵ See I.R.C. § 6013(d)(1)(A); Treas. Reg. § 1.6013-4(a)(1) (stating that both taxpayers must have the same tax year, which for most individual taxpayers is the entire tax year); see also Rev. Rul. 29, 1953-1 C.B. 67 (stating that state law determines if a marriage

Generally, a married filing jointly tax return cannot be filed if either spouse is a nonresident alien at any time during the tax year.²⁰⁶ However, both spouses can elect to treat the nonresident alien spouse as a resident alien to file a married filing jointly tax return.²⁰⁷

The effect of this election is far-reaching. The nonresident alien will be treated as a resident alien for all subsequent tax years in which either spouse is a resident alien for any part of the tax year.²⁰⁸ This election will cause the nonresident spouse's income that would otherwise not be subject to federal income tax to be included with her resident spouse's income and subject to tax.²⁰⁹ While the election may be terminated by the couple, once terminated, the election cannot be made for any subsequent tax year.²¹⁰ Otherwise, each spouse will have to file as married filing separately, or, under certain circumstances, as head of household.

b. Married Filing Separately

The married filing separately status is available to any married taxpayers who do not make the married filing jointly election.²¹¹ The married filing jointly status is generally disadvantageous. Married taxpayers who file separately, among other things, do not qualify for the EITC, the child and dependent care expense credit, or relief from taxation of Social Security benefits.²¹² Married taxpayers who have filed separately are generally permitted to amend the returns to file jointly, unless the statute of limitation has lapsed or either return is subject to certain government controversies.²¹³ Notably, married taxpayers who elect to file their tax return jointly cannot amend the jointly filed tax return to file as married filing separately after the due date.²¹⁴ Therefore, before taxpayers, especially undocumented immigrants married to non-U.S. citizens and residents, elect to file jointly, they should explore all tax filing status alternatives, including the possibility of filing as head of household.

is valid for purposes of filing a joint tax return); Rev. Rul. 58-66, 1958-1 C.B. 60 (stating that, if a state recognizes common law marriage, it will be valid for purposes of married filing jointly tax status).

²⁰⁶ See I.R.C. § 6013(a)(1); Treas. Reg. § 1.6013-1(b).

²⁰⁷ See I.R.C. § 6013(g); Treas. Reg. § 1.6013-6.

²⁰⁸ See I.R.C. § 6013(g).

²⁰⁹ See I.R.C. §§ 1, 61 (taxing the worldwide income of U.S. citizens and resident aliens regardless of its source).

²¹⁰ See I.R.C. § 6013(g)(4), (5).

²¹¹ See I.R.C. § 1(d).

²¹² See I.R.C. §§ 32(d) (requiring married filing jointly tax return for married individuals under EITC); 21(e)(2) (requiring married filing jointly tax return for married individuals under credit for dependent care); 86(c)(1)(C) (setting forth threshold amount for determining taxable amount of benefits at zero for taxpayers who are married (and have lived together for at least one day during the taxable year) filing separately).

²¹³ See I.R.C. § 6013(b)(1), (2)(B); Treas. Reg. § 1.6013-2(a)(1), -2(b).

²¹⁴ See Treas. Reg. § 1.6013-1(a)(1).

c. Head of Household

Under certain circumstances, the head of household filing status may be advantageous. The head of household tax rates and standard deduction amount are generally more favorable than the unmarried or the married filing separately filing statuses. To qualify for head of household filing status, a taxpayer must be unmarried on the last day of the tax year.²¹⁵ A taxpayer who is legally separated from her spouse under a decree of divorce or a separate maintenance agreement qualifies as unmarried.²¹⁶ In addition, an individual married to a nonresident alien spouse is not married for tax purposes if the couple does not elect to treat the nonresident as a resident and file jointly.²¹⁷

Another requirement is that the taxpayer must maintain as her home a household that is the principal place of residence for a qualified dependent for more than one-half of the taxable year.²¹⁸ Alternatively, the taxpayer can maintain a residence that is the principal place of residence for her father and/or mother, who is or are, as the case may be, qualified dependents.²¹⁹ Finally, the taxpayer must provide more than one-half the cost of maintaining the household during the tax year.²²⁰

d. Requirements for Qualifying as a Dependent

To qualify as a dependent under the Code, the taxpayer and the dependent must satisfy a number of requirements. These requirements were recently amended under the Working Families Tax Relief Act of 2004, which was signed into law by President George W. Bush in January 2004.²²¹ This revised definition of a dependent is effective for tax years beginning after December 31, 2004.²²² Accordingly, the new definition is effective for the 2005 calendar year tax year.

Under the revised definition, a dependent includes a “qualifying child” or a “qualifying relative.”²²³ In both cases, a dependent must be a U.S. citizen or resident, or a resident of Canada or Mexico.²²⁴ The most significant change to the definition of a dependent is the new uniform definition

²¹⁵ See I.R.C. § 2(b)(1).

²¹⁶ See I.R.C. § 2(b)(2)(A); Treas. Reg. § 1.2-2(b)(5).

²¹⁷ See I.R.C. § 2(b)(2)(B); Treas. Reg. § 1.2-2(b)(5).

²¹⁸ See I.R.C. § 2(b)(1)(A); Treas. Reg. § 1.2-2(b)(1)(i).

²¹⁹ See I.R.C. § 2(b)(1)(B); Treas. Reg. § 1.2-2(b)(1)(ii).

²²⁰ See I.R.C. § 2(b)(1)(B).

²²¹ See The Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, § 206, 118 Stat. 1166, 1176 (2004) (codified at 26 U.S.C. § 151) (modifying the deduction for personal exemption for dependents to reference the uniform definition of a child set forth in Code section 152).

²²² See *id.* at § 208 (setting forth the effective date for the uniform definition of a child).

²²³ See I.R.C. § 152(a).

²²⁴ See I.R.C. § 152(b)(3)(A).

of “qualifying child.” Congress intended that this new definition simplify and make more uniform the qualification for a dependent child throughout the Code.²²⁵ This definition will be used to qualify taxpayers for head of household status as well as for the Child Tax Credit (CTC), the EITC, and dependency exemptions.²²⁶

i. A Dependent Includes a “Qualifying Child” as Defined in the New Uniform Definition of a Child

A “qualifying child” is broadly defined as the taxpayer’s child; a descendant of the taxpayer’s child; a brother, sister, stepbrother, or stepsister of the taxpayer; or a descendant of any such relative.²²⁷ The qualifying child must be under the age of nineteen (or the age of twenty-four if a student) as of the close of the tax year.²²⁸ Finally, a qualifying child must have the same principal place of abode as the taxpayer for more than one-half of the taxable year.²²⁹

ii. A Dependent Includes a “Qualifying Relative”

The new definition of dependent retained much of the old definition in its definition of a “qualifying relative.”²³⁰ A qualifying relative is an individual who bears a relationship to the taxpayer similar to the relationships described for a qualifying child; who is the taxpayer’s parent, grandparent, aunt, uncle, son or daughter-in-law, father or mother-in-law, or brother or sister-in-law; or who has lived with the taxpayer as a member of her household for the entire year.²³¹ In addition, a qualifying relative cannot have gross income equal to or in excess of the exemption amount.²³² Finally, the taxpayer must provide over one-half of the qualifying relative’s support.²³³

The head of household filing status is likely a better tax alternative to unmarried or married filing separately. Because undocumented immigrants

²²⁵ See The Working Families Tax Relief Act of 2004 § 201 (enacting a uniform definition of a child in Code section 152).

²²⁶ See I.R.C. §§ 152(a)(1) (defining “qualifying child” as a dependent); 2(b)(1)(A) (requiring that the taxpayer share a household with a dependent, including a “qualifying child”); 21(b)(1) (requiring that a “qualifying individual” be the dependent being cared for for purposes of the credit); 24(c) (requiring a “qualifying child” for purposes of obtaining the credit); 32(c) (requiring a “qualifying child” for certain refundable benefits under the EITC).

²²⁷ See I.R.C. § 152(c)(2).

²²⁸ See I.R.C. § 152(c)(3). An individual that is permanently or totally disabled at any time during the calendar year is treated as meeting the age requirement. *Id.*

²²⁹ See I.R.C. § 152(c)(1)(B).

²³⁰ See I.R.C. § 152(a)(2) (including qualifying relative in the definition of the term “dependent”).

²³¹ See I.R.C. § 152(d)(2) (describing qualifying relationships).

²³² See I.R.C. § 152(d)(1)(B).

²³³ See I.R.C. § 152(d)(1)(C).

may be married to nonresident aliens and have dependent children or parents, they may have the opportunity to file as head of household.

e. Application of Alternative Filing Statuses to the Adams Family

Under the application of the tax formula to our hypothetical undocumented immigrant family²³⁴ above, we assumed that Abe, his wife, Abigail, and their U.S.-born daughter, Ariel, were living together in Santa Ana, California. The question of filing status becomes more interesting if we change the hypothetical by assuming that Abigail and Ariel have not yet joined Abe in the United States, but are residing in Mexico. For tax purposes, Abigail and Ariel are classified as nonresident aliens, and Abe will be classified as a resident alien.

i. Married Filing Jointly

Under this fact pattern, Abe and Abigail may file as married filing jointly if they elect to treat Abigail as a resident alien for tax purposes.²³⁵ However, if they make this election, all of Abigail's non-U.S. source income would now be subject to federal income tax and wage withholding unless and until they decide to terminate the election.²³⁶ Moreover, Abigail would have to obtain an ITIN and sign the jointly filed tax return, and would be jointly and severally liable for any resulting tax liability.²³⁷ In many cases where the nonresident spouse has little or no income, this will be the most tax favorable alternative.²³⁸ However, because of lack of a myriad of resources, including finances, education, language skills, and information, Abigail may not be able to obtain an ITIN or even sign the tax return. Alternatively, Abe could try to file without Abigail under the head of household filing status.

ii. Head of Household

If Abe and Abigail cannot satisfy the requirements to elect to treat Abigail as a resident alien for tax purposes, they will not be able to file using the married filing jointly status. Fortunately, under the requirements for

²³⁴ For purposes of this Article, an immigrant family in which every member has a valid Social Security number will be described as "documented," and a family in which every member does not have a valid Social Security number will be described as "undocumented."

²³⁵ See Treas. Reg. § 1.6013-6 (1992).

²³⁶ See I.R.C. § 6013(g).

²³⁷ See James Edward Maule, *Income Tax Liability: Concepts and Calculation*, 507-2d TAX MGM'T (BNA) A-40 to A-44 (2002) (describing implications of joint and several liability, innocent spouse relief, and required signatures).

²³⁸ See tax computation for the Adams family under the married filing jointly tax filing status, *supra* Part III.B.2.b.

head of household status, if they do not make this election they will be treated as unmarried. Therefore, Abe will be able to file as head of household without Abigail if he can satisfy the other requirements for this filing status.

Under the head of household filing status, a taxpayer must maintain as her home a household that is the principal place of residence for a qualified dependent for more than one-half of the taxable year.²³⁹ The taxpayer must also provide more than one-half the cost of maintaining the household during the tax year.²⁴⁰ Abe more than likely provides most of the cost of maintaining his family's household in Mexico and his own household in the United States. Moreover, because he provides over one-half of Ariel's support, she should qualify as his dependent. Unfortunately, because Ariel does not live in the same household as Abe, he will not qualify for head of household filing status.

Alternatively, a taxpayer can maintain a residence that is the principal place of residence for his father and/or mother, who is or are, as the case may be, qualified dependents.²⁴¹ Therefore, if Abe provides over one-half of the support for one or both of his parents, and provides over one-half the cost of maintaining their household in Mexico, he can claim them as dependents and qualify for head of household filing status.²⁴² However, once again Abe's mother, father or both, as qualifying dependents, will have to file for and obtain ITINs.²⁴³ If this was not practicable for Abigail, thereby precluding married filing jointly tax status, then it is likely not practicable for Abe's parents even if they qualify as his dependents. Without an ITIN for any qualifying dependent, Abe will not be able to qualify for head of household filing status. Unfortunately, the remaining alternative has adverse tax consequences that are meaningful, far-reaching, and not well understood even by trained tax professionals.

iii. Married Filing Separately

If Abe and Abigail do not have the resources to elect to treat Abigail as a resident alien, Abe will not be permitted to file jointly with his spouse.²⁴⁴ Moreover, because Abe does not live in the same household as his dependent child for at least one-half of the tax year, he cannot qualify

²³⁹ See I.R.C. § 2(b)(1)(A); Treas. Reg. § 1.2-2(b)(1)(i) (1971).

²⁴⁰ I.R.C. § 2(b)(1).

²⁴¹ I.R.C. § 2(b)(1)(B); Treas. Reg. § 1.2-2(b)(1)(ii) (1971).

²⁴² Subject to either or both parents having an amount of gross income that is less than the exemption amount, and neither filing a joint tax return. See I.R.C. §§ 2(b)(1)(B), 152(b)(2), 152(d)(1)(B).

²⁴³ See I.R.C. § 151(e) (providing that no exemption is allowed with respect to any individual unless his or her ITIN is included in the tax return claiming the exemption).

²⁴⁴ See Maule, *supra* note 237, at A-49 (describing filing status implications for resident and nonresident alien couples that do not make the election to file jointly).

for head of household filing status.²⁴⁵ Therefore, he will have to file as married filing separately. This filing status will cause Abe's federal income tax liability for the current tax year to increase meaningfully from \$0, as married filing jointly, to \$360.

Abe's gross income of \$15,000 will be reduced by the married filing separately standard deduction of \$5,000 and his personal and dependency exemptions deduction for himself and Ariel of \$6,400. Abe will not enjoy the deduction for personal exemption for Abigail because the couple is not filing jointly.²⁴⁶ Because Abe does not live with Ariel for more than one-half of the tax year, she will not qualify as a dependent under the new definition of "qualifying child." However, Ariel should qualify as Abe's dependent under the "qualifying relative" definition because Abe provides over one-half of her support.²⁴⁷

Abe's federal taxable income will be \$3,600 and his income tax liability will be \$360.²⁴⁸ Abe will be subject to Social Security payroll taxes on his wages of \$15,000. His share of Social Security payroll taxes will be 7.65% of \$15,000, or \$1,148.²⁴⁹ Abe's aggregate tax liability of \$1,508²⁵⁰ on \$15,000 of household gross income will generate an effective tax rate of over ten percent.²⁵¹

Because of the risk and expense of undocumented immigration, undocumented immigrants tend to be young men. Even if an immigrant is married with children, like Abe, he may immigrate to the United States without his family to try to earn a living.²⁵² This scenario, as demonstrated above, lends itself to undocumented immigrant families filing their tax returns using married filing separately status. These individuals are trying, but barely succeeding in earning a living. Almost half of immigrant workers earn less than twice the minimum wage and will be categorized as low-wage workers, and many of them are undocumented.²⁵³ Unfortunately, the married filing separately filing status versus the head of household, married filing jointly, or unmarried filing statuses, could have adverse tax consequences for low-wage working immigrant families like

²⁴⁵ See I.R.C. § 2(b)(1)(A).

²⁴⁶ See I.R.C. § 151(b), (c).

²⁴⁷ See I.R.C. § 152 (defining dependent as a qualifying child or relative).

²⁴⁸ See I.R.C. § 1(d), (i) (setting forth tax rate schedule for married filing separately individuals, including the rate reduction to ten percent).

²⁴⁹ See I.R.C. §§ 3101, 3201.

²⁵⁰ Before any applicable tax credits to be discussed in subsequent Sections of the Article.

²⁵¹ The aggregate tax liability was computed by adding the federal income tax of \$360 to his payroll taxes of \$1,148 to derive his total tax expense of \$1,508, yielding an effective tax rate of over 10/his gross income of \$15,000.

²⁵² See DAVID K. SHIPLER, *THE WORKING POOR: INVISIBLE IN AMERICA* 114–15 (2004) (telling the life story of unauthorized migrant farm workers trying "to make enough money to sustain their impoverished families back home.").

²⁵³ See RANDY CAPPS ET AL., *A PROFILE OF THE LOW-WAGE WORKFORCE 5* (Urban Institute Immigration Studies Program, Nov. 2003), available at http://www.urban.org/uploadedPDF/310880_lowwage_immig_wkfc.pdf (finding that two of every five low-wage immigrant workers are undocumented).

the Adams family. The adverse tax consequences are complex and not widely known or understood by experienced tax professionals, or more critically, the undocumented immigrant community. The next Section will continue to explain this separate, unequal, and complex tax treatment of undocumented immigrants.

4. Tax Relief for the “Deserving Poor”²⁵⁴ Under the EITC

Low-income undocumented immigrants pay little or no federal income tax because of the offset against gross income of the standard deduction and personal and dependency exemptions. Their dangerous and underground existence,²⁵⁵ however, has led some undocumented immigrants to file as married filing separately taxpayers and to pay more federal income tax than they would if they were able to enter this country with their families intact. In addition to federal income tax, unauthorized workers pay Social Security taxes on every dollar of reported wages at 7.65%.²⁵⁶ Therefore, these poverty-level workers are paying federal income and payroll taxes at a minimum rate of 7.65%.

There is a broad-based consensus that low-income, working families should not pay taxes.²⁵⁷ In early 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.”²⁵⁸ Several years later, in 1975, 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, were able to package the idea in a refundable tax credit and garner liberal support for the EITC.²⁵⁹ Since it was developed and estab-

²⁵⁴ “The cornerstone of U.S. welfare policy has always been to separate the ‘deserving’ poor from the ‘undeserving.’” Joel F. Handler, *Ending Welfare As We Know It: The Win/Win Spin or the Stench of Victory*, 5 J. GENDER RACE & JUST. 131, 134 (2001).

²⁵⁵ See SHIPLER, *supra* note 252, at 96–120 (describing the precarious economic position of unauthorized farmworkers in America).

²⁵⁶ Employers must match this contribution dollar for dollar, up to a limit that is well beyond the earning level of low-income workers. I.R.C. §§ 3101, 3111 (describing equal rates of employees’ and employers’ federal payroll taxes). Some economists argue that this contribution on behalf of an employee is the employee’s tax cost. STEPHEN J. ENTIN, HERITAGE FOUNDATION, TAX INCIDENCE, TAX BURDEN, AND TAX SHIFTING: WHO REALLY PAYS THE TAX? 31 (Nov. 5, 2004), available at <http://www.heritage.org/Research/Taxes/loader.cfm?url=/commonspot/security/getfile.cfm&PAGEID=71440> (finding that, with an inelastic workforce, the employer’s portion of Social Security taxes are shifted almost entirely to employees).

²⁵⁷ See William Safire, *The 25% Solution*, N.Y. TIMES, Apr. 20, 1995, at A19 (commenting that most taxpayers believe that the poor should not pay any taxes, the middlers something, and the rich the highest percentage).

²⁵⁸ SAUL D. HOFFMAN & LAURENCE S. SEIDMAN, HELPING WORKING FAMILIES: THE EARNED INCOME TAX CREDIT 12 (2003).

²⁵⁹ See *id.* at 11–16 (recounting the conservative history and liberal support of the EITC).

lished in 1975 by conservative forces, the EITC has enjoyed strong support across the entire political spectrum for encouraging work over welfare.²⁶⁰

The EITC was designed to offset the burden of Social Security payroll taxes. In some cases, it can provide a meaningful wage subsidy for low-income working families.²⁶¹ More than twenty-two million taxpayers received the EITC in the 2003 tax year.²⁶² The EITC encourages work and lifts millions of taxpayers out of poverty, including almost three million children each year.²⁶³ The EITC is a refundable tax credit that provides cash refunds of up to \$4,400 (for 2005) to ensure that working poor families pay no taxes.²⁶⁴ For many working poor families, the EITC more than offsets income and Social Security taxes, providing critical cash refunds “for basic necessities like housing, utilities, food, and basic household appliances.”²⁶⁵

a. Qualifying for the EITC

The EITC was designed to encourage the poor to work rather than rely on welfare.²⁶⁶ Accordingly, to qualify for the EITC, an individual and her spouse, if married, must have earned income not in excess of the earned income limitation amount.²⁶⁷ The earned income limitation amount varies with the number of qualifying children and is indexed annually for inflation.²⁶⁸ For 2005, the maximum EITC for eligible individuals with no qualifying children was \$399 for earned income levels of \$5,220 to \$6,530 (\$8,530 for married filing jointly), phasing out for earned income above this level until \$11,750 (\$13,750, for married filing jointly) of the greater of earned income or adjusted gross income (AGI).²⁶⁹ For eligible individuals

²⁶⁰ *Id.* at 14; ROBERT GREENSTEIN, CTR. ON BUDGET AND POLICY PRIORITIES, THE EARNED INCOME TAX CREDIT: BOOSTING EMPLOYMENT, AIDING THE WORKING POOR 1 (2005), <http://www.cbpp.org/7-19-05eic.pdf> (describing the broad-base of support for the EITC, including conservative economists and Presidents George H. W. Bush and Bill Clinton); Dorothy A. Brown, *The Tax Treatment of Children: Separate But Unequal*, 54 EMORY L.J. 755, 801 (2005) (quoting President Clinton when he expanded the EITC in 1993 and commented that the EITC “reward[s] work over welfare Now that’s real welfare reform.”).

²⁶¹ See HOFFMAN & SEIDMAN, *supra* note 258, at 11; Greenstein, *supra* note 260 (describing EITC basics and reporting that EITC expansions were responsible for more than one-half of the large increases in employment among single mothers during 1984–96).

²⁶² See GREENSTEIN, *supra* note 260.

²⁶³ See *id.* (stating 2003 statistics of 4.4 million lifted out of poverty, including 2.4 million children).

²⁶⁴ See I.R.C. § 32.

²⁶⁵ GREENSTEIN, *supra* note 260, at 3; see also SHIPLER, *supra* note 252, at 13–18 (describing how the working poor use their EITC benefits to buy furniture, homes, and pay bills).

²⁶⁶ See HOFFMAN & SEIDMAN, *supra* note 258, at 11–16 (describing the history of the EITC’s design and evolution).

²⁶⁷ See I.R.C. § 32(a)(1).

²⁶⁸ See I.R.C. § 32(b), (j).

²⁶⁹ See Rev. Proc. 2004-71, 2004-50 I.R.B. 970; I.R.C. § 32(a)(2).

with one qualifying child, the maximum 2005 EITC was \$2,662 for earned income levels of \$7,830 to \$14,370 (\$16,370 for married filing jointly), phasing out completely at \$31,030 (\$33,030 for married filing jointly) of the greater of earned income or AGI.²⁷⁰ For eligible individuals with two or more qualifying children, the maximum 2005 EITC was \$4,400 for earned income or AGI levels of \$11,000 to \$14,370 (\$16,370 for married filing jointly), phasing out completely at \$35,263 (\$37,263 for married filing jointly) of the greater of earned income or AGI.²⁷¹

In addition to the earned income limitation, EITC eligibility further requires that an individual does not have an investment income in excess of \$2,700.²⁷² Moreover, taxpayers who are married at the close of the tax year must file a married filing jointly tax return to be eligible for the credit.²⁷³ In addition, the individual cannot be classified as a nonresident alien,²⁷⁴ and must include her SSN (and her spouse's SSN, if married) on her tax return as filed or amended.²⁷⁵ Finally, all eligible individuals must have a qualifying child or satisfy several additional conditions.²⁷⁶

i. Individuals Without a Qualifying Child

To qualify for the EITC without a qualifying child, an eligible individual must (1) have a principal place of abode in the United States for more than one-half of the tax year; (2) not be a dependent; and (3) be at least twenty-five, but not sixty-five or older (or, be married to a spouse who fits within that age bracket, in lieu of the taxpayer) as of the close of the tax year.²⁷⁷

²⁷⁰ See Rev. Proc. 2004-71, 2004-50 I.R.B. 970.

²⁷¹ See *id.*

²⁷² See I.R.C. § 32(i) (describing the disqualifying investment income as interest (taxable and tax-exempt), dividends, net capital gains, net rents, net royalties and net passive income).

²⁷³ See I.R.C. § 32(d) (setting forth requirement that married taxpayers must file a joint tax return to qualify for the credit).

²⁷⁴ See I.R.C. § 32(c)(1)(D) (providing that a nonresident alien may qualify if she will be treated as a resident alien for tax purposes due to an election under Section 6013(g) or (h)).

²⁷⁵ See I.R.C. § 32(c)(1)(F), (m); Internal Revenue Service, Chief Counsel Advice 200028034 (June 9, 2000) (finding that an individual otherwise eligible for the EITC, without a valid SSN, may claim the EITC on an amended return with a valid SSN subject to the lapsing of the statute of limitations); I.R.S., Field Service Advice Memoranda 200032013 (May 9, 2000) (same with respect to a taxpayer who is not authorized to work, but later, after becoming authorized, obtains a valid SSN); I.R.S., Chief Counsel Advice 200126030 (May 15, 2001) (same and noting that the SSN must be issued for an alien lawfully admitted to the United States and entitled to engage in U.S. employment). See I.R.C. § 32(m); 42 U.S.C. § 405(c)(2)(B)(i) (2006).

²⁷⁶ See I.R.C. § 32(c)(1)(A).

²⁷⁷ See I.R.C. § 32(c)(1)(A)(ii).

ii. Individuals With a Qualifying Child

If an individual has one or more qualifying children, she may also be eligible for the EITC.²⁷⁸ A qualifying child is defined under the uniform definition of a child used for purposes of determining dependency status for tax years beginning after 2004.²⁷⁹ Therefore, if a taxpayer has a dependent that qualifies as a “qualifying child,” she will also satisfy the same requirements under the EITC.²⁸⁰ However, a qualifying child for purposes of the EITC must also have a valid SSN.²⁸¹ For purposes of the dependency exemption, a qualifying child must have a TIN,²⁸² but it can be a SSN or ITIN.

b. Not Qualifying for the EITC

Undocumented immigrant families cannot qualify for the EITC. In 1996, Congress enacted, and President William Clinton signed into law, sweeping welfare reform, including unprecedented restrictions on federal benefits for many immigrants.²⁸³ 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.²⁸⁴ In an effort to accomplish this goal, Congress amended the Code to require that any taxpayer include a valid SSN (issued to an individual authorized to work in the United States) for herself, her spouse if she is married, and each qualified child to receive any EITC benefits.²⁸⁵ While this may seem consistent with the denial of virtually all government assistance for undocumented immigrants, it is not. The SSN requirement is poorly targeted and is both overbroad and under-inclusive. This requirement unquestionably denies EITC benefits for legally working and legally present hard-working poor families and provides EITC benefits for certain illegally working taxpayers.

Prior to tax year 1996, SSNs were not required for the EITC for children under age one, and unauthorized workers and their families could claim the EITC.²⁸⁶ A taxpayer was able to file a tax return claiming the EITC by

²⁷⁸ See I.R.C. § 32(c)(1)(A)(i).

²⁷⁹ See I.R.C. § 32(c)(3) (referring to Code Section 152(c) for purposes of a qualifying child).

²⁸⁰ See I.R.C. §§ 32(c)(3), 152(c) (referring to uniform definition of a child for purposes of the EITC).

²⁸¹ I.R.C. § 32(c)(1)(F).

²⁸² See I.R.C. § 151(e).

²⁸³ AM. IMMIGR. LAWYERS ASS'N, *Immigrant Eligibility for Public Benefits*, in IMMIGRATION & NATIONALITY LAW HANDBOOK 775, 759 (2005–06) (describing impact of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

²⁸⁴ STAFF OF JOINT COMM. ON TAXATION, 104TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 104TH CONGRESS 392–95 (Comm. Print 1996).

²⁸⁵ 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)).

²⁸⁶ See HOFFMAN & SEIDMAN, *supra* note 258, at 146.

stating that a TIN had been “applied for.”²⁸⁷ In the early 1990s, several studies were released indicating EITC over-claim rates as high as thirty-nine percent.²⁸⁸ Congress responded with a number of EITC amendments intended to remedy the noncompliance problems.²⁸⁹ As the IRS began to rely more and more on TINs to eliminate fraud in tax compliance generally, beginning in 1995 for 1994 tax returns, certain IRS processing offices required taxpayers, spouses, dependents, and EITC-qualifying children to provide valid TINs, or be subject to refund delays and possible penalties.²⁹⁰

For 1996 tax returns, Congress amended the Code to require a SSN for any EITC eligible individual, her spouse, and any qualifying child.²⁹¹ Specifically, the Code requires a SSN that is not assigned for purposes of applying for or receiving federally funded benefits.²⁹² In addition, the IRS is authorized “to treat the failure to provide a valid SSN as a mathematical or clerical error. Using the math error procedures, the IRS can deny or reduce the credit before a refund is paid.”²⁹³ While Congress’s stated purpose in barring undocumented immigrants from EITC benefits was to remove incentives for unauthorized work, the real incentive was economic.²⁹⁴ This requirement was estimated to increase federal fiscal year budget receipts by more than \$2.8 billion from 1997 through 2006.²⁹⁵

The SSN requirement as originally enacted was reportedly corrected by two subsequent tax acts. In 1998, the SSN requirement was “clarified” for taxpayers who had an otherwise qualifying child who did not qualify because she did not have a SSN.²⁹⁶ Under the technical correction, taxpayers who would otherwise qualify for EITC benefits (e.g., taxpayers without a qualifying child who, together with their spouses, had valid SSNs authorizing them to work) could not receive any EITC benefits if

²⁸⁷ See AM. IMMIGR. LAWYERS ASS’N, *supra* note 283, at 775 (describing the ban under the 1996 Welfare Act on eligibility for the EITC).

²⁸⁸ See HOFFMAN & SEIDMAN, *supra* note 258, at 141–42 (describing compliance issues and error studies); Brown, *supra* note 260, at 773–82 (presenting the history of government scrutiny of the EITC).

²⁸⁹ See *id.* (describing EITC amendments and reforms to combat perceived noncompliance problems).

²⁹⁰ See *id.*

²⁹¹ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 451(a), (b); see also HOFFMAN & SEIDMAN, *supra* note 258, at 142, 193 (stating that requirement for SSNs was in response to EITC compliance problems).

²⁹² See I.R.C. § 32(m) (finding that, for this purpose, the TIN is a SSN issued pursuant to provisions other than “clause (II) (or that portion of clause (III) that relates to clause (II)) of section 205(c)(2)(B)(i) of the Social Security Act”).

²⁹³ HOFFMAN & SEIDMAN, *supra* note 258, at 142.

²⁹⁴ AM. IMMIGR. LAWYERS ASS’N, *supra* note 283, at 759 (describing the original estimated cost savings for all benefit curbing over the first six years at \$23.7 billion).

²⁹⁵ STAFF OF JOINT COMM. ON TAXATION, 104TH CONG., *supra* note 284, at 390–91.

²⁹⁶ See STAFF OF JOINT COMM. ON TAXATION, 105TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN 1998 218 (Comm. Print 1998) (clarifying that a TIN is a requirement for claiming the EITC rather than an element of the definitions of a “qualifying individual” and a “qualifying child”).

they had a qualifying child without a SSN authorizing the child for work.²⁹⁷ For example, if Abe and Abigail each had valid SSNs, but their daughter, Ariel, did not, the family could not qualify for *any* EITC benefits. However, under this same scenario, if Abe and Abigail did not have any children, at certain low-wage levels they would receive EITC benefits. Yet, if Abe and Abigail had a second child with a valid SSN, the family could qualify for EITC benefits with one qualifying child. If the same child did not have a valid SSN, the family could not qualify for any EITC benefits. The correction banned all EITC benefits for families with children where no child is a “qualifying child.” This confusing clarification was effective as if included in the originally enacted related legislation.²⁹⁸

Six years after enactment in 2002, the provision was corrected again because the reference to the Social Security Act under which SSNs could not be issued was incorrect and did not limit EITC eligibility to individuals authorized to work.²⁹⁹ This seemingly critical technical correction was not effective until taxable years beginning after the date of enactment, or 2003.³⁰⁰ Ironically, these corrections and their mismatched effective dates confuse rather than clarify Congress’s stated purpose for the SSN requirement.

c. The Problem: No Method to the Madness

The requirement that every member of the household have a SSN (authorizing work) is ill-conceived because it denies or allows EITC benefits inconsistently with Congress’s stated intent. The SSN requirement excludes families in which every member is legally working or present in the United States from EITC benefits. For example, the provision denies EITC benefits to any authorized immigrant worker or U.S. citizen whose spouse or qualifying child does not have a SSN.³⁰¹ For example, two U.S. citizen parents with a child without a SSN cannot receive any EITC benefits. The Code precludes any EITC benefits for this legally working and present family including EITC benefits available for eligible individuals without a child.³⁰² However, if the same family has one child with a SSN and

²⁹⁷ See I.R.C. § 32(c)(1)(G) (setting forth requirement that if taxpayers have any qualifying children, then at least one qualifying child must have a SSN for the taxpayers to receive any EITC benefits, because under the technical correction a SSN is a requirement for claiming the EITC, rather than an element of the definition of a “qualifying child”).

²⁹⁸ See STAFF OF JOINT COMM. ON TAXATION, 105TH CONG., *supra* note 296, at 218 (setting forth effective date of technical correction).

²⁹⁹ STAFF OF JOINT COMM. ON TAXATION, 107TH CONG., DESCRIPTION OF THE “TAX TECHNICAL CORRECTIONS ACT OF 2002” 5–6 (Comm. Print 2002).

³⁰⁰ *Id.* at 6.

³⁰¹ See I.R.C. § 32(c)(1)(F) (disallowing EITC benefits to an eligible individual who does not include her TIN and, if married, her spouses’ TIN on their tax return), (G) (disallowing EITC benefits to any eligible individual who has one or more qualifying children if no qualifying child has a TIN).

³⁰² See I.R.C. § 32(c)(1)(F).

one child without a SSN, but with an ITIN, the family can qualify for EITC benefits for a married couple with one qualifying child.³⁰³

In addition, a U.S. citizen worker married to a documented immigrant, with a valid ITIN but no SSN, cannot receive any EITC benefits even if the couple has one or more U.S. citizen qualifying children.³⁰⁴ This “legally working and present family” cannot qualify for any EITC benefits. Even if the family decides to file a married filing separately return so that all individuals on the EITC tax return have SSNs, they will not qualify for any EITC. Married taxpayers cannot qualify for the EITC with a married filing separately tax return.³⁰⁵ If the resident alien spouse does obtain a SSN within the statute of limitations period, the family can amend their married filing separately tax returns and file a joint return. However, if either married filing separate return becomes the subject of certain tax controversies, then the returns cannot be amended for a joint filing and the opportunity for any EITC during those tax years is lost. Ironically, only if the couple ends their marriage, or never enters into marriage, will generous EITC benefits be available.

The SSN requirement also permits families who have members that are working in the United States without authorization and without current documents to receive current EITC benefits. For example, a taxpayer, with an SSN that authorized work when it was issued but is no longer valid for employment, will qualify for EITC benefits. The provision requiring a SSN on the tax return does not require that the SSN be currently valid for work or residence in the United States.³⁰⁶ It only requires that the SSN not be issued to secure federal benefits.³⁰⁷ Therefore, SSNs issued temporarily for work, that are no longer valid for work, and non-work SSNs issued to secure state or local benefits, are valid for EITC benefits; meanwhile, SSNs initially issued to secure federal benefits, but that are now work-authorized, are not.³⁰⁸ The SSN requirement as stated and enforced does not assure that only authorized work qualifies an individual for EITC benefits.

Ironically, the government provides EITC benefits to families retroactively for tax years in which they were illegally working and/or present in the United States.³⁰⁹ If an unauthorized worker, her spouse, or qualify-

³⁰³ See I.R.C. § 32(c)(1)(F).

³⁰⁴ See I.R.C. § 32(c)(1)(E)(ii).

³⁰⁵ See I.R.C. § 32(d).

³⁰⁶ See I.R.C. § 32(m).

³⁰⁷ See I.R.C. § 32(m).

³⁰⁸ See AM. IMMIGR. LAWYERS ASS'N, *supra* note 283, at 775.

³⁰⁹ I.R.S. Chief Counsel Advisory 200028034 (June 9, 2000), 2000 WL 33116180 (finding that an individual otherwise eligible for the EITC without a valid SSN may claim the EITC on an amended return with a valid SSN subject to the lapsing of the statute of limitations); I.R.S. Field Service Advisory 200032013 (May 9, 2000), 2000 WL 33119520 (same with respect to taxpayer who is not authorized to work, but later, after becoming authorized, obtains a valid SSN); I.R.S. Chief Counsel Advisory 200126030 (May 15, 2001), 2001 WL 729654 (same, and noting that the SSN must be issued for an alien lawfully ad-

ing child obtains a SSN after a tax return is filed, the return can be amended to add the SSN to claim retroactive EITC benefits.³¹⁰ The IRS has ruled that EITC benefits are retroactively available as long as the statute of limitations has not lapsed.³¹¹ Therefore, once all members of the family have SSNs, EITC benefits are available, even if no family members were authorized to work or even be in the United States during the tax year at issue.³¹²

If Congress intends, as it has stated, that EITC benefits should not be provided on the basis of unauthorized work, the SSN requirement is poorly targeted. The provision does not require that the work upon which the credit is based be authorized. Rather, the requirement is mechanical, requiring that taxpayers record a SSN (issued for other than federal benefits) on the tax return, as filed or as timely amended, for the taxpayer and spouse, if any, and at least one of any children. This restrictive requirement is overbroad because it denies EITC benefits to families in which all workers are authorized and all members are legally present in the United States. In addition, the restriction is too narrow in that it allows EITC benefits for tax years in which all family members were working without authorization and present without documents. Taxpayers can amend tax returns, subject to the statute of limitations, once all required individuals have SSNs, and retroactively receive EITC benefits.

The current EITC identification requirement is both too broad and too narrow. In an effort to quickly and efficiently deny EITC benefits to the “undeserving poor,” Congress and the IRS have devised a mechanical, clerical test. The test categorizes the working poor in America into two separate groups: those that are deserving and holders of SSNs, and those that are undeserving, or holders of ITINs or SSNs issued for federal benefits. The undeserving poor group is comprised of families with at least one non-U.S. citizen who does not have a SSN that was issued for a purpose other than federal benefits. The result is separate, unequal, and irrational treatment of certain hard-working poor families under the Code.³¹³

5. Tax Relief for the Always Deserving Middle-Income Under the CTC

While the EITC was designed to provide tax relief for working poor families, the CTC was designed more than twenty years later to provide

mitted to the United States and entitled to engage in U.S. employment).

³¹⁰ I.R.S. Chief Counsel Advisory 200028034.

³¹¹ I.R.S. Chief Counsel Advisory 200028034; I.R.S. Field Service Advisory 200032013; I.R.S. Chief Counsel Advisory 200126030.

³¹² I.R.S. Chief Counsel Advisory 200028034; I.R.S. Field Service Advisory 200032013; I.R.S. Chief Counsel Advisory 200126030.

³¹³ See Oven, *supra* note 1, at 502–05 (describing anti-immigrant sentiment and racism resulting in welfare reform because of the perception that undocumented immigrants come to the United States to take advantage of public assistance).

tax relief for middle-income families.³¹⁴ Ironically, undocumented working poor immigrant families who are barred from current tax relief under the EITC may qualify for relief under the CTC. Relief under the CTC is available to any taxpayer, spouse, if married, and qualifying children, irrespective of the type of TIN or filing status.³¹⁵ Because it was designed for middle-income families with children, Congress did not have to include a mechanism for segregating the undeserving from deserving recipients. Congress designed the CTC for all middle-income families irrespective of citizenship, variety of TIN, or living arrangements.

a. Qualifying for the CTC

The CTC was enacted by Congress and signed into law by President William Clinton in August 1997.³¹⁶ The CTC offsets a taxpayer's income tax liability dollar-for-dollar by up to \$1,000 per "qualifying child."³¹⁷ For this purpose, a "qualifying child" is defined under the uniform definition of a child with a more restrictive age requirement.³¹⁸ Accordingly, for tax years beginning after 2004, a qualifying child must have the requisite relationship and live in the taxpayer's principal place of abode for more than one-half of the tax year.³¹⁹ For tax years before 2005, a qualifying child had to be the taxpayer's dependent, requiring that the taxpayer provided over one-half of the child's support.³²⁰ The change from a support test to a residence requirement could have adverse consequences for certain immigrant families. In addition, each qualifying child must be under age seventeen as of the close of the tax year, and a U.S. citizen or resident.³²¹

The CTC also has an identification requirement. Taxpayers must provide the name and TIN of each qualifying child to receive the benefits of the CTC.³²² Notably, the identification requirement under the CTC is less restrictive than the identification requirement under the EITC.³²³ Tax-

³¹⁴ See 143 Cong. Rec. H3895 (June 18, 1997) (statement by Rep. Kingston) (commenting that middle class families with eleven million children need tax relief from the high cost of education, health care, etc.).

³¹⁵ See I.R.C. §§ 24(e) (setting forth identification requirement that is broader than the identification requirement under the EITC), 32(m) (setting forth identification requirement that is narrower than the identification requirement under the CTC).

³¹⁶ See Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 101, 111 Stat. 788, 796 (1997).

³¹⁷ See I.R.C. § 24(a), (b)(3).

³¹⁸ See I.R.C. §§ 24(c)(1), 152(c).

³¹⁹ See I.R.C. § 152(c).

³²⁰ See I.R.C. §§ 24(c)(1), 152(a) (2004) (describing the pre-2005 (amended by Public Law No. 108-311, Sec. 201, 118 Stat. 1166, 1176 (Oct. 4, 2004)) definition of a qualifying child for the child tax credit as the taxpayer's dependent child where dependency is established by providing over one-half of the child's support).

³²¹ See I.R.C. § 24(c)(1), (2).

³²² See I.R.C. § 24(e).

³²³ See I.R.C. §§ 24(e) (setting forth identification requirement that is broader than the identification requirement under the EITC), 32(m) (setting forth identification requirement

payers who do not qualify for the EITC solely because they, their spouse, or their children do not have a valid SSN should qualify for the CTC. Holding either a SSN or an ITIN qualifies a taxpayer for the CTC.

i. Targeting Tax Relief for Middle Income Families

The CTC is specifically targeted to middle-income families. Thus, the CTC is phased-out at higher income levels and provides little or no tax relief for higher-income families.³²⁴ The CTC is phased-out by \$50 for each \$1,000 (or fraction thereof) by which the taxpayer's modified adjusted gross income³²⁵ exceeds \$110,000 for a married filing jointly return, \$75,000 for an unmarried filing status return, and \$55,000 for married filing separately return.³²⁶ The CTC is phased out completely at a modified adjusted gross income level of \$129,001 for a family with one child, \$149,001 for a family with two children, and \$169,001 for a family with three children. Neither the phase-out threshold nor the CTC amount is indexed for inflation.³²⁷

ii. Missing the Target? Some Undocumented Immigrant Working Families Also Find Relief Under the CTC

The CTC was not designed or enacted to provide tax relief to working poor families who already qualify for meaningful EITC benefits.³²⁸ Seemingly consistent with this goal, the CTC is refundable under limited circumstances.³²⁹ Notably, because of the restrictive identification requirement under the EITC and the broad identification requirement under the CTC, some of the undeserving poor who are banned from the EITC receive relief in the middle-income arena.

that is narrower than the identification requirement under the CTC).

³²⁴ I.R.C. § 24(b).

³²⁵ For this purpose, adjusted gross income is increased for any excludible foreign-source income of citizens residing in other countries under Section 911, and bona fide residents of Guam, American Samoa, or the Northern Mariana Islands, Section 931, or residents of Puerto Rico, Section 933. I.R.C. § 24(b)(1).

³²⁶ See I.R.C. § 24(b)(2).

³²⁷ See I.R.C. § 24(a), (b)(2). Because these amounts are not indexed for inflation, the CTC will be less valuable with time, and will phase out at relatively lower levels of actual income value.

³²⁸ I.R.C. § 24(d), as enacted by the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 101, 111 Stat. 788, 797-98. The current form of this provision is located at I.R.C. section 24(d)(1)(B)(ii). The reason for the limitation of the refundability feature when enacted to taxpayers with three or more children is obscure, but it may have been in recognition of the fact that the EITC is not increased because a taxpayer has more than two qualifying children.

³²⁹ See I.R.C. § 24(d).

b. How the Refundable CTC Works

Refundable tax credits (like the EITC) provide taxpayers with cash refunds even if their tax liability is zero. At lower income levels, the standard deduction and personal and dependency exemptions will eliminate any income tax liability, making the CTC available only to the extent it is refundable. If a taxpayer's CTC exceeded her tax liability, the 2005 CTC was refundable at a rate of fifteen cents for every dollar her income level was above \$11,000,³³⁰ not to exceed an aggregate CTC benefit of \$1,000 per qualifying child.³³¹ Alternatively, if a taxpayer had three or more qualifying children, the refundable CTC was equal to any excess of the taxpayer's "social security taxes"³³² for the year over her EITC benefits received (again limited to an aggregate CTC benefit of \$1,000 per qualifying child).³³³ This "large family" alternative generally only applies for families that do not qualify for the EITC, because if they qualify, EITC benefits usually exceed their annual Social Security tax expense. Accordingly, if a working poor family qualifies for the EITC, they generally will not qualify for a meaningful, refundable CTC.

For example, a working married couple, like Abe and Abigail Adams, with one qualifying child, and poverty level wages of \$15,000, would receive a refundable CTC of \$600 and a refundable EITC of approximately \$2,662. If the same family had two or more children their refundable CTC would remain at \$600, and they would receive a refundable EITC of \$4,400. This poverty level family would pay no federal income taxes, but would pay \$918 in Social Security taxes. Therefore, the working poor Adams family would be reimbursed in full for their Social Security taxes and would receive a relatively substantial wage subsidy.

If the same working family with one or two children did not qualify for the EITC because one or more family members did not have a SSN, the family would receive no EITC, but would receive the same amount, or \$600, of refundable CTC, and would pay the same amount, or \$918, of Social Security taxes. If the Adams family had three or more children, the refundable CTC would increase from \$600 to \$918, effectively reimbursing them for their annual Social Security tax expense. Notably, the best-case scenario for an undocumented working poor family is full reimbursement of Social Security taxes paid without any possibility of a wage sub-

³³⁰ This threshold amount is indexed for inflation. I.R.C. § 24(d)(3); Rev. Proc. 2004-71 § 3.04, 2004-50 I.R.B. 970.

³³¹ I.R.C. § 24(d)(1)(B)(i).

³³² I.R.C. § 24(d)(2) (defining "Social Security taxes" for this purpose as including taxes imposed by §§ 3101 and 3201(a) and 50 percent of the taxes imposed by §§ 1401 and 3211(a) on self-employment and employee representatives' income). This definition of "Social Security taxes" will be used throughout this Article.

³³³ See *supra* note 328.

sidy. This refundability feature of the CTC is a de facto offset for payroll taxes, rather than a welfare program.³³⁴

c. How the Refundable CTC Fails

Undocumented immigrant families do not receive any meaningful reimbursement of Social Security taxes because they do not qualify for the EITC. Only if these working poor families have three or more children do they qualify for a refundable CTC that effectively reimburses them for their Social Security tax payments.³³⁵ If the undocumented family has less than three qualifying children, then the refundable CTC will only meaningfully reimburse them for their Social Security taxes paid when their income level significantly exceeds \$11,000.

Undocumented working families with fewer than three children and income levels at or below \$11,000 pay Social Security taxes at 7.65%, or up to \$842, and receive no tax relief or wage subsidy. As income levels increase above \$11,000 to approximately \$23,000, the percentage of Social Security taxes that are reimbursed increases from zero percent to approximately one hundred percent.³³⁶ As income levels increase above \$23,000, some of the CTC is used to offset increasing income tax liabilities, and the percentage of Social Security taxes that are reimbursed decreases from approximately one hundred percent to zero percent.³³⁷

³³⁴ See Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867, 1912 (2005). "The 15 percent phase-in rate for the CTC, as earned income rises above \$10,000, is strikingly close to the 15.3 percent total payroll tax rate (counting both the employee share and the employer share). Rather than being viewed as a genuine transfer program, the CTC phase in could be viewed as a mere 'turning off' of the payroll tax (except for a 0.3 percent remnant) over the range of the CTC phase in. If Congress had simply turned off the payroll tax over that income range, that would not have been viewed as a transfer program, and achieving the same effect through the CTC amendment might be similarly viewed." *Id.* at 1913 n.188.

³³⁵ For example, an undocumented, immigrant, working poor family with three qualifying children and \$11,000 of income will pay \$842 of Social Security taxes and will receive \$842 refundable CTC. If the same family has less than \$31,250 of income, all of their Social Security taxes will be reimbursed in full; if the family has four qualifying children and less than \$38,700 of income, or five qualifying children and less than \$46,000 of income, all of their Social Security taxes will be reimbursed in full. At income levels above these amounts, the family is not reimbursed in full because of the overall \$1,000 limit on the CTC.

³³⁶ For example, an undocumented immigrant working poor family with two qualifying children and \$11,000 of income will pay \$842 of Social Security taxes and will receive no refundable CTC. Alternatively, the same family with \$20,000 of income will pay \$1,530 of Social Security taxes and will receive \$1,350 of refundable CTC. At the \$22,500 income level, the Social Security taxes are \$1,721 and the refundable CTC is \$1,725.

³³⁷ For example, an undocumented, working poor family with two qualifying children and \$23,500 of income will pay \$1,798 of Social Security taxes, and will receive \$1,875 of refundable CTC. Alternatively, the same family at \$35,000 of income will pay \$2,678 of Social Security taxes, and will receive \$710 of refundable CTC. At \$40,200 of income, the family will pay \$3,075 of Social Security taxes, and will receive no refundable CTC because all \$2,000 of the CTC offsets the family's income tax liability of \$2,000.

Ironically, some of the poorest undocumented immigrant families pay more in taxes than their richer (either in income level or number of children) low-income neighbors because they do not qualify for either the refundable EITC or the refundable CTC. While these working poor families do not pay income taxes, they do pay regressive Social Security taxes. Notably, workers who are authorized to work in the United States will probably qualify for Social Security retirement benefits, but undocumented workers will never qualify for any benefits with respect to the contributions they make to the Social Security retirement system.

The structure of the refundable portion of the CTC causes the poorest undocumented immigrant families to pay a significantly higher percentage of their income in taxes than higher-income working poor families. If, however, an undocumented immigrant family has three or more qualifying children, it will be reimbursed in full for all taxes paid. Accordingly, the addition of one qualifying child (from two to three qualifying children) causes most of these families' effective tax rate to drop from 7.65% to 0%. This result is inconsistent with fundamental tax policy.

IV. TAXING UNDOCUMENTED IMMIGRANTS IS INCONSISTENT WITH FUNDAMENTAL LEGAL PRINCIPLES

A. *Fundamental Tax Policy Goals*

Fundamental tax policy requires that individuals perceive their tax system as fair.³³⁸ If individuals perceive that a tax system is unfair, they will not comply, and the tax system will be ineffective.³³⁹ The goal is that the tax burden should be distributed appropriately, such that every individual pays her fair share of the aggregate tax burden.³⁴⁰ Most importantly, each individual should perceive that her share is fair, and that her neighbors near and far are paying their fair shares.³⁴¹ Obviously, fairness is not an exact science, but rather a balancing of various values.³⁴² To make the goal of fairness less elusive and any debate more manageable, tax scholars deconstruct fairness into the concepts of vertical and horizontal equity.³⁴³

³³⁸ See HOFFMAN & SEIDMAN, *supra* note 258, at 47–49 (noting that fairness is prominent in tax policy debates).

³³⁹ See *id.* (describing violent reactions by U.S. and British citizens because of their perception of an unfair tax).

³⁴⁰ See *id.* at 49–51.

³⁴¹ See *id.*

³⁴² See *id.* at 50.

³⁴³ See HOFFMAN & SEIDMAN, *supra* note 258, at 49.

1. Vertical Equity

Vertical equity requires that persons who are not similarly situated should be treated differently.³⁴⁴ Vertical equity implies that the tax burden should impose the same degree of sacrifice, which depends upon an individual's well being before any assessment.³⁴⁵ For example, the sacrifice of ten dollars for a poor family could be equivalent to a one thousand dollar sacrifice for a very wealthy family.³⁴⁶

Vertical equity may be implemented consistently with a taxpayer's ability to pay.³⁴⁷ In our federal income tax system, ability to pay is determined generally by a taxpayer's income level.³⁴⁸ Taxpayers with higher levels of income have a greater income tax liability than taxpayers with lower amounts of income. Moreover, the percentage of total tax liability increases as income level increases. This is a fundamental attribute of a progressive tax structure.

Another concept that is used to determine the distribution of the tax burden is the "benefit principle."³⁴⁹ The benefit principle attempts to distribute the tax burden among parties in accordance with the government benefits they enjoy.³⁵⁰ While some government benefits are already subject to a user fee, e.g., U.S. postal service, certain parks and recreation, and highway usage through gas and tire excise taxes, others are not. Government benefits such as national defense, police and fire protection, air, land, and water pollution controls, and other commodity and business regulations are enjoyed by all, while the government does not allocate the costs through a user fee. Arguably, the benefits and protections enjoyed by high-income households are more valuable than the benefits and protections enjoyed by poverty-level households.³⁵¹ Poverty-level households have no capital assets to protect. However, poverty-level households often need basic benefits, such as food, health, and housing assistance, that they simply cannot afford. Therefore, the benefit principle without consideration of the ability to pay principle cannot work.³⁵²

At income levels at or below poverty, individuals should not pay any taxes because they do not have the ability to pay. At poverty income levels, all cash flow is required for the necessities of life. Federal and state governments provide supplemental assistance to these individuals, or welfare, based upon their meager financial resources as compared to a mini-

³⁴⁴ See *id.*

³⁴⁵ See *id.* at 54.

³⁴⁶ See *id.*

³⁴⁷ See *id.* at 52.

³⁴⁸ See I.R.C. § 1 (setting forth federal income tax rates on taxpayers that increase for each higher layer of increased taxable income).

³⁴⁹ See HOFFMAN & SEIDMAN, *supra* note 258, at 50–52.

³⁵⁰ See *id.*

³⁵¹ See *id.*

³⁵² See *id.*

mum standard of living. The working poor do not have the resources to pay for these benefits so they do not. Accordingly, other taxpayers who can bear this burden do because they have the ability, and their sacrifice is relatively less significant. This method of cost allocation, or tax burden distribution theory, has endured time and is generally perceived as fair.

2. *Horizontal Equity*

The second principle underlying a fair tax system is horizontal equity. Horizontal equity requires that similarly situated households should pay the same amount of tax.³⁵³ However, because society wants to encourage a number of behaviors by subsidizing them with tax deductions, credits or reduced rates, similarly situated households are not always treated the same. They might be treated differently, even if they have the same amount of net income, if the character of their income or expenses is different. For example, a \$2,000 home mortgage interest payment is treated more favorably than a \$2,000 residential rental expense. Because society wants to encourage home ownership, home mortgage interest expense is deductible. Horizontal inequality is tolerated and in certain cases desirable to achieve societal goals.³⁵⁴ However, it would be inappropriate to base tax liability on characteristics such as race or religion.³⁵⁵ “A democratic society should not permit arbitrary discrimination.”³⁵⁶

Then why do we tolerate horizontal inequity based upon immigration status? An answer can be found in fundamental economic theory for immigration policy. The answer is that tariffs, here in the form of a discriminatory tax on undocumented immigrant families, are better than quotas as a restriction on immigration for a market power country such as the United States.³⁵⁷ A market power country desiring to protect its domestic market will prefer tariffs to quotas because an optimal tariff can transfer wealth from immigrants to non-immigrants.³⁵⁸ Alternatively, quotas impose restrictions that generate “quota rents” for the holder of the restricted right, benefiting immigrants rather than non-immigrants.³⁵⁹ Nevertheless, current U.S. immigration policy relies on onerous quotas and ineffective tariffs to restrict immigration.³⁶⁰ After analyzing optimal immigration policy in the

³⁵³ See *id.* at 74–75.

³⁵⁴ See HOFFMAN & SEIDMAN, *supra* note 258, at 75.

³⁵⁵ See Richard A. Musgrave, *Equity and the Case for Progressive Taxation*, in TAX JUSTICE 9 (Joseph J. Thorndike & Dennis J. Ventry, Jr., eds., 2002).

³⁵⁶ *Id.*

³⁵⁷ Chang, *supra* note 4, at 1154–63 (concluding that tariffs will do less harm to national economic welfare than quotas).

³⁵⁸ *Id.* at 1159–66.

³⁵⁹ *Id.*

³⁶⁰ See *id.* at 1151–52 n.18 (describing the implementation of immigration quotas in 1921, and the greater restrictions on labor during the period of globalization than the Industrial Revolution), 1219 (describing the “national origins” quota system in place from 1921–1965).

next section, the excessive nature of these immigration restrictions should suggest that reform is necessary.

B. Fundamental Immigration Policies

Fundamental economic theory for immigration policy prescribes free movement of workers across borders to achieve free trade in the labor market.³⁶¹ Migration of labor without restrictions across national borders could more than double worldwide real income.³⁶² Unrestricted immigration could “increase production, create wealth and help reduce poverty.”³⁶³ “Immigration restrictions impose costs by driving up the cost of labor, which in turn drives up the cost of goods and services to consumers,” destroying wealth and causing economic distortions throughout the world.³⁶⁴ If the United States, as a market power, desired to maximize the economic welfare of its non-immigrants, it would eliminate all immigration quotas and “labor certification requirements” and impose appropriate tariffs on immigrants.³⁶⁵

Quotas and tariffs are two types of immigration restrictions. “Quotas allow immigrants to keep the quota rents in the form of after-tax wages higher than those that prevail in alternative labor markets.”³⁶⁶ Because of quotas, smugglers, producers of counterfeit documents, and unscrupulous U.S. employers exact significant “quota rents” from undocumented immigrants.³⁶⁷ In addition, the U.S. government spends millions of dollars annually on detection, apprehension, and deportation of undocumented immigrants.³⁶⁸ If the government removed these quotas, undocumented immigrants and their employers could move out of the black market.³⁶⁹ Public coffers would benefit from reduced expenditures and increased revenues

³⁶¹ “Like international trade in goods . . . international migration connects domestic and international markets. The free flow of resources in response to market signals promotes efficiency and produces economic gains for both producers and consumers. The migration of labor, both domestically and internationally, represents such a flow of productive resources.” *ECON.REP.PRES.*, 1986, at 213 (recognizing the importance of the free flow of labor, the Council of Economic Advisors for President Ronald Reagan’s administration); see Chang, *supra* note 31, at 371–76 (describing that immigration barriers are costly to the world economy and the economy of developing and developed countries); Chang, *supra* note 4, at 1148–52 (same); Johnson, *supra* note 76, at 964 (“True believers in the free market presumably would prefer the free flow of both labor and trade.”).

³⁶² Chang, *supra* note 4, at 1150 (noting studies describing the economic worldwide gains from free labor movement, and recounting that the most conservative estimate suggests that the gains “would be a significant fraction (over thirteen percent) of worldwide real income.”).

³⁶³ John A. Scanlan, *A View from the United States—Social, Economic, and Legal Change, the Persistence of the State, and Immigration Policy in the Coming Century*, 2 *IND. J. GLOBAL LEGAL STUD.* 79, 140 (1994).

³⁶⁴ See Chang, *supra* note 4, at 1158.

³⁶⁵ See *id.*

³⁶⁶ *Id.* at 1160.

³⁶⁷ *Id.* at 1193–95.

³⁶⁸ *Id.* at 1194.

³⁶⁹ See Chang, *supra* note 4, at 1194–95.

from sharing the value that immigrants would enjoy from authorized status.³⁷⁰

Tariffs, in the form of a discriminatory tax or exclusion of government benefits, capture economic gains from unrestricted immigration for the benefit of non-immigrants.³⁷¹ The optimal tariff assures that each immigrant makes a net positive contribution to the public coffers.³⁷² The federal government presently imposes significant tariffs on undocumented immigrants. Undocumented immigrants are banned from most federal assistance programs.³⁷³ Yet they pay sales, excise, property, income and payroll taxes, generating a net positive contribution to public coffers.³⁷⁴

If impracticable quotas and "labor certification" requirements are removed, then the net contribution of previously undocumented immigrants may change. If undocumented immigrants can enter the country and work without limit, employers and unauthorized workers who have evaded paying taxes through unreported cash payments should comply with tax reporting and payment requirements.³⁷⁵ While unrestricted immigration could cause unemployment or a wage decrease for unskilled non-immigrants,³⁷⁶ empirical studies have shown that current levels of unauthorized immigrants have had little effect on wages and employment of non-immigrants.³⁷⁷ An influx of immigrants would also lead to an increased demand for public goods such as roads and parks, increasing congestion and external costs.³⁷⁸ Even so, undocumented immigrants tend to be young, able-bodied, fully employed men with increasing levels of education. These demographics tend to generate a positive fiscal effect, especially when taking account of the fiscal impact of descendants of immigrants.³⁷⁹ Because of many known and unknown variables and factors, a calculation of the net benefit or cost of undocumented workers without quotas is beyond the scope of this Article.

Fortunately, it is not necessary to continue the analysis, because while optimal immigration policy requires a lifting of quotas, the current U.S. immigration policy has been moving in the opposite direction.³⁸⁰ Even with inoperable quotas exacting significant quota rents, the U.S. government imposes onerous tariffs on undocumented immigrants. These tariffs include

³⁷⁰ *Id.*

³⁷¹ *Id.* at 1162, 1176, 1210 (noting that a discriminatory tax can also take the form of an income tax credit not available to immigrants, but available to citizens and permanent residents).

³⁷² *Id.* at 1166–72 (discussing optimal tariffs for skilled and unskilled workers).

³⁷³ See also text accompanying notes 18–25.

³⁷⁴ *Id.* at 1197.

³⁷⁵ See Chang, *supra* note 4, at 1195.

³⁷⁶ *Id.* at 1207.

³⁷⁷ *Id.*; Howard F. Chang, *Immigration and the Workplace: Immigration Restrictions as Employment Discrimination*, 78 CHI.-KENT L. REV. 291, 305–308 (2003).

³⁷⁸ *Id.* at 1165.

³⁷⁹ See Chang, *supra* note 31, at 407–08 (citing findings in National Council study).

³⁸⁰ See *id.* at 371–76.

ineligibility for many labor law protections and most federal assistance and benefits, including Social Security and the EITC. Consequently, undocumented immigrant families, despite disproportionately low income levels, have a higher effective tax rate than similarly situated non-immigrants. They lack the ability to pay their disproportionately high tax liabilities. Moreover, undocumented immigrants derive little benefit from government services, and bear significant actual and psychological costs of entering the United States without documents. This structure is inconsistent with optimizing immigration to maximize the economic benefits to U.S. non-immigrants. The next Part will suggest tax reforms consistent with fundamental tax and immigration policies.

V. PROPOSALS FOR REFORMING THE TAX TREATMENT OF UNDOCUMENTED IMMIGRANTS

The exclusion of undocumented working poor families from the EITC and the targeting of the CTC for middle-income families have created an abyss in federal relief for hard-working, poor families. Undocumented working poor families have higher effective income tax rates than their neighbors who enjoy higher income levels. Undocumented working families at the lowest income levels, without the ability to pay or the benefit of government services, are subject to regressive Social Security taxes without any reimbursement. Only if these families have three or more children do they receive any relief. The structure of the CTC creates an incentive to increase family size for the poorest of all undocumented immigrant families. Certainly Congress did not intend to create this mess. Fortunately, once the interactions of the EITC, ITINS, and the CTC are understood in the context of the demographics of undocumented immigrants, tax reforms can be designed. Unfortunately, but perhaps not surprisingly, none of the recent proposals for tax or immigration reform include tax relief for undocumented working families.

A. EITC Reform

The Code discriminates against working poor immigrant families in which even just one member does not have a SSN issued for a purpose other than claiming federal benefits.³⁸¹ The SSN requirement applies even if the family member without the qualifying SSN is not working, or even claiming EITC benefits with respect to her work. This poorly targeted requirement should be amended to better achieve Congress's intent. Congress desired denial of EITC benefits with respect to work performed in

³⁸¹ The Code also discriminates against immigrant families in which one member is authorized to work, but has a SSN that was originally issued for federal benefits. See I.R.C. § 32(m).

the United States without authorization.³⁸² To achieve this goal, EITC benefits would only be provided with respect to earned income from authorized work. In addition, only family members who are legally present in the United States could count toward measuring EITC benefits.

To accomplish this goal, I propose a revised EITC taxpayer identification rule that would require a TIN for all individuals reported on the tax return (which could be a SSN or an ITIN) and a SSN (or other qualifying documentation) that provides current work authorization for EITC eligible wages. This rule would allow EITC benefits only with respect to authorized work, and for qualifying individuals that are legally present in the United States.

Under this proposal, EITC benefits would be provided to a taxpayer with respect to wages earned pursuant to a work-authorizing SSN. As long as the taxpayer's spouse, if any, had a TIN and was legally present in the United States, the spouse would qualify the taxpayer for married filing jointly EITC benefits. In addition, if the couple had one or more qualifying children with a TIN who were legally present in the United States, any children (up to two) would qualify them for additional EITC benefits. If either the spouse or child (each with a TIN to ensure they exist) were not legally present in the United States, EITC benefits would be allowed to the taxpayer, but they would not be increased to the level of married filing jointly with qualifying children.

To the extent that any tax return reports this information and claims EITC benefits, the IRS would have to verify the validity of the reported identification information. This requirement should not cause a chilling effect with respect to EITC claims or tax filing because the IRS currently performs a verification of every SSN reported on any tax return to ensure that it accurately matches the SSA's name and SSN number database. Any mismatches or errors currently cause the IRS to generate a mathematical error notice before a refund is generated.

The Department of Homeland Security currently manages a database that provides participating employers with worker authorization information about a potential employee's SSNs within three to five seconds. ITIN information should be similarly accessible to verify whether an ITIN holder is lawfully present in the United States. These existing databases could be used by the IRS to verify EITC claims for all working poor families.

This proposal would not provide taxpayers with the opportunity to amend tax returns to receive EITC benefits retroactively if the earned income or the individuals did not qualify during the tax year. The requirement would be that eligible wages and qualifying individuals would have to be eligible or qualifying during the period in question. Taxpayers could amend returns and claim EITC benefits if a TIN was not available until after a return was filed or if EITC benefits were not properly claimed.

³⁸² STAFF OF JOINT COMM. ON TAXATION, 104TH CONG., *supra* note 284, at 390–95.

However, the proposal should provide for retroactive EITC benefits if the EITC is perceived as an earned entitlement rather than welfare.

The EITC, which was born out of a conservative anti-welfare, pro-work perspective, is fundamentally different from welfare.³⁸³ If the EITC is an earned entitlement, then the proper model might be Social Security benefits, which are perceived as an “earned entitlement” rather than “welfare.”³⁸⁴ Notably, EITC benefits are an entitlement contingent upon work and, for individuals without a qualifying child, are only available for twenty-five- to sixty-four-year-olds, generally prior to the availability of Social Security retirement benefits.³⁸⁵ Anyone legally present in the United States can qualify for Social Security retirement benefits, as long as she has a certain amount of Social Security–covered wages for a certain period.³⁸⁶ In addition, the individual must have a SSN.³⁸⁷ However, the Social Security–covered wages do not have to be earned during a period of time in which the worker was authorized.³⁸⁸ The individual has the burden of proving that she has the requisite amount of Social Security–covered wages.³⁸⁹ If earnings were reported under an invalid SSN, proving past earnings could be challenging, but the SSA has a policy of assisting individuals in accurately reflecting their earnings records. While placing the burden on the individual to come forward may have a chilling effect, the potential financial benefits could be significant and the SSA “does not as a rule prosecute persons who use a Social Security card not their own for purposes of reporting earnings.”³⁹⁰

The allowance of retroactive EITC benefits for individuals who obtain SSNs before the lapse of the statute of limitations is similar to the retroactive accounting under Social Security retirement system. To better align EITC benefits as an earned entitlement, the identification requirements described above could be modified to require a work-authorizing SSN with respect to any earned income obtained no later than the close of the statute of limitations for the tax year. This potentially significant retroactive financial benefit might also motivate undocumented immigrants to enter the U.S. tax system and to actively seek work authorization.

The foregoing proposals better align EITC benefits with Congressional intent. The proposals encourage authorized work as well as documented

³⁸³ See HOFFMAN & SEIDMAN, *supra* note 258, at 105, 112–18 (finding that “the EITC is fundamentally different from the welfare system in terms of its reward structure and work incentives.”).

³⁸⁴ See NUSCHLER & SISKIN, *supra* note 21, at CRS-3 (describing Social Security benefits as an earned entitlement).

³⁸⁵ See I.R.C. § 32(c)(1)(A)(ii)(II).

³⁸⁶ AM. IMMIGR. LAWYERS ASS’N, *supra* note 283, at 764.

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.*

immigration status. Moreover, the availability of EITC benefits might motivate immigrants who have not filed tax returns to seek assistance and file.

B. Revised Refundable CTC

Even with a better-targeted EITC, fundamental tax policy also demands a remedy for the misapplication of the refundable CTC. The refundable CTC could provide a safety net for working poor families that will continue to pay regressive Social Security taxes. Certain working poor families may continue to pay taxes because they do not qualify for EITC benefits (e.g., they file as married filing separately, or are not authorized to work in the United States, or their spouse or child is not lawfully present in the United States) or because their EITC benefits are less than their Social Security taxes paid (e.g., low-income EITC beneficiaries without a qualifying child).

To ensure that working poor families do not pay income or payroll taxes, Congress could eliminate the family size requirement for the calculation of the refundable CTC when Social Security taxes exceed the EITC. As a result, the CTC would be refundable to the extent of the greater of (1) fifteen percent of the excess of earned income over \$11,000 (as indexed for inflation); or (2) the excess of Social Security taxes paid less any EITC benefits received. The refundable portion of the CTC could continue to be limited to an aggregate benefit of \$1,000 for each qualifying child.

In many cases when a working poor family qualifies for the EITC, the first option would provide the greatest CTC refund because under the second option, EITC benefits would exceed Social Security taxes paid. However, this proposal should provide critical tax relief for undocumented working families in the lowest income levels who do not qualify for the EITC. This revised structure should assure that all working families at or below the poverty level do not bear the burden of income or Social Security taxes.

For example, under the proposed amendment, an undocumented working family with one qualifying child and income of \$11,000 would pay \$842 of Social Security taxes, no income taxes, and would receive a refundable CTC of \$842. This family would receive no refundable CTC under current law. Under the amended provision, undocumented families with one qualifying child and income up to approximately \$13,000 would pay neither income nor Social Security taxes.

Above this income level, three-person families would pay some amount of tax. For example, if the same family had \$15,000 of income, Social Security taxes would be \$1,148, and the refundable CTC would be capped at its maximum benefit of \$1,000. Therefore, because of the maximum \$1,000 benefit under the CTC for each qualifying child, this undocumented working poor family would pay \$148 in Social Security taxes, but no income taxes. As income levels increased, and the CTC benefit remained

capped at \$1,000, the family would pay greater amounts in Social Security taxes and eventually income taxes.

However, as family size increases, CTC benefits would also increase. For example, an undocumented working poor family with two qualifying children and \$22,500 of income would pay Social Security taxes of \$1,721 with a refundable CTC of \$1,725. If the same family had \$26,200 of income, Social Security taxes would be \$2,004, and the refundable CTC would be \$1,660. The remaining CTC of \$340 (\$2,000 aggregate tax benefit for two qualifying children) would offset the family's \$340 federal income tax. Accordingly, this family would pay no income taxes, but would pay some amount of Social Security taxes.

Under the proposed amendment, the poorest undocumented (and documented) working families would pay no taxes. Consistent with horizontal and vertical equity goals, poverty-level families working and residing in the United States would be relieved from any tax burden. As income levels increased and ability to pay and benefits from the government were enhanced, overall tax liabilities would increase.

VI. CONCLUSION

Under the current designs of the EITC and the CTC, certain working poor families at and below the poverty level are paying taxes. In cases where the workers are undocumented, these taxpayers will likely never realize retirement benefits from the billions of dollars they collectively pay into the Social Security system each year. Moreover, in some cases, the poorest undocumented working families are subject to a higher tax rate than their less destitute, undocumented working poor neighbors. Congress could not have intended that the poorest working families pay more than their more fortunate working colleagues. This irrational result may be an unintended consequence of an increasingly incomprehensible tax system and impracticable immigration policies.

The proposed amendments to the EITC and the refundable CTC should ensure that the poorest working families pay neither income nor payroll taxes. Congress's failure to provide a refund of these tax payments may have been an unintended consequence of the complexities of the SSN requirement and interaction of the EITC and the refundable CTC. However, the proposed amendments should begin to remedy this problem. As demonstrated above, even with the amendments, some undocumented working poor families will not be reimbursed in full for their Social Security taxes. This results from the \$1,000 ceiling on the CTC. As Congress and President George W. Bush work to fulfill their promise to reform and simplify our federal income tax system, we must encourage them to support a tax

system that is fair for all families working hard to keep the United States the land of the golden door.³⁹¹

³⁹¹ “Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me. I lift my lamp beside the golden door!” New Colossus Emma Lazarus Nov. 2, 1883. Emma Lazarus’s famous sonnet has come to symbolize the Statue of Liberty’s universal message of hope and freedom for immigrants coming to America and people seeking freedom around the world.